

**Secretariat General**

**Directorate General**

**Human Rights and Rule of Law**



**DG-I (2012) 4  
12 October 2012**

**COMMENTS RELATING TO FREEDOM OF EXPRESSION AND FREEDOM OF  
ASSOCIATION WITH REGARD TO NEW GENERIC TOP LEVEL DOMAINS**

**by<sup>1</sup>**

**Mr Wolfgang Benedek, Professor for International Law and International Relations at  
the University of Graz, Austria (assisted by Paul Gragl and Matthias C.Kettemann)**

**Ms Joy Liddicoat, Association for Progressive Communications, New Zealand**

**Mr Nico van Eijk, Director of the Institute for Information Law at the University of  
Amsterdam, The Netherlands**

---

<sup>1</sup> The opinions expressed in this document are personal and do not engage the responsibility of the Council of Europe. They should not be regarded as placing upon the legal instruments mentioned in it any official interpretation capable of binding the governments of member states, the Council of Europe's statutory organs or the European Court of Human Rights.

Executive Summary .....	3
1. Introduction.....	4
2. Human rights obligations of states .....	4
3. Content-related aspects of new gTLDs.....	6
3.1. The nature of domain names.....	6
3.2. Content-related choices and judgments.....	7
3.2.1. Evaluation of applied-for new gTLD strings .....	7
3.2.2. Second and third level domains .....	8
3.2.3. Editorial-like judgement .....	9
4. Permissible restrictions of the exercise of the right to freedom of expression and the right to freedom of assembly and association – a regional perspective.....	9
4.1. Hate speech .....	10
4.2. The protection of morals and public order .....	11
4.3. Commercial expression.....	12
4.4. Trademark protection.....	12
4.5. Alternative means of expression .....	13
5. Sensitive expression and DNS stability .....	14
5.1. Sensitive expression .....	14
5.2. DNS blocking and related risks to DNS resilience and stability.....	15
5.3. Implications for GAC advice .....	16
5.3.1. Advice that an application not proceed .....	16
5.3.2. Advice that an application not proceed unless remediated .....	17
6. Conclusions .....	19
Glossary of terms used .....	20

## **Executive Summary**

Domain names are not only technical Internet resources. People may use them as a means of receiving and imparting information, ideas and opinions or to indicate association. Courts in various jurisdictions consider that freedom of expression and freedom of association apply to domain names. The protection of these human rights and fundamental freedoms is important in the context of the new gTLDs programme.

The approvals of new gTLD strings for delegation as well as registrations at the second level are not expected to be mechanical actions but the result of evaluation processes where judgment will be exercised on a mix of technical, content-related and other considerations. These processes may involve editorial-like decisions, similar to those taken by media organisations, which necessitate reflection on the media-like freedoms and responsibilities of ICANN.

The introduction of new gTLDs comprising words or expressions which might raise sensitivities of a national, cultural, religious or other nature is considered as a potential risk factor for domain name blocking and filtering with possible consequences for the Domain Name System (DNS) stability. Both a prohibition to delegate new gTLDs on grounds of their sensitivity as well as TLD blocking and filtering can affect Internet users' ability to access online information of their choice and to connect with each other.

Differences between national, cultural religious or other sensitivities and those of a political nature may be very difficult to determine. Where a decision regarding the introduction of sensitive new gTLDs needs to be taken, it is preferable to give priority to upholding the right to freedom of expression and the right to freedom of association. This can be done while managing related DNS risks rather than advising that a new gTLD application should not proceed or be unreasonably or unfairly remediated. A human rights approach would enable the GAC to explore a wide range of options which can reflect nuanced and complex considerations.

Ultimately, in international human rights law, states have obligations to protect, respect and promote the human rights and fundamental freedoms of persons within their jurisdiction. In the member states of the Council of Europe any interference with these rights and freedoms should meet the conditions laid down in the European Convention on Human Rights as interpreted by the European Court of Human Rights. These obligations continue to exist when states participate in activities of entities with specialised technical mandates.

