



Centre for Communication Governance at National Law University, Delhi

Submission to the United Nations Special Rapporteur on Freedom of Speech and Expression

Study on Access to Information in International Organizations

The Centre for Communication Governance thanks the Special Rapporteur for the opportunity to submit this comment. We recently published a report on Indian participation in international internet governance institutions over the last 5 years (2011-15).¹ Some of our findings on transparency and access to information are relevant to the upcoming report.

Our report looked at three internet governance institutions/processes viz. the Internet Corporation for Assigned Names and Numbers (ICANN), the Ten-Year Review of Overall Outcomes of the World Summit on Information Society (WSIS+10 Review) at the UN General Assembly and the Multistakeholder Advisory Group (MAG) of the Internet Governance Forum (IGF). We found that there is a need for greater transparency across these institutions and the internal processes must be demystified to enable greater developing country participation.

We found that developing country participation at internet governance institutions is often a question of resources and capacity.² There is a need for capacity building for developing country stakeholders to enable them to engage more meaningfully with internet governance

¹ Puneeth Nagaraj and Aarti Bhavana, "MultiStakeholderism in Action: Analysing Indian Engagement at Global Internet Governance Institutions (2011-15)", Centre for Communication Governance October 2016, available at <tinyurl.com/ccgmsreport> (last accessed 14th December, 2016).

²Id, at p. 18, 45 and 78.

institutions.³ This is necessary if we are looking to ensure that developing country concerns are represented and articulated adequately in global conversations on internet governance. For example Indian stakeholders were able to build nuance into the conversations on human rights at the WSIS+10 negotiations.⁴ Interventions of this nature need to become the norm.

Internet governance institutions and other stakeholders are aware of the need to build capacity and initiatives like regional Schools of Internet Governance are helping bridge this gap.⁵ However, more work needs to take place to make such initiatives rigorous and to build high-capacity networks of people who are able engage with such institutions in a sustained manner. Moreover, capacity building must not be limited to short training programmes or workshops; it must extend to tertiary education with dedicated university programmes.⁶

One hurdle, that is relatively easy to resolve in this context, is ensuring that stakeholders from developing countries have the resources to attend these meetings regularly. ICANN and the Internet Society provide fellowships to enable community members to attend meetings. These fellowships are awarded based on criteria such as engagement with internet governance issues, engagement with their respective communities and follow up once they return from meetings.⁷ International organizations may look to similar fellowships while creating funding opportunities for developing country participants.

Our findings⁸ on access to information and transparency with respect to each institution covered in the report are discussed in some detail below. With respect to the WSIS+10 Review, we found that developing country participants found it difficult to access process related information. At ICANN, our study echoed the findings of many earlier studies which called for ICANN to be more transparent and accountable. Nominations to the IGF MAG, as

³ Id.

⁴ Id, at p. 26.

⁵ See for instance two recent regional initiatives, Asia Pacific School for internet Governance, available at <<https://sites.google.com/site/apsigasia/>> and India School for Internet Governance, available at <<http://isig.in/about-insig/>> (last accessed 16th December, 2016).

⁶ See for instance, the Master's programme in Social Science of the Internet at the University of Oxford, available at <<https://www.oii.ox.ac.uk/study/msc/>> (last accessed 19th February, 2017); and the Master's in Contemporary Diplomacy with a specialization in Internet Governance at the University of Malta, available at <<http://www.um.edu.mt/arts/overview/PMCDIGVFDL2-2012-3-F>> (last accessed 19th February, 2017).

⁷ See for instance the ISOC IGF Ambassador Programme criteria, available at <<http://www.internetsociety.org/what-we-do/education-and-leadership-programmes/next-generation-leaders/igf-ambassadors-programme>> (last accessed 19th February, 2017); also see the ICANN Fellowship Criteria, available at <<https://www.icann.org/resources/pages/fellowship-applicant-criteria-2016-09-08-en>> (last accessed 19th February, 2017).

⁸ Supra, note 1.

highlighted below are conducted through an opaque process which has been criticised by civil society.

1. WSIS+10 Review

The WSIS+10 Review, held in 2015, ten years after the Tunis Agenda reviewed the progress made in the last decade. Our report analysed Indian participation in the WSIS+10 negotiations that concluded with the High-Level Meeting of the UNGA in December, 2015. In the preparatory process, the UNGA through the co-facilitators created formal avenues for stakeholder engagement. However, in the course of our research, we discovered that a number of developing country stakeholders faced difficulty in accessing information about meetings and other events related to the Review.

