Response to CWG-Internet March 2014 Open Consultation

Richard Hill

Association for Proper Internet Governance (APIG)

Abstract

This response takes the view that different stakeholders have different roles and responsibilities, as outlined in the Tunis Agenda. States are responsible for protecting the public interest. Thus, states should take steps as follows.

Multilingualization of the Internet Including Internationalized (multilingual) Domain Names: support current activities and, in addition, consider implementing additional national ccTLDs, if necessary through alternate roots.

International Internet Connectivity: implement the provisions of Recommendation ITU-T D.50 and its Supplements.

International public policy issues pertaining to the Internet and the management of Internet resources, including domain names and addresses: internationalize the management of domain names and addresses and ensure that, at the national level, assignment and management practices serve the public interest.

The security, safety, continuity, sustainability, and robustness of the Internet: accede to the 2012 ITRs.

Combating Cybercrime: agree a simplified version of the Budapest Convention.

Dealing effectively with spam: accede to the 2012 ITRs.

Issues pertaining to the use and misuse of the Internet: agree that it may be appropriate to allow greater freedom of speech online than offline; agree to limit intermediary liability; agree to reform significantly online copyright law.

Availability, affordability, reliability, and quality of service, especially in the developing world: implement Recommendations ITU-T D.50 and D.156; consider functional separation as an appropriate measure, which may be more effective than network neutrality regulation.

Contributing to capacity building for Internet governance in developing countries: increase support and funding.

Developmental aspects of the Internet: see our previous submission.

Respect for privacy and the protection of personal information and data: adopt best practices outlined by civil society and adopt changes to the ITU Constitution to reinforce secrecy of international telecommunications.

Protecting children and young people from abuse and exploitation: implement widely agreed best practices.

Background

On 4 March 2014 the ITU CWG-Internet decided that Open Consultations would be convened on the following issue:

> "Recognizing the scope of work of ITU on international Internet-related public policy matters, represented by the list of topics in Council 2009 Resolution 1305 Annex 1 which was established in accordance with decisions of ITU membership at the Plenipotentiary Conference, the Council Working Group on International Internet Related Public Policy **invites all stakeholders to provide their position on following question :**

Q1. What actions are to be undertaken by governments in relations to each of the international Internet-related public policy issues identified in Annex 1 to Resolution 1305 (adopted by Council 2009 at the seventh Plenary Meeting)?"

According to Annex 1 of the cited resolution, the topics are:
1. Multilingualization of the Internet Including Internationalized (multilingual) Domain Names
2. International Internet Connectivity
3. International public policy issues pertaining to the Internet and the management of Internet resources, including domain names and addresses
4. The security, safety, continuity, sustainability, and robustness of the Internet
5. Combating Cybercrime
6. Dealing effectively with spam
7. Issues pertaining to the use and misuse of the Internet
8. Availability, affordability, reliability, and quality of service, especially in the developing world
9. Contributing to capacity building for Internet governance in developing countries
10. Developmental aspects of the Internet
11. Respect for privacy and the protection of personal information and data
12. Protecting children and young people from abuse and exploitation

We treat each of the topics in detail below, outlining the actions that, in our view, should be undertaken by governments. However, we start with a Preamble regarding the role of governments in Internet governance.

Preamble: The role of governments

The word "government" can be used to refer to the executive branch of a state or, more generally, to the various governance mechanisms of a state, that is, the executive, legislative and judiciary. In this document, the term "government" is used to refer to the state as a whole.

There has been a recent trend to minimize the fact that, in telecommunications, network effects and economies of scale often have the effect that portions of the market are natural monopolies, see for example Kim, Jino W., 2005. "Economic Theory and Practices: Telecommunication Policy and Regulation for Competition", ITU <http://www.itu.int/ITU-D/treg/Events/Seminars/2005/Thailand/Reference%20Material/Background%20Paper%20-%20Economic%20Theory%20and%20Practices.pdf>.

As a result, lack of government intervention has led to sub-optimal results, see for example Crawford, Susan, 2013. *Captive Audience: The Telecom Industry and Monopoly in the New Guilded Age.* Yale University Press. A summary is available at <http://business.time.com/2013/01/09/is-broadband-internet-acces-a-public-utility/?goback=%2Egde_65453_member_204153607>.