While the GAC is neither the decision-maker on new gTLDs nor a human rights body, a human rights approach, if taken properly into account, will help substantiate GAC advice on a new gTLD and at the same time strengthen the overall human rights compliance with international standards. States, as public policy duty bearers, have genuine and legitimate reasons to avoid violating the rights and freedoms of the people within their jurisdiction. Consequently, GAC advice should be given special consideration by the ICANN Board.

## 1. Introduction

1. ICANN's remit does not generally extend to any examination of the content comprised in or to be hosted under TLDs.<sup>1</sup> Nonetheless, Internet content-related considerations do not fall completely outside ICANN authority and deliberations on new gTLDs delegations are not expected to be mechanical actions.

2. The role of the GAC in ICANN is to provide advice on the activities of ICANN as they relate to concerns of governments and where ICANN activities may affect public policy issues, including those relating to freedom of expression as particularly referred to in the GAC Operating Principles.<sup>2</sup>

3. GAC scrutiny of issues related to content or expressions contained in the new gTLDs is limited, primarily because GAC is not the decision-maker in relation to new gTLD applications. However, its consideration may extend to linkages between applied-for new gTLD strings and possible content to be hosted thereunder based on GAC's interpretation of, or assumption about, the actual or implied meaning or purpose of particular TLDs.

4. When acting in their advisory role, GAC members have unique human rights obligations that other stakeholders in the ICANN community do not. GAC members represent governments of United Nations member states; their duties apply regardless of the government of the day in any particular country or the individual official participating in the GAC. These unique state obligations should inform the role of governments in Internet governance and public policy making as referred to in the Tunis Agenda for the Information Society.<sup>3</sup>

***When acting in their advisory role, GAC members have unique human rights obligations that other stakeholders in the ICANN community do not.***

5. In a Council of Europe context, the special responsibilities of Council of Europe member states in Internet governance have been affirmed explicitly in the Declaration of the Committee of Ministers on Internet governance principles.<sup>4</sup>

6. This paper aims at providing background information on human rights standards, notably those on the right to freedom of expression and the right to freedom of association, in line with the Council of Europe's Committee of Ministers Declaration on the protection of freedom of expression and information and freedom of assembly and association with regard to domain names and name strings<sup>5</sup>. It reflects on international law obligations to protect and promote these rights and freedoms and how these obligations could be taken into account in GAC's interactions with the ICANN Board.

7. In this context, the role of the GAC is considered from the perspective of its consensus-based advice as a group of governments rather than from the perspective of individual governments' human rights obligations and how these may be raised or considered within the GAC. This is because there are a variety of processes for individual governments to provide input to new gTLD applications and a separate dispute resolution procedure available to individual governments who wish to object to a specific new gTLD application.<sup>6</sup> In this paper, a deliberate choice has been made not to comment on any particular new gTLD application or applied-for new gTLD string.

## 2. Human rights obligations of states

8. States are duty bearers and have obligations to respect, promote and protect the human rights and freedoms of their citizens. They have these obligations when acting in relation to their respective national matters and, collectively, share an international consensus on core

human rights standards. These are laid down in non-binding instruments including the Universal Declaration on Human Rights (UDHR) and binding instruments such as the International Covenant on Civil and Political Rights (ICCPR) as well as other instruments. States may also have human rights obligations agreed at a regional or multi-lateral context such as those provided in the European Convention on Human Rights (ECHR) as regards the 47 Council of Europe member states.

9. Recently, the United Nations Human Rights Council adopted the Resolution ‘The Promotion, Protection and Enjoyment of Human Rights on the Internet’ which affirmed “that the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one’s choice, in accordance with articles 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.”<sup>7</sup>

10. GAC has stated in the GAC Principles Regarding new gTLDs, that new gTLDs should respect “the provisions of the Universal Declaration of Human Rights which seeks to affirm *“fundamental human rights, in the dignity and worth of all human beings and in the equal rights of men and women”*”<sup>8</sup>.

