

Internet freedom in a world of states

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Abstract

Last year's ITU WCIT conference inflamed the community's fears of the extension of intergovernmental control over the Internet. Whilst this fear was legitimate, an over-emphasis on the ITU can obscure the fact that the Internet is already controlled in undemocratic ways – often by governments, through both national and global processes, but also by corporate interests. It also obscures the fact that government action is sometimes necessary to uphold the rights of Internet users, just as government inaction can sometimes support their freedoms.

This is no less true at the global level than at the national level, although the appropriate mechanisms of governance at each level differ. Specifically, there are some areas in which developing globally-applicable principles for the governance of the Internet could be valuable and important. Despite popular belief, there is no network of global multi-stakeholder processes or institutions that covers all of the important public policy areas in which such global principles could be useful. However, with the convening of a new CSTD Working Group on Enhanced Cooperation, we now have the opportunity to fill that gap.

To date, civil society has been very reluctant to participate in the development of such a positive agenda for the evolution of Internet governance arrangements. But if we do not, either the status quo will prevail or less democratic and multi-stakeholder alternatives (such as the ITU) will come to the fore. This paper suggests one possible format for operationalising the enhanced cooperation mandate from WSIS, but its principal message is that regardless of the format adopted, now is the time for civil society to seriously consider the merits of a more formal institutional platform for the protection of the rights and freedoms of Internet users.

Introduction

In the wake of last year's defeat of the controversial ACTA treaty in Europe and of the SOPA and PIPA bills in the United States, both of which called on intermediaries to police consumers' use of the Internet, digital rights activists in the West have naturally gained a heightened sensitivity to their governments intruding on Internet freedoms.

One indication of this was how aggressively they opposed all Internet-related proposals at the World Conference on International Telecommunications (WCIT) of the International Telecommunications Union (ITU) last December. The fear was that although many of those proposals seemed modest, they were the vanguard of a movement from governments to more broadly address Internet governance issues such as online freedom of expression, security and privacy through purely intergovernmental processes, rather than through existing, more open and inclusive, multi-stakeholder mechanisms.

There are three assumptions that seem to underlie this fear:

1. Governments should not be involved in Internet governance.
2. If governments are involved in Internet governance, it should only be at the national level,

- not at the global level.
3. If governments are involved in Internet governance at the global level, there are existing, bottom-up multi-stakeholder mechanisms through which they can address all their concerns, instead of resorting to the ITU.

However, all three assumptions are wrong. To fail to comprehend this is to misunderstand the forces that drive many governments towards the use of intergovernmental mechanisms to set policies for the Internet, and to overlook the opportunity that we have right now to channel these forces in a way that is more responsive to the concerns of ordinary Internet users. In fact, if all three assumptions are disproved, it follows that finding a more acceptable way for governments to participate in global Internet governance is imperative. So let's examine those assumptions in turn.

The need for governments at the national level

The first assumption, that governments don't have a legitimate role in governance of the Internet, seems so far-fetched that I might be accused of raising a straw-man argument – yet it is a serious school of thought called cyber-libertarianism, and flows almost as an axiom from the framing of advocacy for online rights and freedoms (particularly by activists from the United States) as the “Internet freedom” movement. Moreover this cyber-libertarian framing is not reserved to those who are otherwise politically libertarian. Even politically progressive activists are inclined to be more distrustful of governmental intervention online than offline, in an expression of Internet exceptionalism, which holds that the Internet is different, and deserving of a more hands-off regulatory approach.¹

To accept the cyber-libertarian proposition is to deny any role for government intervention at the national level, in areas that many of us actively support, such as:

- Passing network neutrality rules that would prevent network operators from discriminating against particular types of Internet content or services.
- Providing incentives for the migration to the next generation version of the Internet protocol, IPv6 – a task at which the forces of markets and norms have so far manifestly failed.²
- Setting enforceable standards for the protection of consumers' personal data, that go further than the weak voluntary codes of practice adopted by segments of industry.
- Extending universal service policies so that consumers in rural areas are guaranteed a basic level of Internet service, enabling them to participate in the information society on an equal footing with their city-dwelling peers.

In 1993 or even 2003 we might have given the market the benefit of the doubt and held off from regulating in these areas. But in 2013, it seems increasingly implausible that the legitimate interests of all consumers in having affordable access to the open Internet, whilst maintaining their own privacy, can be secured without targeted government intervention of some sort or other.

