

# REPUBLIC OF MALTA



**Statement by  
Dr. Alex Sceberras Trigona  
Special Envoy of the Prime Minister of the Republic of Malta  
Permanent Mission of the Republic of Malta to the United Nations**

**World Summit on Information Society Review Process  
New York, 15 December 2015**

---

Excellencies,

Earlier this year at the stimulating UNESCO Conference in Paris on “Connecting the dots: Options for future Action” I continued advocating applying the legal concept of Common Heritage of Mankind (CHOM) to the Internet’s critical infrastructure as I have been doing since way back in 1997 in Kuala Lumpur, Malaysia at the World Internet Forum, organized by the Commonwealth Network for Information Technology for Development (COMNET-IT) sponsored by the Commonwealth Secretariat, London. I reiterated this again, most recently, just last month in Malta during the Commonwealth Heads of Government (CHOGM) Summit meeting at the Commonwealth Youth Forum appealing to those youngsters, especially from small island states relying so existentially on the Internet for their sustainability, to take up their share of this advocacy too now.

In 1997 I had raised the sharply contrasting choices facing the world community regarding the Internet:

- Should the Internet be left to develop alone or should we endeavour to bring it into the fold of **Common Heritage of Mankind [CHOM]**?
- Should the Internet be left unprotected, governed only, as it were, by the law of the jungle as a *“res nullius”*? Or should it be internationally recognized and protected in the interest of present and future generations, constructed as it is – increasingly internationally – as *“res communis omnium”* as common property, and therefore eminently appropriate for stewardship management as part of the Common Heritage of Mankind?

We have come a long way since then as the Paris and Hague Conferences earlier this year showed. The original resistance to CHOM as I remember in the Council of Europe Parliamentary Assembly in the late 90s debates on these points had slowly but surely already started to evaporate in the face of rising cybercrime. This was soon to be tackled with the inter-governmental CoE Cybercrime Budapest Convention adhered to also by major non-European countries. But other developments too had started eating into the old positions held by those who still doubted the benefits of institutionalization.

The operating mantra on Internet Governance was first of all a pure multi-stakeholder model. This is now generally accepted. Moreover it is contextually better supported by **“Mankind”** in CHOM. The word 'Mankind' undoubtedly covers all stakeholders. CHOM also justifies improved mechanisms to equitably narrow the **‘digital divide’** wherever, for the benefit of **“Mankind”** particularly in

developing countries, including by intensifying even further capacity building programmes, as so commendably articulated in the Addis Ababa Agenda reflected in last month's EU/Africa Summit. Similarly the complex **Privacy** debate demands an enveloping framework as CHOM provides all stakeholders with. The basic point is that the CHOM paradigm gives us the much sought for 'global policy coherence'. In other words we are faced with and must deploy all our endeavours to overcome the great challenge of globalization having spread 'de facto' but not yet 'de jure'.

Secondly, even the old admonition *“If it ain't broke, don't [try to] fix it”* is now no longer applicable what with developing strains and cracks in the edifice emerging recently as manifested by the cybersecurity deficit already demanding a variety of governmental interventions across the globe. The old admonition is therefore making way for regulating the internet not only by applying general principles of international law to cyber-space, but also by customizing rules for the Internet by analogy with the UN Convention on the Law of the Sea.

Third, ours is a Review process where we are obviously still operating within the UN's remit of WSIS itself. Ten years ago the 2005 Working Group on Internet Governance [WGIG] had already very clearly recommended in para 48 of its Report under **GLOBAL PUBLIC POLICY AND OVERSIGHT** that the WGIG “recognized that any organizational form for the governance function/oversight should adhere to the following principles:-

- No single Government should have a pre-eminent role in relation to international internet governance;
- The organizational form for the governance function will be multilateral, transparent and democratic, with the full involvement of Governments, the private sector, civil society and international organizations. [WSIS Declaration of Principles, para 48, Geneva]”

Instead of attempting to remove the word “multilateral” from the remit itself, it is strange that not enough time has been devoted to examining ways and means how to safeguard International Internet Governance from the “pre-eminent” role of any single Government and how best to protect the Internet internationally for the present as well as for the next billion users too – viz., from recognized new threats developing over the past 10 years.

