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Article abstract

Internet Governance emerged as a contentious and key issue at the 2003 World Summit on the Information Society (WSIS) in Geneva. Against the backdrop of digital solidarity – *the benefits of the Information Society should be shared amongst citizens of both developed and developing countries to ensure fair and equitable development for all* – the author advocates the need for Civil Society to work together to develop a unified voice and a consolidated list of critical issues. The author provides an overview of some of the contentious issues leading up to the Geneva Phase of WSIS. The author also looks at some of the issues addressed in two critical meetings following the Geneva Summit: The International Telecommunication Union Workshop on Internet Governance (ITU Workshop) and the United Nations Information and Communications Technologies Task Force Global Forum on Internet Governance (UN Global Forum). This is followed by an analysis and discussion of what the author perceives to be the most important issues on Internet Governance from the perspective of enhancing human rights and promoting human dignity in the Information Society. The author identifies three prominent issues: appropriate and effective capacity building, language and cultural rights in the domain name system, and a cautionary approach to model laws which could impact on human rights. The author concludes by offering a strategy on how civil society can be most effective in its contribution to Internet Governance issues for the upcoming WSIS meeting in Tunis.

SETTING A POSITIVE AGENDA FOR INTERNET GOVERNANCE AT THE WORLD SUMMIT ON THE INFORMATION SOCIETY (WSIS) : OF TECHNOLOGY AND HUMANKIND

By Alana Maurushat[*]

Internet Governance emerged as a contentious and key issue at the 2003 World Summit on the Information Society (WSIS) in Geneva. Against the backdrop of digital solidarity – *the benefits of the Information Society should be shared amongst citizens of both developed and developing countries to ensure fair and equitable development for all* – the author advocates the need for Civil Society to work together to develop a unified voice and a consolidated list of critical issues. The author provides an overview of some of the contentious issues leading up to the Geneva Phase of WSIS. The author also looks at some of the issues addressed in two critical meetings following the Geneva Summit: The International Telecommunication Union Workshop on Internet Governance (ITU Workshop) and the United Nations Information and Communications Technologies Task Force Global Forum on Internet Governance (UN Global Forum). This is followed by an analysis and discussion of what the author perceives to be the most important issues on Internet Governance from the perspective of enhancing human rights and promoting human dignity in the Information Society. The author identifies three prominent issues: appropriate and effective capacity building, language and cultural rights in the domain name system, and a cautionary approach to model laws which could impact on human rights. The author concludes by offering a strategy on how civil society can be most effective in its contribution to Internet Governance issues for the upcoming WSIS meeting in Tunis.

Lors du Sommet mondial de la société de l'information (SMSI), qui se tenait à Genève en 2003, la question de la gouvernance de l'Internet est apparue non seulement comme la question clé du sommet mais également comme une question sujette à controverses. Dans un climat de solidarité numérique – *les avantages tirés de la société de l'information devraient être partagés entre les citoyens de chaque pays, pays développés et pays en voie de développement, afin que soit garanti à chaque citoyen un développement de l'Internet juste et équitable* – l'auteur insiste sur la nécessité pour la société civile de mener une réflexion commune afin de développer une ligne directrice et de consolider la liste des problèmes existants. L'auteur présente une vue d'ensemble des principales questions litigieuses mises de l'avant lors du sommet de Genève, qui constituait la première phase du SMSI. Elle s'intéresse ensuite à différentes problématiques débattues lors des deux réunions qui ont suivi le sommet de Genève: l'Atelier de l'Union internationale des télécommunications dédié à la gouvernance de l'Internet et le Forum concernant la gouvernance de l'Internet organisé par le Comité de réflexion des Nations Unies en charge des questions liées aux technologies de l'information et de la communication. Suivent alors un travail d'analyse ainsi qu'un débat relatif à ce que l'auteur perçoit, au regard de la protection des droits de l'homme et de la dignité humaine, comme constituant les plus importantes questions juridiques concernant la gouvernance de l'Internet. L'auteur identifie trois thèmes fondamentaux: l'intensification efficace et appropriée du renforcement capacités, la protection des droits culturels et linguistiques dans le système des noms de domaine et la prudence quant à la manière d'élaborer des lois qui pourraient éventuellement impacter les droits de l'homme. L'auteur clôt sa réflexion en proposant une stratégie portant sur la façon dont la société civile pourrait le plus efficacement apporter des solutions liées aux problèmes soulevés par la gouvernance de l'Internet, en vue de la prochaine rencontre SMSI à Tunis.

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> Electric circuitry has overthrown the regime of 'time' and 'space' and pours upon us instantly and continuously the concerns of all other men. It has reconstituted dialogue on a global scale. Its message is Total Change, ending psychic, social, economic, and political parochialism.
>
> > Quentin Fiore and Marshall McLuhan, The Medium is the Message[1]

> I know, up on top
> you are seeing great sights,
> But down at the bottom
> we, too, should have rights.
> > Doctor Seuss,
> > Yertle the Turtle and Other Stories[2]

"Information Society" is a nebulous term subject to many different interpretations. What is meant exactly by this term depends on the vantage point of the person defining it. For some, the notion of an "information society" signals the transition from the industrial revolution into the information age with rapid technological development enabling information to be collected, stored and exchanged in an unprecedented manner. This interpretation concentrates on universal access to information and communication technology. A different conception places emphasis on "information" and the transformation of information into knowledge where the focus on the information age is not solely about technological development but about how such technologies may be harnessed for the betterment of humankind. Yet for others, the pendulum swings to a vision with the right of communication at the heart of the Information Society with a view to enhancing human rights in communities around the world.[3]

"Internet Governance" is equally as nebulous a term as "Information Society." From a technical standpoint, the Internet represents an inter-connecting network of cables, wires, hard-drives, and the physical infrastructures comprising the Internet. A broader perspective of the Internet is to associate the technology with a new mode of communication encompassing a new social, cultural, and even

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[1]   Marshall McLuhan & Quentin Fiore, *The Medium is the Message*, (Corte Madera: Gingko Press, 1967) at 16.

