

## NCSG Comments on Council of Europe report on ICANN and Human Rights

August 2014

The NCSG welcomes the opportunity to comment on a report recently released by the Council of Europe on [ICANN's procedures and policies in the light of human rights, fundamental freedoms and democratic values](#).<sup>[1]</sup> The report examines how European human rights principles related to freedom of expression and privacy apply to the activities of ICANN. In particular, the report provides a systematic review of how specific ICANN policies, procedures and practices, including those dealing with generic Top Level Domains names (gTLDs), the Registrar Accreditation Agreement (RAA) and the WHOIS database, intersect with fundamental rights.

At the outset, the NCSG would like to thank the authors of the report, Dr Monika Zalnierute and Thomas Schneider, for their work on an extremely timely and valuable document. We would also like to thank the Council of Europe for its efforts in promoting the inclusion of human rights considerations within Internet governance generally, and within ICANN specifically.

While the NCSG disagrees with some of the definitions and recommendations offered by the authors, we generally warmly welcome the report, which confirms many of the views submitted by ICANN's non-commercial users over the years. In particular, we fully agree with the authors' assessment that several of ICANN's policies fall short of international human rights standards and that those standards must be mainstreamed and more systematically applied within ICANN.<sup>[2]</sup> We also share the view that the public interest is a standard that lacks sufficient specificity to appropriately guide policy or constrain ICANN's decisions in several policy areas of relevance to human rights.

At the same time, we are highly sceptical that the GAC could be entrusted with the promotion of human rights compliant policies within ICANN based on its past record, for instance in relation to the .xxx gTLDs. This is especially so in the absence of any credible means of holding either GAC or ICANN accountable for human rights violations. Moreover, we believe that the suggestion that ICANN should be given "international or quasi-international status" needs further detailed analysis and research regarding the implications of such proposals. We elaborate on these issues further below.

Our comments are divided into two parts. Part I sets out what we regard as the positive features of the report. Part II lays down more specifically our areas of concern with the authors of the report.

## **What we support**

### Human rights principles must be fully respected and mainstreamed within ICANN

The NCSG is pleased that the authors concur with our view that several ICANN policies fall short of international human rights standards:

- *ICANN's policy on sensitive new gTLDs do not fully comply with the right to freedom of expression:*
  - The report makes clear that governments and politicians are required to tolerate criticism to a greater degree than ordinary individuals under international human rights law. [3] It goes on to suggest that private corporate giants should equally display greater tolerance and more readily accept criticism of their activities or policies.[4] We couldn't agree more. The NCSG have long criticised the GAC opposition to generic TLD proposals that imply criticism of a brand, a person or an idea, such as .fail, .gripe, .wtf or .sucks, on those grounds.[5]
  - We also agree with the authors of the report that ICANN ought to take social and cultural factors into account as part of its new TLD allocation policy rather than solely rely on market-based approaches.[6] In particular, we share the authors' concern that pluralism and diversity risk being severely undermined by the auction procedure as a method of dispute resolution about single new gTLDs.[7] It is plain that this procedure gives an unfair advantage to financially richer entities and is therefore likely to lead to greater concentration of TLDs in the hands of a few at the expense of pluralism and cultural and linguistic diversity.
  - The report further suggests that "invoking trademark protection should not be used as a means to limit freedom of expression".[8] This is also welcome. Nonetheless, we believe that this section could be further developed and more specifically explain how free speech concerns should be addressed as part of the string confusion objection and the legal rights objection procedures.
- *ICANN's Registrar Accreditation Agreement (RAA) fails to comply with right to privacy under international human rights law.* Specifically, the report echoes our

longstanding view that RAA provisions requiring data retention and disclosure interfere with the right to privacy and data protection principles.[9] Importantly, the authors strongly imply that it is inappropriate for a private organisation such as ICANN to introduce data retention requirements by contract in order to facilitate access by law enforcement agencies.[10] They conclude, and we agree, that “law enforcement considerations seem to be over-represented in the new data retention provisions of the 2013 RAA at the expense of privacy considerations”.[11]

- *ICANN’s WHOIS database is not fully consistent with international human rights law*: the report confirms what the NCSG and data protection experts have said all along in relation to ICANN’s policy in this area, namely that open access by third parties to the WHOIS database does not contain effective safeguards regarding the way that personal data will be collected and processed by third parties.[12] The report also questions the necessity and proportionality of WHOIS-related policies, as well as the absence of any purpose limitation. This finding therefore throws into sharp relief the problems identified in the minority report of data protection expert Stephanie Perrin[13] in response to the conclusions of ICANN’s Expert Working Group’s on gTLD Directory Services.[14]

We further agree with the authors that ‘new innovative solutions’ must be explored with a view to ICANN systematically taking international human rights law into account. In particular, we fully support the suggestion that human rights should be referred to in ICANN’s bylaws.[15] As one example of how this could be done, we draw attention to the Internet Governance Project (IGP)’s proposal to guarantee ICANN’s accountability by way of a contractual commitment from ICANN to its community that its policy decisions regarding domains would not violate fundamental human rights to free expression and privacy.[16] The IGP suggests that this could be achieved by introducing limited third party beneficiary provisions so that registrants, as well as registries or registrars, could take action to initiate challenges to policies that violated fundamental rights.[17]

### The public interest test is inadequate to define policy

The authors make clear that the concept of ‘public interest’ is “vague providing neither guidance nor constraint on ICANN’s actions”.[18] We concur. At the same time, we question whether the solution lies in attempts to further “flesh out” the concept of global public interest, as suggested. At any rate, we support the report’s suggestion that

consistency with fundamental rights should be one of the primary criteria for assessing whether a policy is in the public interest.[19]

### Human rights advisory panel

The NCSG strongly supports the authors' proposal that a human rights advisory panel, or committee, be created within ICANN.[20] We also note an earlier suggestion that ICANN's policy proposals should be subject to a human rights impact assessment. We believe that both proposals should be subject of further discussion within ICANN, including by way of public consultation. This is especially important at a time where ICANN is undergoing significant reform and must demonstrate to the world that it is an accountable institution in anticipation of the US-NTIA stewardship transition.

