COMMENTS ON CCWG-ACCOUNTABILITY THIRD DRAFT PROPOSAL

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As an external advisor on accountability I have had the privilege to witness firsthand the incredibly dedicated and creative work has gone into this path-breaking proposal. Co-chairs and participants in the Cross-Community Working Group (CCWG) on Accountability have made truly impressive progress in tackling one of the greatest challenges in contemporary governance: namely, to ensure that a global multistakeholder institution such as ICANN adequately answers to the publics that it affects.

Of course no proposal will get everything exactly right. Accountability problems are never fully 'solved', and the quest for better arrangements will and must continue after the current reforms. The question is not whether the current CCWG proposal is flawless, but whether it fulfils the criteria to get approval of the IANA stewardship transition by the National Telecommunications and Information Administration (NTIA) of the United States Government.

My answer to this question, in respect of the 30 November 2015 draft proposal, would be broadly yes. However, I would also add the following eight cautions.

1. Engagement (Paragraphs 70-72). The principle of engagement (perhaps 'consultation' would be a more precise term) is a crucial cornerstone of accountability; however, the precise practices need to be carefully thought through. It is therefore somewhat unfortunate that this provision (and the proposal to include it as a fundamental bylaw) has been added to the CCWG proposal late in the day and without much consideration of modalities or implications. (The proposal provides only 16 lines on 'engagement', as compared with 114 lines on 'escalation'.) The text gives little or no specification about who is to be consulted, by whom, when, for what purpose, and through what mechanisms.

    Clearly there is not time in the context of the IANA transition to work out and 'stress test' these details about engagement. Indeed, other global governance institutions have spent years developing and codifying their practices of stakeholder consultation. This is a major ongoing job for ICANN staff, Accountability and Transparency Review Teams (ATRT), external consultancy reports, and more.

In the absence of more thorough groundwork, it might be premature to list in a fundamental bylaw the precise occasions on which 'extensive engagement' would be required. For example, does one really want to bind ICANN to an open-ended 'extensive engagement' about details of the annual IANA budget and the Annual ICANN Operating Plan and Budget? Could this provision not allow handfuls of activists to hold ICANN to ransom, filibuster-style, by demanding ever more evidence and explanation about the smallest details of these budgets? Maybe some lobbies would seek to hold up a budget in 'consultations' until the ICANN board gave way to certain special interests? Inadvertently, an ill-defined engagement requirement could reproduce the kind of relationship that creates so many stalemates between the legislative and the executive branches of the United States Government?

More to the immediate point of the IANA transition, an unelaborated and unlimited requirement of engagement could undermine NTIA criteria by: (a) creating possibilities of lobbyist capture; and (b) inviting institutional deadlocks at ICANN that undermine the stability and resilience of the global Internet.

2. Inspection (Paragraphs 49, 57, 63, 132, 136). As with engagement, the third draft's new provisions on the right to inspect documents needs to be elaborated and specified more. To be sure, inspection/transparency is (like engagement/consultation) indispensable to accountability. However, the contours of inspection need to be established more precisely.

Indeed, public disclosure requirements cannot be open-ended. For example, most would agree that the right of inspection should not extend to personnel files that have no public-interest relevance. In addition, some commercially sensitive information arguably should not be immediately made public if such disclosure would disturb market mechanisms. Thus, for example, a central bank should not be required to disclose in advance the timing of its interest rate adjustments, and maybe there could be efficiency arguments for ICANN to have a certain discretion about when and how it releases some market-shaping information.

As with engagement/consultation, other global governance institutions have spent years working out more exactly the who, what, when, why, and how of transparency and associated rights of inspection. It therefore seems unrealistic to expect that ICANN can comprehensively resolve this challenging issue in a matter of weeks at the close of the IANA transition deliberations. Perhaps one will have to live for the time being with a general commitment to a default position of public disclosure, subject to limitations (to be detailed later) in line with reasonable confidentiality standards.