More generally, a trend to excessive laissez-faire has resulted in the Internet being used for mass surveillance and abusive use of personal data. Governments must intervene to avoid the monopolization, commodification and monetisation of information and knowledge, inequitable flows of finances between poor and rich countries, and erosion of cultural diversity. And to avoid that technical, and thus purportedly 'neutral', decisions lead to social injustice if technology architectures, often developed to promote vested interests, increasingly determine social, economic, cultural and political relationships and processes. And to ensure that those with central positions of influence do not use it to consolidate power and to

establish a new global regime of control and exploitation, under the guise of favouring liberalization, while in reality reinforcing the dominance and profitability of major corporations at the expense of the public interest, and the overarching position of certain national interests at the expense of global interests and well being. *(NOTE: This statement is taken from the Preamble of the Just Net Coalition document "Towards a Just and Equitable Internet for All". The Just Net Coalition was formed at a meeting in Delhi in February 2014. It comprises several dozen organisations and individuals from different regions globally concerned with internet governance, human rights and social justice, and the relationship between them. The document is available at <http://content.netmundial.br/contribution/towards-a-just-and-equitable-internet-for-all/110>.)*

More fundamentally, states are the only institutions that, at present, can protect the public interest. Article 21 of the Universal Declaration of Human Rights and Article 25 of the International Covenant on Civil and Political Rights provide that everyone has the right to take part in the conduct of public affairs, directly or through freely chosen representatives. That is, everyone has the right to take part, directly or through freely chosen representatives, in public policy decisions, where "public policy decisions" refers to decisions that affect public affairs.

This human right of course also applies to public policy decisions regarding the Internet, by virtue of the principle that offline rights apply equally online.

Thus the principle that people, either directly or through their freely chosen representatives, have the right to make public policy decisions also applies to public policy decisions regarding the Internet. This principle is correctly embodied in 35(a) of the Tunis Agenda, which states that policy authority for Internet-related public policy issues is the sovereign right of States.

Thus the roles and responsibilities of the several stakeholders outlined in the Tunis Agenda must be reaffirmed.

A more detailed discussion of this matter is given in submissions to the NETMundial meeting, see:

http://content.netmundial.br/contribution/a-fundamental-principle-for-internet-governance/83

http://content.netmundial.br/contribution/is-certain-kind-of-multistakeholderism-a-post-democratic-ideology-need-to-save-netmundial-outcome-documents-from-crossing-some-sacred-democratic-lines/300

And in our background paper for the NETMundial meeting, see:

http://www.apig.ch/Future%20of%20Internet%20governance.doc

1. Multilingualization of the Internet Including Internationalized (multilingual) Domain Names

Many measures have been taken in recent years to favour the multi-lingualization of the Internet and its domain names. Those measures should be supported and continued.

In addition, consideration should be given to expanding the domain name space not just through the new gTLD program conducted by ICANN, but also by automatically giving a new ccTLD to any country that asks for one.

Such new ccTLDs could take the form, for example, ".ch1" for a second ccTLD for Switzerland. Uniqueness would be ensured by retaining the existing ccTLD code as the first two letters of any new ccTLDs.

Thus governments should (1) conduct national consultations to determine whether it would be beneficial to create new ccTLDs and, if the answer is positive (2) request that IANA create such new ccTLDs.

Alternatively, if IANA does not wish to create such new ccTLDs, they could be created under an alternate root. For proposals regarding alternate roots, see the following submission to the NETMundial meeting:
  http://content.netmundial.br/contribution/internet-governance-what-next/129

In addition, see the following submission regarding proposals for decentralization of critical Internet resources through peer-to-peer systems:
  http://content.netmundial.br/contribution/supporting-experimentation-in-the-decentralization-of-internet-resources/172

The submission cited above cites an Internet draft. That draft can be found at:
  https://datatracker.ietf.org/doc/draft-grothoff-iesg-special-use-p2p-names/?include_text=1

2. International Internet Connectivity

Recommendation ITU-T D.50 and its Supplements, in particular Supplement 2, outline various concrete measures that can be taken to reduce the cost of international Internet connectivity.

Governments should consider implementing those measures as appropriate at the national level, and should cooperate internationally to implement those measures. The cited Recommendation is available at
  http://www.itu.int/ITU-T/recommendations/rec.aspx?rec=10857

3. International public policy issues pertaining to the Internet and the management of Internet resources, including domain names and addresses

3.1 Domain names

The management of the domain name system is at present highly centralized. It is in fact more centralized than any aspect of any telecommunications technology that has ever been deployed internationally.

That centralization results in lack of competition at the top level of the domain name system. That centralization and lack of competition are the side effects of technical decisions that were made long before the Internet became a public network. There is no inherent technical reason for such strict centralization and lack of competition.

