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Information Document

Contribution to WTPF

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*An earlier version of this contribution was submitted to the February 2012 meeting of the Informal Expert Group (IEG). It was published as WTPF-IEG/3/18. Elements of the proposed Draft Opinion contained in that contribution were included in some of the opinions agreed by the IEG, but not all elements were discussed due to the limited time available during the IET meeting.

Therefore, this contribution proposes for consideration some revisions to Draft Opinion 5 agreed by the IEG.*

**Introduction**

**1. Background**

Much of the public discussion concerning the 2012 World Conference on International Telecommunications (WCIT-12) focused on a supposed drive by some countries to impose greater government control over the Internet.[[1]](#footnote-1) Some of the most vehement negative reactions to this supposed drive come from individuals who believe that “the Internet” should not be subject to ordinary national and international law; these people believe that “the Internet” should be governed by its own rules, which should be developed by “the Internet community” through informal methods (such an approach has been called anarchical). We will refer to such a school of thought as that of the “separatists”[[2]](#footnote-2). In the extreme form, this school of thought can be summarized as follows:

The defenses for hate, lies, drugs, sex, gambling, and stolen music are in essence that technology justifies the denial of personal jurisdiction, the rejection of an assertion of applicable law by a sovereign state, and the denial of enforcement of decisions. … In the face of these claims, legal systems engage in a rather conventional struggle to adapt existing regulatory standards to new technologies and the Internet. Yet, the underlying fight is a profound struggle against the very right of sovereign states to establish rules for online activity.[[3]](#footnote-3)

However, most national legislators and most national courts have refused this school of thought: laws are adapted specifically to deal with new technologies and the Internet, and courts apply old laws by analogy to new technologies and the Internet.[[4]](#footnote-4) It is now widely accepted that indeed existing laws and regulations must be adapted and applied appropriately to new technologies. As one author puts the matter:

… what happened to us over the last 20 years is that, both publicly and privately, we have become increasingly reliant on information technologies (creating new kinds of vulnerability, both collective and personal), we have migrated many routine activities to on-line environments in ways that are deeply disruptive (we live for many hours each day in our on-line worlds), and we have begun to appreciate that the technological management of our activities has major regulatory implications. If we want to retain a degree of control over our futures, then we need to exert some influence over the spheres of regulatory significance—which is to say, we need to work on creating the right kind of regulatory environment not only for information technologies but also for a raft of other technologies that are enabled by information technology and that are converging to shape our futures.[[5]](#footnote-5)

In some cases, it is felt necessary to harmonize to some degree national laws that related to new technologies (including the Internet), and intergovernmental organizations typically undertake this task, either agreeing “soft law” in the form of declarations or resolutions, or agreeing true international law in the form of treaties.[[6]](#footnote-6)

**2. The role of ITU**

Indeed, much of the work of the ITU has consisted, since its inception and to the present day, in formulating both soft laws and true international law whose purpose is to harmonize, to some extent, national laws so as to facilitate peaceful relations, international cooperation among peoples and economic and social development by means of efficient telecommunication services. The soft laws take the form of Resolutions and Recommendations, the true international law is found in the Constitution, Convention, Radio Regulations, and International Telecommunication Regulations.

It is not disputed that the ITU has contributed in many ways to the growth of telecommunications (including the Internet) during the past 20 years, in particular through its development and standardization activities.

The ITU membership has agreed that ITU is an appropriate forum in which to discuss certain Internet-related public policy issues. Resolutions 101, 102, and 133 resolve:

to explore ways and means for greater collaboration and coordination between ITU and relevant organizations\* involved in the development of IP-based networks and the future internet, through cooperation agreements, as appropriate, in order to increase the role of ITU in Internet governance so as to ensure maximum benefits to the global community;
\*Including, but not limited to, the Internet Corporation for Assigned Names and Numbers (ICANN), the regional Internet registries (RIRs), the Internet Engineering Task Force (IETF), the Internet Society (ISOC) and the World Wide Web Consortium (W3C), on the basis of reciprocity.

