Enhanced Cooperation for the Public Interest

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1. Introduction

In view of today's huge significance of information and communication technologies in general and the Internet in particular, governments need to strongly take this highly technical realm in consideration in regard to various governmental responsibilities.

Consequently, the so-called Tunis Agenda for the Information Society[1], an international soft law instrument adopted at the UN World Summit on Information Society in Tunis in 2005, appropriately asks the UN Secretary General to convene "a new forum for multi-stakeholder policy dialogue—called the Internet Governance Forum (IGF)" with a mandate that includes making recommendations where appropriate (para 72g).

In this context of the IGF which is explicitly mentioned in paras 67 and 72-78 of the Tunis Agenda, para 68 says: "We recognize that all governments should have an equal role and responsibility for international Internet governance and for ensuring the stability, security and continuity of the Internet. We also recognize the need for development of public policy by governments in consultation with all stakeholders." Paras 69-71 call for a process of "Enhanced Cooperation" with this objective: "to 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."

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[1] http://www.itu.int/wsis/docs2/tunis/off/6rev1.html

Unfortunately, even though the Internet Governance Forum has been created and it is very valuable, the UN system has failed to implement the aspects of the IGF and Enhanced Cooperation which have been quoted above. The IGF does not make any recommendations, and the UN has not initiated such a process of Enhanced Cooperation as outlined in the Tunis Agenda[2], nor heeded calls for the establishment of a multistakeholder working-group.[3] Consequently, it may now be appropriate for others, including in particular civil society, to consider taking action to address these enhanced cooperation needs that have been identified but not effectively addressed by the UN.[4]

2. Governments and the Public Interest

Governments have a formal and moral responsibility to act according to the public interest, at least from the perspective of their particular nation. (In regard to conflicts of interest between national interests and the global public interest, it is less clear what the government's responsibility should be considered to be.)

The duty of governments to protect the public interest is particularly clear with regard to promoting and safeguarding those aspects of human dignity that are protected at least theoretically by international human rights treaties.

In practice, large corporations are often much more effective than civil society organizations in explaining to governments the policy measures that would be beneficial from their perspective. This can in practice undermine or even totally pervert the stated goal of governments of acting in the public interest. The processes and practices of democracy provide an important and much-needed corrective, even if this is often slower and less effective than we would like it to be.

Nota bene, the disproportionately large lobbying influence of large corporations can not be justified by arguing that the other stakeholder have simply neglected to make effective use of the available means for influencing public policy: Even if in theory everyone has equal opportunities in seeking to influence public policy, in practice it is only the large corporations that have

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[2]http://unpan1.un.org/intradoc/groups/public/documents/un-dpadm/unpan035383.pdf

[3]See e.g. by APC's proposal: http://www.apc.org/en/news/enhancing-cooperation-among-stakeholders-internet

[4]For more details see Jeremy Malcolm's blog post http://jere.my/l/2w

the economic power to derive such great financial benefits from influencing public policy that hiring an army of lobbyists can be a profitable economic activity. The situation is as if say in a soccer tournament the organizers ensured that the playing field is even, but denied all teams except for one the opportunity to professionally prepare for the competition.

3. Need for Strategic Rethinking

Increasingly more public policy issues cannot be effectively addressed without rethinking the strategies for addressing them, because pre-Internet policy mechanisms are fundamentally inadequate for today's interconnected world. In the following I briefly mention just two examples:

Example A: Digital expressions of culture Despite all the lawsuits, P2P file sharing is more popular than ever, and I'm fully convinced that it is totally impossible to stop it without destroying much of the Internet in the process. That is not to say that artists and copyright holders deserve to be fairly compensated. But we need to find ways to make that happen without trying to destroy the fundamental property of culture that it is something that can be shared. In the current legal environment, EFF's "Voluntary Collective Licensing of Music File Sharing" proposal[5] might be the best way forward, but at the same time the assumptions which form the basis of the current international system of copyright and collection societies should be reexamined.

In this context, I would like to draw attention to the IGF workshop 34 "Standards for sustainable digital culture" scheduled to take place in Conference Room #1 on 7 November 2012 from 11.00 to 12.30; this workshop will explore the need for better standardization of file format metadata in order to make better solutions possible.

Example B: Privacy protection As more and more personal data is collected and transferred across jurisdictional boundaries, the traditional mechanisms for data protection may no longer be sufficient or even practicable.

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[5]https://www.eff.org/wp/better-way-forward-voluntary-collective-licensing-music-file-sharing

This has been discussed at the workshop "Strengthening the protection of cross-border internet personal data" organized by the Council of Europe at the 2011 IGF in Nairobi.