Two respondents from a survey circulated as part of an earlier report illustrate the difficulties faced by civil society actors.⁹ The first respondent stated,

‘While it was commendable that the UN General Assembly facilitated written contributions from civil society and our participation in “stakeholder consultation” days, the opportunities to engage did not adequately feed into the formal process. More efforts could have been made to integrate input from other stakeholders to the intergovernmental meetings.....’¹⁰

This was also in contrast to past events in the WSIS process and meetings held at other internet governance institutions. On this another respondent noted,

‘The earlier events were fairly open, given that non-ECOSOC accredited NGOs were able to apply and accepted to participate..... However, the last 30 days or so leading up to the High Level Event in December were much more closed. Governments negotiated and civil society largely did not hear about the latest drafts until a few days after they were finished. Above all, civil society had no formal mechanism to participate over the last month or so -- the most crucial time when the final text was being decided.’¹¹

⁹ Puneeth Nagaraj, “Civil Society Participation in the Negotiations of the Ten Year Overall Review of WSIS Outcomes”, Global Partners Digital June 2016, available at <<http://www.gp-digital.org/publication/civil-society-participation-inthe-negotiations-of-the-ten-year-overall-review-of-wsis-outcomes/>>, at 13-14 (last accessed 12th August, 2016).

¹⁰ Id, at 14.

¹¹ Id.

The report on civil society participation in the WSIS+10 Review found that process related barriers such as transparency was the most commonly cited barrier faced by civil society actors during the Review.¹²

2. ICANN

ICANN is the international body responsible for the management of the Domain Name System of the internet. Until recently, it was under the supervision of the US government. After the recently concluded Internet Assigned Numbers Authority (IANA) transition, control of ICANN has been transferred to a global multistakeholder community. ICANN has for long been subject to criticism for its record on transparency.¹³

The Berkman Klein Centre for Internet and Society in their 2010 Review of ICANN's accountability and transparency noted that there is a deficit in active, passive and participatory transparency.¹⁴ It has also been argued that accountability measures normally seen in private corporations, standards bodies and government agencies are absent in the case of ICANN.¹⁵ Stakeholders have also stated that many important discussions take place behind closed-doors, ignoring public input.¹⁶ This contrasts with the notion that ICANN operates through an open, bottom-up multistakeholder fashion.¹⁷

Respondents interviewed as part of our report highlighted specific areas where ICANN needs to be more transparent. The At Large Advisory Committee (ALAC) for instance, has come in for much criticism from Indian stakeholders for resisting accountability measures.¹⁸ ALAC

¹² Id.

¹³ For a more detailed study on ICANN's Accountability, see Jonathan GS Koppell, "Pathologies of Accountability: ICANN and the Challenge of "Multiple Accountabilities Disorder"", Public Administration Review, Vol. 65, No. 1 (Jan- Feb, 2005), available at <<http://www.jstor.org/stable/3542585>> at pp. 94-108 (last accessed 23rd August 2016). See also The Berkman Centre for Internet and Society, "Accountability and Transparency at ICANN: An Independent Review", (2010) available at <<https://www.icann.org/en/system/files/files/review-berkman-final-report-20oct10-en.pdf>> (last accessed on 15th August, 2016)>.

¹⁴ Id, Berkman Centre at p. 15.

¹⁵ Milton Mueller, "ICANN, Inc.: Accountability and participation in the governance of critical Internet resources" Internet Governance Project, Paper IGP09-002, available at <<http://internetgovernance.org/pdf/ICANNInc.pdf>> at p. 2 (last accessed 31st August, 2017).

¹⁶ See Monika Ermhert, *Is ICANN Policymaking Around Its Bottom-Up Multistakeholder Process?*, Intellectual Property Watch (12th April 2013), available at <<http://www.ip-watch.org/2013/04/12/is-icann-policymaking-around-its-bottom-up-multistakeholder-process/>> (last accessed 27th August, 2016); Damien Cake in an interview with John Gilmore, *It's Time for ICANN to go*, Salon Magazine (3rd July, 2002) available at <https://www.salon.com/2002/07/02/gilmore_2/> (last accessed 27th August, 2016).

¹⁷ See, "Welcome to ICANN", available at <<https://www.icann.org/resources/pages/welcome-2012-02-25-en>> (last accessed 26th August, 2016).