And ITU Council Resolution 1305 invites Members States to recognize the scope of work of ITU on international Internet-related public policy matters, represented by the list:

1. Multilingualization of the Internet Including [Internationalized (multilingual) Domain Names](http://www.itu.int/publ/T-RES/publications.aspx?lang=en&parent=T-RES-T.48-2008)
2. International Internet Connectivity
3. International public policy issues pertaining to the Internet and the management of Internet resources, including domain names and addresses
4. The security, safety, continuity, sustainability, and robustness of the Internet
5. Combating Cybercrime
6. Dealing effectively with spam
7. Issues pertaining to the use and misuse of the Internet
8. Availability, affordability, reliability, and quality of service, especially in the developing world
9. Contributing to capacity building for Internet governance in developing countries
10. Developmental aspects of the Internet
11. Respect for privacy and the protection of personal information and data
12. Protecting children and young people from abuse and exploitation

However, some of the discussions in ITU have been very difficult because, on the one hand, non-ITU members have challenged the agreements made within ITU; and, on the other hand some ITU members take the view that such discussions in ITU should only take place if they are opened to non-ITU members.

There does not appear to be any real disagreement regarding the need to consult widely and to encourage multistakeholder discussions. The disagreement appears to relate more to the best way to conduct truly open and inclusive consultations. Some take the view that all stakeholders, even non-ITU members, should be able to participate in ITU meetings in their own right. Others take the view that it is more appropriate to conduct multistakeholder consultations at the national level, in the national language, and to include, as appropriate, stakeholders in national delegations to the ITU. The topic has been discussed at various levels in ITU and, as a result, various steps have been agreed by the ITU membership, for example to make certain documents publicly available and to invite, in some cases, comments from the general public.

**3. WCIT-12 and Internet governance**

The ITU membership failed to reach full consensus at WCIT-12 regarding how best to adapt the International Telecommunications Regulations to the current telecommunications environment, of which the Internet is a key component. The failure to reach consensus was largely due to differing views regarding the role of national governments and of intergovernmental organizations with respect to Internet governance. Those differences in views were highlighted, at times in an exaggerated manner, during a pre-WCIT press campaign[[7]](#footnote-7) which may have contributed to making negotiations at WCIT more tense and difficult than initially expected.

Surprisingly, some have used the failure to reach full consensus at WCIT to argue that “ITU opposes the interests of American citizens and businesses by advocating practices of state-sponsored censorship and oppression that are antithetical to our Constitution, laws, and national ideals of freedom”; that “ITU is conducting a campaign to usurp control of the Internet from the open and transparent system of multi-stakeholder Internet governance that created and enables the Internet that we know today”; and that “the ITU is spending more than $180M/year to oppose the Internet”.[[8]](#footnote-8)

**4. A way forward?**

Ignoring such misleading rhetoric, it seems appropriate to recall that the issue of the proper role of governments with respect to Internet governance was extensively debated at the World Summit on the Information Society, and consensus text was agreed in that forum. Paragraph 35 of the Tunis Agenda states that “Policy authority for Internet-related public policy issues is the sovereign right of States. They have rights and responsibilities for international Internet-related public policy issues.”

The role of intergovernmental organizations (such as ITU) is also covered in paragraph 35, which states that “Intergovernmental organizations have had, and should continue to have, a facilitating role in the coordination of Internet-related public policy issues.” Of course, as also stated in paragraph 35 other types of stakeholders have a role in technical standardization and other aspects of Internet.

And, as stated in paragraph 55, the existing arrangements for Internet governance have worked effectively. Paragraphs 35 and 55 can be viewed as a compromise. Some might take the view that paragraph 55 basically prohibits any change to the status quo. It is not clear that all the signatories of the Tunis Agenda would agree with that interpretation. Further, the Tunis Agenda was agreed in 2005, and paragraph 55 clearly refers to the situation at that time: it does not make any statements about what might or might not be optimal in the future—as opposed to paragraph 35 which does refer to the future.

Three Resolutions of the ITU Plenipotentiary Conference – 101, 102 and 133 (agreed in 2010) – are elaborations of the principles agreed at WSIS; these resolutions outline ITU’s mandate regarding certain Internet governance issues.