4. Global vacuum on Internet-related public policy

We have global Internet governance institutions for the relatively low level, technical aspects of making the Internet work. Their legitimacy is based to a significant extent on the fact that the technical community which supports these institutions has created the Internet in the first place, and this perceived legitimacy is great enough that so far they are able to effectively fulfill their roles.

Critics can point to US interests and Western perspectives having an unduly great influence. The concerns include US courts authorizing seizures of domain names of companies in other countries[6] and the pro-Ascii bias evident in how Bulgaria is not allowed to use .бг, the cyrillic version of .bg[7]. (A more reasonable response to Bulgaria's request would have been to require that second-level domains registered under .бгmust be cyrillic, which would have been sufficient for ensuring that .бгcannot be used for phishing attacks against .br websites.)

The situation is much worse with regard to topic areas that have already been subjected to national legislative activity and international treaties: Currently there are no effective processes available for adapting, in an internationally coordinated manner, the various legal systems to the realities of the Internet age, in a way that appropriately furthers and protects the public interest. Treaty proposals like ACTA which on the surface appear to address needs of the Internet age, are invariably influenced so strongly by the desire of the U.S. government to further the interests of their country's "copyright industry" that a change of strategy appears to be not realistically feasible via that path.

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[6]http://www.wired.com/threatlevel/2012/03/feds-seize-foreign-sites/
[7]http://icannwiki.com/index.php/.%D0%B1%D0%B3

5. Scenarios of public policy coordination or lack thereof

Scenario I: Continuation of the status quo. Since I expect that the readers of this paper are already familiar with the status quo of Internet governance in the areas they care about, I will not discuss this in detail here. I can certainly imagine that it is possible for the current governance arrangements to continue without fundamental changes. This would imply that no fundamental rethinking happens in the areas where our legal systems are fundamentally inadequate to the needs of the Internet age, even though such a continuation of the status quo is to everyone's disadvantage with few exceptions (which however include politically influential stakeholders such as the US "entertainment industry".)

Scenario II: Multistakeholderism providing non-democratic "legitimacy". Matthias Kettemann has suggested[8] "that an International Internet norm is legitimate if it meets a formal and a material legitimacy requirement:

- formally, it needs to be symbolically validated through its emergence in a multi-stakeholder process (the input and throughput dimension of legitimacy),

- materially, it needs to be determinate enough for its purpose (thus allowing for non-binding instruments), cohere with the Internet's core principles and be consonant with the values of Internet Governance, and adhere systematically to the broader normative system of Internet Governance (the output dimension of legitimacy)."

This seems to imply a denial of any need for democratic legitimization. In fact Kettemann approvingly refers to multistakehodlerism as being "post democratic".

I find that thought very scary and in fact highly disturbing.

In defense of this notion of legitimacy it could be argued that this is how the Internet has been created in the first place.

However, it is not really an argument against democracy-based public policy action that the Internet was created in a different way making use of the

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[8]Posting on the governance list of Tue, 2 Oct 2012 11:00:11 +0200

principle of free societies that everything is allowed that is not explicitly forbidden. This history does not imply anything about whether it is possible and appropriate now for governments to take a more active role.

Scenario III: Committee on Internet Related Policies (CIRP). In a statement to the UN General Assembly on October 26, 2011, India proposed the formation of a new UN body named "Committee on Internet Related Policies."[9] This committee would consist of 50 UN Member States "chosen on the basis of equitable geographical representation", and would meet annually for two working weeks in Geneva. Non-governmental stake-holders would participate through four Advisory Groups.

The stated goal is to "enable coherent and integrated global policy-making on all aspects of global Internet governance".

The proposal shares the typical UN predisposition to attempt globally centralized, top-down policy-making: "It is becoming increasingly evident that the Internet as a rapidly-evolving and inherently global medium, needs quick-footed and timely global solutions and policies, not divergent and fragmented national policies."

The proposal aims at transferring to the UN the special role and position of power in Internet governance currently enjoyed by the US: "The intent behind proposing a multilateral and multi-stakeholder mechanism is not to 'control the internet' or allow Governments to have the last word in regulating the internet, but to make sure that the Internet is governed not unilaterally, but in an open, democratic, inclusive and participatory manner, with the participation of all stakeholders, so as to evolve universally acceptable, and globally harmonized policies in important areas and pave the way for a credible, constantly evolving, stable and well-functioning Internet that plays its due role in improving the quality of peoples' lives everywhere."

Together with earlier statements from the IBSA (India, Brazil and South Africa) group[10], the CIRP proposal has led to a lot of discussions, including a CSTD meeting on enhanced cooperation on public policy issues pertaining to the Internet on 18 May 2012.

