

Comment on the CCWG-Accountability Draft Proposal

The CCWG-Accountability proposal does an excellent job of creating an empowered community as the accountability forum which can hold the accountable actor, the Board, to account for its decision-making. By tightening up the principles, commitments and core values in ICANN's by-laws, the proposal makes clear what the standards are against which the Board is to be held to account. The new community powers are finely balanced and limited in a way that will not hamper the Board's fiduciary duties towards ICANN, nor undermine the efficiency or effectiveness of the Board's decision-making processes. In addition, reforming the way in which the Independent Appeals mechanisms function enables those affected by the Board's decisions to have the basis for such decisions to be tested in a fair and accessible process. The inclusion of the Affirmation of Commitments into the ICANN Bylaws strengthens community review of ICANN's activities. The stress tests are comprehensive and indicate that the proposed changes should be able to withstand pressures from the environment, external and internal, to the ICANN ecosystem. In brief, the CCWG-Accountability proposal does establish the necessary system of checks and balances that has been lacking from ICANN's governance system and should meet the standards set for the IANA transition to take place.

Public Accountability Forum

What is missing is a space in which the community - as accountability forum - can hold the Board - as accountable actor - to account on a regular basis. Here the work of public accountability academic, Mark Bovens, may be of use¹. He sees accountability as a social relation and defines accountability as 'a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor can be sanctioned'.

At its regular meetings, ICANN holds a Public Forum which already has many of these features. The Board gives an account of some of its activities and members of the community can make comments and pose questions to the Board. It may be of value to transform this Public Forum into a Public Accountability Forum. The way this could work is as follows:

1. The community, that is the supporting organisations and advisory committees, represented by their chairpersons and vice-chairs, meets and constitutes itself as the accountability forum.
2. The accountability forum then chooses a chairperson and vice-chair to convene the Public Accountability Forum at each tri-annual ICANN meeting, for the period of a year.
3. The Board and the CEO would constitute the accountable actor at the Public Accountability Forum.

¹ Mark Bovens: 'Public Accountability' in Ewan Ferlie, Laurence E. Lynn Jr. and Christopher Pollitt *The Oxford Handbook of Public Management* Oxford University Press, 2007.

4. The Chairpersons consult with the community, the Board and the CEO to determine the agenda for the Public Accountability Forum.
5. At the Public Accountability Forum, the Board, as accountable actor, gives an account of the agenda items and the accountability forum, represented by the chairs and vice-chairs of each supporting organisation and advisory committee, pose questions and pass judgment. Passing judgment, in this instance, would be the equivalent of comments on the behaviour or actions of the accountable actor rather than a formal judgment by the accountability forum as a whole.
6. In a second round, members of the community have an opportunity to pose questions and pass judgment. Passing judgment here would be the perception or opinion of the individual community member on the behaviour or actions of the accountable actor.
7. Should any matters arise that touch on the new community powers to sanction the Board, these are noted by the chairs of the Public Accountability Forum for discussion by the accountability forum, which would meet on its own directly after the Public Accountability Forum is over.
8. The Chairs of the Public Accountability Forum briefly sum up the discussion and close the Public Accountability Forum.

The idea would be to limit the agenda to a few key issues rather than to address every conceivable question. The emphasis would be on the accountable actor giving an account of its actions and the accountability forum questioning and passing judgment. The question of sanctions would only arise if the issues under discussion touched on one of the new community powers.

Guarding the guardians

The question of who will guard the guardians has arisen in the CCWG-Accountability's discussion space – put forward most clearly by Jan Aart Scholte in his capacity as one of the advisors to CCWG-Accountability. He poses the question in these terms:

There is that ever-present thorn 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?

Michael Goodhart has addressed the issue in this way:

In thinking about how to translate models and modalities of democratic accountability to the transnational context, scholars have naturally focused on the question of *who* is entitled to hold power-wielders to account. That is, they have emphasized the *process* of democratic accountability. This approach has not been terribly fruitful, because in world politics, the logic of democratic accountability breaks down. The familiar democratic mechanisms don't and can't work because their legitimacy turns out to have less to do with the mechanisms

themselves than with certain distinctive features of the Westphalian state: First, the symmetry and congruence between citizens and rulers and between the laws and policies rulers make and their constituents; second, the peculiar status of the people, whose standing as a source of democratic legitimacy is a function of its taken-for-grantedness. Identifying democratic standards of accountability independently from the mechanisms with which they are commonly associated, advances the debate on accountable international relations².

In other words, Goodhart argues that in global governance at present the solution to the issue of representation is to identify democratic standards and values and use those as the template against which to measure an international organisation's accountability.