In summary, there was agreement at WSIS that Internet is a technology subject to each individual nation’s national laws, regulation, and enforcement action domestically, even if there is a wide range of diverse national approaches. To the extent that a harmonization of national approaches is required, ITU as a multistakeholder international organization is one of the appropriate forums for discussion of certain Internet governance issues: indeed, international public policy is a natural extension of sovereign rights of national authorities to regulate their national telecommunication, while cooperating to foster increased international telecommunications.

Apart from the “separatists” mentioned above, it is generally accepted that national laws and regulation apply to Internet, although some laws and regulations might be adjusted specifically for Internet (for example, a more liberal regime might apply to Internet Service Providers). So it seems appropriate to discuss the legislation/policy-development process related to the Internet and what is or should be the role of national authorities in these processes nationally and internationally. As stated above, the ITU would appear to be an appropriate forum for some of those discussions.

Of course, in accordance with the WSIS principles, inputs to ITU from Member States should be based on open and inclusive consultations, involving all stakeholders, at the national level. And this independently of whether non-state entities contribute directly to discussions at the ITU in their capacity as ITU members.

In order to reflect the above considerations, it is proposed that WTPF consider the revisions proposed below to the draft opinions agreed by the Informal Expert Group.

**Proposal
Revisions to Draft Opinion 5**
*The original is found in document WTPF13-IEG3/C 42*

**DRAFT OPINION 5: SUPPORTING MULTI-STAKEHOLDERISM IN INTERNET GOVERNANCE**

The fifth World Telecommunication/ICT Policy Forum (Geneva, 2013),

*noting*

a) that some take the view that national and international laws do not, or should not, apply to the Internet or to online activities;

b) but that courts of law have generally applied established law to Internet and to online activities;

c) and that national and international laws have been adapted, as necessary, to cover Internet and online activities,

*recalling*

Paragraph 34 of the Tunis Agenda for the Information Society (Tunis Agenda) which provides a working definition of Internet Governance as 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,

*recognizing*

a) that, as per paragraph 37 of the Tunis Agenda, a multi-stakeholder approach should be adopted as far as possible, at all levels, to improve the coordination of the activities of international and intergovernmental organizations and other institutions concerned with Internet Governance and the exchange of information among themselves;

b) that, as per paragraph article 35 of the Tunis Agenda, that the management of the Internet encompasses both technical and public policy issues and should involve all stakeholders and relevant intergovernmental and international organizations. In this respect, it is recognized that:

i) Policy authority for Internet-related public policy issues is the sovereign right of States. They have rights and responsibilities for international Internet- related public policy issues;

ii) 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;

iii) Civil Society has also played an important role on Internet matters, especially at community level, and should continue to play such a role;

iv) Intergovernmental organizations have had, and should continue to have, a facilitating role in the coordination of Internet-related public policy issues; and

v) International organizations have also had, and should continue to have, an important role in the development of Internet-related technical standards and relevant policies.

c) that, as per paragraph 55 of the Tunis Agenda, existing arrangements for Internet Governance have worked effectively to make the Internet the highly robust, dynamic and geographically diverse medium that it is today, with the Private Sector taking the lead in day-to-day operations, and with innovation and value creation at the edges;

d) that, as per paragraph 69 of the Tunis Agenda, there is a need for enhanced cooperation to enable Governments, on an equal footing, to carry out their roles and responsibilities in international public policy issues related to the Internet, but not in the day-to-day technical and operational matters that do not impact on international public policy issues,

*considering*

a) Resolution 101 (Rev. Guadalajara, 2010), Resolution 102 (Rev. Guadalajara, 2010) and Resolution 133 (Rev. Guadalajara, 2010) each of which resolves to explore ways and means for greater collaboration and coordination between ITU and relevant organizations (including, but not limited, to ICANN, IETF, RIRs, ISOC, W3C) on the basis of reciprocity, through cooperation agreements, as appropriate, in order to increase the role of ITU in Internet governance so as to ensure maximum benefits to the global community;

b) Resolution 3 of the World Conference on International Telecommunications (Dubai, 2012);

c) that while the ITU membership has agreed that ITU is an appropriate forum in which to discuss certain Internet-related public policy issues, such discussions have been difficult because, on the one hand non-ITU members have challenged that agreement; and, on the other hand some ITU members take the view that such discussions in ITU should only take place if they are opened to non-ITU members;

d) that many countries conduct open and inclusive consultations at the national level, involving all stakeholders, and encourage all stakeholders to participate in ITU as members of national delegations,

