The Internet Governance Forum (IGF) Workshop
"Towards a code of good practice on public participation in Internet governance - Building on the principles of WSIS and the Aarhus Convention"

Hyderabad, 4 December 2008
2:30 to 4:00 pm.

DISCUSSION PAPER ON THE CONCEPT OF A CODE OF GOOD PRACTICE ON PARTICIPATION, ACCESS TO INFORMATION AND TRANSPARENCY IN INTERNET GOVERNANCE

Submitted on behalf of
UNECE, the Council of Europe and APC

Based on an exploratory report by
Professor David Souter

INTRODUCTION

The UNECE, the Council of Europe (CoE) and APC have been concerned about issues of information and participation in Internet governance since the World Summit on the Information Society and the Working Group on Internet Governance which informed it during 2005. They initiated discussions and held workshops around this theme at both Athens (2006) and Rio de Janeiro (2007) meetings of the Internet Governance Forum (IGF); in both cases drawing particular attention to the Aarhus Convention as a potential starting point for thinking about the principles and instruments that might apply. A "Best Practice Forum" on Public participation in Internet governance: emerging issues, good practices and proposed solutions, held during the Rio IGF, enabled participants to explore the possibility of a mechanism that would enable Internet governance institutions to "commit themselves in their activities to transparency, public participation … and access to information."

During the Rio IGF a number of speakers expressed their support for the objectives of the initiative and there was considerable informal interest in the relevance of the Aarhus Convention both within the Best Practice Forum and beyond. More recently, during the February 2008 IGF consultation meeting in Geneva, the desirability of further work on this theme was emphasised by, among others, UNDESA and the Government of Switzerland. The latter urged that "in every forum and organisation [in Internet governance], there should be structures that allow the people, the citizens, the users to make them[selves] heard," recommended further consideration of the application of the WSIS principles, and explicitly welcomed the UNECE/CoE/APC initiative.

To keep the momentum in this process, the CoE, on behalf of the three partners in the initiative, commissioned an exploratory report from Professor Souter on the "Concept and Possible Scope of a Code of Good Practice on Participation, Access to Information and Transparency in Internet Governance". It was discussed at an open stakeholder workshop held in Geneva on 23 May 2008 which encouraged the development of this discussion paper for the Hyderabad IGF. This paper is a shortened and edited summary version of Professor Souter's report.

PART 1: THE CONTEXT

The proposition which is put forward by UNECE, the Council of Europe and APC, seeks to establish the meanings of "information", "participation" and "transparency" in this context. It draws on two source documents (the Aarhus Convention and the Geneva Declaration of Principles), and is essentially threefold:

- that the quality and inclusiveness of Internet governance would be improved by steps to make information about decision-making processes and practice more open and more widely available, and to facilitate more effective participation by more stakeholders;
- that ways of achieving this might be encapsulated in a "code of good practice" concerned with information, participation and transparency;
- that this "code of good practice" should be based on the WSIS principles as well as on existing arrangements in internet governance institutions, and might draw on the experience of developing and implementing the Aarhus Convention.

A "code of good practice" for information, participation and transparency

The proposition concerns a possible "code of good practice" to achieve more inclusive and better-informed Internet governance that can meet the needs of an increasingly diverse and continuously innovative Internet environment. Within this discussion paper, the term "code of good practice" is understood to mean a set of principles or guidelines, drawn up on the basis of relevant experience (particularly experience of what has proved successful), which can help to provide:

- a standard or benchmark against which existing practice may be measured; and
- a frame of reference which organisations may find useful in adjusting or developing their own arrangements.

A voluntary code of this kind which is not prescriptive in nature will only prove useful if it has value to its stakeholders. In the present context it needs to appeal therefore, both to those entities that enact or manage elements of Internet governance (Internet governance forums/institutions) and to consumers of Internet governance outcomes (Internet users, those engaged in other policy domains impacted by the Internet).

Internet governance (IG)

The meaning of "Internet governance" has been, and continues to be, contested. The principal distinction in discussions has lain between "narrow" and "broad" interpretations, i.e. between:

- "narrow" interpretations which focus on the management of the Internet, in particular on technical issues such as the domain name system, IP and WWW standards;
- and "broad" interpretations which include technical and public policy areas in which the Internet relates to other domains of social, economic, cultural and political decision-making (such as telecommunications policy, intellectual property, freedom of expression and crime).

"Narrow" issues are mostly (but not entirely) dealt with by entities that focus almost entirely on the Internet (e.g. the Internet Corporation for Assigned Names and Numbers (ICANN), the Internet Engineering Task Force (IETF), the World Wide Web Consortium (W3C), the Internet Assigned Numbers Authority (IANA), Regional Internet Registries (RIRs) etc.), or by entities that substantially do so (International Telecommunication Union Telecommunication Standardisation Sector (ITU-T)). "Broad" IG issues also include entities which are exclusively concerned with the Internet, but reach deeply into areas in which governance is mostly led by entities that are not primarily focused on the Internet (e.g. ITU, World Trade Organisation (WTO), World Intellectual Property Organisation (WIPO) and national and international policing).

