6 June 2014
From: Robin Gross

Comments on Enhancing ICANN Accountability

Thank you for this opportunity to provide input regarding the improvement of ICANN's accountability mechanisms. I currently serve as a member of the Executive Committee of ICANN's Non-Commercial Stakeholders Group, although I submit this comment solely in my personal capacity as an attorney and individual participant in ICANN's policy development process for more than a decade.

While some improvements have been made in response to the Accountability and Transparency Review Teams (ATRT) and the Affirmation of Commitments, ICANN's accountability gaps have become an issue of heightened concern. This is particularly true in light of the 14 March 2014 US National Telecommunications and Information Administration (NTIA) announcement that the US Government will relinquish the crucial oversight function it has historically held with respect to ICANN and the IANA contract. Without that crucial oversight function, there are few checks on ICANN's management of the Internet domain name system and little incentive for the organization to improve accountability. I welcome the ICANN CEO's recent statements recognizing the inter-relation and inter-dependence between ICANN's accountability issues and the IANA stewardship transition process. Consequently, resolving ICANN's accountability issues must be a necessary prerequisite to completing the IANA stewardship transition.

At a threshold level, the previous recommendations made by ATRTs should be implemented in a timely fashion as well as the creation of an ongoing review process to ensure accountability mechanisms are continually targeted for improvements.

Strengthen Protection for Human Rights in Policy Development Process

One area where ICANN has been entirely unaccountable is in its record on human rights, specifically respecting human rights principles in the policies it develops and adopts, despite the fact that everyone who uses the Internet is governed by ICANN's policies. An accounting should be made for how ICANN's policies impact the basic human rights of Internet users and ongoing mechanisms to ensure ICANN's policies do not circumvent the rights of Internet users should be put in place before the organization can be considered sufficiently developed to govern without NTIA oversight.

A longstanding and significant impediment to ICANN's legitimacy to govern is the organization's lack of respect for basic human rights in its policy development process, which is partly due to its corporate governance structure. As a private corporation fulfilling a public interest function, ICANN is in a unique and sometimes ill-suited position. Through its management of the Internet domain name system, ICANN is undertaking public governance duties, but it lacks important responsibilities that are typically attached to governance, like protection for basic human rights such as privacy, free expression, or due process. ICANN claims that as a private corporation, the

organization is under no duty or obligation to protect anyone's human rights in its policies, as that is an obligation undertaken solely by nation-states, and not private corporations such as ICANN. So there remains a large gap between the governance power ICANN wishes to exercise and the responsibilities it is willing to undertake to protect human rights in its own policies and administration. None of ICANN's accountability mechanisms ensure the organization's policies protect the existing rights of Internet users – indeed none are intended to, and consequently that crucial need goes unmet in the Internet governance ecosystem. Surely an organization that claims to support the global public interest should make some effort to protect basic the human rights of Internet users in its own policies.

As I stated in 2008, in my comment during NTIA's Midterm Review of Joint Project Agreement:

> ICANN needs to commit to the protection of civil liberties, in particular, respect and adherence to internationally recognized principles of freedom of expression and privacy rights. Given its unique function, ICANN must be required to provide at least the same level of protection to citizen's fundamental rights that are enshrined in the Universal Declaration of Human Rights and numerous national laws. [1]

Unfortunately, ICANN has made no improvements in its human right record since that comment six years ago, and has arguably become even more brazen in its rejection of its responsibility to incorporate human rights principles in its own policies (see letters from data protection authorities such as the Article 29 Working Party and EUDPS).[2] At the same time, ICANN has consistently provided privileged and expanded "protections" in its policies to intellectual property rights.

Under ICANN's governance model, policy decisions are made by "consensus" of parties (or board members), who are under no obligation to protect human rights and lack expertise on human rights, although those policy decisions can touch upon the rights of Internet users. But human rights are intended to be fundamental rights that cannot be bargained away as part of a compromise among mostly commercial actors in an ICANN policy development process. Without additional safeguards, ICANN's corporate structure is ill-suited to meet the needs of a global governance organization. Thus, even supporters of a "multi-stakeholder model for Internet governance" recognize the need for strengthening human rights protections in ICANN policies and operations before ICANN is adequately accountable to govern.

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[1] 15 February 2008 Comment from Robin Gross, RE: "The Continued Transition of the Technical Coordination and Management of the Internet's Domain Name and Addressing System: Midterm Review of the Joint Project Agreement", available at: http://www.ntia.doc.gov/legacy/ntiahome/domainname/jpacomments2007/jpacomment_094.pdf

[2] See Letters from Data Protection Authorities to ICANN on Privacy, available at: https://community.icann.org/display/gnsononcomstake/Privacy

Under the corporate governance structure, the board of directors is legally required to owe its duty of loyalty to the corporation, not to the global public interest or the specific stakeholder interest which he or she represents, creating a conflict of interest between the corporation and the global public interest. Thus, the corporate framework alone is inadequate for meeting the needs of a global governance institution, which is charged with a broader purpose and should be driven by different incentives.

Before ICANN can be said to be adequately accountable to the public interest, it must make improvements on its handling of human rights in its policy development process because its corporate structure and existing accountability mechanisms do not currently address those needs.

Improve Accountability to Bottom-Up Decision Making Process

Another accountability problem inherent in ICANN's purely corporate structure is top-down decision making, which is anti-democratic. Without the consent of the governed, governance is illegitimate, which is why bottom-up decision making is a necessary principle for democratic governance.