This is not to deny that government intervention also very often has deleterious effects on Internet users; for example through punitive intellectual property enforcement measures that limit fair use

1 A classic debate between the cyber-libertarian and Internet exceptionalist viewpoint on the one hand, and a conservative “unexceptionalism” is found in Jack L. Goldsmith, *Against Cyberanarchy* L. 65 U. Chi. L. Rev. 1199 (1998) and David Post's response “Against 'Against Cyberanarchy',” 17 *Berkeley Tech. L.J.* 1365 (2002). Tim Wu joined Goldstein in updating his argument in *Who Controls the Internet? Illusions of a Borderless World* (Oxford University Press, 1996).

2 The “Father of the Internet”, Vint Cerf, is one of those who has supported the use of government incentives to promote IPv6 migration: Jennifer Scott, “Cerf calls on Government incentive for IPv6 migration” 11 November 2010, <http://www.itpro.co.uk/628531/cerf-calls-on-government-incentive-for-ipv6-migration>.

and innovation, through secretive surveillance of our online communications, through the production of malware for use in cyber-war, or through banning the use of particular Internet services such as Internet telephony or VoIP.

But excluding governments from regulating the Internet is the wrong answer, not least because industry also often acts against the rights and freedoms of Internet users. Websites collect and sell our most private details to advertisers without our knowledge or consent, copyright owners and ISPs enter into closed-door pacts to throttle the Internet access of users suspected of sharing files, and financial intermediaries collude to choke off funds from Wikileaks. We are entitled to look to our governments to protect us against misbehaving corporations through domestic consumer law, competition law or privacy and data protection law, or through less intrusive measures such as tax incentives, development grants or co-regulatory codes.

In some of these cases though (such as the Wikileaks example), governments and corporations are complicit in the infringement of our rights and freedoms. So what recourse do we have if neither our own governments nor the market can protect us against infringements of our rights online? In such cases we either have to look to another mechanism of governance – such as norms, or technology (more on these shortly) – or we have to look to the global level.

The need for governments at the global level

This brings us to the next assumption, which is that if governments do sometimes need to involve themselves in Internet governance, it should only ever be at the national level. That can't be true, because the decisions that governments make at the national level (for which most of us would accept the need in certain cases) have an invariable tendency to spill outside the country's borders.

This occurs because the Internet itself is borderless, and so policies made in one country, whether by governments or by private actors, can affect users anywhere in the world, over whom the policy-maker has no legitimate claim of authority. For example, in 2011 United States authorities seized the domain names rojodirecta.com and rojodirecta.org claiming authority to do so under US law, although the domains were owned by a Spanish company and had been ruled legal under Spanish law (the domains were later returned).³ Similarly, when content is taken down under authority of the US Digital Millennium Copyright Act (DMCA), it affects users throughout the world. Why shouldn't those users have any say in that?

If they should, then we turn to the question of *how* they should have this say. As alluded to above, the cyber-libertarian is inclined to limit it to the use of technology or norms. As an example of the former, technologically knowledgeable users can use strong encryption software, such as PGP and Tor, to craft online spaces and communications channels that are largely unregulatable. But many of the same features of Internet technologies that make them open and free, also limit their effectiveness as shields against government or corporate abuses. Technology is even less effective in promoting positive rights, such as providing cross-border remedies for online fraud.

Similarly norms can be useful, but they are not self-enforcing. We can to some extent rely on the power of the crowd to enforce Internet norms; this is what was so effective in defeating ACTA, SOPA and PIPA last year. This is important where democratic processes at the national level are weak or corrupt, but is even more vital at the global level, where the democratic deficits of traditional intergovernmental institutions (such as the ITU) and trade negotiations (such as ACTA and the Trans-Pacific Partnership or TPP) are relied upon by governments to facilitate the “policy laundering” of domestically unpopular proposals.

3 Nate Anderson, “Government admits defeat, gives back seized Rojodirecta domains”, 30 August 2012, <http://arstechnica.com/tech-policy/2012/08/government-goes-0-2-admits-defeat-in-rojadirecta-domain-forfeit-case/>.