[2]   Dr. Seuss, *Yertle the Turtle and Other Stories*, (Toronto: Random House of Canada, 1986) at 13.

[3]   See *e.g.* "Our vision of the Information Society is grounded in the Right to Communicate, as a means to enhance human rights and to strengthen the social, economic and cultural lives of people and communities." Communications Rights in the Information Society (CRIS), "Home Page," online: CRIS <http://www.crisinfo.org>.

economic space. This space is often associated with the term "cyberspace," though the two are often used interchangeably.

The more controversial element is the notion of "governance." Traditionally, one associates governance with that of governments: formal and nationalized bodies, whether they are elected or otherwise, who set the rules and laws which govern a given society. Governments and governance are most readily associated with national authorities. Internet Governance on the other hand is perhaps better equated to the Latin form of *gubenare* meaning "to steer or pilot", or its Greek form *kuberman* meaning "to steer or control."[4] The governing entities of the Internet are not limited to national authorities such as ministries, national regulators, or nationally established commissions. Other, and arguably equally influential players, include: the private sector (e.g. VeriSign, Microsoft, IBM), international organizations (e.g. ICANN, IETF, IANA) intergovernmental organizations (e.g. UN, APEC, ITU, WIPO), and civil society (e.g. Heinrich-Böll Foundation, Markle Foundation). In this sense, the Internet is often seen as being steered in a non-traditional manner by several groups at the same time with minimal consultation among them. For this reason, Internet Governance is often referred to as having a self-governing structure.

Internet Governance is perhaps best understood by way of analogy to an ecosystem. In a biological ecosystem, there is a symbiotic relationship between organisms which co-exist to form a self-sustaining environment. In an Internet ecosystem, there is a similar symbiotic relationship between computer protocols and the various governing bodies who each play a role in the "steering" of the Internet. It is possible and often desirable to allow for biodiversity in an ecosystem; knowing where and what species to introduce or to remove from the ecosystem is a critical question. While it is generally understood that diversity in an ecosystem may lead to a more robust and stable environment, the introduction of a species which has not evolved in the ecosystem may have dire consequences. The same can be said for Internet Governance; while some change is inevitable and desirable, determining what and how to change is critical. The removal of one organism and the addition of another may have unanticipated and undesirable effects on the entire system.

The following discussion on Internet Governance stems from its emergence as a contentious and key issue at the World Summit on the Information Society (WSIS). The discussion is further situated within the goal of achieving digital solidarity, which entails that the benefits of the Information Society should be shared amongst citizens of both developed and developing countries to ensure fair and equitable development for all. This principle is at the heart of the WSIS *Plan of Action*[5] and *Declaration of Principles*[6] as well as at the core of human rights concerns in the digital frontier. This article is further guided by the philosophy behind the

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[4] Eric Partridge, *Origins: A Short Etymology Dictionary of Modern English* (New York: Greenwich House, 1988) *s.v.* "governance".

[5] "Plan of Action," World Summit on the Information Society, 1st phase, 12 December 2003, (WSIS-03/GENEVA/DOC/5) [*Plan of Action*].

[6] "Declaration of Principles," *World Summit on the Information Society*, 1st phase, 12 December 2003 (WSIS-03/GENEVA/DOC/4) [*Declaration of Principles*].

Universal Declaration of Human Rights that everyone is entitled to exercise human rights and realize human dignity.[7] Part I of this article provides an overview of some of the contentious issues leading up to the Geneva Phase of WSIS. Part II looks at some of the issues addressed in two critical meetings following the Geneva Summit: The International Telecommunication Union Workshop on Internet Governance (ITU Workshop), and the United Nations Information and Communications Technologies Task Force Global Forum on Internet Governance (UN Global Forum). Part III provides an analysis and discussion of what the author perceives to be the most important issues on Internet Governance from the perspective of enhancing human rights and promoting human dignity in the Information Society. The three prioritized issues are: 1) appropriate capacity building for effective participation; 2) linguistic relativism and cultural sovereignty in the domain name system; and 3) the need for a prudent and cautionary approach to model laws in an era marked by the scourge of international terrorism. Part IV concludes by offering a strategy on how civil society can be most effective in its contribution to Internet Governance issues for the upcoming WSIS meeting in Tunis.

I.   Leading up to the Geneva Phase of WSIS

Of the many issues addressed in the various Prepcoms leading up to the first phase of WSIS in Geneva, the most controversial was that of Internet Governance. As the regional ministry conferences and Prepcoms progressed, Internet Governance became the focal point of debate. By the end of Prepcom3bis+, the debate had become so heated that it nearly became the straw that broke the camel's back. Delegates were deadlocked over many issues relating to Internet Governance while proposals put forth represented diametrically opposed views. The debate on Internet Governance can be summarized by the following three disparate positions:

1.   A narrow and technical definition of Internet Governance versus a more broad definition inclusive of emerging policy issues.

A technical definition is associated with the development of technological tools and computer protocols to facilitate technical coordination, compatibility, operability and the efficient functioning of inter-connecting systems. A more broad definition embodies policy issues. Such policy issues could potentially include pricing models for connection, spam, taxation, sovereignty, language and cultural rights, human security, privacy and freedom and expression, and so forth.

2.   Whether increased intergovernmental involvement would be best achieved through the Governmental Advisory Committee (GAC) of the Internet Corporation for Assigned Names and Numbers (ICANN) or through a United Nations entity such as the International Telecommunication Union (ITU).

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[7]   *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948), 71, art. 28.