Let us therefore agree that **Protecting the Internet and the global Information ecosystem it supports for the benefit of present and for future generations whilst enhancing universal accessibility to them** should be our overriding objective.

This is why more attention and support should be given to cybersecurity and the valid work done by the UN's Group of Governmental Experts [GGE] which published three reports so far in 2010, 2013 and this year 2015<sup>1</sup>. Similarly important is the workshop carried out by the Universities of Harvard, MIT and the University of Toronto with their useful conclusions on Cybernorms<sup>2</sup>.

---

<sup>1</sup> The Three UN GGE Reports can be found at A/65/201 ([www.un.org/ga/search/view\\_doc.asp?symbol=A/65/201](http://www.un.org/ga/search/view_doc.asp?symbol=A/65/201)) in 2010, A/68/98 ([www.un.org/ga/search/view\\_doc.asp?symbol=A/70/174](http://www.un.org/ga/search/view_doc.asp?symbol=A/70/174)) in 2013 and A/70/174 ([www.un.org/ga/search/view\\_doc.asp?symbol=A/70/174](http://www.un.org/ga/search/view_doc.asp?symbol=A/70/174)) this year.

<sup>2</sup> For a report on this workshop, see R. Hurwitz, An Augmented Summary of The Harvard, MIT and U. of Toronto Cyber Norms Workshop, May 2012. <https://citizenlab.org/cybernorms/> The framing questions for Cyber Norms Workshop are available at <https://citizenlab.org/cybernorms2012/>

Most to the point were U.S. Secretary of State, Senator Kerry's list of five principles as he declared in his 24th Inchon Memorial lecture on 18th May this year that the Internet needs rules to be able to flourish, apart from recognizing that basic rules of international law apply in cyberspace. The question arises if these suggested rules are already 'de lege ferenda' elements of a future International Convention on the Internet as Kerry admitted that "even with these principles, ensuring international cyber stability will remain a work in progress".

"We still have a lot of work to do to develop a truly reliable framework – based on international law – that will effectively deter violations and minimize the danger of conflict." Kerry claimed furthermore that "these 5 principles are universal concepts that should be appealing to all responsible states, and they are already gaining traction".

That the 5 principles seek to regulate inter-state behaviour in cyberspace says much for these recently new found governmental responsibilities. They contrast so sharply now with the original euphoric glee of some excited cyber-gurus' pronouncements 20 years ago. They denounced governments - prohibiting them from tampering with cyberspace which they idealistically declared in 1998 to be completely 'Independent'<sup>3</sup> and well beyond governmental jurisdiction. In fact precise cyber geo-location has since re-introduced enforceable national jurisdiction. We have come a long way since resistance to international law applying to the internet based on this ungrounded euphoria started to fall flat, first, because it became increasingly apparent that it was bad science, technologically defective and untenable in fact, secondly because of the loss of trust when reliance on nonexistent Weapons of Mass Destruction was sought to justify the 2003 Iraq War and third due to the more dramatic and widespread loss of trust due to the 2013 Snowden revelations.

Time does not permit me to enunciate Kerry's 5 principles which are footnoted here for ease of reference<sup>4</sup> but it is manifestly obvious that we are now definitely back to the UN's basic business of transforming power into law, through diplomacy, in fact back to negotiating new legislation on the Internet. We have an impressive model. This very building and the UNO itself are living testimony 70

---

<sup>3</sup> A Declaration of the Independence of Cyberspace - by John Perry Barlow issued in Davos, Switzerland, 8<sup>th</sup> February, 1998 was perhaps the high point of the post cold war defiant euphoria. Although not responsible for Perry Barlow's views the prestigious Davos World Economic Forum has since then focussed more attention on the efficient workings of UNCLOS regarding deep seabed mining and also on the future of cyber-governance with e.g. Carl Bildt's counsel to the US in Project Syndicate "One Net, One Future" last October "the US needs to adapt as well. It must accept that it is no longer the only global cyberpower, and that its own behavior must comply with globally accepted norms to which all must adhere."