The WSIS adopted the following working definition of Internet governance:
"Internet governance is the development and application by governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programmes that shape the evolution and use of the Internet".1

This working definition draws clear attention to two important aspects of Internet governance, which distinguish it from most other governance domains:

- that Internet governance is undertaken by diverse organisations, including many which have a private sector or civil society structure, as well as (and often rather than) by governments and intergovernmental organisations;
- and that the instruments of Internet governance reach well beyond formal legal instruments such as laws and standards, to include (for example) behavioural norms and even programme code.

[1] *Tunis Agenda for the Information Society*, para. 34.

Within this paper, Internet governance is interpreted broadly, to include issues of public policy which are affected by the Internet (such as intellectual property, cybercrime and freedom of expression) as well as narrower issues which more clearly "shape the evolution and use of the Internet." This broad interpretation is consistent with that taken by the IGF.

The distinction between "narrow" and "broad" interpretations remains important, particularly when considering issues of inclusiveness (information and participation). It is especially significant when considering differences between Internet governance agencies which lie entirely within the Internet space (such as ICANN) and governance agencies which have an impact on the Internet but which also have wider responsibilities (such as the ITU and WIPO).

There have been important differences in the development of governance between the Internet and other policy domains. Four of these are particularly significant for present purposes.

- Firstly, as noted above, at least within the "narrow" interpretation, Internet governance has evolved to a great degree without significant involvement of governments or intergovernmental organisations. The authority and expertise of government agencies within the Internet is therefore weak compared with their authority and expertise in other policy domains. Many, perhaps most, entities concerned with Internet governance have emerged from experience within the Internet community. Many governments are uncomfortable with this.
- Secondly, and largely as a result, the architecture of Internet governance is much more highly distributed than governance in other social and economic policy domains. Many entities have varying and often overlapping levels of formal and informal authority and influence. Their structures are diverse and many are highly flexible, responding to the dramatic changes in technology and markets which have characterised the Internet since its inception. And governance as such is not always present: whole areas of Internet practice have evolved in the spaces between governance rather than in areas that are recognisably governed.
- Thirdly, the boundaries between national and international governance are blurred in Internet governance. It is difficult to locate many Internet-enabled activities within national jurisdictions, and the rules and laws established by both national and international authorities can be bypassed relatively easily in "cyberspace". This is as true of rules concerning Internet governance itself as it is with those concerning copyright or censorship.
- Fourthly, the ethos of Internet governance has been significantly different from that in other policy domains. In particular, Internet governance entities have been less concerned to establish strict or formal rules (except where this is essential, as with IP addresses or the definition of routing protocols) and much more willing to accommodate experimental modes of technical and behavioural development (well summarised in the use of the phrase "rough consensus and running code" to characterise practice in the Internet Engineering Task Force (IETF)). As will be discussed later, the difference in ethos may be particularly marked between Internet and environmental experience.

All of these issues have made and may continue to make it more difficult to establish common norms or codes of practice in the Internet space than in other policy domains.

The WSIS principles

The WSIS principles concerning Internet governance are summarised in the Geneva Declaration of Principles, which the World Summit on the Information Society agreed in 2003 and read as follows:

"The international management of the Internet should be multilateral, transparent and democratic, with the full involvement of governments, the private sector, civil society and international organisations. It should ensure an equitable distribution of resources, facilitate

access for all and ensure a stable and secure functioning of the Internet, taking into account multilingualism".2

The Declaration of Principles goes on to consider the roles of different stakeholder groups in managing the Internet. In doing so, it identifies "policy authority for Internet-related public policy issues" as "the sovereign right of States", which have "rights and responsibilities for international Internet-related public policy issues." However, it also accords roles based on their expertise to the private sector, civil society, intergovernmental and international organisations, as follows:

- "The private sector has had, and should continue to have, an important role in the development of the Internet, both in the technical and economic fields.
- "Civil society has also played an important role on Internet matters, especially at the community level, and should continue to play such a role.
- "Intergovernmental organisations have had, and should continue to have, a facilitating role in the coordination of Internet-related public policy issues.
- "International organisations have also had, and should continue to have, an important role in the development of Internet-related technical standards and relevant policies."3

The wording of these consequential statements of role and responsibility was highly contested. However, the principle of multistakeholder participation in Internet governance was strongly emphasised in later WSIS discussions and was made a founding principle of the IGF. The Tunis Agenda for the Information Society also clarified the allocation of responsibilities agreed in Geneva as follows:
"… the management of the Internet encompasses both technical and public policy issues and should involve all stakeholders and relevant intergovernmental and international organisations".4

The WSIS principles themselves are vague, and words such as "transparent", "democratic" and "multistakeholder" are open to different interpretations. This reflects the fact that reaching agreement on them in the first place was to some extent an exercise in creative ambiguity. Some have suggested that they are so vague that the effort of seeking to develop a common understanding of them is not worthwhile. The proposition examined in this paper takes a different view: that it is both possible and worthwhile to build at least a more common understanding of them around existing principles and practice within the Internet community, and that the separate experience of the Aarhus Convention may be helpful in doing so.

Inclusiveness and multistakeholder participation

The critical issue where participation is concerned might be defined to be "inclusiveness", i.e. that Internet governance ("the international management of the Internet") should be:

- inclusive of all who wish to participate – both multilateral (all countries) and multistakeholder (all stakeholder communities); and
- inclusive in enabling their effective participation (through access, information and transparency).