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[9]http://igfwatch.org/discussion-board/indias-proposal-for-a-un-committee-for-internet-related-policies-cirp

[10]http://www.internetgovernance.org/2011/09/17/india-brazil-and-south-africa-call-for-creation-of-new-global-body-to-control-the-internet/

Scenario IV: Enhanced Cooperation Task Force (ECTF). After that CSTD meeting ended without any significant outcomes, in particular not creating any credible multistakeholder process (such as a WGIG-like working-group) that could lead, thropugh a UN based process, to a realization of the kind of enhanced cooperation that is foreseen in the Tunis agenda (and which I agree is needed) I have written up a proposal for a more bottom-up form of enhanced cooperation which could be established simply by interested governments and other stakeholders by starting to cooperate during the preparatory steps for policy decision processes:

Drawing inspiration from how the rough consensus processes of the Internet Engineering Task Force (IETF) works, the ECTF proposal[11] is to use similar processes for drafting policy recommendations on non-technical topics. That is not designed to supplant the role of national governments in deciding about which balance to choose between conflicting legitimate interests, a task which is a key part of just about every policy making process. Rather ECTF will improve the information input of such policy decision making process, and provide coordination between countries as follows: Where different reasonable policy choices exist, the concerned ECTF working-groups can work out a set of policy choices so that when different countries choose different options, any "legal interoperability" problems caused by these differences are minimized.

ECTF is designed to complement the IGF and benefit from synergies with the IGF. For example, ECTF Working-Group annual meetings will by default be organized as IGF pre-events.

One significant advantage of the ECTF proposal is that it provides a way to create politically credible policy recommendations which are based more directly than other policy processes on human rights principles and on evidence-based arguments on how these objectives can be best achieved.

The RFA ("Request For Action") recommendation documents produced by ECTF Working-Group would not directly constitute policy decisions, but rather they aim to inform the existing national policy-making processes about possible courses of action and the likely outcomes. In this way, ECTF would support and complement existing democratic processes around the world, in a way that allows global coordination to happen, but without restricting the freedom of any country to have legal rules that differ from the rules in other countries.

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[11]See http://enhanced-cooperation.org/RFA/1

6. Logical connections and legitimate reservations

Strategic thinking and evidence-based analysis requires tools for expressing and communicating logical connections in complex systemic contexts. I think that a good set of tools is the "logic trees" of Goldratt's "Theory of Constraints", as explained in particular in Dettmer's book "The Logical Thinking Process"[12].

Here is a simple example of such a logic tree, expressing that the CIRP proposal relies on reaching a sufficient degree of agreement within the UN, while the ECTF proposal doesn't have this precondition:
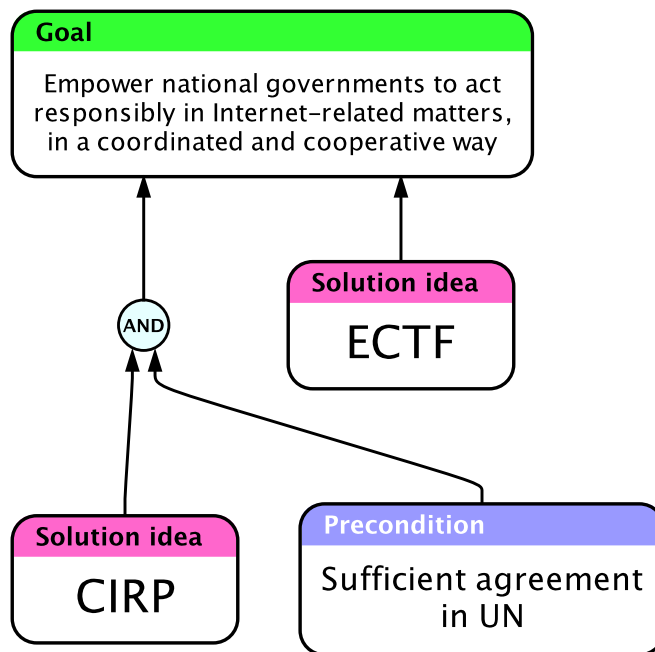
The main benefit of such logic trees is that they allow to express and discuss arbitrarily complex systems of causal relationships. There is a wide variety of "legitimate reservations" which may be expressed about such a logic tree, allowing to express different concerns in a way that adds to the shared understanding.

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[12]H. William Dettmer: The Logical Thinking Process. A systems approach to complex problem solving. Milwaukee, USA, 2007 (Quality Press). ISBN 978-0-87389-723-5.