As the meetings progressed, there appeared to be a growing debate over which entity, ICANN or ITU, should take the lead in the technical coordination of domain names and their related policies. A consensus arose that ICANN was no longer merely responsible for the technical coordination of the Internet and that it had become a policy-making group. As a policy-making group whose decisions have an impact on governments around the world, it was argued that a broader form of global participation was needed with respect to Internet Governance, one in which national governments would have greater influence in the process.

3. Increased flexibility to allow for more national sovereignty in regulations, versus maintaining the status quo.

Issues of sovereignty tended to focus on control over domain name management policy for country code top level domains (CCTLDs). Many countries expressed the desire to be able to formulate their own policies catering to their country's needs in the area of domain name dispute resolution which is currently indirectly tied to ICANN policies.

Other issues of sovereignty included Internet language and content regulations. These issues ranged from regulation of pornography, to spam, to taxation, to delivery of content in indigenous languages.

The level of disagreement between participants with regard to these issues emerged as a potential stumbling block for the adoption of a WSIS *Plan of Action* and *Declaration of Principles*. Delegates agreed to mandate the Secretary General of the United Nations to establish a working group to address Internet Governance issues in paragraph 13(b) of the WSIS *Action Plan*:

> We ask the Secretary General of the United Nations to set up a working group on Internet Governance, in an open and inclusive process that ensures a mechanism for the full and active participation of governments, the private sector and civil society from both developing and developed countries, involving relevant inter-governmental and international organizations and forums, to investigate and make proposals for action, as appropriate, on the governance of Internet by 2005. The group should, *inter alia*:
>
> i) develop a working definition of Internet Governance;
>
> ii) identify the public policy issues that are relevant to Internet Governance;
>
> iii) develop a common understanding of the respective roles and responsibilities of governments, existing inter-governmental and international organisations and other forums as well as the private sector and civil society from both developing and developed countries;

iv) prepare a report on the results of this activity to be
     presented for consideration and appropriate action for the
     second phase of WSIS in Tunis in 2005.[8]

Appointed by the Secretary General, Markus Kummer will be the
coordinator of the UN Working Group on Internet Governance. Nitin Desai, formerly
under-Secretary General for Economic and Social Affairs at the United Nations, has
acted as Chairperson for the Working Group since November 2004. The rest of the
members have diverse backgrounds as, according to Kummer, legitimacy is a key
concern.[9] The Working Group will issue a formal report in July 2005 prior to the
Tunis phase of WSIS.

In the interim, two important meetings (ITU Workshop and the UN Global
Forum) have taken place which shed light on issues and potential obstacles. The ITU
Workshop took place in February, 2004. The UN Global Forum took place a month
later in March, 2004. Salient points from each meeting will be summarized in the
following section.

II.   International Meetings on Internet Governance Post-Geneva

A.   ITU Workshop on Internet Governance

The ITU Strategy and Policy Unit organized a workshop on Internet
Governance in Geneva this past February 2004. According to the Chairman's Report,
"the overall objective of the Workshop was to contribute to the ITU's process that
will prepare its inputs and position vis-à-vis the United Nations working group to be
established on Internet Governance […]"[10] Approximately thirty experts in Internet
Governance gathered to present and exchange viewpoints on these issues while
another 140 participants, notably representatives from ITU Member States, took part
in the meeting.

The importance of advocating a system of governance which would involve
meaningful involvement of developing countries is noted in the Chairman's summary
report.[11] What is interesting to note is the very limited number of participants from
developing nations among these experts. Further, the entire workshop was conducted
in English, without translation services and with limited support for developing

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8   *Supra* note 5.
9   Markus Kummer, "Internet Governance" (Address to Civil Society in Washington, D.C., April 2004)
      [unpublished].
10   Markus Kummer, "Chairman's Report for the ITU Workshop" (Geneva: International
      Telecommunication Union, 2004), online: International Telecommunication Union <http://www.itu.
      int/osg/spu/forum/intgov04/workshop-internet-governance-chairmans-report.pdf>.
11   *Ibid.* at para. 18.

countries in attendance. One has to wonder at what stage "meaningful involvement of developing countries" will become a reality as opposed to a mere future imperative.

The Workshop consisted of nine sessions: Session 1: Perspectives on the Negotiations at the WSIS; Session 2: Background Paper on Internet Governance; Session 3: Perspectives on the WSIS Discussions on Internet Governance; Session 4: Towards a Definition of Internet Governance; Session 5: Public Policy Issues in Internet Governance; Session 6: Understanding Internet Focus Institutions; Session 7: Understanding Intergovernmental Institutions; Session 8: Capacity Building; and Session 9: Strategic Issues 2005 and Beyond.

The more relevant and interesting sessions were those related to defining Internet Governance, identifying public policy issues and capacity building.

1.   INTERNET GOVERNANCE

This session was encouraging in that the discussion was not heavily centered on ICANN. In the Prepcoms, much of the debate focused heavily on ICANN and the domain name system. The debate made it seem that the issues raised by Internet Governance were associated unequivocally with one sole body, namely ICANN. The latter is one of several governing entities and is arguably neither the most important nor the most influential.[12] For example, governing entities which predominantly address technical issues include IETF (Internet Engineering Task Force), W3C (World Wide Web Consortium), IEEE (Institute of Electrical and Electronics Engineers), ETSI (European Telecommunications Standards Institute), IANA (Internet Assigned Numbers Authority), and ITU (International Telecommunication Union). ICANN's role is unique in that it is assigned governing tasks related to both the technical coordination of IP-Addresses, as well as policy issues related to such coordination. Other governing entities oriented towards policy issues include the WIPO (World Intellectual Property Organization), the WTO (TRIPS), the ITU, and domestic justice departments and ministries (mainly those of the United States and Europe). As a result of concentrating on ICANN, many important issues were not addressed at the Prepcom phase. The ITU Workshop took a more sophisticated approach to issues surrounding ICANN which was well-stated by Wolfgang Kleinwächter:

> In the beginning it seemed that the controversial discussion is a debate on two not directly related levels: Technicians discussed technical issues, politicians, political issues. ICANN supporters argued that Internet Governance is a technical question and can be better handled by a private corporation. The ITU supporters argued, that Internet Governance is a political problem and falls under the national sovereignty of the governments of UN Member States. But a 'compromise' in a way, to separate technical and political issues and to give both organisations a

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12   Roger Clarke, "Overview of Internet Governance" (10 August 2004), online: Australian National University <http://www.anu.edu.au/people/Roger.Clarke/II/Governance.html>.

number of responsibilities, could not be reached, because the question is
not so simple.