Frank Vibert argues that we need to recognise that we are living in an era which has seen the rise of unelected bodies or 'non-majoritarian institutions' at national and global level. He has identified a number of features of such unelected bodies:

- 1 Most operate in technically sophisticated areas;
- 2 Almost all rely on sources outside the government for information and knowledge;
- 3 With this specialised information and knowledge they form their own communities³.

As such, non-majoritarian institutions like ICANN are epistemic communities which are bound by a set of values, knowledge and standards rather than elected representatives of the billions of Internet users or netizens. At this stage of human development it is simply not possible for ICANN to hold global elections as it tried to do in 2000. That may be possible as technology changes in the future. Nor is there a fully representative system of world government at this point in history. What ICANN does have in its system of governance is a strong set of stakeholders from governments, business, civil society and the technical community. If the current proposal of the CCWG-Accountability is substantially accepted, this form of multi-stakeholder governance will constitute the ICANN community formally as one that has not simply a supportive or advisory role but one that has powers to hold the Board to account against a set of values and standards. This lays new ground in global governance.

As Richard Mulgan has pointed out, the danger of posing the question of who guards the guardians in a non-majoritarian representative context is that it leads to the problem of infinite regress:

If the only way of making one body accountable for how it holds others accountable is to establish a further agent of accountability to watch how this body holds others accountable, then this further agent itself will need to be held accountable by someone else and so on *ad infinitum*. The problem of how to guard existing guardians thus leads to a search for further

² Michael Goodhart: 'Accountable International Relations' in Mark Bovens, Robert E. Goodin and Thomas Schillemans: *The Oxford Handbook on Public Accountability* Oxford University Press, 2014, p295

³ Frank Vibert: *The Rise of the Unelected: Democracy and the New Separation of Powers* Cambridge University Press, 2007.

guardians to guard existing guardians, a search that must be ultimately fruitless in the absence of a final guardian who does not need guarding⁴.

Mulgan's solution to this problem is to propose a form of reciprocated, mutual accountability:

In such a structure, two or more parties are accountable to each other, rather than each being accountable to a different party, as in a linear chain of accountability. The legislature and the judiciary as well as holding the executive to account, are also accountable to each other. Courts can hold legislatures accountable for adherence to the law, including the basic rules of the constitution, while legislatures can hold the judiciary accountable for reasonable interpretation of existing law⁵.

The question this raises is whether there is a space for mutual accountability within ICANN's systems of accountability and governance that can go some way to addressing the question of who guards the guardians. The question that Jan Aart Scholte raises - 'How does one ensure that the community empowerment mechanism does not become a vehicle for capture of ICANN by insider activists?' needs to be answered. Perhaps in addition to the community powers and the suggestion of a Public Accountability Forum, consideration could be given to establishing a Mutual Accountability Roundtable.

Mutual Accountability Roundtable

The idea of mutual accountability is that multiple actors are accountable to each other⁶. How might this work in ICANN? It would be necessary to carve out a space within the various forms of accountability undertaken within ICANN that are of the principal-agent variety. So where the new community powers and possibly a Public Accountability Forum construct the community as a principal who calls the Board as agent to account, a line of mutual accountability would enable all ICANN structures to call one another to account. So one could imagine a Mutual Accountability Roundtable that meets once a year at the ICANN meeting that constitutes the annual general meeting. The form would be a roundtable of the Board, CEO and all supporting organisations and advisory committees, represented by their chairpersons. The roundtable would designate a chairperson for the roundtable from year to year at the end of each AGM who would be responsible for the next Mutual Accountability Roundtable. There could be a round of each structure giving an account of what worked and didn't work in the year under review, following by a discussion on how to improve matters of performance. The purpose would be to create a space for mutual accountability as well as a learning space for improvement.

It could be argued that this form of mutual accountability would contradict and undermine the 'linear chain of accountability' established in the new community powers and cause confusion. The answer to this is that ICANN needs a combination of accountabilities to

⁴ Richard Mulgan: *Holding Power to Account: Accountability in Modern Democracies* Palgrave Macmillan, 2003, p232

⁵ Mulgan, *ibid*, p231

⁶ L. David Brown: 'Multiparty social action and mutual accountability' in *Global Accountabilities: Participation, Pluralism and Public Ethics* Cambridge University Press, 2007.

manage its complexity as an organisation. In the IANA transition, it is critically important for ICANN to have a strong principal-agent relationship at the centre of its accountability system to replace that of the NTIA. However, that system is vulnerable to charges that the community assuming the role of accountability holder or forum is itself not representatively accountable to the global public of Internet users. To address this requires a way of introducing a system of mutual accountability as well as a recognition that ICANN is accountable as a whole ecosystem to a set of democratic standards and values captured in its Bylaws.

Willie Currie

An Advisor to the CCWG-Accountability

May 26 2015