¹⁸ Intervention by an Indian stakeholder on the At-Large Worldwide mailing list (11th October 2015), on file with the authors.

not taking on board transparency recommendations has been singled out for criticism.¹⁹ One of the respondents cited in our report highlighted the difficulties he faced in running for an elected position within ICANN. He further stressed that the Ombudsman was of little help in addressing the issues he raised with respect to the election.

In a similar vein, Indian stakeholders have cited difficulties in accessing documents under ICANN's Documentary Information Disclosure Policy (DIDP) to highlight the need for greater transparency.²⁰ The allocation of funds from gTLD auctions has also been a target of accountability-based criticisms,²¹ where stakeholders have questioned the functioning of such a system without oversight or any framework of accountability.²² Intended for community development activities, one Indian stakeholder called for the incorporation of globally accepted standards of accountability and transparency in spending the proceeds.²³

The ICANN Board of Directors has been criticised by the Berkman Centre among others for conducting closed door deliberations.²⁴ This is problematic as ICANN's bylaws do not contain clear rules for the conduct of Board meetings.²⁵ Mueller points out that the Board can operate in a non-transparent way as the critical details of many policies are usually contained in the Board's contracts with private parties, and are not subject to the bottom up policy process.²⁶

¹⁹ Id.

²⁰ For an analysis of DIDP requests within ICANN, see Padmini Baruah, *Peering behind the veil of ICANN's DIDP (II)*, CIS-India Blog, available at <<http://cis-india.org/internet-governance/blog/peering-behind-the-veil-of-icanns-didp-ii>> (last accessed 17th August, 2016).

²¹ Public comment submission by Centre for Communication Governance on the New gTLD Auction Proceeds Discussion Paper, available at <<http://forum.icann.org/lists/comments-new-gtld-auction-proceeds-08sep15/pdfdpj9HDDbXo.pdf>> (last accessed 27th August, 2016).

²² Public comment submission by Government of India on the New gTLD Auction Proceeds Discussion Paper, available at <<https://forum.icann.org/lists/comments-new-gtld-auction-proceeds-08sep15/pdfXVALj8hwRn.pdf>> (last accessed 17th August, 2016).

²³ Public comment submission by Centre for Communication Governance on the New gTLD Auction Proceeds Discussion Paper, available at <<http://forum.icann.org/lists/comments-new-gtld-auction-proceeds-08sep15/pdfdpj9HDDbXo.pdf>> (last accessed 27th August, 2016).

²⁴ *House subcommittee to hear criticism of ICANN*, NSI (22nd January, 2002) available at <<http://www.cnet.com/news/house-subcommittee-to-hear-criticism-of-icann-nsi/>>; and public comments submitted by IP Justice to ICANN Accountability and Transparency Review Team (20th July, 2010), available at <<https://forum.icann.org/lists/atrt-public-input/msg00014.html>> (last accessed 15th August, 2016). This issue has also been addressed by The Berkman Centre for Internet and Society, "Accountability and Transparency at ICANN: An Independent Review", (2010) p. 15 available at <<https://www.icann.org/en/system/files/files/review-berkman-final-report-20oct10-en.pdf>> (last accessed on 15th August, 2016).

²⁵ Article VI, ICANN Bylaws, available at <<https://www.icann.org/resources/pages/governance/bylaws-en#VI>>, (last accessed 15th August, 2016). See also,

²⁶ *Supra*, note 13, at p. 2.

Similar concerns over a lack of transparency have also been raised with respect to the Nominating Committee (NomCom). The NomCom is a body that elects 8 of the 16 members on the ICANN Board (the highest decision making body in ICANN), as well as members of other SOs and ACs.²⁷ However, there are no clear rules or procedures for the way the NomCom conducts itself as the NomCom does not publish its selection procedures.²⁸ ICANN's bylaws are also silent on this point.²⁹

In the wake of these criticisms, ICANN has implemented multiple accountability and transparency mechanisms.³⁰ During the recently concluded IANA transition, there was pressure on ICANN to address issues related to transparency and accountability.³¹ Some of these processes are ongoing as part of Workstream 2 in the IANA transition.

3. IGF MAG

The MAG is a multistakeholder body that consists of representatives of various stakeholder groups. The MAG is responsible for the conduct of each year's IGF meeting. But the selection of the IGF MAG has been subject to criticism for a lack of transparency, as discussed this below. The selection of MAG members is made by the UN Department of Economic and Social Affairs (DESA)³² under the authority of the UN Secretary General, who retains the power to select members.³³ However, this has not been without controversy, with DESA's pivotal role in the IGF coming under question.³⁴

²⁷ For an explanation of the NomCom and its composition, see Article VII, ICANN Bylaws, available at <https://www.icann.org/resources/pages/governance/bylaws-en#VII> (last accessed 15th August, 2016).