But that crowd can also become a mob, in which the nuances of policy debates are swept away in a heady fervour of cyber-libertarian banner waving. For example the hacktivist group Anonymous has done much good work in upholding online rights and freedoms in the face of threats from governments, cults and corporations alike. But it was also criticised by civil society participants at WCIT for attacking the ITU's website and thereby jeopardising the only official channel for remote users to participate in that meeting. Therefore, whilst direct action through grassroots groups such as Anonymous is valuable as a last resort, it should never become our primary means to shape Internet policy. As security specialist and author Bruce Schneier recently wrote:

The masses can occasionally organize around a specific issue – SOPA/PIPA, the Arab Spring, and so on – and can block some actions by the powerful. But it doesn't last. The unorganized go back to being unorganized, and powerful interests take back the reins.⁴

To be organised at the global level, in a way that is effective to curb the rights abuses of governments and corporations, implies sitting at the table with them to manage the cross-border implications of Internet-related public policies. Currently, this means sitting on the sidelines of the secret negotiations at the TPP, or in the back row of the auditorium at WIPO (the World Intellectual Property Organisation). And that's if we're lucky. On other issues, it means we have no say at all because there *is* no global forum dealing with these issues.

The need for institutional evolution

So we should *at least consider* whether a more formally institutionalised means of engagement of online activists in Internet policy discussions at the global might bridge the gap that exists after self-regulatory, technology-based and grassroots-led initiatives have failed. For some issue areas, this may be seldom; for example, we already have strong global mechanisms for the participation of all stakeholders in Internet standards development, and in the allocation of IP addresses and domain names, through institutions such as the IETF, the W3C and ICANN.

But in other areas, such as security and cybercrime, intellectual property enforcement, consumer protection, data protection and privacy, and online freedom of expression, we do need to look at the evolution of current institutional arrangements. This moves us to the third assumption highlighted above, to the effect that there is no need for any reform to Internet governance arrangements, since “the current organizations, systems and processes successfully meeting the needs of its stakeholders via its industry-led, bottom-up, consensus-based processes.”⁵ If only that were true.

There are global discussions of these issues, of course – but they are either too weak to have a tangible impact on actual policy outcomes (this is the case of the Internet Governance Forum or IGF), or they do not offer the opportunity for meaningful participation from all affected stakeholders (a much longer list, including the ITU itself, as well as the OECD, APEC, WIPO, the CSTD and the TPP).

Often it is civil society that is excluded from these existing arrangements – as was the case with ACTA, and now the TPP – but in other cases it is the governments from developing countries, who see developed-country groupings such as the G8 and OECD taking the lead, whilst their own interests are sidelined. The OECD, for example, has been quite explicit about its intentions in this regard, stating in a recent paper:

4 Bruce Schneier, “Power and the Internet”, 31 January 2013, http://www.schneier.com/blog/archives/2013/01/power_and_the_i.html?nc=35.

5 That particular formulation of this view comes from a Cisco submission to the ITU available at <http://www.itu.int/md/S12-WTPF13PREP-C-0014/en>, but even civil society has made much the same claim, see eg. Harold Feld's submission to the US House of Representatives hearing on WCIT of 5 February 2012, available at <http://www.publicknowledge.org/harold-felds-wcit-hearing-testimony-feb-5-2013>.

Given the global nature of the Internet and the cross-border services that Internet intermediaries often provide, an international convergence of approaches for the development of policies involving Internet intermediaries was viewed as essential, to provide effective guidance to the business sector. The OECD was identified as being able to help the emergence of such principles and to support their diffusion.⁶

Similarly, the United States government is currently seeking to broaden support for another Internet principles document of the OECD, the 2011 Communiqué on Internet Policy-making. There is much to welcome in this Communiqué, though in the end the OECD's Civil Society Information Society Advisory Committee declined to support it partly due to a perceived over-emphasis on the role of intermediaries in intellectual property enforcement. But even aside from this, such an instrument cannot be globally legitimate unless it is developed in a global forum. Therefore it is hypocritical for US policy-makers to label developing countries sidelined by US-driven initiatives such as these, and turning to the more inclusive (of governments) ITU, as “Internet freedom's foes”.⁷

Thus outside of narrow technical areas, what we find is that far from being an inclusive multi-stakeholder regime, powerful governments and companies are making their own rules for the Internet and then seeking to impose them on the rest of the world. We saw it with ACTA, SOPA and PIPA, we see it in progress at the TPP, and we see the potential for similar exclusionary rule-making at the ITU and even, despite all good intentions, at the OECD. This is the true face of the status quo of Internet governance, and it is unsustainable.