"Multistakeholderism" has become a defining characteristic of WSIS and post-WSIS discourse on inclusiveness. In broad terms, this is taken to mean openness to participation (not necessarily on equal terms) by governments, the private sector and civil society - with the Internet technical community generally considered as a fourth stakeholder group, and international/intergovernmental organisations sometimes being considered as a fifth.

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[2] *Geneva Declaration of Principles*, para. 48. This text is reiterated in the *Tunis Agenda for the Information Society*, para. 29.

[3] *Geneva Declaration of Principles*, para. 49.

[4] *Tunis Agenda for the Information Society*, para. 35.

Although multistakeholderism has been widely adopted as a principle within Internet governance, there remain significant issues concerning its extensiveness and character. Different actors have different interpretations of multistakeholder participation in practice. Some see it primarily in representational terms (for example, allocating certain rights and representation to different stakeholder groups); while others seek to achieve multistakeholderism by treating stakeholder status as irrelevant to participants' engagement. These differences of interpretation pre-date WSIS in some Internet governance bodies (for example, debates about individual and government representation in ICANN, the membership structure of IETF, etc.).

The Aarhus Convention

The Aarhus Convention is an agreement of the UN Economic Commission for Europe, which was signed in 1998 and entered into force in 2001. It is concerned specifically with policy matters directly concerning or indirectly affecting the environment. It covers both:

- general statements of, frameworks for and legislation concerned with environmental policy (or policy in other areas which has environmental impact); and
- specific policy decisions of environmental significance within a broad list of policy areas which are included in an annex (covering the energy, metal, chemical, waste management, timber, transport and water industries, gas and oil, mining and quarrying, electricity and other activities).

The Convention is a rights-based instrument which establishes rights (largely for individual and legal persons, including NGOs and private sector businesses) and concomitant responsibilities (largely for implementing agencies, both governmental and private sector) in three areas concerning environment matters[5]:

- the right of access to information;
- the right of public participation in decision-making; and
- the right of access to justice.

The right of access to information here includes an expectation that governments and implementing agencies shall collect appropriate information as well as a requirement that they shall make it available.

The Aarhus Convention is not the only international governance instrument to establish rights for citizens and other non-official stakeholders concerning information and participation in formal decision-making processes. It is, however, widely considered to be the most inclusive instrument of its kind in extending rights to non-official parties, and is therefore regarded by proponents of information and participation rights as the frontier of best practice. It therefore provides an appropriate benchmark against which existing practice and proposals for information and participation in other sectors can be measured.

For the purpose of this discussion paper, it is useful to distinguish between the principles set out in the Aarhus Convention, which may be felt to have general relevance to information and participation in other policy domains, and the mechanisms which it deploys, which are more likely to be specific to environmental issues and governance.

[5] As defined by the Convention, "Environmental information" includes the state of elements of the environment, such as air and atmosphere, water, soil, land,etc. and the interaction among these elements; factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment and economic analyses and assumptions used in environmental decision-making; and the state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by such factors, activities or measures (article 2).

The core principles of the Aarhus Convention might be summarised as follows (quotations from the Convention in italics):

- that citizens and others should have *rights of access to information, public participation in decision-making, and access to justice* in respect of environmental issues (article 1);
- that the governments of states party to the Convention should legislate and regulate *to establish and maintain a clear, transparent and consistent framework to implement the provisions of* the Convention, including appropriate means of enforcement, and should assist and provide guidance to the public in making use of these provisions (article 3);
- that they should also *promote environmental education and environmental awareness among the public*, including Convention entitlements (article 3);
- that they should *provide for appropriate recognition of and support to associations, organisations or groups promoting environmental protection* (e.g. to relevant civil society organisations) (article 3);
- that they should promote the application of the principles of the Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment (article 3);
- that they should ensure that adequate information is collected by public authorities about proposed and existing activities which may significantly affect the environment, and should *publish and disseminate a national report on the state of the environment* at regular intervals (article 5);
- that public authorities should make information covered by the Convention freely available to the public, on request and as soon as practicably possible, unless disclosure is deemed inappropriate for certain specified reasons (which must be stated publicly) (article 4);
- that the public should be informed, *early in an environmental decision-making procedure*, and in an adequate, timely and effective manner, about any specific environmental matter than affects them, afforded the necessary information about it to understand and analyse its impact, and provided with means to express their views and otherwise participate in the decision-making process, *when all options are open and effective public participation can take place* (article 6);
- that the public should have the right to participate during the preparation of plans and programmes relating to the environment (i.e. to general environmental policymaking) and during the preparation … of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment (articles 7 and 8);
- that there should be rights of appeal for parties who feel that their rights to information and participation have been infringed (article 9);
- and that these rights should be exercisable by both individuals and groups/organisations (including civil society organisations), whether located within or without the national territory.

The Convention suggests a number of instruments that may be used by governments to implement these provisions, but expects implementation to vary according to national legal frameworks, rather in the manner of a European Union directive.6

Analysis

This section addresses two main questions:

- consistency between the WSIS principles and those set out in the Aarhus Convention;

[6] An exception to this approach is found in the European Community's implementation of the Protocol on Pollutant Release and Transfer Registers to the Aarhus Convention which, having adopted a regulation having direct effect in its Member States, aims to ensure uniformity of implementation of national PRTRs within the European Union.

- and similarities and differences between the environmental and Internet governance domains.