²⁸ John E. Savage & Bruce W. McConnell, "Exploring Multi-stakeholder Internet Governance", East West Institute (2015), available at <<https://cybersummit.info/sites/cybersummit.info/files/Exploring%20Multi-Stakeholder%20Internet%20Governance.pdf>>, at p. 7 (last accessed 15th August, 2016). A lack of rules on how NomCom operates can have serious consequences. One of the stakeholders at our consultation referred to an instance where they were the only candidate to stand for an election for ALAC, but someone else was ultimately appointed. Further, they claimed that the ombudsman only responded to their complaint after the election was completed

²⁹ *Id.*

³⁰ For more details, see "Accountability", available at <<https://www.icann.org/resources/accountability>> last accessed 23rd August, 2016).

³¹ Charter of the Cross-Community Working Group on Enhancing ICANN's Accountability (CCWG-Accountability), available at <https://community.icann.org/display/acctcrosscomm/Charter> (last accessed 17th August, 2016).

³² *Id.*

³³ Report of the Working Group on Improvements to the Internet Governance Forum, A/67/65-E/2012/48, 16th March, 2012 at para 20 (d), available at <http://unctad.org/meetings/en/SessionalDocuments/a67d65_en.pdf> (last accessed 23rd August, 2016).

³⁴ Farzaneh Badii, "Will the UN Kill the IGF", May 29th 2016, available at <<http://www.internetgovernance.org/2016/05/29/will-the-un-kill-the-igf/>> (last accessed 23rd August, 2016).

Nominations to the MAG are made by focal points for each stakeholder groups such as the Internet Society or ISOC (technical community),³⁵ Civil Society Coordination Group or CSCG (civil society)³⁶ and the International Chamber of Commerce Business Action to Support the Information Society or ICC BASIS (private sector). Applicants can also apply to the DESA directly. The DESA has used its discretion to not select members nominated by the various stakeholder focal points in the past.³⁷ However, it is not clear as to how the DESA picks MAG members.³⁸ The only available information on DESA's selection criteria are the five 'Selection and Operation Principles' listed on the IGF website.³⁹ These criteria include achieving a geographic and gender balance and that representatives should have strong linkages to their stakeholder groups.⁴⁰

Besides the question of geographic balance, the MAG selection process has come in for criticism from stakeholder groups.⁴¹ The CSCG recently wrote to the DESA asking for greater transparency in its selection procedures after some of their nominations were not selected to the MAG.⁴² They noted in their letter that their nominations to the MAG were based on a transparent and inclusive process and that the DESA did not offer an explanation as to why the CSCG's nominations were not accepted.⁴³

This lack of transparency also affects the way Indian stakeholders are selected as MAG representatives. In the past (as confirmed by the CSCG chair), the DESA had used its discretion to select a civil society representative from India who was not nominated by the CSCG.⁴⁴ Similarly, in 2014 an Indian civil society member nominated by the CSCG was not confirmed by the DESA.⁴⁵

³⁵ See this year's ISOC nominees to the IGF MAF at <<http://www.internetcollaboration.org/nominations/>> (last accessed 21st August, 2016).

³⁶ See this year's CSCG nominees to the IGF MAF at <<http://internetgov-cs.org/2016-02-01>> (last accessed 21st August, 2016).

³⁷ Mail from Ian Peter, Chair of the CSCG dated 16th August 2016 in response to question from the author.

³⁸ The 2016 MAG selections were a source of controversy. See, Kieren McCarthy, "Critics Hit Out at 'Black Box' UN Internet Body", The Register 31st March 2016, available at <http://www.theregister.co.uk/2016/03/31/black_box_un_internet_body/> (last accessed 21st August, 2016)

³⁹ MAG Renewal Announcement, 2016, available at <<http://www.intgovforum.org/cms/magabout/mag-renewal-announcement>> (last accessed 31st August, 2016).

⁴⁰ *Id.* These criteria were also separately confirmed by the CSCG Chair and a sitting member of the MAG. However, both responses acknowledged a lack of transparency in how these criteria are weighed.

⁴¹ *Supra*, note 34.

⁴² Mail from Ian Peter to the IGF Secretariat, dated 4th April, 2016. Available at <<http://internetgov-cs.org/2016-04-04>> (last accessed 21st August, 2016).

⁴³ *Id.*

⁴⁴ *Supra*, note 37.

⁴⁵ *Id.*