

Comments by Roberto Bissio, member of the advisory group to the CCWG Accountability Group on the Draft Recommendations on Enhancing ICANN Accountability

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As a member of the honorary advisory group I regret that key recommendations and observations made during the conference calls of the group were not taken into account or properly responded to in the Draft Recommendations.

On the first conference call of the advisors the issue was raised of the need to define under what jurisdiction ICANN would be incorporated. This is a key starting point, as the jurisdiction will ultimately define the law that applies and incorporation, which implies registering by-laws (and the definition of a: who is a party, b: who takes decision and c: who the parties relate to the decision-making) but also who the "external authority" that ultimately defines the legitimacy and legality of the whole operation.

First, it must be pointed out that in replacing the role of the US government, the focus here is on external accountability of ICANN and not its internal accountability. External accountability is the larger political accountability, with regard to general public interest, and the internal accountability is vis a vis the groups and constituents - often called stakeholders - that directly deal with ICANN, and are in any case represented in various ways in its internal processes.

While internal accountability is important, it must be remembered that this whole debate was triggered by the vacuum that arises in terms ICANN's *external accountability* as a consequence of the US government stepping out (in whatever limited way). The focus should therefore be on the responsibility to the larger public - what the document calls "the community" and which is not defined.

Yet, in any analysis of what the Internet currently is and who benefits from ICANN services or could be affected by its malfunction, it is clear that "the community" is composed by the billions of users of Internet and potentially by all of humanity.

Such a large public will never be able to exercise direct accountability. Two institutional devices are normally employed in democratic polities. (1) A body that is as representative as possible of the larger public is the one that extracts accountability, and (2) there is separation of powers whereby when one particular body (and groupings around it) is to be held accountable, we seek another body which has the

least overlap with the first body in its constitution and interests and make the first one accountable to the second one - making the arrangement in a manner - as is their between the executive and the judiciary for instance - that both bodies have different kinds of power, and therefore neither can independently become tyrannical, at least not easily. At the same time, by the very separation of groups/ processes involved in constitution of the two bodies, the very dangerous possibility of collusion is minimised.

In the current case, neither of these key criteria and method-templates have been satisfied or employed. There has been no effort made to explore some kind of global structure that can be considered to have some kind of representativity vis a vis the global public - however less than perfect. Neither the lesser and easier criterion of seeking separation of power by looking at a body/ system with a very different kind of constitution than what makes the current power configuration in the ICANN being fulfilled. What one sees is that the same groups and systems that put the ICANN decision making structures in place in the first instance are being given some recall and interim powers vis a vis this power structure. Certainly an improvement as far as the ICANN's organisational structure is concerned but it says nothing about ICANN's accountability to the global public what this process was really mandated to seek, and put in place.

It should be reminded that NTIA asked for transfer of oversight to global multistakeholder community. Most of the external advisors to the group share the notion that this requires some form of internationally agreed legal incorporation and accountability to an external group that can somehow represent the whole of humanity. We were told that this would be "unrealistic".

I can very well understand the political difficulties, but not being a US citizen there is little I can do to change those purely domestic circumstances that make it difficult for the US government to agree on a proper international process for the future of the Internet. On the other hand, in joining this advisory group of ICANN as an "outsider" I committed myself to be candid and honest in my advise and in that regard I feel obliged to state that, as important as the bylaws and INTERNAL accountability mechanism are, the objective of "improving institutional confidence" stated in the draft of 26 February 2009 cannot be achieved without looking at the EXTERNAL accountability issues and through the incorporation as a national institution subject to the national laws and policies of a single country. We all know how this confidence has deteriorated recently, for reasons not related to ICANN.

I cannot agree more that this confidence is essential. I have experienced that in my own, limited experience with the Internet. When I started to set up what became the first Internet Service Provider for the public in Uruguay (that is, outside the University) in the late eighties, the obvious benefit of the new tools was the capacity to deliver messages much cheaper than fax and much faster than mail (later renamed "snail mail"). It took "only" six hours for a message from Montevideo to reach the Makerere University in Kampala, relaying it through IGC in San Francisco via UUCP links...

Further, “conferences” (now called groups or lists) were possible without extra charges, making the utopia of communication “many to many” possible.