There is broad consensus that the current asymmetric role of the US government with respect to the management of the domain name system should not continue. Alternatives include:

1. Agreeing a Memorandum of Understanding between all concerned parties, along the lines of the proposal made by the Internet Ad Hoc Committee (IAHC) in the mid 1990s, see:
     http://web.archive.org/web/19971211190034/http://www.gtld-mou.org/

2. Modularizing ICANN's functions as suggested in section 3 of a submission to the NETMundial meeting, see:
     http://content.netmundial.br/contribution/roadmaps-for-further-evolution-of-internet-governance/65

Also available at:
http://www.apig.ch/Brazil%20input2%20final.doc

Another proposal for modularization of ICANN's functions is presented at:
http://www.internetgovernance.org/wordpress/wp-content/uploads/ICANNreformglobalizingIANAfinal.pdf

3. Replacing the oversight role of the US government with a weaker oversight role by the ITU as suggested in section 4 of the cited submission to the NETMundial meeting and in a submission to the US National Telecommunications and Information Administration (NTIA), see:
http://www.ntia.doc.gov/legacy/ntiahome/domainname/dnstransition/comments/dnstrans_comment0081.htm

Governments should discuss the alternatives and come to an agreement. In particular, the anomaly of having an informal government committee (GAC) within a private company (ICANN) should be corrected. If ICANN should receive advice from governments, than that advice should come from a formal intergovernmental mechanism, for example ITU's Council Working Group on International Internet-related Public Policy Issues (CWG-Internet), and appropriate groups within other concerned intergovernmental organizations, such as WIPO and UNESCO.

The highly centralized nature of the DNS could be addressed by introducing alternate roots, see:
http://content.netmundial.br/contribution/internet-governance-what-next/129

As stated in 1 above, governments should consider whether additional ccTLDs should be deployed and, if so, take steps to ensure that they are deployed.

Further, governments should take steps to ensure that Recommendation E.910, 'Procedures for registration with the domain ".int"' is implemented. That Recommendation can be found at:
http://www.itu.int/ITU-T/recommendations/rec.aspx?rec=8012

Further, governments should ensure that revenues derived from monopoly control of gTLDs and ccTLDs are not excessive and are used in the public interest. This also applies to the fees that ICANN charges for new gTLDs and for domain names within existing gTLDs such as ".com" and ".org". In this context, see
http://www.open-root.eu/about-open-root/news/financing-ldcs-in-the-wsis-process

3.2 IP addresses

If it is felt that the relatively slow rate of transition to IPv6 simply reflects market and economic realities, then there is no need for government intervention apart from the current awareness and capacity building efforts, for example as called for in *invites Member States and Sector Members* 1 of WTSA-12 Resolution 64 (Johannesburg, 2008; Dubai, 2012).

On the other hand, if it is felt that the relatively slow transition to IPv6 perpetuates the historical geographical imbalances in IP address allocation, then some consideration could be given to taking steps to expropriate under-utilized IPv4 blocks and moving towards geographical allocation of recovered space, even perhaps to national allocation of the recovered space.

For a justification of this position, see our previous submission to CWG-Internet:
http://www.apig.ch/CWG-IPv4.doc

Further, governments should recognize that IP addresses are a critical resource that must be managed in the public interest. As stated in EU Directive 2002/21/EC at cons. 20, "Access to numbering resources on the basis of transparent, objective and non-discriminatory criteria is essential for undertakings to compete in the electronic communications sector. Contrary to what the cited Directive states, national regulatory authorities should be responsible for ensuring such access even for IP addresses. The cited Directive is at:
 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:108:0033:0050:EN:PDF

Governments should review current IP address assignment and management practices in order to ensure that they are in the public interest, that is, that they are transparent, objective and non-discriminatory and foster competition.

4. The security, safety, continuity, sustainability, and robustness of the Internet

Governments should accede to the 2012 International Telecommunication Regulations (ITRs), recognizing that adopting article 6 of that treaty will contribute to the security of the Internet without adversely affecting freedom of speech.