The need for Internet principles

There is a real opportunity here to influence the evolution of existing Internet governance arrangements in a way that would kill two birds with one stone:

1. To provide developing countries with more equitable representation in the development of shared principles for global Internet governance, such as those already being developed by narrower bodies such as the OECD, and thereby to provide an alternative in what will otherwise be an ongoing battle to have these issues taken up at the ITU.
2. To provide a firm institutional foundation for the participation of Internet rights and freedom activists from civil society in global Internet policy development processes, supplementing rather than supplanting their existing roles as public interest advocates, watchdogs, and participants in the grassroots development of norms, standards and code.

At the same time we want to guard against the unguarded expansion of intergovernmental authority that could as easily sanction the violation of Internet users' rights and freedoms, as uphold them.

Because the mechanisms of democratic accountability are much weaker at the global level, we must be very cautious about encouraging the development of binding rules for the Internet at the global level, at least until very robust mechanisms of multi-stakeholder oversight are in place. This is not to say that it will *never* be justified – indeed, self-professed Internet freedom activists are amongst those now supporting a new global treaty at WIPO, that would allow copyright works that have been adapted for the use of the blind to be exchanged across borders. But that is a treaty that civil society was instrumental in initiating.

⁶ OECD, *The Role of Internet Intermediaries in Advancing Public Policy Objectives*, (OECD Publishing, 2011), p.194. <http://dx.doi.org/10.1787/9789264115644-en>

⁷ Statement of Commissioner Robert M McDowell, Federal Communications Commissioner, 5 February 2013, <http://docs.house.gov/meetings/IF/IF16/20130205/100221/HHRG-113-IF16-Wstate-McDowellR-20130205.pdf>.

Much more often, limiting global governance to soft law, or principles, is the safer bet, as it provides more flexibility in the implementation of such principles at the national level, and much stronger text can be agreed than in the case of treaty text, which too often descends into legalistic wrangling. Policy-makers also tend to be far more open to the participation of public interest representatives in the development of soft law instruments.

The development of such soft global principles can provide guidance for national lawmakers, Internet engineers and businesses alike in developing policies that take into account the interests of those outside their borders who are likely to be affected by those policies. It can also ensure that countries are held to account for infringements of global norms, such the Universal Declaration of Human Rights. Indeed, the Universal Declaration itself began as a soft law instrument; only 30 years after its passage in 1948 did its provisions become binding in the form of the International Covenants (and other hard laws and treaties that it influenced).

What is needed, then, is a mechanism by which all stakeholders, including governments, the private sector and civil society, can collaborate on the development of non-binding principles for Internet governance that address their respective public policy concerns in a way that also upholds the rights and freedoms of Internet users.

It sounds like a pretty tall order – and of course, in many cases, the outcome of such a process will not be agreement. But, in fact, that is all the better – a failed attempt at developing global principles on a particular issue means that the issue will fall through for determination at a lower level, such as in national parliaments, or by the free market, or through technological means – which are more palatable to the cyber-libertarian anyway.

To give a practical example, if United States-based businesses are developing websites targetted to a global audience, it makes sense that there should be global baseline principles for online privacy that both those companies, and US regulators, can be guided by, and that those principles should be developed with the full participation of affected Internet users and businesses and their governments from around the world. If, in the end, a consensus cannot be reached, then we will continue to muddle through by handling the issue through a patchwork of national laws, technical standards and self-regulation – but perhaps with a little more insight into the perspectives of the other stakeholders than we had before.

In any case, the development of global standards it is already happening, with or without us. APEC has done a lot of work on cross-border privacy standards (without much civil society involvement), the OECD's work has already been noted, and the ITU has similar ambitions; it describes its upcoming May 2013 World Telecommunication Policy Forum (WTPF) as being “designed to foster debate, [and] build multi-stakeholder consensus expressed in the form of ‘Opinions’ illustrating a shared vision to guide ongoing global ICT policies, regulatory and standardization efforts worldwide.”⁸

At the last meeting of the IGF in Baku, the Forum's Multistakeholder Advisory Group (MAG) was urged to put together a compendium of the many existing statements of Internet governance principles that others had developed. But although this is an important first step, it is unclear whether its MAG will allow the IGF to take this mandate up, let alone to allow the IGF to be used as a more inclusive forum for the actual development of such principles.