The problem is that technical and political aspects of Internet Governance
are interwoven in a way, that they can not be separated by cutting the issue into two
pieces. The technical control of the root server system is linked to the stability and
security of the Internet, which is a precondition for the functioning of the global
economy. The introduction of new Top Level Domains, while basically a technical
question of putting a zone file into the root, is like the creation of "new territory in
Cyberspace" and has unavoidable economic and political implications. The marriage
between Mobile Telephony and Internet Communication (ENUM) and the emergence
of Internet Telephony (VoIP) leads to the convergence of the "Internet Numbering
System" and the "Telephone Numbering System" which creates conflicts between
two different allocation procedures: top down under the sovereignty of national
governments for telephone numbers vs. bottom up by global private networks for IP
numbers. Issues, which has been discussed and decided within ICANN like Dispute
Resolution for Domain Names or the election/selection of representatives for
individual Internet users have a political component.[13]

While it was recognized that there are many interwoven issues involving
both technical and policy aspects, there seemed to be a consensus that the way
forward would be one of process and not definition. The Workshop also seemed to
reach a consensus that a workable definition for Internet Governance is important and
that such a definition should reflect a broader perspective rather than a narrow,
technically-focused one. The Workshop further stressed the importance of identifying
the issues and stakeholders first, and then proceeded to offer viewpoints as to how to
tackle the problem.

There was to be a consensus that the concept of Internet Governance should
be inclusive, decentralized, transparent, and accountable – concepts often associated
with good governance.

2.   PUBLIC POLICY ISSUES

The ITU Workshop addressed several public policy issues. In order to situate
the issues within a common framework, the session had the objective of "reduction of
poverty & access to resources."[14] Unfortunately, expert presenters had prepared their
talks before learning of this objective. By and large, panellists stuck to their original
presentations and addressed the overriding objective only so far as already prepared in
their original presentations.

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13   Wolfgang Kleinwächter, "ICANN between technical mandate and political challenges" (2000) 24
        Telecommunication Policy 553.
14   Bob Kahn, "Opening Address" (Address to the Subcommittee on Basic Research of the Committee on
        Science of the US Congress, March 1998) [unpublished].

There were a few common themes both in the presentations and during the question sessions. Public policy issues may be separated at the national level and intergovernmental level. Technical issues, however, are not so neatly segregated. It was further noted that while ICANN is by no means the only governing entity involved in public policy decisions, it is the one which more people are familiar with and is therefore often the target of criticism.

The public policy issues discussed were broad: IP rights, spam, additional CCTLDs, the desire to impose content regulations, data protection and privacy, security of public infrastructure, jurisdiction, law enforcement harmonization, global resource management and the rights of individuals to participate in Internet Governance. This last issue was put forth by Karl Auerbach who suggested that some of these policy issues should be addressed by a system of peer production of governance. In such a system, individuals would only connect to trusted systems; this would allow for the partial resolution of spam, spyware and security problems. What became glaringly obvious was that the experts selected were heavily focused on technical issues as well as public policy issues stemming from Internet use in developed countries. One may attribute this focus to the background of the experts or to the fact that technical and public policy issues are inseparable.

Four themes emerged from this session which seemed to reach consensus among participants. The first was that the Internet already had several governing bodies. The second was that there was room for the improvement of current regimes. The third related to identifying public policy problems. And lastly, the participants agreed that governing entities should be accountable for their decisions.

3.   CAPACITY BUILDING

As written in the Chairman's Report:

> Efforts to develop inclusive governance structures at the international level
> will be ineffective unless initiatives are taken to build Internet Governance
> capacities in developing countries and regions. This session discusses
> some of those challenges and how institutions are addressing them.[15]

There were some good ideas that emerged from this session. It was interesting to note that solutions to meaningful global participation often involved communications through web-conferencing and other interactive means. This begs the old chestnut, "What came first: the chicken or the egg?" One has to wonder how such communication tools can ever prove to be an effective capacity-builder when they are unavailable in many parts of the world.

It must be acknowledged, though, that capacity building is an inherently complex issue that requires a significant amount of time and effort to be adequately addressed. This topic will receive more treatment in Part III of this article.

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[15]   *Supra* note 10 at para. 45.

B.   UN ITC Task Force Global Forum on Internet Governance

The Global Forum took place in New York in March 2004 with the participation of over 300 representatives from governments from developed and developing countries, civil society, private sector stakeholders, academia and key leaders in the Internet community. Similar to the ITU Workshop, expert presenters were largely limited to "the usual white male Anglo-Saxons."[16]

Many of the same experts rehashed similar issues in this forum. The importance of the forum was that it was open, transparent and had a wide array of participants from different sectors and countries.

The Global Forum was divided into 5 sessions: Session I: Setting the Stage (Issues and Institutions); Session II: Stakeholders Baseline: Accumulated Concerns, Perspectives, and Exploring How We Can Co-operate; Session III: Guiding Principles: A Checklist for Internet Governance; Session IV: The Way Ahead; and Session V: Closing Session.