California corporation law provides for an organization's Board of Directors to have the final say in its decisions. Despite this principle, the Board is still required to follow its own corporate Bylaws and Articles, which do require bottom-up policymaking at ICANN, meaning policy decisions are made by the community and the Board validates the bottom-up decisions. Legally, the Board can only ignore a bottom-up decision if it goes through a very specific procedure outlined its Articles that requires the engagement and negotiation with the community to change the bottom-up policy.[3] Sadly, none of ICANN's existing accountability mechanisms have been capable of requiring ICANN to follow this process, and the Board-Staff has a troubling tendency to violate community-made policy without impunity. As a result, there is little incentive for the Board-Staff to remain faithful to the community-made policy, and lobbying the Board to violate the community-made policy has become the norm, further exacerbating ICANN's accountability problems.

Need for Independent Checks on Board Decisions

Accountability requires meaningful, external, and independent checks on the decisions of ICANN's Board of Directors. At the same time, decisions should only be reviewable provided they violate a narrow set of clear, objective, pre-announced criteria. At present, the existing accountability mechanisms are inadequate for providing a meaningful and external check on board decisions. In nearly all cases, accountability rests with someone or something that receives its paycheck from ICANN, lacking the level of independence and neutrality necessary to perform an oversight and accountability function. Perhaps the only exception to lack of independence in ICANN's accountability mechanisms is the

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[3] See ICANN Bylaws Annex A, Section 9, available at:
https://www.icann.org/resources/pages/bylaws-2012-02-25-en#/AnnexA

Independent Review Panel (IRP) process, however that accountability measure fails for other reasons including its cost prohibition and the standard of malfeasance required to win an IRP. And the ICANN Board can choose to disregard an IRP ruling at its own discretion, so the independence of the IRP process abruptly ends with the ICANN Board.

Too many of ICANN's purported accountability mechanisms are opportunities to provide comment on proposed policy, but not to play a role in the decision making, which is too often reserved for staff rather than the bottom-up comment. Staff is able to "cherry pick" among comments submitted that support its goals and ignore comments which argue against staff's desired outcome. So the opportunities provided are mainly for passive participation or "busy work", but not to have a meaningful impact on the direction of policy. Comment periods and other top-down consultations are not equivalent to bottom-up policy development.

ICANN's existing accountability mechanisms are also inadequate because they are too dependent upon and provide too much deference to ICANN senior staff (particularly legal counsel) to guide the Board's decision making, when the Board is supposed to serve as a "check" on the staff. So the accountability mechanisms are essentially "self-evaluating" and lacking of independence. As ICANN revenues sky rocket above $236 million and staff hiring numbers hit all time highs, the community needs mechanisms capable of serving as an effective check on the Board-Staff more than ever before.

Greater Transparency of Board and Government Advisory Committee Activities

For there to be true accountability, there must be transparency in how, why, and by whom decisions were taken by the Board and senior staff. ICANN Board meetings should be regularly audio-cast on the web (and archived) just as the GNSO council meeting is made available to the public for listening.

The public minutes of the meetings of the Board should provide much more detailed information than is currently provided. Minority opinions and the diversity of opinions expressed should be more fully incorporated into the meeting minute notes. Greater public notice should be provided regarding the agenda of Board meetings, including more details of the discussion agenda and more advance timing of the notice to the public.

Improvements in transparency are needed to ICANN's Document Information Disclosure Policy (DIDP). An example of where the DIDP fell woefully short of acceptable transparency and accountability was when the Non-Commercial Stakeholder Group requested documents that influenced staff's decision to change the GNSO policy of "exact match only" for inclusion into the trademark clearinghouse to the trademark plus fifty additional entries per trademark registration.[4] Board-staff responded to NCSG's DIDP by claiming all the documents requested were privileged and confidential and refused to release a single additional document. ICANN's Reconsideration Request

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[4] NCSG DIDP Request of 24 July 2013, available at
https://www.icann.org/en/system/files/files/ncsg-request-24jul13-en.pdf

process also failed to provide accountability to this error in governance by further refusing to release information about how the public policy was internally made.[5]

The Cooperative Engagement Process (CEP) of the Independent Review Panel needs transparency, including providing records of discussions and advance notice of a clear process to move forward that applies equally to all parties including ICANN staff.

Transparency should be significantly strengthened with respect to the activities, decisions, and deliberations of the Governmental Advisory Committee (GAC). Too many of these meetings are behind closed doors and by invitation only, which is an unacceptable way of making public policy in today's day and age, where transparency is required for governance to be legitimate. The public has a right to know how its governmental representatives are performing and the policy positions they are taking on the public's behalf on the GAC.

Without these minimum transparency improvements and those recommended by the ATRTs, ICANN will not be able to meet its accountability goals.

Proposal for Accountability Working Group

I support ICANN's general intent to create an Accountability Working Group, however I am concerned about the proposal for staff to select "experts" to serve on the Accountability Working Group, and believe any additional expertise should be selected by the community based on the needs identified by the community through a bottom-up process. The participating Supporting Organizations and Committees should select their own representatives and participants in this working group, which should be equally open to all stakeholders. Governments should not be privileged over other interests in its participation on this working group.

Thank you for this opportunity to provide comment into ICANN's accountability improvement process.

Regards,
Robin Gross

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[5] NCSG Reconsideration Request to ICANN Board Governance Committee, submitted 8 September 2013, available at:
 https://www.icann.org/en/system/files/files/request-ncsg-08sep13-en.pdf