<sup>4</sup> "First, no country should conduct or knowingly support online activity that intentionally damages or impedes the use of another country's critical infrastructure.

Second, no country should seek either to prevent emergency teams from responding to a cybersecurity incident, or allow its own teams to cause harm.

Third, no country should conduct or support cyber-enabled theft of intellectual property, trade secrets, or other confidential business information for commercial gain.

Fourth, every country should mitigate malicious cyber activity emanating from its soil, and they should do so in a transparent, accountable and cooperative way.

And fifth, every country should do what it can to help states that are victimized by a cyberattack."

years later of the victors' commitment at the end of WWII to transform power into law, through diplomacy, turning swords into ploughshares!

Nowhere has this been more closely observed than by Admiral Michael Rogers, NSA Director, who in Estonia on a Cyber-warfare Conference on the 27<sup>th</sup> May, 2015, cited the Maltese 1967 initiative proclaiming the sea-bed and its subsoil beyond national jurisdictions as "Common Heritage of Mankind" [CHOM] in Article 136 et. seq. of the UN Convention on the Law of the Sea [UNCLOS] as a hopeful equivalent for an analogous Law of the Internet. "Can we create a '**global commons**', so to speak, that enables open, reliable, safe and resilient communications, a flow of information and ideas?" he said. "(This should be) in a framework that maximises its use for all of us." He continued, "I'd like to see if we can create something equivalent to the maritime world in the cyber world that enables us to keep moving information, keep moving commerce, keep moving ideas on a global basis."

Information as a common pool resource had already been thoroughly analysed by Nobel Prize winner Elinor Ostrom together with colleagues at Duke University<sup>5</sup>. Earlier still we had thrived on the UNDP's commendable research work on global public goods [GPG] and on the internet as a GPG<sup>6</sup> though this categorization similarly to '**global public resource**' or '**global public facility**' do not of their own accord generate international rights and obligations as with CHOM. Nor in general does reliance on Conflict of Laws or Private International Law resolve all internet disputes adequately where applicable or at all where extra-territorial legislation is involved. The critical infrastructure of the Internet as CHOM would delineate clearly which aspects of the physical and content layers could be left to PIL and which parts of the logical layer would fall in its remit.

It is to be noted that the international legal principle of Common Heritage of Mankind is not only to be found in international treaty law but is now part of international customary law. Besides UNCLOS 1982 we find CHOM in the Outer space Treaty 1967, the Moon Treaty 1979 and the Antarctic Treaty 1959 with its 1991 Protection Protocol. The CHOM concept is also embedded in the other Maltese initiative of 1988 UNGA A/Res/43/53 proposing "Conservation of Climate as part of the Common Heritage of Mankind" leading to the 1992 UN Framework on Climate Change and last Saturday 12<sup>th</sup> December, in Paris to the historic COP21 legally binding conclusions on Climate Change. Worth mentioning too are UNESCO's Treaty on the Human Genome [1997] and on the Responsibilities of Present Generations towards Future Generations [1997] and the 1972 Convention to recognize and protect the World's Natural and Cultural heritage as the CHOM.

Moving on now from the geo-political and legal justifications for CHOM. Amongst the many academic contributions advocating the international regulation of the Internet and/or as CHOM in this regard I would highlight four:-

---

<sup>5</sup> "Law and Contemporary Problems" Duke University, USA, Volume No.66, Nos 1 &2, Winter & Spring 2003. Special issue on "THE PUBLIC DOMAIN". "Ideas, Artifacts and Facilities: Information as a Common-pool resource" – Charlotte Hess, Elinor Ostrom.