The most relevant session was Session III, pertaining to guiding principles for Internet Governance. This involved a number of break-out sessions where participants formed small groups to discuss issues in detail. Some of the issues covered included the future role of ICANN; the need for a new system of governance involving multiple stakeholders; mechanisms allowing access for sustainable connection; national government's positive obligation to ensure user access in remote areas; facilitation of e-commerce in the global market; the role of international entities in education; the importance of technological neutrality in domestic legislation; uneven levels of privacy and free expression protection; how to defend human rights online; the call for an international treaty on spam; the Internet as a public utility, and so forth.

In spite of the stimulating discussions in these break-out groups, one cannot help but notice a common recurring theme in many of the other sessions, namely that ICANN was still very much the focus of discussion and certainly was the entity most looked at in many of these sessions. Arguments of U.S. versus non-U.S. dominance of domain names resurfaced with continual calls for true "international" Internet Governance.

The key lesson to be gleaned from these proceedings is that the issues are varied and complex. It is of no coincidence that the UN Information and Communication Technologies Task Force – which has been working on many of these issues for several years – issued a 401 page report containing substantive policy analysis and recommendations.[17]

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[16]   Heinrich-Böll Foundation, "Working Group on Internet Governance is Shaping Up: Coordinator Markus Kummer on Details Civil Society Caucus striving for common position" (13 May 2004), online: Worldsummit2003.org <http://www.worldsummit2003.de/en/web/621.htm>.
[17]   Abdul Basit Haqqani, ed., "The Role of Information and Communication Technologies in Global Development: Analyses and Policy Recommendations" (United Nations Information and

C.   **Some Reflections on the ITU Workshop and UN ITC Task Force Global Forum on Internet Governance**

The ITU Workshop and the UN ICT Global Forum are interesting precursors to the upcoming Second Phase of the WSIS in Tunisia. The various sessions clearly identified areas which would be difficult for the UN Working Group and delegates at Phase II of the WSIS to tackle. It became evident through these proceedings that the fulfillment the mandate given to the UN Working Group in producing a final Report in July, 2005, would be daunting, if not impossible, given the short time frame. It was further evident that many issues could be identified but that it would be practical to prioritize issues requiring immediate attention; to do otherwise would likely lead to a symphony of discordant tunes in Tunisia.

If discussion once again centres on ICANN, there is little hope for the emergence of a fruitful discourse on these issues, let alone the production of any workable solutions in Tunisia. There are three potential reasons why discussions have focused on ICANN. The first is that ICANN is the Internet governing body that the majority of entities are most familiar with; it certainly receives the most attention in literature. The second is that issues surrounding ICANN involve sovereignty which is an area of discussion that both developed and developing countries are interested in. Lastly, there seems to be more misinformation about ICANN than accurate information reported as to the related duties of this governing body (a fault in many ways attributable to the organization itself). As a result, issues are often raised with respect to ICANN but which, in reality, turn out to be related to another unfamiliar mechanism or governing entity. Many experts feel the need to dispel misinformation on ICANN before they are able to pursue more pressing and substantial issues. Regardless of whether talk becomes ICANN-centric, it is important to note that the head of the UN Working Group, Mr. Kummer, has already stated that his party will not recommend a new UN group to be formed nor will they recommend that the functions of ICANN be transferred to the UN.[18] This is a pivotal point if we assume that the UN Working Group Report will form the framework for the discussion which will take place in Tunisia. Concentrating research and policy formulation by governments and civil society on ICANN between now and the Report of the UN Working Group in July 2005 may prove to be a waste of resources in this short time-frame. This is not to say that there are no important issues to be raised within the context of ICANN, but there should be a careful selection of such issues. Prioritizing issues at all levels is the first task in which all interested stakeholders should participate.

There has been one common thread running through each of the various meetings both leading up to the WSIS in Geneva, as well as the meetings which have

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Communication Task Force, 2004), online: United Nations Information and Communication Task Force (UN ICT Task Force) <http://www.unicttaskforce.org/perl/documents.pl?id=1360>; *First annual report of the Information and Communication Technologies Task Force*, UN ICT Task Force, 2003, UN Doc. E/2003/56, online: UN ICT Task Force <http://www.un.dk/E.2003/56>.

[18]   *Supra* note 10.

proceeded afterwards: *The benefits of the Information Society should be shared amongst citizens of both developed and developing countries and there should be meaningful and effective participation in Internet Governance by developing nations*.

III.   Prioritizing Issues

A.   Enabling Appropriate Capacity Building and Participation in ICT Policy Making Processes for Developing Nations

Capacity building and meaningful participation in communications development is not a new issue stemming from the WSIS; it has been a recurring theme for several decades with the introduction of technologies ranging from the telegraphic wire, to radio signals, to telephone lines, to television, to satellite, to the Internet. One might go so far as to argue that the issue of capacity building traces its roots to all innovative mediums which have transformed society from the quest for fire, to writing paper, to the Gutenberg press, to the Internet. The importance of information and wisdom sharing has been a constant in many eras and which now finds its current emphasis in the digital era.

Appropriate and effective participation of developing nations in Information Communications Technology (ICT) policymaking should be given the highest priority as an Internet Governance issue. Capacity building must grow from such participation: "Sustainable futures for information societies require the development of intellectual, technical, managerial and regulatory capacity in various domains."[19] The issues of capacity-building and the participation of developing nations were given much attention in the first phase of the WSIS and received further attention during the ITU Workshop and UN Global Forum.

The issues of capacity-building and participation of developing nations have already been taken up by the G8 Digital Opportunity Task Force and the UN ICT Task Force. Two key documents provide a comprehensive analysis of the problem: a study by the Commonwealth Telecommunications Organisation and Panos London entitled "LOUDER VOICES: Strengthening Developing Country Participation in International ICT Decision-Making"[20] and a report written by the Implementation Team on Global Policy Participation of the G8 Digital Opportunity Task Force entitled "A Roadmap: Global Policymaking for Information and Communications Technologies: Enabling Meaningful Participation by Developing-Nation Stakeholders" ("the Reports").[21] These are comprehensive documents with thoughtful analysis and recommendations throughout.