11. When states participate in specialised bodies with a primarily technical mandate such as GAC does in ICANN – states do not divest themselves of their human rights obligations. In this regard, several considerations should be noted.

***When states participate in specialised bodies with a primarily technical mandate such as GAC does in ICANN – states do not divest themselves of their human rights obligations.***

12. Firstly, while GAC can provide advice to the ICANN Board on public policy issues which may relate to human rights, GAC is not a human rights standards-making body (for example in a Council of Europe context, the European Court of Human Rights (ECtHR) could render a judgment which conflicts with GAC advice and provides a precedent to follow and to be respected by Council of Europe member states).

13. Secondly, when developing advice in a GAC context, states are bound by internationally agreed human rights standards as well as regional or multi-lateral agreements they may have entered into.

14. Thirdly, while there are universal international human rights standards which governments must protect, respect and promote – in the particular context of this paper, such as the right to freedom of expression and the right to freedom of association –<sup>9</sup> there is no universal single way or any single correct way to give effect to those standards.<sup>10</sup> The UDHR is the most commonly agreed standard among states.

15. The reference to the UDHR in the GAC Principles regarding new gTLDs is, therefore, appropriate because the UDHR is a non-binding instrument which defines, for the purposes of the Charter of the United Nations,<sup>11</sup> the meaning of the words “fundamental freedoms” and “human rights”. The United Nations Charter is binding on all UN Members.

16. The guarantees on the right to freedom of expression, the right to freedom of association and other fundamental rights and freedoms are further elaborated in the ICCPR, the International Convention on the Elimination of all Forms of Racial Discrimination and the Convention on the Elimination of all Forms of Discrimination against Women and in other international instruments. While not fully binding on all GAC members, these offer good guidance when interpreting GAC’s principles of respect for the UDHR and could be a basis when providing advice to the ICANN Board. These instruments are specifically referred in

the new gTLDs Applicant Guidebook (the Guidebook) in connection with the Limited Public Policy objections procedures<sup>12</sup>.

### **3. Content-related aspects of new gTLDs**

#### **3.1. The nature of domain names**

17. For Internet users at large, domain names represent an important way to find and access information on the Internet.<sup>13</sup> Domain names have both an addressing function and an expressive dimension. The relationship between these two may vary in scope and strength. Words or forms of expression included in a TLD offer possible associations with the nature of activities and content available on websites registered with that particular TLD. For example .com initially yields an association with commercial activities although a wide variety of organisations use this TLD. By contrast .org and .net are rather associated with non-profit or civil society activities. More closed TLDs, such as .museum and .travel, have an even stronger relationship with what is represented by 'museum' and 'travel'.

18. National courts in different jurisdictions have reviewed, mostly in the context of trademark cases, questions related to use of second level domain names as means of expression, some of which are referred below<sup>14</sup>. In a case involving usage of a trademark in second level domain names for criticism purposes, the Paris Court of Appeal considered that this was done in the exercise of the right to freedom of expression and upheld such expressive use of trademarks by stating that:

"[...] freedom of expression, a principle of constitutional status, as recognised in the treaties and conventions recalled by [one of the appellants] has the implication that [the appellants] could denounce, on the Internet websites concerned in this case, in the form that they deem appropriate the social consequences of [plans] implemented by the defendants; that even though this freedom is not absolute, it can only be subject to restrictions made necessary by the respect of rights of others"<sup>15</sup>

19. Moreover, the French Constitutional Council has affirmed the need to protect freedom of expression in the context of the French country code TLD (ccTLD). On grounds of, *inter alia*, absence of safeguards for constitutional freedoms, notably freedom of expression, the Council declared unconstitutional a legal provision of the Postal and Electronic Communications Code, which designated ccTLD registries and authorised them to attribute domain names.<sup>16</sup>