Principles of information and participation

Although the implementation of the basic principles set out in the Aarhus Convention is obviously, in some respects, specific to the environmental sector, the Convention's core principles themselves are consistent with the WSIS principles of multilateralism, transparency, democracy and multistakeholderism, which were adopted in Geneva. While certainly not the only way in which the WSIS principles can be interpreted, they offer an approach for adding substance to them by suggesting how principles of inclusiveness might apply in practice. They are therefore, prima facie, worth looking at as a possible model for interpreting the WSIS principles in Internet governance.

The Aarhus principles are also consistent with the objectives of inclusiveness which can be found in current Internet governance discourse and in the stated aims of many Internet governance bodies. In fact, all existing Internet governance bodies have their own established ways of handling information, participation and transparency. Their approaches are highly diverse. In the case of Internet-only bodies (such as ICANN or the RIRs), they have been developed by established participants to suit the particular roles and stakeholder communities they serve. In many instances, the resulting rules and norms are much more open/inclusive than those in comparable governance bodies outside the Internet. In the case of governance agencies which work primarily outside the Internet, information and participation rules and norms have been developed to meet the requirements of those organisations' wider roles, responsibilities and stakeholder groups rather than of Internet governance alone.

This instrumental diversity is often celebrated in the Internet community, and clearly has great value in making particular organisations' rules and norms fit for purpose. However, this does not exclude or reduce the potential value of agreeing common principles – which would enable organisations to gain from one another's experience, facilitate input from stakeholders who are "outside the club", and help to avoid conflicting decisions being adopted by different agencies. The Aarhus Convention offers a set of principles on information and participation which has been relatively well-tested in practice and which has gained widespread stakeholder consent, including that of governments. This suggests that it has potential value as a starting point for considering how information and participation might be facilitated in Internet governance.

Environment and Internet governance

If this applies to Aarhus principles, does it also apply to Aarhus instruments? Different areas of governance take different forms, derived, inter alia, from their historic development, the character of the interrelationships between different stakeholders that are concerned with them, and the attitudes and behavioural experience of participants. There are a number of substantial differences between the characters of environmental and Internet governance, which may affect the transferability of the Aarhus instruments. Three of these appear to be especially important.

Type of governance instrument available:

- The Aarhus Convention is an intergovernmental agreement which imposes mandatory information and participation requirements on governments and government agencies. These requirements can be enforced through national law, supported by "justice" instruments which are set out in the Convention itself. This is a highly rules-based environment which relies on enforcement as well as consent for application.

- Internet governance is very different. Its instruments are rarely intergovernmental or even governmental, and are unlikely to be enforceable through national law or other

traditional judicial instruments. Standardised instruments cannot readily be superimposed on an underlying layer of established law and precedent. Adherence to Internet governance norms and instruments is, therefore, essentially voluntary rather than enforceable.

Scope and purpose of governance:

- The Aarhus Convention seeks to enable stakeholders to raise issues of environmental significance in relevant areas of decision-making, principally because environmental factors are felt to have cross-cutting importance and so need to be incorporated before decisions are made (for example, through ex ante impact assessment). This raises the profile of environmental factors in decision-making, but does not necessarily make them the prime determinants of outcomes.
- Again, Internet governance is very different. In areas which are largely contained within the Internet space, Internet factors are almost invariably primary. In Internet-related policy areas such as intellectual property, where Internet governance interacts with governance in other policy domains, the key issues are more to do with ensuring consistency of practice across domains.

Ethos of governance:

- Environmental policy-making is substantially imbued with the "precautionary principle", i.e. the proposition that, "if one is embarking on something new, one should think very carefully about whether it is safe or not, and should not go ahead until reasonably convinced it is."7 It is the precautionary principle that has underpinned the demand for information and participation rights for those affected by or interested in environmental decisions, which finds expression in the Aarhus Convention.8
- Internet governance, by contrast, has been built around a culture of "permissiveness", of experimentalism and innovation, of "rough consensus and running code". The WSIS principles' endorsement of "stable and secure functioning of the Internet" is generally interpreted to include facilitation of innovation and creativity – setting standards on the basis of what works in practice (recognising that they can and will be adapted and developed over time), allowing services to be introduced without ex ante assessment of the impact they might have on society or economic and political behaviour. The Internet would not be what it is today with the precautionary principle in place.

Conclusions

The WSIS principles affirm aspirations for inclusiveness which are generally endorsed within the Internet space, but offer little in the way of practical approaches to implementation. The principles set out in the Aarhus Convention are consistent with the WSIS principles, and have the advantage of being tested in an established, if different, area of national and international governance. They therefore offer a potentially worthwhile starting point for considering how the WSIS principles might be more effectively addressed. However, the governance instruments of the Aarhus Convention are more context-specific to environmental issues, and likely to have less direct relevance for the Internet.

PART 2: EXPLORING THE CHALLENGE

This second part of the paper looks at issues concerned with the possible development and application of an information and participation code of good practice.

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[7] P. Saunders, *Use and Abuse of the Precautionary Principle*, cited in Wikipedia.

[8] See principles 10 and 15 of the *Rio Declaration on Environment and Development*

Mapping Internet governance

Mapping is an exercise that enables identification of the dimensions of Internet governance and of a possible structure for developing a code of good practice on participation, access to information and transparency in Internet governance. It helps to assess whether such a code of good practice would be useful (and what would make it so); what it might contain; how it might effectively be introduced and provides information on all the diverse stakeholders that are involved.