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19   "Final Report of the International Seminar on the Information Society, Human Rights and Human Dignity," Montreal, June 2004 (2004) 18.1 R.Q.D.I. 231.

20   Don Maclean *et al.*, "Louder Voices: Strengthening Developing Country Participation in International ICT Decision-Making" (London: Panos London, 2002), online: Panos London <http://panos.org.uk/images/books/Louder%20Voices.pdf> ["LOUDER VOICES"].

21   Implementation Team on Global Policy Participation of the G8 Digital Opportunity Task Force, "Global Policymaking for Information and Communications Technologies: Enabling Meaningful

As the Reports articulate, effective participation of developing countries does not entail mere attendance at international ICT meetings. Effective participation means contributing to policymaking issues in a meaningful and engaging manner. Such inclusive participation should not only involve partaking and contributing at multiple levels (the national level, regional level, international ICT governmental level such as the UN, ITU, WIPO), but also at the levels of international multi-stakeholders organizations (e.g. ICANN), private sector organizations (e.g. IETF), and civil society (e.g. Markle Foundation). The Reports reveal that there is adequate participation at the intergovernmental level, but not at the other levels. "Effective" participation is characterized as involvement in the "whole decision-making process – which includes identifying issues, setting agendas, conducting policy research and analysis, formulating position, building coalition, negotiating with other stakeholders, implementing results and applying them within national ICT and developing contents"[22] as they relate to coordination, policy and technical capacity.

The methodology employed in the Reports is one of case study involving a select group of developing countries participating in ICT policy-making. The Reports reached a similar conclusion in identifying a common set of challenges. Three broad challenges were identified: 1) creating greater ICT policy awareness with access to affordable and accurate information; 2) building policy and technical capacity; and 3) strengthening national policy institutions and processes. Interestingly enough, funding was not seen as a major obstacle, though using funds in an effective manner was.

The time has come to resist the urge to write further studies and to instead look towards taking active measures to implement some of the recommendations made in "LOUDER VOICES" and "A Roadmap." Many of the recommendations do not involve increased funds but the channelling of existing funds into more effective paths. One such example involves rotating meetings in different geographical regions and, in particular, to developing nations, in order to reduce participation costs (many meetings and policy-making groups are located in Geneva and New York). Another example would be to develop an appropriate set of strategies on a wide range of issues (intellectual property, wireless communications, CCTLD registries) tailored directly for challenges faced by developing nations. "Best Practices" regional workshops could be established using successful studies of a developing nation in the region. A further obstacle presented in the Reports emphasized that developing nations often do not send the most effective type of person to educational and training sessions. While the choice of national representation at such meetings and training sessions should rest with a nation state, it would be wise to indicate the recommended skill set prior to attendance as some prior knowledge of technical and political concepts involved aids significantly in effective participation.

Participation by Developing-Nation Stakeholders" (New York: Markle Foundation, 2002), online: Markle Foundation <http://www.markle.org/downloadable_assets/roadmap_report.pdf>.

[22] "LOUDER VOICES," *supra* note 20 at 8.

B.   The Limits of ICANN: Linguistic Relativism and Cultural Sovereignty in the Domain Name System

As highlighted throughout this article, the core issue of Internet Governance and human rights relates to the digital divide (lack of capacity building) which hinders the economic, social, cultural, and economic rights of developing countries. A critical question surfaces: Is the management of the DNS by ICANN an appropriate means to promote human rights? If so, how do human rights considerations factor into the governance structure?

The questions posed above are broad and fraught with difficulties. Calls for reform to the structure of ICANN have been numerous. The most common criticisms of the current structure of ICANN are that it is U.S.-centric, decisions have not been sufficiently transparent, multiple level stakeholders need to be more involved in the process, sovereignty is undermined as States are hampered in their control of domain name system procedures, and more dialogue needs to be initiated between CCTLD operators, national governments and ICANN.[23] The extent to which these criticisms relate to human rights issues, however, is not obvious at first glance.

If we operate under the assumption that changes to the structure of ICANN could help achieve human rights objectives, it would seem that the specific human rights at issue must first be identified. In this author's opinion, the most prominent human rights directly affected by the current structure and policy of ICANN are language and cultural rights.

There is an assumption (mostly among English language speakers) that the language of the Internet is English. This assumption is reflected in the structure of ICANN as a predominantly U.S. established and funded institution, as well as in its related policies regarding the domain name system (DNS). Statistics show that over 64.2 percent of all Internet users are non-native English speakers with 33 percent of this figure being comprised of users in Asian countries.[24] Some forecasters predict that by 2007 Chinese will be the most common language used on the Internet.[25] The "internationalization" of the Internet comes as no surprise as affordable Internet access becomes more readily available in the world. While Internet content on web pages and in e-mails is currently available in many of the world's languages, webpage addresses and e-mail addresses must be typed in English characters. The reason for this is that the technical standards for Internet addresses are based on ASCII (American Standard Code for Information Interchange) characters, which are limited to all the upper and lower-case Latin letters, numbers, and punctuation.

With its technical standards focused on ASCII characters, ICANN has been under growing pressure to accommodate domain name registries from non-English

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[23]   Stuart Lynn, "President's Report: ICANN - Case for Reform" (24 February 2002), online: ICANN <http://www.icann.org/general/lynn-reform-proposal-24feb02.htm>.

[24]   Global Reach, "Online Language Population," online: Global Reach <http://www.global-reach.biz/globstats>; Internet World Stats, "Internet Users by Language," online: Internet World Stats <http://www.internetworldstats.com/stats7.htm>.