<sup>6</sup> Global Public Goods: International Co-operation in the 21st Century. Edited by Inge Kaul, Isabelle Grunberg, Marc Stern, published for the UNDP, 1999. Inge Kaul, Pedro Conceição, Katell Le Goulven and Ronald U. Mendoza - Providing Global Public Goods: Managing Globalisation, Oxford University Press, New York, 2003. On Internet as a GPG see The Public Face of Cyberspace: The Internet as a Public Good - Deborah Spar, published in Global Public Goods: International Co-operation in the 21st Century, Kaul, Grunberg and Stern (eds), Oxford University Press, New York, 1999. This was a UNDP publication, available from <http://web.undp.org/globalpublicgoods/TheBook/globalpublicgoods.pdf>

- In 2004 John Matthiason proposed a concept paper “**A Framework Convention: an Institutional option for Internet Governance**” for the Internet Governance Project<sup>7</sup>.
- In 2006 Augusto Segura-Serrano had already published a Jean Monnet paper at the New York School of Law on “**Internet Regulation: a hard law proposal**” assessing which of UNCLOS articles could be transposed to a UN Convention on the Law of the Internet fine-tuning the Internet as CHOM to the ‘critical resources of the Internet’ as CHOM.
- In March 2015, Dennis Broeders presented his report “**The Public Core of the Internet: an international agenda for internet governance**” to the Dutch Foreign Minister. Through steady and technically corroborated argumentation he concludes by proposing that the internet’s backbone should be an international neutral zone as a global public good whose identified protocols and infrastructure are to be safeguarded by working towards establishing an international norm – a standard, prompting CHOM? And, may I add, for Peace and Peaceful Purposes only - that prohibited governments from appropriating or interfering, for the sake of keeping the internet infrastructure operational and trustworthy. This standard, he recommends, could be disseminated through relevant UN forums as well as through regional organisations such as the Council of Europe, the OECD, the OSCE, ASEAN and the AU and would lay the foundations for what could eventually expand into a broader regime.
- More specifically, Jovan Kurbalja, my former student, friend and colleague with whom I've worked on this from the beginning, had outlined his thoughts in a blog post December 2013 on “**The International Inviolability for the root zone**”<sup>8</sup> later developed further into a DiploFoundation policy brief in October 2014 on Possible Practical Solutions for global inviolability of the Internet Root Zone, one of which was a CHOM status of the root zone that would support inviolability through exclusion of claims of sovereignty [very much like UNCLOS] over the root zone and management by mankind as a whole by, amongst others, codifying the US [and all other states] constant and customary practice of non-interference with the root zone and with the domain spaces of other states without their consent, through an International Internet Root Convention.

The fact that not only the successful 2014 NetMundial conference in Brazil, but also the European Union is deeply convinced that Internet Governance problems cannot be solved on a national basis and therefore seeks to diplomatically reconcile and broker the extreme geo-political players at both ends of the spectrum. Under Action 97 the EU has undertaken to promote the internationalisation of Internet Governance. More specifically it seeks to identify how to globalise the IANA functions, whilst safeguarding the continued stability and security of the domain-name system and to establish a clear timeline for the globalisation of ICANN, including its Affirmation of Commitments. Committed as we Europeans are to the EU’s DIGITAL SINGLE MARKET, can that be achieved sustainably without a Global Digital Single Market? Which further strengthens the arguments for the CHOM as an essential operating framework.

---

<sup>7</sup> The Internet Governance Project is a partnership of the Convergence Center, Syracuse University School of Information Studies, the Daniel P. Moynihan Institute of Global Affairs of the Maxwell School of Syracuse University and The Institut für Politikwissenschaft der Universität Zürich.

<sup>8</sup> [www.diplomacy.edu/blog/international-inviolability-root-zone](http://www.diplomacy.edu/blog/international-inviolability-root-zone)

Persistence for international regulation of the internet is obviously apart from the Russian and Chinese “Cyber-pact” earlier this year in which, amongst other stipulations, the two sides agreed on a range of trust and confidence building measures and joint “promotion of norms of international law in order to ensure national and international information security,” especially under the auspices of the platforms of the relevant international organizations: the UN, OSCE and ITU.

To conclude, the fact that the US is the technology leader of the internet whilst China has the largest number of users makes our task much more urgent.

These are few of the many reasons compelling us to ask the Secretary General of the UN to consider placing an item on the agenda of next year’s General Assembly agenda entitled **“Protection of the Internet as part of the Common Heritage of Mankind”**.

©AST2015