COMMENTS ON CCWG-ACCOUNTABILITY DRAFT PROPOSAL 1 MAY 2015

Jan Aart Scholte (Accountability Advisor)
3 May 2015

The first and overarching comment has to be one of congratulations to CCWG for the impressive achievement of this document. That the group could in just six months produce such a comprehensive, creative, reflective, professional proposal is a real tribute to what a well-executed multistakeholder process can accomplish. Of course one can always find areas for further development, but the glass is already so very much more than half-full.

As regards thoughts on further development of the proposal, the first five points below concern the community empowerment mechanism, while the subsequent nine points address other issues:

1. What would be a suitable name for the community empowerment instrument? Presumably 'SO/AC Membership Model' would not be comprehensible to, or resonate with, wider audiences. Something like ´Multistakeholder Assembly/Chamber/Council', which would name the multistakeholder principle that NTIA has required and ICANN embraces?

2. To reiterate a point made in earlier input from accountability advisors, the proposal could address more directly the issue of maximizing correlation between 'the ICANN community' and the (continually evolving) wider world of global Internet stakeholders. Indeed, at para 45 there is a (somewhat complacent?) equation of 'the community' with 'the people'. This correspondence is not automatic and requires proactive cultivation. The proposal is still thin on concrete measures in this regard. How can one ensure that the multistakeholder mechanism will adequately encompass all affected circles? Would any adjustments in the AC and SO constructions be advisable at this juncture to obtain a better congruence?

3. Relatedly, the current draft persuasively argues for 'participation reflecting the functional, geographic, and cultural diversity of the Internet' (para 97); and specifies that review groups 'must be as diverse as possible' (para 273). However, the proposal suggests few concrete measures for putting these principles into practice. For example, while the proposed composition of the community empowerment mechanism (para 170) addresses functional diversity, nothing is specified on gender, language, region, etc.

4. Relatedly again, how (and how readily) could the formula which constitutes 'the Community' in the empowerment mechanism (set out at 2.6.1.2) be adjusted in future,

as and when the prevailing arrangement is found inadequately to reflect the constellation of ICANN stakeholders at that future time? The world of 2045 is likely to be quite different from that of 2015 – will ICANN's constitution allow it readily to change with the times?

5. At a risk of broken-record syndrome I'll reiterate the issue of the accountability of those who hold ICANN to account. How will participants in the empowerment mechanism be held accountable to wider stakeholder circles, both within ICANN (i.e. the ACs and SOs) *and beyond*? Legislators in democratic nation-states are subject to election by the general population, but delegates in the ICANN 'parliament' would only be elected by ACs and SOs, whose connections to wider constituencies – and that so-called 'global public interest' – can be quite thin? How does one ensure that the community empowerment mechanism does not become a vehicle for capture of ICANN by insider activists? Is this a weak point that opponents of the transition could target?

6. The proposal relies quite heavily on 'the (global) public interest' as an ultimate criterion of policy evaluation: the phrase appears 23 times in this draft. Yet, as one side note (para 106) briefly acknowledges, the concept 'public interest' can be quite problematic in practice. 'The public interest' can very much lie in the eye of the beholder. Moreover, the concept can be abused by the powerful to claim that their advantages are for the collective good. True, the (global) public interest could be 'identified through the bottom-up multistakeholder policy development process' (para 97); however, this would make it all the more imperative to ensure that the multistakeholder mechanisms are not dominated by powerful special interests and equitably involve all affected circles, which takes us back to points 2 and 3.

7. Is some more precise definition of 'independence' wanted? The concept is given no specification at para 34. For example, if someone were to challenge the 'independence' of a proposed panelist on the IRP, how would the validity or otherwise of the objection be determined? Is it sufficiently specific to say the person is not 'beholden to ICANN´ (para 125); how would that beholden-ness be concretely assessed?

8. Also regarding the Independent Review Panel, how can the costs of non-compliance be made sufficiently high that parties will follow the rulings? For example, the Dispute Settlement Mechanism of the World Trade Organization has binding rulings, but sometimes rich and powerful states can pay the (for them relatively modest) fine and continue with the violating behavior.

9. Could tensions arise in practice between para 35 ('ICANN accountability requires compliance with applicable legislation in jurisdictions where it operates') and para

51/2/iii/2 ('any decision to defer to input from public authorities must be consistent with ICANN's Commitments and Core Values')?

10. Perhaps motivate why 'the community' should have more influence on certain Board decisions. Currently para 12 simply affirms this point, without giving any rationale.

11. Likewise, perhaps motivate more explicitly the creation of Fundamental Bylaws. Currently para 113 simply asserts that 'CCWG-Accountability believes', without specifying the grounds for this belief. Since the creation of Fundamental Bylaws adds considerable complication to the proposal, perhaps greater justification of the step is wanted? Indeed, why would Fundamental Bylaws inherently enhance accountability, as implied at para 122? Could situations not arise where a particular Fundamental Bylaw worked against accountability and, owing to its 'fundamental' character, would be harder to correct?

12. The proposal repeatedly refers to ICANN's 'limited technical mission' and the need to avoid 'mission creep' (e.g. paras 47, 51, 52, 117, 124, 125). Where in practice would the line be drawn between 'technical mission' and wider activity? Could one person's legitimate mandate be another's mission creep? What lies behind this concern? Would it be helpful to be more specific in this regard: e.g. that ICANN should not embark on unduly restrictive regulation of the domain name industry; or that ICANN should not interfere in the operations of ccTLDs?

13. It is excellent that the document puts a spotlight on Work Stream 2 issues, countering the worries of some that these matters would be parked on a railway siding and then forgotten. Moreover, it is implied on page 87 that the CCWG will continue to exist after the IANA transition in order to work on these issues. Perhaps this intention to sustain the CCWG over a longer term could be affirmed more strongly and unambiguously? Also, perhaps some indication could be given of an initial timeline for progress on WS2 issues? For example, progress on WS2 could be one of the topics for the first IANA Functions Review two years after the transition and then also a core evaluation concern for the next Accountability and Transparency Review?

14. Perhaps note that the jurisdiction issue – which for many observers lies at the heart of ICANN accountability challenges – is mentioned only once (para 688/2) and then in order to defer the issue. Will critics pick up on this point?