And, finally, the new tools allowed to collect and access decentralized information hosted in different parts of the world. The tool to organise and access information was called “gopher”, a robust, reliable and easy to use and understand software developed by the University of Minnesota. When an alternative tool invented in Switzerland was created we studied it and found that HTTP was slower, less efficient and more expensive (because of its heavier consumption of network resources) than gopher. We concluded that it would never take off...

But CERN disclaimed ownership of the W3 software, making it of public domain under international law, while the University of Minnesota registered it as its property, thus allowing them to decide at any moment to start charging fees for its use. (Which they actually did and then undid). A major confidence crisis occurred and a massive shift happened from a University-backed well developed and documented software to experimental tools of an European institution whose main focus and expertise was not at all related to the Internet. The only justification for that shift is that of the “property” of the tool, which is to say, its “external accountability”. One was subject to the whims of its creator, the other had (and still has) the backing of international intellectual property law to guarantee that its condition of a global public good cannot be reverted.

Around that same time I was engaged in using those new electronic tools to enable the distant participation of Southern NGOs in the Earth Summit that took place in Rio de Janeiro in 1992. The officially called UN Conference on Environment and Development was the first major Internet-enabled international event.

As a consequence, Chapter 40 of its outcome document, popularly known as “Agenda 21” includes the following paragraph (numbered 40.25):

"Establishment and strengthening of electronic networking capabilities

"Countries, international organizations, including organs and organizations of the United Nations system, and non-governmental organizations should exploit various initiatives for electronic links to support information sharing, to provide access to databases and other information sources, to facilitate communication for meeting broader objectives, such as the implementation of Agenda 21, to facilitate intergovernmental negotiations, to monitor conventions and efforts for sustainable development to transmit environmental alerts, and to transfer technical data. These organizations should also facilitate

the linkage of different electronic networks and the use of appropriate standards and communication protocols for the transparent interchange of electronic communications. Where necessary, new technology should be developed and its use encouraged to permit participation of those not served at present by existing infrastructure and methods. Mechanisms should also be established to carry out the necessary transfer of information to and from non-electronic systems to ensure the involvement of those not able to participate in this way."

The term "Internet" was not yet of common usage, but many of the functions listed, such as facilitating the linkage of different electronic networks, are those that ICANN currently performs.

Recently, the state of Alabama passed a law (Alabama-2012-SB477) according to which the State of Alabama and all political subdivisions "may not adopt or implement policy recommendations (...) originating in, or traceable to Agenda 21". Further "the State of Alabama and all political subdivisions may not enter into any agreement, expend any sum of money, or receive funds contracting services, or giving financial aid to or from those non-governmental and inter-governmental organizations as defined in Agenda 21".

In Texas a similar bill is being considered (SB 445) according to which "a governmental entity may not enter into an agreement or contract with, accept money from, or grant money or other financial aid to a nongovernmental or intergovernmental organization accredited by the United Nations to implement a policy that originated in the Agenda 21."

ICANN could be easily be identified as a non-governmental organization implementing a policy recommended by Agenda 21. It can be "accused" to abiding to human rights norms and standards set by the United Nations. Would it be allowed to function if a similar law is passed in California?

I do hope such a thing does not happen, but I am afraid a "stress test" such as the one mentioned in the draft should consider if it is "a realistic option now or in the near future" that the forces that dominate the legislatures in Alabama and Texas might one day also do so in California. The mere fact that this is plausible, even if not probable, undermines the Institutional Confidence in ICANN, not because of any flaw in ICANN itself, its bi-laws or its conducts, but just because of it being incorporated in a state that has the authority to decide that the carefully crafted objectives, bi-laws and mandate of ICANN are contradictory with that state policy.

The Internet community preferred the guarantees of international intellectual property law over the promise of a prestigious American university more than two decades ago, when probably 90% of the users of the Internet were from the US and a large number of them from academia. How can we expect

now that the “community”, enlarged to three billion users, half of them in Asia, trusts the California legislature more than international law?

It is important to point out, also, that while NTIA may be shedding direct executive oversight - which is very significant in removing an element of possible ad hoc interference in ICANN's work, as a legal entity registered in California, ICANN remains accountable to both the US courts and its many executive agencies like the Office of Foreign Assets Control.

A legal entity can be registered in a national jurisdiction (or subnational, as is the case of ICANN, currently registered in California) or it can be created by a treaty among countries as an international entity and be subjected to the Vienna convention on international law. As far as I know there is no third option.