For a justification of this position, see:
- Richard Hill, "WCIT: failure or success, impasse or way forward?", *International Journal of Law and Information Technology,* vol. 21 no. 3, p. 313, DOI:10.1093/ijlit/eat008
  http://ijlit.oxfordjournals.org/content/21/3/313.abstract
- Richard Hill, *The New International Telecommunications Regulations and the Internet: A Commentary and Legislative History* (2013) Schulthess/Springer
  Available in Switzerland at:
  http://www.schulthess.com/buchshop/detail/ISBN-9783725569359
  Available elsewhere at:
  http://www.springer.com/law/international/book/978-3-642-45415-8
  And:
  http://www.amazon.com/The-International-Telecommunication-Regulations-Internet/dp/3642454151

Having acceded to the 2012 ITRs, governments should cooperate to improve security by encouraging implementation of best practices such as those outlined in Recommendations ITU-T E.408, E.409, X.1031, X.1032, X.1034, X.1035, X.1036, X.1037, X.1051, X.1052, X.1054, X.1055, X.1056, X.1101, X.1111, X.1112. X.1113, X.1114, X.1121, X.1122, X.1123, X.1124, X.1125, X.1141, X.1142, X.1143, X.1144, X.1151, X.1152, X.1153, X.1154, X.1156, X.1161, X.1162, X.1164, X.1171, X.1205, X.1206, X.1207, X.1208, X.1209, X.1210, X.1311, X.1312, X.1313, X.1500, X.1601 and the Recommendations they reference.

5. Combating Cybercrime

Governments should negotiate a simplified version of the Budapest Convention on Cybercrime. That Convention is a good instrument, but contains some detailed provisions that might be difficult for some states to implement. Thus, a streamlined version of the convention might attract a larger number of signatory states.

6. Dealing effectively with spam

Governments should accede to the 2012 International Telecommunication Regulations (ITRs), recognizing that adopting article 7 of that treaty will contribute to dealing with spam without adversely affecting freedom of speech. See 4 above for a justification of this position.

Further, governments should encourage implementation of best practices to combat spam such as those outlined in Recommendations ITU-T X.1231, X.1240, X.1241, X.1242, X.1243, X.1244, X.1245. Those Recommendations are available at:
 http://www.itu.int/ITU-T/recommendations/index.aspx?ser=X

7. Issues pertaining to the use and misuse of the Internet

7.1 Freedom of speech

It is widely accepted that offline rights apply equally online. Conversely, everything that is illegal offline is also illegal online. Freedom of speech is at present protected in general by customary international law as enunciated in the Universal Declaration of Human Rights, and by Article 19 of the International Covenant on Civil and Political Rights. Paragraph 2 of that Article 19 outlines the restrictions that can be imposed on free speech. Those restrictions must be provided by law and be necessary:

a) For the respect of the rights or reputations of others;

b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

The formulation of the permissible restrictions is very broad and has been interpreted in some countries in ways that have excessively restricted online free speech.

The ITU Constitution contains provisions regarding the right of the public to correspond (Article 33). It also outlines the restrictions to that right, in terms very similar to the cited Article 19. Indeed, Article 34 of the ITU Constitution provides that states may cut off telecommunications, in accordance with their national law, "which may appear dangerous to the security of the State or contrary to its laws, to public order or to decency".

Governments should recognize that it may be appropriate to allow greater freedom of speech online than offline. This can be done by modifying paragraph 2 of Article 34 of the ITU Constitution as follows:

> 2 Member States also reserve the right to cut off, in accordance with their national law, any other private telecommunication which is~~may appear~~ dangerous to the security of the State or contrary ~~to its laws,~~ to public order ~~or to decency~~. However, any such cut off shall take place only if it is held to be necessary and proportionate by an independent and impartial judge.

7.2 Intermediary liability

Governments should recognize that the liability of intermediaries in telecommunications should be limited. This can be done by agreeing a new provision in a future version of the International Telecommunication Regulations, for example:

Article 4A

Immunity of intermediaries

> 1 Member States shall ensure that entities that merely emit or transmit content that they do not own or originate shall not be held liable for violations of any national laws in relation to the said content, provided that such entities:

>> a) take steps to prevent reception in certain geographical areas of content which is illegal in those areas, and take steps to prevent reception by children of content which they cannot legally receive; or

b) take reasonable measures to receive notifications of illegal content and take reasonable measures to prevent reception of such content upon notification.