3. Human rights (Recommendation #6). A third significant expansion of the accountability agenda in this third draft CCWG proposal relates to human rights. Like 'engagement' and 'inspection', this additional provision wants more careful consideration and specification. For example, which human rights would the proposed bylaw cover (there are many); and as defined in which international legal instruments (again, there are many treaties, and their conceptions and priorities vary)?

   If the CCWG is serious about incorporating human rights into ICANN practice (as opposed to relatively empty rhetoric), then it could be helpful to enlist additional expert advisors for Work Stream 2 on both the law and the politics of human rights. In particular it would be important to get expert advice on political dimensions – i.e., how human rights provisions play out in practice – rather than obtaining only legal advice.

4. SO/AC Accountability (Recommendation #10). As the above provisions regarding 'engagement' and 'inspection' indicate, the CCWG has in its third draft proposal still further enlarged the accountability competences of 'the community', as constituted in Supporting Organizations (SOs) and Advisory Committees (ACs). While there are compelling arguments for establishing these community checks on the board, these reforms also make it ever more urgent to address the accountability of SOs and ACs themselves. It is therefore entirely appropriate and essential that the CCWG proposal includes 'enhancing the accountability of SOs and ACs' as one of its core recommendations (Paragraphs 262-70).

   That said, certain revisions of paragraph 268 could further clarify the task ahead. (In particular the first two sentences of the current draft are ambiguous.) The text could be amended to read something on the lines of:

   The subject of Supporting Organizations and Advisory Committees accountability will be a priority concern of Work Stream 2, which will consider, inter alia, proposals to:
   - *Include SO and AC accountability in the scope of the Accountability and Transparency Review Process*
   - *Create a "Mutual Accountability Roundtable" involving representatives of the ICANN Board, Community and Staff*
   - *Develop a detailed plan on enhancing SO and AC accountability*
   - *Apply the Independent Review process to SO and AC activities*

5. Diversity (Paragraphs 6 and 283). As the CCWG-Accountability has repeatedly recognized in the course of its year-long deliberations, the question of SO/AC accountability is closely intertwined with the issue of diversity. SOs and ACs – and participants in ICANN more generally – lack full credibility as 'representatives' of global Internet stakeholders when they do not adequately encompass the full range of geographical, social and cultural interests around the DNS. The question of diversity featured prominently in public comment on earlier versions of the CCWG proposal. Diversity has also been a major preoccupation for the CCWG's Working Group 3.

    It is therefore somewhat surprising to see diversity given bare mention in the third draft proposal. The issue is named in only the briefest terms in paragraphs 6 and 283, without any motivation or elaboration. Yet increased diversity is one of the most important challenges for the future global legitimacy of ICANN.

    It would therefore send a politically sensitive signal to expand paragraph 283 so that it: (a) expresses recognition of widespread and serious concerns about increasing diversity at ICANN (inter alia, in terms of region, gender, language, age, (dis)ability, and more); and (b) indicates that Work Stream 2 will give systematic attention to ways of enhancing diversity across all of ICANN's accountability processes.

6. Status of the Government Advisory Committee (Paragraphs 58-59). It would be helpful to have clarification regarding the place of the GAC vis-à-vis community empowerment through the Sole Designator. The third draft proposal 'anticipates' the participation of the GAC and includes the GAC alongside four other SOs/ACs in the diagram of the empowered community. However, my understanding is that the GAC has not yet come to a position on this matter, which leaves a significant question mark hanging over the new accountability arrangements.

7. Community Forum (Paragraph 79). Arguably a Community Forum held at 15 days' notice outside the normal ICANN meeting cycle should always be virtual. It is not clear why a Community Forum to discuss the specific issue of a full board recall would be an exception to this rule and require a face-to-face meeting. Any F2F called at 15 days' would very probably be attended disproportionately by a small number of well-resourced insiders who could in effect 'capture' the process. Making all extraordinary Community Forum meetings virtual overcomes that significant objection.

8. ICANN funding of the Independent Review Process (Paragraph 235). This arrangement could prompt perceptions of a conflict of interest. It could be seen as akin to a

defendant financing their own trial. Perhaps ICANN resources could provide the financial means for IRP work, but might ICANN not better pay the money into a trust fund that lies at arm's length from the institution?