The record of the IGF's last seven years suggests not – which is why developing countries called the United States government's bluff when it finally about-faced last year and suggested that the IGF could be used to strengthen government collaboration in Internet public policy development, rather

8 See <http://www.itu.int/en/wtpf-13/Pages/overview.aspx>.

than establishing a separate framework or mechanism for this process.

The need for enhanced cooperation

Developing countries would have none of it, and so last December – in fact at the same time as the WCIT meeting was taking place in Dubai – the UN General Assembly in New York passed a resolution that was actually much more significant for the future of Internet governance, although it was overlooked by most. The resolution

Invites the Chair of the Commission on Science and Technology for Development to establish a working group on enhanced cooperation to examine the mandate of the World Summit on the Information Society regarding enhanced cooperation as contained in the Tunis Agenda, through seeking, compiling and reviewing inputs from all Member States and all other stakeholders... [and]

Requests the Chair of the Commission on Science and Technology for Development to ensure that the working group on enhanced cooperation has balanced representation between Governments from the five regional groups of the Commission, and invitees from all other stakeholders, namely, the private sector, civil society, technical and academic communities, and intergovernmental and international organizations, drawn equally from developing and developed countries;⁹

This resolution didn't come out of the blue; in fact, it has been in train since 2005, in the final output document of the World Summit on the Information Society (WSIS), the Tunis Agenda. From the starting point “that there are many cross-cutting international public policy issues that require attention and are not adequately addressed by the current mechanisms”, the Tunis Agenda called for creation of the IGF as a multi-stakeholder discussion forum to address these issues, together with a broader

process towards enhanced cooperation involving all stakeholders, proceeding as quickly as possible and responsive to innovation ... [which would] enable governments, on an equal footing, to carry out their roles and responsibilities, in international public policy issues pertaining to the Internet, but not in the day-to-day technical and operational matters, that do not impact on international public policy issues.¹⁰

The Tunis Agenda also specifies that this is to be a

transparent, democratic, and multilateral process, with the participation of governments, private sector, civil society and international organizations, in their respective roles. This process could envisage creation of a suitable framework or mechanisms, where justified, thus spurring the ongoing and active evolution of the current arrangements in order to synergize the efforts in this regard.

The principle, then, is clear enough – that the IGF should be a multi-stakeholder forum where Internet public policy issues can be discussed (and – though this part of its mandate has been forgotten – where recommendations to address those issues can be developed where appropriate), as part of a broader process that will also allow governments to carry out their “rights and responsibilities for international Internet-related public policy issues” in a more participatory way, perhaps through a new framework or mechanism that would facilitate this.

9 General Assembly Resolution A/RES/67/195 , Information and communications technologies for development , http://unctad.org/meetings/en/SessionalDocuments/ares67d195_en.pdf.

10 Tunis Agenda for the Information Society (2005), <http://www.itu.int/wsis/docs2/tunis/off/6rev1.html>.

What remains lacking is the detail of how this broader process should be implemented. The Working Group on Internet Governance (WGIG), which was a multi-stakeholder group that advised the World Summit, produced a set of four options; three of which had some variant of a global Internet council, which would intercede in policy areas where national interests were impacted, but which fell outside the scope of existing intergovernmental arrangements (and were railed as a “UN takeover of the Internet” by US commentators¹¹). There was variation between these options on whether such a body would be UN-linked or not, and how other non-governmental stakeholders would participate in it.

In the years since then, surprisingly no new options to institutionalise the enhanced cooperation mandate have been seriously put forward, other than a 2011 proposal by the Indian government called the Committee on Internet Related Policies (CIRP), which built upon an earlier model put forward that same year by the IBSA trilateral grouping of Brazil, India and South Africa.

The CIRP would have been a 50-member governmental body, complementary to the IGF, with advisory bodies for civil society, the private sector, inter-governmental and international organisations, and the technical and academic community. The OECD's Information & Communications Policy Committee (ICCP) is structured along very similar lines, but is less geographically inclusive.

The CIRP too was shot down amidst claims of a “UN takeover of the Internet”.¹² There were, true enough, significant problems with it, beyond its inherent structural bias towards governments. The biggest of these was that it proposed to go further than “ensuring coordination and coherence in cross-cutting Internet-related global issues” (which is needed), to also “coordinate and oversee the bodies responsible for technical and operational functioning of the Internet, including global standards setting” (which is not).