2 Member States shall not prevent the entities mentioned in 1 above from placing greater restrictions on the content that they emit or transmit, for example by refusing to emit or transmit:

a) Pornography or sexually explicit content.

b) Content showing animal abuse, drug abuse, under-age drinking and smoking, or bomb making.

c) Content containing graphic or gratuitous violence, or showing someone being physically hurt, attacked, or humiliated. This includes depictions of accidents and dead bodies.

d) Content subject to intellectual property rights, in particular copyright.

e) Hate speech, that is speech which attacks or demeans a group based on race or ethnic origin, religion, disability, gender, age, veteran status, and sexual orientation/gender identity.

f) Content related to predatory behavior, stalking, threats, harassment, intimidation, invading privacy, revealing other people's personal information, and inciting others to commit violent acts.

g) Spam, in particular any content with misleading descriptions, tags, titles or thumbnails in order to increase views. And large amounts of untargeted, unwanted or repetitive content, including comments and private messages.

The specific restrictions of 2 above are commonly applied by many popular web sites, see for example
  http://www.youtube.com/t/community_guidelines

7.3 Copyright issues

It is not disputed that the current offline copyright regime does not work well online. One solution that has been proposed is to adopt laws that increase the penalties for online copyright violations. However, that approach has drawn strong resistance from citizens and the proposals have been rejected by parliaments in various countries.

Indeed, as many scholars have pointed out (see for example the work of Eben Moglen), it is not appropriate to try to limit the use and functionality of the online environment to what is available offline.

Governments should recognize that a new online copyright regime is an urgent necessity and should take steps to adopt the specific measures that have been proposed by various groups, in particular the Pirate Party, see:
http://www.copyrightreform.eu/sites/copyrightreform.eu/files/The_Case_for_Copyright_Reform.pdf

8. Availability, affordability, reliability, and quality of service, especially in the developing world

It is not disputed that the Internet is not sufficiently available or affordable in developing countries. The affordability issue can be addressed by implementing, as appropriate, the provisions of Recommendation ITU-T D.50 and its Supplements, and also Recommendation ITU-T D.156.

Further, it must be recognized that, in many economies, the infrastructure is a natural monopoly. Thus there will never be competition at the infrastructure level. In order to avoid abuse of a dominant position, the incumbent infrastructure provider must either be regulated (for example, local loop unbundling, network neutrality, etc.), or, preferably, the infrastructure must be provided as a public good, for example by functional separation of the incumbent.

Regarding functional separation, see:
http://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/guidelines/195-berec-guidance-on-functional-separation-under-articles-13a-and-13b-of-the-revised-access-directive-and-national-experiences
and in particular the annex that details the favourable experiences in some countries:
http://berec.europa.eu/doc/berec/bor_10_44_b.pdf

Functional separation should become the norm, not the exception.

And this applies not just to fixed infrastructure, but also to the mobile infrastructure. At a minimum, mast sites should be provided as a public good. But consideration should also be given to providing the active radio network as a public good.

9. Contributing to capacity building for Internet governance in developing countries

Governments should increase their funding for capacity building, through ITU-D and other involved organizations.

10. Developmental aspects of the Internet

See our previous submission to CWG-Internet:

http://www.apig.ch/CWG-Development%20Aspects.doc

11. Respect for privacy and the protection of personal information and data

As already noted, offline rights apply equally online. However, violations of privacy and abusive use of personal information have far greater consequences online than they do offline. Thus it is necessary to strengthen the protection of online privacy. This must be done at the national level, by ensuring compliance with the necessary and proportionate principles outlined at:

https://en.necessaryandproportionate.org/text

States must review their national laws to ensure that they protects the right to privacy, in particular in telecommunications (including the Internet), and they must limit surveillance by government agencies.

In addition, the protection of privacy must also be ensured at the international level. Article 37 of the ITU Constitution covers the secrecy of telecommunications. The current provisions appear to be too weak and should be strengthened. Thus, governments should agree to amend paragraph 2 of Article 37 as follows:

> 2 Nevertheless, they reserve the right to communicate such correspondence to the competent authorities in order to ensure the application of their national laws or the execution of international conventions to which they are parties. However, any such communication shall take place only if it is held to be necessary and proportionate by an independent and impartial judge.

Further, states must agree to respect the privacy expectations of citizens of other states, even if a citizen's data flows through a state with lower privacy protection. That is, the data for a citizen of state X must be protected in accordance with the laws of state X, even if it flows

through state Y which has a lower level of privacy protection. This could be achieved by adding a new paragraph to Article 37 of the ITU Constitutions as follows:

> 3 Member States shall respect the secrecy of telecommunications in accordance with both their own laws and the laws of the state of the originator of such correspondence.

12. Protecting children and young people from abuse and exploitation

Governments should continue to take steps to protect children, through national laws and international cooperation, for example by implementing the measures outlined at:

http://www.itu.int/osg/csd/cybersecurity/gca/cop/

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