[25]   Walid, "Welcome to Walid," online: Walid <http://www.walid.com>.

speaking countries, most notably China. Non-English and non-ASCII domain names are known as Internationalised Domain Names (IDN). IDN technology has been and continues to be developed to facilitate and promote non-English domain name characters. The problem, however, lies in its utilization or, more specifically, in its non-use in the ICANN system. Using Chinese characters as an example, IDN is used by four entities which allow the registration of Chinese character domain name systems: China Internet Network Information Centre (CNNIC), Taiwan Network Information Center (TWNIC), VeriSign, and Singapore based i-DNS.net. There remain many technical glitches, however, which make any practical use other than the mere registration of such domain names cumbersome. For many of these applications a user must physically alter the browser settings to use this technology; some computers may not have even have browsers capable of running such applications. While some technical barriers to IDN remain, the main obstacles today are a lack of funding and global coordination for this complicated but important task.

There is a growing discourse that the slow development of IDN is the result of an English language, U.S.-dominated ICANN. Some have even gone so far as to suggest that such dominance is a "conspiracy."[26] This does, of course, oversimplify the issue. There remain several technical and political challenges at the global level which must first be resolved. One such issue is the technical resolution of domain name registration with ASCII characters and IDN with companies which operate using the ICANN root server (eg. VeriSign). One may register the name but it is not operable. With CNNIC and similar national initiatives, when one types in a Chinese domain name, one is directed to the website through non-ICANN root servers. This has political implications. Take for instance the registration of a civil society or human rights group which wishes to register a Chinese domain name. A foreign website with sensitive or critical content of the Chinese government would, in all likelihood, not be able to register a domain name in Chinese characters.

An additional concern is that separate systems may lead to the fragmentation of the DNS operated by ICANN. The primary benefit of ICANN has always been that there existed a unified system for domain name registration and a unified forum for resolution of disputes. Imagine the technical and political chaos (not to mention the economic burden and inefficiency) which could ensue if countries all over the world set up their own root servers. Companies would have to register their marks in multiple systems in order to access customers operating on different domain name systems. The technical difficulties in accessing websites in multiple languages would not be resolved and might even become an even greater problem. On the other hand, imagine the possibilities and advantages of a dynamic system where ICANN would be able to handle IDN registrations within its existing legacy root server.

In order for ICANN to enter registries in multiple languages into its root zone or legacy root server, extensive cooperation between ICANN, nations, CCTLD operators, as well as the various technical coordination groups involved with IDN

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[26] Adam Peake, "Internet Governance and the World Summit on the Information Society (WSIS)" (Association for Progressive Communications (APC, 2004), online: APC <http://rights.apc.org/documents/governance.pdf>.

development and those groups involved with the fostering of linguistic and cultural rights (Internet Engineering Task Force (IETF), Multilingual Internet Names Consortium (MINC), UNESCO, Chinese Domain Name Committee (CDNC) – to name but a few) will be required. While the lack of funding for such a large project remains an important hindrance, perhaps an even greater obstacle is that many countries have political interests in maintaining control over domain name registration. As IDN invariably involves issues of language and culture, many nations view the U.S. unilateral control over the DNS through ICANN to be contentious and inappropriate.

Language is a repository of cultural diversity. The right to communicate in one's mother tongue is at the heart of cultural rights. Such a right to communicate is a bundle of rights inclusive of, but not limited to, the right to speak one's mother tongue; the right to receive information from the government in one's mother tongue; the right to be educated in one's mother tongue; and the right to retrieve and send information with new technologies in one's mother tongue. The promotion of diversity of culture and multilingualism is highlighted in the WSIS *Declaration of Principles* and *Plan of Action*. Such promotion of language and cultural rights is significantly impeded by the lack of standardized and open deployment of critical IDN enabling technology. The question of who should have control of non-English domain name systems is controversial. Some would call for a supranational group other than ICANN to be entrusted with domain name registration. Others would advocate for countries and/or linguistic communities (e.g. Chinese language) to continue to develop separate domain name system registries to maximize control over language and cultural development over the Internet. A third solution would mandate ICANN with the task.

The call for an international group other than ICANN to oversee IDN development is problematic. No other group to date has taken an active interest in either supporting ICANN to develop IDN or taken the initiative to begin the negotiations and coordination required for IDN development and deployment. Furthermore, in spite of the many criticisms of ICANN, one must note that other organizations such as the International Telecommunication Union are even more closed in their policy development processes than ICANN. While the delegation of IDN development to an entity such as the ITU may allow for greater nation state input, the participation of civil society in policy development would be significantly less than what is currently enjoyed under ICANN. Meanwhile, the development of national and linguistic community DNS registries separate and independent of ICANN (not registered with ICANN on the legacy root) also creates many potential human rights concerns. Countries with poor human rights records and histories of corruption, as previously argued, might initiate policies that would be more detrimental to linguistic and cultural rights. While this article does not insist on the adoption of viewpoints going against state sovereignty, such concerns certainly warrant attention.

The third option would see ICANN mandated with the task of introducing and coordinating a fully internalized system. Funding mechanisms aside, a potential

restructuring of ICANN to allow for even greater multi-stakeholder participation is critical for ICANN to be effective in implementing such a far-reaching and important undertaking.

C.   A Cautionary Approach to Model Laws

While much has been written about issues of Internet Governance for WSIS by various civil society groups, nations and international organizations, there is a surprising lack of academic contribution to many of its core issues. This is most evident in the discussion of potential model laws and international agreements to be adopted at the Tunisia phase of the WSIS.