In any case, with the new UN mandate for a working group to consider the enhanced cooperation process afresh, we have the opportunity to improve upon the WGIG and CIRP proposals in order to strike a better balance between the interests of public and private stakeholders than either those proposals or the status quo, and in particular to enshrine the protection of Internet users' rights and freedoms as the primary objective of the process.

The need for democracy

Our starting point in developing such a proposal should be to make global Internet governance processes more democratic. In principle, democracy is very straight-forward: it simply requires an accountable and transparent process by which those who will be affected by a decision have an equal say in how that decision is made, provided that the decision also respects the fundamental human rights of all.

In practice, it becomes more complex, particularly at the global level where the proportional representation of those impacted by global public policy decisions is impractical. Even so, a consensus has emerged that in the context of Internet governance, the multi-stakeholder model is the best approach to the democratisation of global institutions, in that it promotes the inclusion of all affected viewpoints in the policy development process, roughly grouped according to their typical roles, competencies and interests in that process.

Another insight that has emerged from democratic practice and literature, and of equal importance

11 See Ilessner, “UN poised to take over the Internet”, 17 August 2005, <http://www.humanevents.com/2005/08/17/un-poised-to-take-over-the-internet/>.

12 Kieren McCarthy, “India formally proposes government takeover of Internet”, 27 October 2011, <http://news.dot-nxt.com/2011/10/27/india-proposes-government-control-internet>.

in the development of any proposal for an enhanced cooperation framework or mechanism, is that better decisions are reached when democratic processes are *deliberative*. What this means is that we should not merely express preferences, but debate them, in an inclusive forum where power imbalances are, as far as possible, taken out of the equation.

The existing grassroots Internet governance institutions responsible for technical standards, such as the IETF, offer a good model to emulate – though they are certainly not perfect. The IETF, for example, has problems with inclusivity, and has expressed its own concerns that

The IETF is unsure who its stakeholders are. Consequently, certain groups of stakeholder, who could otherwise provide important input to the process, have been more or less sidelined because it has seemed to these stakeholders that the organization does not give due weight to their input.¹³

Thus, a recent initiative of Internet standards bodies including the IETF and W3C (the OpenStand Principles)¹⁴ has been criticised within civil society as being too market-focused, and paying insufficient attention to broader public interest objectives such as inclusion. To mention this here is not to criticise the IETF, but simply to point out that multi-stakeholder governance is not something that even the much-lauded Internet technical community organisations have yet perfected.

We should therefore also be open to innovations in multi-stakeholder governance from outside the Internet technical community, and – yes – even those from within the UN system. Consider that WGIG was such an innovation – it was a truly multi-stakeholder group, that developed a set of policy recommendations through a deliberative democratic process, quite unlike the stereotypical United Nations diplomatic conference. WGIG not only met in person, but also conducted its work online through mailing lists and a wiki, and when text could not be agreed – notably on the future of ICANN – this did not result in the collapse of the discussions, or in a compromise declaration full of weasel words; rather, four alternatives were given as food for further consideration.

Admittedly, in our creativity to develop a balanced multi-stakeholder framework or mechanism for enhanced cooperation we are working under one limitation – the Tunis Agenda's pronouncement that “[p]olicy authority for Internet-related public policy issues is the sovereign right of States. They have rights and responsibilities for international Internet-related public policy issues.” This is a proposition that it will be difficult for many Internet freedom activists to accept. Yet all governments participating at WSIS (yes, even the United States) agreed to this. Even before that, in fact as early as 2000 with their effective declaration of sovereignty over country-code domain names, governments had thrown down the gauntlet in this regard.¹⁵

Ultimately, many of us would all like to see a world in which the nation state does not exercise a dominant role in global governance, but in which transnational networks of individuals, voluntarily entered into and potentially overlapping, negotiate the rules and principles under which we live. But that world has not yet come to pass, and in the meantime the future of Internet governance hangs in the balance. Essentially, unless we are happy to be confined to the use of non-state mechanisms of governance such as markets, technology and norms – which as explained above is untenable – then we have no choice for the time being but to accept a role for states that is (at least in formal terms) broader than we might wish.