Internet governance is complex and highly distributed. Many different entities (formal and informal) have governance authority or power in different contexts, and their characteristics can be broken down in many different ways. For example:

- Some are exclusively concerned with the Internet; some largely concerned with the interface between the Internet and other technical or policy domains; some primarily concerned with other policy domains but with an interest in ensuring that conduct on the Internet is consistent with conduct in their primary domains.
- Some are primarily or exclusively technical; others largely concerned with policy issues or with particular stakeholder interests.
- Some are international or intergovernmental, with responsibilities to maintain global consistency; some regional (such as UNECE and the Council of Europe themselves); some national; some essentially stateless.
- Some are led by governments or international agencies; some by the private sector; some by groupings within the Internet community which cannot be defined in terms of traditional stakeholder groups.
- Some make significant use of traditional governance instruments such as legislation; some are based around technical standards and programme code; others rely much more on behavioural norms.

There have been a number of attempts to list and/or to map the entities concerned, although the task is a difficult one, not least because the number of agencies with some Internet governance roles is very large and because the scope of Internet governance is fluid. New aspects of Internet governance arise continually as a result of changes in technology, market extensiveness and service deployment, while the continued widening of the Internet's reach into other social and economic domains makes aspects of Internet governance more and more relevant to other established governance forums. One useful approach juxtaposes the scope of decision-making (*i.e.* the range of issues covered within a particular decision-making process or in a particular institution) against the type of governance instrument primarily used (the extent to which governance relies on "hard" instruments like laws and standards, or "soft" instruments like norms and policy agreements). [9]

A practical understanding of Internet governance needs to be multi-dimensional, involving a number of mapping tools. It has to comprehend factors such as the relative influence and decision-making power of different entities on different issues, the relationships between different stakeholders and IG entities, and variations between and within national Internet environments. In addition, the decision-making outcomes which interest stakeholders are usually concerned with issues – spam or cybercrime, for example – many of which are or need to be addressed by a number of different agencies together. Information and participation rights, however, apply to individual agencies, each of which has its own established practice. A common approach to information and participation rights could therefore facilitate cooperation between agencies on concrete issues and help stakeholders to coordinate their own input into these complex decision-making processes.

[9] This approach was developed in D. Maclean, D. Souter *et al*, *Louder Voices*, for G8 DOT Force, 2002, and developed by D. Maclean for Internet governance in 'Herding Schrödinger's Cats', in *Internet Governance: a Grand Collaboration* (UN ICT Task Force, 2004).

It is important to recognise that the boundaries between "technical" and "policy" issues (and, by extrapolation, agencies), while similar to those between "narrow" and "broad" definitions of Internet governance, are not identical with these. It is possible to distinguish between three main types of Internet governance issues:

1. Issues which are inherent to and encompassed within the Internet itself such as the development of a new engineering standard (e.g. as done by IETF);
2. Issues which are primarily contained within the Internet itself, but which have substantial policy (and sometimes technical) impacts on other policy domains – e.g. spam; or the proposal to establish a new generic top-level domain (gTLD) (e.g. within ICANN or ITU);
3. Issues which are primarily external to the Internet but which have substantial implications for it – for example, intellectual property (such as in WIPO).

Although in practice it is true that all technical issues (such as standards) have policy dimensions and implications - and that all policy issues likewise have technical dimensions and implications - what matters is the extent to which one or the other dimension predominates. Information and participation arrangements can be and are structured differently in different cases, and this diversity is probably essential in order to optimise the quality of decision-making outcomes for all stakeholders. Governance in areas which are primarily technical generally needs to be led by technical expertise, and the ability to participate in it will depend on technical competence in these areas. However, such technical governance also needs to comprehend the impact of technical decisions on other areas of governance and policy. External, policy-oriented participation is concerned with ensuring that technical developers and managers are aware of and take into account the social, economic and political implications of the technical choices that they make. In other words, it is about ensuring that technically optimal solutions do not result in social, economic or other policy outcomes that are sub-optimal or negative. This way of looking at the relationship is similar to the way in which the Aarhus Convention introduces environmental policy concerns into technical decision-making processes.

Mapping stakeholders

Within the Internet governance debate, up to five broad stakeholder communities are usually identified – governments, intergovernmental organisations, the private sector and civil society, plus the "Internet community" or "Internet technical community". These stakeholder communities address issues of both general relevance (for example, whether there should be more global domains) and of specific relevance (for example, whether there should be a specific .xxx domain). When it comes to more generic issues and debates, stakeholder groups tend to be identified in relation to Internet governance as a whole. This is comparable to participation in overall environmental policymaking in terms of the Aarhus Convention. When it comes to more specific instances of decision-making, however, the identification of relevant stakeholders depends less on whether they are from government, private sector or civil society and more on their relationship with the specific decision concerned.

Existing information and participation arrangements

Existing Internet governance institutions have a wide range of information and participation arrangements. Their diversity reflects the institutions' different histories, experience, professional and technical cultures. To take three examples:

- ICANN has long discussed and tested different options to balance the real and perceived requirements of its various stakeholders, from individual Internet users to sovereign nation-states, North and South. "At Large" and "Government Advisory Committee" structures have their supporters and detractors within debates that reflect different views about the legitimacy of ICANN's foundation documents and legal status. Nevertheless, ICANN processes are generally regarded as more open than those of intergovernmental agencies.