20. In a Dutch case, the court of The Hague in a summary procedure denied a protest website ([www.injeholland.nl](http://www.injeholland.nl)) the right to use a ccTLD domain name that resembled the name of the organisation that was the object of the protest ([www.inholland.nl](http://www.inholland.nl)). According to the court – supporting the trade name protection arguments put forward – it was not justified to damage the trade name by including it in the name of the protest website. However, the court pointed out that the protesters' right to freedom of expression remained intact because it was allowed to use the name on the website itself as part of the discussion about the reputation of the organisation.<sup>17</sup>

21. In other jurisdictions, the relationship between the functionality and expression dimensions of domain names has been considered more specifically. The United States Court of Appeal of the Second Circuit Court, considered in the case *Name.Space, Inc. v. Network Solutions, Inc.*, that:

"[...] the functionality of domain names does not automatically place them beyond the reach of the First Amendment. Although domain names do have a functional

purpose, whether the mix of functionality and expression is "sufficiently imbued with the elements of communication" depends on the domain name in question, the intentions of the registrant, the contents of the website, and the technical protocols that govern the DNS."<sup>18</sup>

22. Other lower courts case-law in Europe move in the same direction and recognise the relationship between expression function of domain names and freedom of expression.<sup>19</sup>

23. The expected introduction of new gTLDs may provide new opportunities for further enhancement of the expressive dimension of domain names. Words or forms of expressions contained in applied-for new gTLD strings may be seen as useful by different individuals or communities for purposes of expressing ideas or views by simply adding words or expressions through registrations at the second or third level. The relationship between expressions included in the top, second and third level domains may thus entail expressive and communication elements, from which it follows that TLDs should not be considered in isolation.

***The relationship between expressions included in the top, second and third level domains may thus entail expressive and communication elements, from which it follows that TLDs should not be considered in isolation.***

24. Domain names are key elements for Internet information indexing and selection systems especially those enabled by search engines. Queries made on search engines which consist of words, combinations of words or entire sentences are an important means of finding domain names of websites, which might include those words, as well as of accessing content hosted by them. The question to what extent search engines' indexing of website contents can substitute domain names' role regarding access to information falls beyond the scope of this paper. Suffice it to say here that the functionality dimension and expression dimension of domain names cannot be strictly separated from each other or that there is a gradual transition from one into the other.

## **3.2. Content-related choices and judgments**

### **3.2.1. Evaluation of applied-for new gTLD strings**

25. The approval or rejection of applied-for new gTLD strings for delegation, which comprise words, names or forms of expression, will not be a mechanical action but the result of an evaluation process where judgment will be exercised and choices made. The Guidebook provides for three cases when such judgments and choices may directly relate to Internet content.

26. *First*, the Guidebook contains a list of names and words which are ineligible for delegation.<sup>20</sup> This constitutes a content-related choice made a priori by ICANN which is expected to result in content-related judgment whenever questions involving usage of any of those ineligible words may arise.

27. *Second*, the string review, which is part of the evaluation procedure, includes an assessment as to whether an applied-for new gTLD string might have an adverse impact on the DNS stability and security.<sup>21</sup> This is likely to include considerations of TLD-blocking risks which might be envisaged as a consequence of different sensitivities relating to words, names or forms of expression included in applied for strings. This was the case in deliberations on the controversial .xxx applied-for TLD where the ICANN Board stated that the risk of blocking was not such as to justify non approval of that string.<sup>22</sup>

28. Generally, TLD-blocking impact assessments cannot be strictly separated from considerations as to what content users, communities or governmental authorities in one or

more parts of the world may find useful or harmful. In this regard, ICANN’s possible role in content-related assessments was signalled in the San Francisco GAC Communiqué.<sup>23</sup> Thus, applied-for string reviews may involve judgments as to what content might fit or not fit for inclusion in domain names and by implication in websites (a more detailed analysis of this question is included in the fifth part of this paper).