It is incumbent upon us however to ensure that in practice, this role is strictly circumscribed, and in

13 IETF, “IETF Problem Statement”, May 2004, <http://www.apps.ietf.org/rfc/rfc3774.html>.

14 See <http://open-stand.org/>.

15 Governmental Advisory Committee, ICANN, Principles for Delegation and Administration of ccTLDs, 23 February 2000, <http://www.icann.org/committees/gac/gac-ccldprinciples-23feb00.htm>.

practical terms is as near as possible to an equal role with that of the other stakeholders. WGIG provides an example of this, but we have precedent much further back than that – the International Labour Organisation (ILO), for instance, which incorporated civil society and industry representatives as full voting members since its inception in 1919. The Aarhus Convention is another example of an intergovernmental instrument that treats the public as a full and equal stakeholder in policy development processes.¹⁶

The need for a concrete proposal

So the challenge for civil society is to be creative. The Tunis Agenda, after all, was an agreement between governments only (civil society wrote its own, dissenting WSIS outcome document),¹⁷ and as such the other stakeholders can, at the very least, advocate for a flexible interpretation of its language. There are many options that we could, and should, be putting forward for a balanced framework for global Internet policy development – a Wikipedia-style collaborative project, a Pirate Party style liquid democracy, or Github-inspired set of “forks” of best practice documents, just to name a few. A recent civil society proposal, the Enhanced Cooperation Task Force or ECTF, borrows heavily from the processes of the IETF – and why not?¹⁸

For my part, my research (and my experience of what governments will and won't accept) leads me towards an organisation style called the consociation, or consensus democracy. This is a structure in which all stakeholders develop policy positions together in a deliberative process, yet ultimately are also required to come to a consensus as individual stakeholder groups, effectively giving each group a right of veto over proposals of mutual concern. This, as I perceive it, is the only way in which governments might be induced to participate in an enhanced cooperation process that did not otherwise accord them a dominant position over the other stakeholder groups. 320 pages into my original development on this idea, I wrote that:

an appropriate structure for a transnational network for Internet governance could consist of an open and transparent forum within which members of all stakeholder groups deliberate with the aim of reaching consensus, led by a meritocratic executive council to which each group appoints its representatives using consensual or democratic means, and which would be required to ratify all decisions of the forum by consensus.¹⁹

Such a group could act as a complement to (not as a replacement for) the existing Internet governance institutions, and might conveniently be attached to the IGF. It would address only those areas that in which there is not already a democratic, multi-stakeholder process for developing public policy principles at the global level. It would seek to reach a consensus on such principles where possible, to provide guidance to regulators, online businesses and other stakeholders who have a need to implement policies in a coherent and coordinated way, that takes account of the perspectives and human rights of all those who will be affected by those policies. The actual implementation of its recommendations would largely continue to be decentralised as it is at present, and would also depend on upon the ratification of those recommendations by each individual stakeholder group according to whatever procedures that group itself had agreed.

This is just one option, of course, and it may have its faults. The point is not to push this particular proposal to the exclusion of others, but rather to underline the critical importance of beginning a

16 Formally, the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998), <http://www.unece.org/env/pp/treatytext.html>.

17 “Much more could have been achieved” Civil Society Statement on the World Summit on the Information Society, 18 December 2005, <http://www.itu.int/wsis/docs2/tunis/contributions/co13.pdf>.

18 See <http://enhanced-cooperation.org/RFA/1.html>. Disclosure: I am credited in the acknowledgments section of this proposal.

19 Jeremy Malcolm, *Multi-stakeholder Governance and the Internet Governance Forum* (Terminus Press, 2008), p.320.

conversation on such concrete proposals that could take the enhanced cooperation mandate forward, rather than digging our heads into the sand and wishing that mandate away.

In January this year the Chair of the CSTD outlined the process that is already in train to convene a Working Group on Enhanced Cooperation, that will help to determine, one way or another, how the enhanced cooperation mandate will be expressed through the evolution of Internet governance arrangements.²⁰ The next steps are up to us. Will we participate productively to provide a firmer institutional foundation for the representation of the public interest in global Internet governance arrangements, or will we dig in our heels and insist that those arrangements remain forever stuck in the same mould as in 1998?