- The Internet Engineering Task Force (IETF) operates as an open association which develops standards and other technical instruments in a process of open debate and testing of ideas, through what is generally called "rough consensus and running code", rather than through formal time-bound decision-making processes. Participation is (in principle) open to anyone, but meaningful participation depends on technical expertise and peer group acceptance.
- The ITU is a United Nations agency which makes decisions through multilateral negotiations between representatives of Member States. Decision-making processes can be quite highly formalised, particularly where international competition is concerned. However, some areas of ITU decision-making have become more open, for example through the acknowledged importance of private "sector members", especially in standardisation.

In practice, those Internet governance bodies which have grown up in the Internet space tend to have much more open information and participation arrangements than those which are rooted outside the Internet, particularly intergovernmental agencies (which are often bound by United Nations multilateralism, based on governmental roles). Internet development has been led by non-governmental rather than governmental stakeholders. The culture of the Internet community during its development has placed emphasis on inclusiveness and on sharing of information and knowledge.

The case for a common approach

There is no single right approach for information and participation in Internet governance. Different agencies have developed different processes in order to deal with different kinds of decisions. These differences have proved useful in enabling them to make the decisions that they need to make. Many of these processes are more inclusive than is commonly found in other areas of international governance and participants in these Internet governance agencies are likely to be strongly committed to the processes they have.

Any approach to developing common principles for information and participation will be highly sensitive. Each Internet governance body has its own processes, which have developed out of its own experience; with which its constituents are familiar and (often) comfortable; and which have (in its terms and to its constituents) delivered outcomes that meet the organisation's (and the Internet's) requirements. In looking towards a common approach, there is much that can and should be learnt from these experiences. In addition, any consideration of multistakeholder participation also needs to take account of an equitable multilateral engagement. This means that increased information and participation rights almost certainly need to be accompanied by measures such as capacity-building, participation resources and ease of participation to increase the ability of disadvantaged stakeholders to participate.

Inclusiveness

Inclusiveness in this context means the opportunity for all who have an interest in a particular general policy or specific circumstance – i.e. those that are affected by it - to offer their opinion, argue for it and have it considered on its merits alongside those of other stakeholders.

Inclusiveness (both multilateral and multistakeholder) has:

- a normative value in itself, *i.e.* that it is "right and just" that all who are affected by a decision should have the opportunity to express their view and be heard;
- a practical value in improving the quality of decisions made as it engages more and wider expertise and experience, improves the understanding of the context, and facilitates consent and compliance among those affected by decisions.

The first of these characteristics is most attractive (and of most value) to those who are currently or normally outside the formal decision-making process (*e.g.* citizens, NGOs, local community organisations). It lies at the heart of the Aarhus Convention. The second is most attractive to those who currently participate and have influence within the formal process (national and local governments, property developers, Internet engineers *etc*). Information and participation arrangements that deliver *both* objectives are most likely to be successful and sustainable, because they add value for all stakeholders. Decision-making bodies need to put resources into enabling participation by providing useful and usable information about process and issues, by making decision-making meetings accessible at low cost, and by mitigating their perceived social exclusiveness. Even so, it can be difficult to ensure that the views of those most affected (such as local citizens) are heard as clearly as external groups with vested interests (including private sector firms and advocacy groups).

Principles and practice

The proposition examined in this paper is essentially concerned with process, i.e. with the means of engagement between stakeholders and decision-making forums. It is not concerned directly with substantive issues, i.e. with the particular policy choices that are being made. The case for inclusiveness is that more inclusive participation has more legitimacy and credibility, and that it should contribute positively to the quality of decision-making.

It is, of course, difficult to separate substance entirely from process issues. The outcomes of policy debates are always likely to be influenced by who participates within them; indeed, that is part of what makes inclusiveness contribute positively to legitimacy. In considering process issues, however, it is important to separate the value of inclusiveness per se from its possible outcomes. What matters, where process is concerned, is improving the quality of process itself rather than achieving particular substantive outcomes.

It is important, nevertheless, to consider the types of substantive decision-making which are concerned. Three distinctions are particularly important here:

- Substantive decision-making can be represented in a continuum ranging from purely (or almost purely) technical issues, such as the functionality of routing protocols to purely (or almost purely) policy issues, such as the regulation of child pornography on the Internet. Between these ends of the continuum lies a wide range of hybrid decision-making, some of which is more technical than policy-oriented, some more policy-oriented than technical.
- Decision-making can be divided into strategic policy-making, which is concerned with the overall direction of policy (for example, whether energy policy should focus on renewable, nuclear or carbon sources; whether there should be more gTLDs10); and specific decisions, which are concerned with particular instances of policy application (for example, whether a particular nuclear power station should be built, whether there should be a .xxx gTLD). Modes of policy-making are often very different for general/strategic and particular/specific decisions. The Aarhus Convention establishes information and participation rights in both contexts, but recognises that their application differs in practice. This is particularly important where the identification of "interested" stakeholders is concerned.11 Strategic policy-making can take a broad, general view of stakeholders when considering inclusiveness (governments, the private sector, civil society), whereas specific decisions need to pay much more (and more nuanced) attention to disaggregated interest groups (those living close to a nuclear power station; potential employees; local farm producers; etc.)
- Decision-making can be divided into international or global decision-making, which is concerned with establishing rules or norms that apply across the board; and national decision-making, which is concerned with the application of those rules or

[10] Generic top-level domains.