*emphasizing*

a) the constructive role played by the ITU in fostering the continuing development of the Internet, in particular through activities of its three Sectors;

b) that ITU is a multistakeholder organization, open to the private sector and to civil society, which can participate both as members in their own right and as members of national delegations;

c) the important and constructive role of open and inclusive multistakeholder consultations at the national level,

*is of the view*

1 that it is important to further implement multi-stakeholder practices as outlined in the relevant paragraphs of the Tunis agenda;

2 that all parties should continue to cooperate in good faith in accordance with their respective roles and mandates;

3 that the ITU, within its mandate, must continue to contribute to the development of the Internet and to facilitate intergovernmental discussions on Internet governance;

4 that ITU should further develop mechanisms to consult as widely as possible, including by making documents publicly available on the ITU’s web site and by accepting comments from non-members,

*invites Member States and other stakeholders*

1. to explore ways and means for greater collaboration and coordination between governments; the private sector, international and intergovernmental organizations, and civil society, as well as greater participation in multistakeholder processes, with a view to ensure that the governance of the Internet is a multi-stakeholder process that enables all parties to continue to benefit from the Internet;
2. to contribute based on their roles and responsibilities as stated in paragraph 35 of the Tunis Agenda;
3. to ensure that all stakeholders are appropriately consulted at the national level and that their views are appropriately represented during discussions in ITU, for example by including them in national delegations as appropriate;
4. to focus in particular on how to improve the participation of developing country stakeholders in the initiatives, entities, and institutions involved in various aspects of Internet Governance.

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1. Numerous articles to that effect can be found at: <http://www.scoop.it/t/wcit> [↑](#footnote-ref-1)
2. This term is used in Joel Reidenberg, “Technology and Internet Jurisdiction” (2005) 153 *University of Pennsylvania Law Review*, p. 1951. [↑](#footnote-ref-2)
3. Reidenberg, *op. cit.*, pp. 1953-1954. [↑](#footnote-ref-3)
4. There is nothing new about this. A court in New Hampshire, USA, determined in 1869 that a telegraph was a valid means to form a contract: see *Howley vs. Whipple*, 48 N.H. 487, 488 (1869). Relatively old reviews of the situation can be found in Benjamin Wright, *The Law of Electronic Com*merce (1991) Little, Brown and Company; and in Clive Gringras, *The Laws of the Internet* (1997) Butterworths; an up-to-date review can be found in Chris Reed, *Making Laws for Cyberspace* (2012) Oxford University Press. In almost all countries, laws concerning libel, intellectual property, pornography, gambling, sales of pharmaceuticals and controlled substances, etc. determine if certain content can be legally published online, see <http://en.wikipedia.org/wiki/Internet_censorship_by_country> [↑](#footnote-ref-4)
5. Roger Brownsword, The shaping of our on-line worlds: getting the regulatory environment right (2012) 20 *International Journal of Law and Information Techn*ology, p. 272. [↑](#footnote-ref-5)
6. We cite only a few example of such work. In WIPO, see <http://www.wipo.int/copyright/en/internet_intermediaries/index.html> ; see also <http://www.wipo.int/treaties/en/ip/wppt/index.html> . In the Council of Europe, see art 20.1.f of the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. [↑](#footnote-ref-6)
7. Many related press articles can be found at <http://www.scoop.it/t/wcit> [↑](#footnote-ref-7)
8. See <http://DefundTheITU.org> and <https://petitions.whitehouse.gov/petition/de-fund-itu/mSJ49QcV?utm_source=wh.gov&utm_medium=shorturl&utm_campaign=shorturl> [↑](#footnote-ref-8)