Whatever our decision is, it may determine the future of the Internet. We should not underestimate the power that civil society can have to advocate for significant changes to global governance frameworks and mechanisms. The Mine Ban Treaty, for example, would not exist but for the efforts of civil society,²¹ and neither would the Disability Convention.²² In the more specific context of Internet governance, we should emulate the efforts of those who fought for the passage of the Marco Civil at the national level in Brazil, even though they ultimately did not succeed.²³

Just as much effort and expenditure may be needed to promote these proposals through networking, lobbying, outreach, research and capacity building as we expended fighting against SOPA, PIPA and ACTA. Targets for this advocacy work will include the CSTD Working Group, the IGF MAG, national governments, industry groups and the Internet technical community, as well as the broad community of Internet users who will be naturally suspicious about the evolution of Internet governance arrangements, and may be inclined to uncritically accept rumours of a “takeover of the Internet”.

Conclusion

The battle to secure Internet rights and freedoms in a world of states is a hard one, but it is imperative that we undertake it on all fronts. Limiting ourselves to a negative, reactive approach is not sustainable – otherwise we will be forever fending off an increasing volley of threats, exhausting our limited time and resources, while the underlying interests that produce these threats are not being squarely addressed. Rather, we need to recognise the need for positive proposals that can advance these interests for the long term, and these proposals should be advanced at the global level just as much as at the national level.

Claims that there already *is* a comprehensive network of multi-stakeholder Internet governance institutions that stakeholders can join, rather than – for states – having recourse to the ITU, is a lie, and one that must be exposed as such so that it can no longer constrain the natural evolution of Internet governance arrangements. It is indeed absurd to ask stakeholders to address policy issues of concern through multi-stakeholder processes, when those processes – outside of the technical – do not yet exist. Developing countries, in particular, will not fall for this, and the unmet need for the representation of their interests in Internet governance processes will not simply go away.

20 See http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=391&Sitemap_x0020_Taxonomy=Commission%20on%20Science%20and%20Technology%20for%20Development.

21 Formally, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997). The International Campaign to Ban Landmines (ICBL), a global network initiated by six NGOs in 1992, was awarded the Nobel Peace Prize in recognition of its efforts to bring about the treaty: see <http://www.icbl.org/>.

22 Similarly, development of the Convention on the Rights of Persons with Disabilities (2006) was initiated by the General Assembly in 2001 following a call the previous year from the five international disability NGOs.

23 See <http://culturadigital.br/marcocivil/>.

There is not only enough room, but indeed an urgent need, for the development of a more globally inclusive and democratic framework or mechanism to balance the interests of all governments and other stakeholders, outside of the realm of technical standards and Internet resource allocation and without impinging upon the work of existing multi-stakeholder bodies in those areas.

This evolutionary extension to existing Internet governance arrangements will, if it is sufficiently deliberative and transparent, expose and eliminate proposals from states that are based upon repression and control, since these would never pass muster in a multi-stakeholder environment – though at the same time, its authority should be limited to the development of principles, rather than their implementation or enforcement. It may also help preclude the emergence of new exclusionary processes such as ACTA and the TPP in the future, and even if it doesn't, it will at least drain them of their claimed legitimacy and arm us to defeat them more easily.

The “Internet freedom” meme is not adequate to encapsulate this imperative, and whilst bottom-up norm-setting in the absence of regulation is an important and continuing tradition of the Internet community, some form of political process to render this norm-setting formally legitimate is sometimes required in order to make sure that those norms are reflected as appropriate in national laws and industry practices. After all, rights as well as freedoms are important to Internet users, and at some point, democratic processes have to be allowed to develop these rights into public policy principles for the guidance of lawmakers, industry and technical community alike.

For as long as we remain blind to this, rejecting or ignoring proposals for the evolution of Internet governance arrangements on the false assumption that the status quo is sustainable, we risk assuring the ITU's future as the only global body capable of authoritatively developing globally-applicable public policy principles for the Internet.

Alternatively, we can collaborate on the design of a better, truly multi-stakeholder alternative to the ITU, that would allow all stakeholders to contribute their perspectives on important public policy issues in a deliberatively democratic forum that would balance the interests of the powerful with those of the powerless, and produce more thoughtful, just and inclusive recommendations that uphold the rights and freedoms of Internet users.

There is no template for this; it might involve the enhancement of the IGF's existing MAG, the development of a new adjunct body based on consensus democracy as I briefly sketched in the last section, or perhaps some other framework or mechanism that nobody has even thought of yet. I'm looking forward to seeing what we can come up with. Are you in?