[11] For a definition of "the public concerned", see article 2, paragraph 5, of the Aarhus Convention.

norms within the legal, social, cultural, economic and political context of individual nation-states. International decision-making in most policy domains (but not Internet governance) is mostly conducted through intergovernmental organisations. National decision-making is mostly conducted through national and local government bodies. In both cases, there are very different experiences of the depth and scope of information and participation rights.

The first challenge in developing guidelines or a code of good practice is to aim at making it applicable across this broad range of decision-making forms and forums. This suggests that guidelines or codes of practice need to be expressed in broad and general terms – sufficient to give substance to the WSIS principles but not to exclude particular decision-making areas. Consistent with the Aarhus Convention, there might be a presumption in favour of accessibility of relevant documentation, *e.g.* a principle that information used in decision-making should be accessible to all who are interested (or who have an interest), unless there are strong grounds (on the basis, for example, of national security or personal privacy) that override this principle in a particular case.

A second challenge in developing guidelines or a code of good practice is concerned with achieving consistency of practice between countries. This is much easier to achieve within a geographical region than it is within the entire global community. But testing at a national level within a region can offer scope for piloting guidelines or a code of good practice at a regional level and demonstrate its potential value.

Developing consent

The development of decision-making processes in collective governance needs to be built on consent. Internet governance is highly complex and distributed and many different entities establish rules and norms which have the effect of managing Internet resources and behaviour. These different entities have grown up separately, without a common understanding of governance roles and responsibilities. Each has its own established ways of doing things, which are rooted in history, in experience, and in (professional and national) cultural norms. Any approach towards a code of good practice should recognise and build on the substance of inclusiveness that already exists within Internet entities.

This approach can provide a solid basis for exploring the relevance of external experience like the Aarhus Convention. Although different Internet bodies have different principles and practice concerning information and participation, these generally reflect an underlying ethos in favour of inclusiveness. It should be possible to distil principles from diverse practice which reflect that common ethos, and to relate those principles to those which have developed in other governance domains. Also, as the decision-making needs of Internet agencies change over time, having a set of guidelines or a code of good practice could help Internet agencies to manage the evolution of their processes in ways that better reflect inclusiveness and maximise the value that can be derived from it.

Developing resources and capabilities

Arrangements for more open provision of information and for more inclusive participation - of the kind included in the Aarhus Convention – provide means by which stakeholders can participate more effectively in governance. They are not, however, sufficient in themselves. The right to information does not mean that information can or will be used. The right to participate does not convey expertise or influence. Where agencies extend information and communication rights, they also incur responsibilities to enable would-be participants to understand the issues with which they are dealing, the implications for their own constituencies, and the processes in which they hope to engage. Only if this happens is greater inclusiveness likely to improve the quality of decision-making.

PART 3: RECOMMENDATIONS

The proposition put forward by UNECE, the Council of Europe and APC, which is explored in this paper, is essentially threefold. As summarised in the introduction to the paper, it is:

- that the quality and inclusiveness of Internet governance would be improved by steps to make information about decision-making processes and practice more open and more widely available, and to facilitate more effective participation by more stakeholders;
- that ways of achieving this might be encapsulated in a "code of good practice" concerned with information, participation and transparency;
- that this "code of good practice" should be based on the WSIS principles as well as on existing arrangements in internet governance institutions, and might draw on the experience of developing and implementing the Aarhus Convention.

The assessment of the appropriateness of the proposition, set out in this paper, rests on three key points:

- Internet governance is of significant and increasing importance but at the same time highly complex and distributed. Many different agencies/institutions are involved, some of which are encompassed within the Internet space while others have responsibilities reaching far beyond it. These agencies/institutions have very diverse ownership, management and participation structures, which offer varying degrees of inclusiveness – some of which go well beyond the norms in intergovernmental organisations.
- There is nevertheless concern among stakeholders about the quality of inclusiveness in Internet governance. A commitment to greater inclusiveness was made in the WSIS principles on Internet governance, adopted in 2003. The WSIS principles are, however, broad, ambiguous and open to different interpretations. They do not provide benchmarks against which information and participation practice can be measured.
- Although it stems from experience in a different policy domain, the Aarhus Convention offers a set of principles and practices for information and participation which have gained the consent of all stakeholder groups (governments, private sector and civil society actors) in that domain. These principles and practices might provide a framework for developing benchmarks and/or common principles and practices for Internet governance.

The first of these points is essentially a statement of fact. The second and third frame questions for consideration which are, essentially, as follows:

- Is it desirable (appropriate) and feasible (viable) to move beyond the WSIS principles to more formal benchmarks or codes of practice?
- Does the Aarhus Convention provide an appropriate basis or framework for doing so?

Whether it is desirable to move beyond the WSIS principles – to put more flesh on their bones – is a matter of opinion, which divides actors in and observers of Internet governance. The wording of the principles was, after all, for many involved in WSIS, an act of creative ambiguity. Many now regard existing inclusiveness arrangements in particular Internet governance forums as sufficient in practice, and regard their diversity as a reflection not just of history and culture but also of their fitness for contemporary purpose.