## **Our Concerns**

### Role of governments

The COE report notes that governments have “primary legal and political responsibility for the protection of human rights.” Whilst this is correct as a matter of international human rights law, we are concerned that the GAC has more often than not been the very source of human rights violations within ICANN. In our experience, nearly all of the human rights violations identified by the authors of the COE report in the context of ICANN exist because of the insistence of governments in the GAC. We are therefore unable to accept the suggestion that the GAC should be given anything more than an advisory role in policy-making within ICANN.[21] We also are concerned that this phrase can be cited by those who wish for ICANN to hold no obligation to respect the fundamental rights of Internet users. We do however see the benefit of greater transparency and coordination between the various supporting organisations and advisory committees of ICANN, including the GAC, in order to avoid political capture of policy issues at a late stage in the policy-making process.[22]

### ICANN legal status

The NCSG believes that the suggestion that ICANN should be given “international or quasi-international status” needs further detailed analysis and research of the implications of such proposals.[23] In our view, any review of the organisation's legal

status must be based on a careful assessment of the pros and cons of the various options available, including the possibility of reorganizing ICANN as a California public benefits corporation with membership. This discussion would need to build on previous work done with ICANN on this issue and would need to involve an extensive bottom-up discussion among the ICANN community. Any discussion of review of ICANN legal status should also aim to ensure protection of human rights is strengthened not weakened.

### Hate speech

Although we welcome the authors' conclusion that domain names such as .sucks "ordinarily come within the scope of protection offered by the right of freedom of expression",[25] some of our members find it difficult to reconcile with the authors' recommendation that ICANN should ensure that 'hate speech' is not tolerated. As the authors recognise themselves, "there is no clear or unique understanding of what 'hate speech' is, and the definitions and conceptions vary in different countries".[26] Indeed, the report is grounded in a European approach to free speech, which is far from being widely shared by the ICANN community or globally. Equally, there is no agreed definition of 'hate speech' under international law.[27] At the same time, international law requires States to prohibit incitement to discrimination, hostility or violence.[28] It is difficult to draw the line between 'hate speech' and 'incitement' and lawful speech may be chilled as a result.

In any event, we believe that ICANN should not seek to regulate content or determine what constitutes 'hate speech' for the purposes of domain name policy. When the question arises in practice, consideration should be given to the possibility of consulting with the Human Rights Advisory Panel (as outlined above) or the UN Special Rapporteur on freedom of expression as an independent expert on free speech issues.

### **Conclusion**

The NCSG would like to thank the Council of Europe for commissioning this report and for the opportunity to provide comments on it. We hope that our comments will prove a valuable contribution to on-going discussions about human rights within ICANN and remain eager to participate in further discussions.

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[1] This comment, initially drafted by ARTICLE 19, Edward Morris, the Internet Governance Project and Joy Liddicoat is supported by and submitted on behalf of the Non-Commercial Stakeholder Group (NCSG). NCSG is the voice of civil society and non-profit organizations in ICANN's domain name policy-making organ, the Generic Names Supporting Organization. NCSG is composed of two constituencies, the Non-commercial Users Constituency (<http://ncuc.org>) and the Not-for-Profit Operational Concerns Constituency (<http://www.npoc.org>) as well as un-affiliated individual noncommercial members who participate in policy development in ICANN's Generic Names Supporting Organization (GNSO).

[2] See NCUC comments on human rights and new gTLDs:

<http://www.ncuc.org/NCUC-ISSUES-COMMENT-ON-NEW-gTLDs-AND-HUMAN-RIGHTS/>

[3] See para. 59 of the report.

[4] Ibid.

[5] See e.g. <http://www.internetgovernance.org/2007/06/27/icann-confronts-free-expression-debate/>

[6] Paras. 81-82.

[7] Paras. 78-79.

[8] Para. 58.

[9] See para. 97; see NCUC: <http://www.ncuc.org/wp-content/uploads/2013/04/NCUCPrivacyLetter28062012.pdf>

[10] Paras. 101, 110-114.

[11] Para. 119

[12] See 107-111 of the report.

[13] <https://www.icann.org/en/system/files/files/perrin-statement-24jun14-en.pdf>

[14] <https://www.icann.org/en/system/files/files/final-report-06jun14-en.pdf>

[15] Paras. 128-130 of the report.

[16] <http://www.internetgovernance.org/2014/07/02/human-rights-in-icann-the-council-of-europe-report/>

[17] Ibid.

[18] Para. 115 of the report.

[19] Para. 131.

[20] Para. 134. The NCSG is currently working on a proposal for a Human Rights Panel within ICANN.

[21] Para. 126.

[22] See, for instance, <http://www.article19.org/data/files/medialibrary/37494/ICANN-policy-final.pdf>

[23] Para. 136.

[24] Para. 9

[25] Para. 117

[26] Para. 45

[27] See, e.g., UN Special Rapporteur on freedom of expression, A/66/290, para. 26, available at: <http://www.ohchr.org/Documents/Issues/Opinion/A.66.290.pdf>

[28] See article 20 (2) of the International Covenant on Civil and Political Rights (ICCPR).