ICANN could choose to change its HQ or official address and incorporate in Switzerland or the Cayman Islands, but it would still be legally accountable to the national jurisdiction of the country that decides it can exist, or it can become an international organization, created by a treaty.

Only sovereign parties can sign a treaty and create a new legal international entity. The headquarters of an international entity are located somewhere, no matter if they are a huge campus or a post office box. For that purpose international organizations define host country agreements with the jurisdiction in which they are located and those host country agreements explicitly grant to the HQ of international organizations extraterritorial immunity. US law does not apply within the perimeters of the UN headquarters and Swiss law does not apply inside the building of the World Trade Organization (same as with embassies, ofcourse). The mechanisms of international law, immunity and extraterritoriality have slowly evolved since the middle ages precisely to make trade and diplomacy possible and to create entities outside of the jurisdiction of any single government.

The current accountability of a global governance body to the law and institutions of just one country is the major issue to correct. This can be corrected only by incorporating ICANN under international law - arrived at by an international treaty - and giving ICANN jurisdictional immunity in the country of its physical location.

The “Implementation” section of the draft recognizes "The requirement that ICANN remains compliant with applicable legislations, in jurisdictions where it operates". This is the legal consequence of it not being an international organization and this is highly problematic because different jurisdictions can impose different (and conflicting) normatives. No global institution works like that and, instead, global institutions have immunity from prosecution (diplomatic status) in all countries where they operate and the guarantees of international law. This is how the UN and World Bank offices around the world

operate, as otherwise they would be subject to the whims of any and all of the 200 sovereign governments of the world.

If we want the Internet to be free of undue government pressures we will be doing it a disservice by denying ICANN the extraterritorial status and immunity from government prosecution that only by being an international organization it can acquire.

An international organization can have non-state actors as members and decision-makers. For example the International Labour Office is tripartite, with governments, workers and employers of each member country sitting as equals in its assembly. And the status of international organization is compatible with the condition that ICANN not be "government-led." This is precisely the case of the International Criminal Court, for example, where its statute carefully provides for the independence of the judges from any government. But to gain legal status, an IO needs to be created by an international treaty. In the treaty creating an IO the parties will define bylaws, membership and, of course, accountability mechanisms.

A treaty-making process can take decades or a couple of years. The International Criminal Court was negotiated and ratified in as much time as the discussion of the governance of ICANN is already taking.

While international law provides a framework, the treaty should define the composition of the external body, completely independent of ICANN, to which it is to be accountable and can be considered as representing global public interest. This can include representatives of all groups of people which are affected by ICANN's policies -and not just the groups directly interacting with ICANN. Accountability to the latter can also be improved by beefing up ICANN' internal accountability systems. This issue, however, must be considered separately from that of external accountability – which is to be the focus at this stage. It will be a big mistake to conflate the external accountability issue with that of internal accountability.

To meet US gov's requirement that this new external oversight body should not be inter-governmental, different kinds of non-gov mechanisms can be considered. But we should remember that here we are looking at accountability to the external public and not internal stakeholders. It is for instance possible to assemble a body with membership from different global sectoral groups like media, education, health, gender, disability groups and so on. A simply constituency system and way of filling these positions can be developed employing established global structures associated with these different groups. Such a body will have an arms length role, which involves ensuring that ICANN decisions are as per concerned international law, as well as its own internal processes, and should be based on clearly laid rules, that should be written in the above proposed international treaty.

Some "Values" are reaffirmed by the draft, such as openness, transparency, "fairness" and "bottom up". Inclusiveness, gender balance and respect for freedom of expression have been suggested as additional values to incorporate. All those values ultimately originate in the legal rights framework and, in particular, in the Universal Declaration of Human Rights that is the most universally adhered to document. ICANN should mention it explicitly as the basis of its value system and as the closest to an universally accepted value system that could summarize the aspiration of the "community" ICANN should serve. Human Rights and democracy need to be explicitly recognized as the common values from which all others derive. Without that reference it becomes impossible to recognize where any other values come from and therefore what its context and meaning actually is.

Without being naive about the many political constraints, I think that we would do the Internet constituencies (which is soon going to be everybody in the planet) a disservice if we don't think of a future ICANN that can be legally independent from any of the countries in which it operates instead of one that is ultimately accountable to only one government.