The case for giving the WSIS principles greater solidity and/or establishing a code of good practice for inclusiveness rests on three main propositions:

- it would give Internet governance processes and decisions more credibility and legitimacy in the eyes of important stakeholder groups (notably, but not exclusively, civil society);
- it would help different Internet governance bodies to coordinate their work and make decision-making more consistent; and

- it could improve the quality of decision-making by ensuring that a fuller range of views and a wider range of experience is brought to bear (notably at the interface between technical and policy concerns).

The principal arguments raised against building on the WSIS principles can be summarised as being:

- that it is unnecessary and may introduce new areas of conflict into governance;
- that it may jeopardise the innovativeness, creativity and responsiveness of Internet governance;
- and that it may adversely affect the quality of decision-making, in particular by lowering the general level of expertise and/or requiring longer time-frames for decisions to be made.

This paper takes the view that the potential advantages of seeking to give more substance to the WSIS principles are significant, and that it would be worthwhile exploring further the possibility of developing a set of principles or code of good practice that could secure broad acceptance within the Internet governance community. The risks identified are genuine but can and should be addressed in the design of any more substantive set of principles. In any event, the way in which the Internet evolves means that any instruments which tend to inhibit innovation or delay decision-making are unlikely to prove sustainable.

PART 4: CONCLUSION AND THE WAY FORWARD

This paper has reviewed the proposition, put forward by UNECE, the Council of Europe and the Association for Progressive Communications, to develop "a code of good practice on participation, access to information and transparency in Internet governance," drawing on the experience of the Aarhus Convention in an effort to fulfil the WSIS principles for Internet governance which were agreed in Geneva in 2003. At present, there is a wide range of diverse experience with information and participation principles in Internet governance. There is a good case for investigating whether it might be possible to develop common principles by drawing on this experience and on best practice in governance in other policy domains. The Aarhus Convention can readily be considered best practice outside Internet governance for this purpose. The report suggests a framework for continuing work on this theme which would seek to build a constituency of support around consensus principles that would put flesh on the bones of the WSIS principles, and might provide a basis for gradual deployment within the wide range of forums concerned with Internet governance today and in the future.

Moving forward

In this context, it would seem essential to move forward with some caution – testing the options of a common approach first with those agencies and in those national Internet governance institutions where there is most interest in exploring its desirability and potential development. Therefore, the first stage recommended for moving forward is one of dialogue and discussion at the IGF in Hyderabad on how one should or could proceed as well as with key Internet governance entities and some national stakeholders.

The assessment in this paper is that existing Internet governance processes and the Aarhus Convention both provide useful starting points.

There are a number of possible approaches. One way to move forward, for example, would emphasise the comparative aspects of the work. It would avoid suggesting any draft statements of principle from the outset, but build on assessment of experience in Internet governance agencies and with the Aarhus Convention, focusing on different dimensions and stages of inclusiveness. These dimensions/stages might include, for example:

- collation of information;
- access to information about issues and processes;

- participation rights and responsibilities in broad policy-making;
- participation rights and responsibilities in decision-making about specific issues;
- transparency of outcomes;
- supporting information and resources to would-be participants;
- stakeholder engagement in implementation; and
- monitoring and evaluation of inclusiveness.

In order to do this, a first step could be a comparative assessment ("mapping") of existing arrangements in a number of selected internet governance institutions that would agree to participate in such an exercise.

Another approach would be to start by suggesting clear and specific propositions as initial ideas that could be explored in dialogue with and between Internet governance agencies. A third approach would be to construct a dialogue around the Aarhus Convention principles themselves. This would involve comparing principles and practice in existing Internet governance agencies with Aarhus principles and practice.

The Aarhus Convention and its possible contribution

The Aarhus Convention can be taken to represent "best practice" in traditional governance circles – the frontier of existing information and participation rights in such domains. Their relevance to the present process could consist of comparisons which could be made both in a systematic review with Aarhus principles as well as Aarhus practices, likewise.

The second stage could then build on this review by seeking to identify what aspects of the experience of the forums/countries and of best practice in more traditional governance as represented by the Aarhus Convention, might have general applicability within the Internet governance. In other words, it would seek:

- to establish whether a clear, common set of principles could be put forward which could help Internet governance agencies fulfil their commitments to inclusiveness, and what those principles might be; and
- to identify any approaches or instruments which have proved especially successful for particular Internet governance entities or within Aarhus implementation, which might be considered by Internet governance agencies in general.

This assessment would have relevance to both "narrow" and "broad" Internet governance issues and agencies.

The main parties to be involved

The existing partnership proposing this initiative includes two intergovernmental organisations (UNECE and the Council of Europe) and a leading international civil society association (APC). The most important stakeholders are, however, Internet governance entities themselves and for the initiative to develop traction it is essential that it engages directly with a number of key Internet governance agencies.

Given the sensitivity and complexity of the issues involved, it would seem most productive to build on the input of a relatively small group of interested parties rather than to seek comprehensive engagement across the whole range of Internet governance entities and stakeholders. After the Hyderabad IGF, and building on the outcome of the workshop, a small working group could develop a work plan which could then be presented for more discussion in the wider Internet community.