Two model laws in particular have surfaced: *The Council of Europe Convention on Cybercrime*[27] (*Cybercrime Convention*) and the *Digital Millennium Copyright Act*[28] (DMCA). The *Cybercrime Convention* was enacted to harmonize European domestic criminal offences related to cybercrime as well as to propose procedural provisions that would facilitate law enforcement of such offences. An additional purpose was to offer a model for international cooperation whereby non-member European nations may also sign the *Convention*. As for the DMCA, it is American legislation which addresses copyright concerns in the digital age.

The discussion surrounding these model laws raises concerns. The message in many of the comments (even those made by civil society) is that, although both model laws raise issues of human rights and privacy, these concerns are generally only relevant to developing nations with poor human rights records and where international human rights treaties have not been signed.[29] Nothing could be further from the truth. These model laws have been highly controversial in developed nations as well and indeed, there is a paucity of support from academics and human rights groups for these model laws.

The *Cybercrime Convention* has been widely criticized for its potential for human rights violations and, in particular, those rights relating to freedom of expression and privacy.[30] The chief criticism is that the *Convention* will serve to initiate an international network of surveillance lacking appropriate provisions to adequately safeguard human rights.

Some of the more serious problems arising from the application of the DMCA are: i) the violation of freedom of expression, ii) the enclosure of the public domain through digital lock-up, iii) a skewing of the balance that copyright policy has traditionally aimed to achieve between private rights and the public interest, iv) the inadequate privacy protection afforded to individuals whose private information may be tracked through technology, v) the chilling effect on scientific research, and vi) the

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[27]   *Convention on Cybercrime*, 23 November 2001, Eur. T.S. 185.

[28]   *Digital Millennium Copyright Act*, 17 U.S.C. § 1201 (1998).

[29]   *Supra* note 26 at 24.

[30]   Jason Young, "Surfing While Muslim: Privacy, Freedom of Speech and the Unintended Consequences of Cybercrime Legislation" 50 McGill L.J. [forthcoming].

imperialist "bullying" tactics employed by the United States to persuade nations to adopt similar if not identical legislation. The academic community has overwhelmingly responded with criticism of the DMCA.[31] To advocate that such a piece of legislation forms a potential global model defies reason. The suggestion that an Internet Governance working group could facilitate improvements to the DMCA to make it globally acceptable to multi-stakeholders and, at the same time, to address human rights concerns, in particular issues of freedom of expression and privacy, would be a silk purse from a sow's ear.

The author will take the argument of model laws one step further by adding that the WSIS is an inappropriate forum to contemplate model laws relating to ICTs. Any adoption of a model law or international agreement requires detailed scrutiny, thought and reflection – none of which could be reasonably expected within such a short time-frame.

IV.   Mobilizing Civil Society for Tunisia in 2005

Until the UN Working Group Report is released in July 2005 it is difficult to speculate whether there will be effective dialogue on the issue of Internet Governance in Tunisia. In an address to Civil Society in Washington,[32] Mr. Kummer made an astute remark concerning Civil Society and Internet Governance. He noted that the Civil Society "Internet Governance" caucus is having a difficult time in finding a common position. Attempts thus far to find common perspectives have failed. With polarized views on Internet Governance issues, Civil Society is not likely to have a strategic influence in Tunisia on this topic. Efforts should be made within Civil Society and other concerned groups to actively work in the ensuing year to find a common voice, so that it becomes an effective one.

If Civil Society and developing nations are to have an influence in Tunisia they must develop a consolidated list of critical issues to be addressed. This article has identified three prominent issues: appropriate and effective capacity building, language and cultural rights in the domain name system, and a cautionary approach to model laws which could impact on human rights. By and large, the most important of the aforementioned issues is developing a strategy to address appropriate and effective capacity building. Civil Society should make the strongest effort to convey

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[31]   Yochai Benkler, "Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain" (1999) 74 N.Y.U.L. Rev. 354; David Nimmer, "A Riff on Fair Use in the Digital Millennium Copyright Act" (2000) 148 U. Pa. L. Rev. 673; Ejaan MacKaay, "Intellectual Property and the Internet: The Share of Sharing" in Neil Netanel, Nina Elkin Koren and Victor Bouganim, eds., *The Commodification of Information* (The Hague: Kluwer Law International, 2001) 133; Pamela Samuelson, "Towards More Sensible Anti-Circumvention Regulations" (2001), online: SIMS <http://www.sims.berkeley.educ>; Jacqueline Lipton, "Copyright in the Digital Age: A Comparative Survey" (2001) 27 Rutgers Computer & Tech. L.J. 333; Jessica Litman, "The Breadth of the Anti-Trafficking Provisions and the Moral High Ground" (ALAI 2001 Congress: Adjuncts and Alternatives to Copyright, Columbia University, New York, June 13-17, 2001) [unpublished]; and Peter Yu, "The Escalating Copyright Wars" (2004) 32 Hofstra L. Rev. 907.

[32]   *Supra* note 9.

to the UN Working Group that bridging the digital divide is the most important issue to be addressed. Civil Society and developing nations should further stress the importance of implementing the suggestions made in the Reports produced on this issue, "LOUDER VOICES" and "A Roadmap." Likewise, it would be valuable for concerned groups to send a clear message to ICANN in Tunisia that the time has come for more serious efforts to be made with IDN technology to reinforce language and cultural rights in the domain name system. The last issue on model laws does not require a positive act but rather urges Civil Society and all groups to oppose any attempt to move towards the adoption of model laws which impact negatively on human rights.

The Tunisia Phase of the WSIS will present many challenges and obstacles. This author speculates that many of the Internet Governance issues will be controversial and proposed solutions will likely not meet with consensus from stakeholders. This does not, however, mean that the challenges are insurmountable. Both phases of the WSIS should be viewed as an important first step towards a long-term dialogue propelling involved entities forward with a broader vision of Internet Governance issues – perhaps in and of itself a groundbreaking feat.