29. *Third*, the Guidebook provides objection procedures in the context of which content-related questions and potential tension between the right to freedom of expression and the right to freedom of association, on the one hand, and other legitimate interests and rights, on the other hand, may arise.<sup>24</sup>

30. The first two grounds for initiating objection procedures – namely String Confusion Objection<sup>25</sup> and Legal Rights Objection<sup>26</sup> – are clearly focused on the protection of traditional trademark rights. A delicate balance is at stake where freedom of expression needs to be weighed against the property rights of trademark owners. Invoking trademark protection should not be used as a means to limit the freedom of expression and to stifle public debate.<sup>27</sup>

31. The third objection ground, namely the Limited Public Interest Objection, is concerned with cases when the applied-for gTLD string is considered to be contrary to generally accepted legal norms of morality and public order that are recognised under principles of international law. The Guidebook states that “[u]nder these principles [of international law], everyone has the right to freedom of expression, but the exercise of this right carries with it special duties and responsibilities. Accordingly, certain limited restrictions may apply”.<sup>28</sup>

32. In this particular objection procedure the string applied-for will be tested against a list of morality and public order considerations which relate to incitement and promotion of violence and lawless action, discrimination, child pornography as well as a determination that an applied-for string would be contrary to specific principles of international law.<sup>29</sup>

33. Given the general nature of these considerations and the lack of a uniform international interpretation thereof, deliberations may involve judgment as to whether Internet users or communities are likely to find a particular applied-for string against norms of morality and public order and therefore of a limited public interest. These judgements may have a direct impact on Internet content availability. Moreover, the specific reference to the right of freedom of expression contained in the Guidebook is an acknowledgement of the fact that deliberations in this context intersect with issues related to the exercise of the right to freedom of expression.

***The implementation of the Guidebook’s rules and procedures may involve content-related choices and judgment.***

34. The fourth ground for refusal – Community Objections – relates to cases when “there is a substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted”. This allows for an ample margin of discretion, as illustrated by the approval of the controversial .xxx TLD. Although, many objections were filed, they were not decisive for the final deliberation of the ICANN Board.<sup>30</sup>

### **3.2.2. Second and third level domains**

35. Registries and registrants are expected to set out their own policies regarding registrations of domain names in the second and third level domains. Subject to legal requirements applying in their jurisdictions and certain content-related specifications mandated by ICANN<sup>31</sup>, policies on registrations at the second and third levels are expected



to involve content-related choices and judgments exercised freely by their operators.<sup>32</sup> While stating that it has no role in respect of Internet content ICANN has maintained that content-related issues will likely be a matter to be addressed by registrants.<sup>33</sup>

### **3.2.3. Editorial-like judgement**

36. The content-related judgments and choices explained above, to the extent that they may result in decisions on the availability of information on the Internet, are similar to editorial judgments made by media routinely in respect of what content is relevant for purposes of the public interest and what content to project in the public domain.

37. This issue is relevant, as from the perspective of the right to freedom of expression and access to information, editorial activities may entail special guarantees and responsibilities. These relate to freedom from interference by governments or other actors and responsibilities to protect rights and freedoms (editorial responsibilities, respect for dignity and privacy, respect for the presumption of innocence and fair trial, respect for intellectual property, remedies for third parties) and to serve the public interest in accessing diverse information.

38. The notion of editorial-like activities by Internet intermediaries in the new communications environment is not new.<sup>34</sup> The Council of Europe's Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media affirms that editorial functions can be evidenced by the actors' own policy decisions on the content to make available or to promote, and on the manner in which to present or arrange it. Editorial policies can be embedded in mission statements or in terms and conditions of use or may be expressed informally as a commitment to certain principles. The lack of an explicit assertion of editorial control by the media should not, by itself, be considered as an indication of its absence.<sup>35</sup>

## **4. Permissible restrictions of the exercise of the right to freedom of expression and the right to freedom of assembly and association – a regional perspective**

39. All 47 member states of the Council of Europe have undertaken to secure the civil and political rights and freedoms provided in the ECHR. The initial and primary responsibility for the protection of the rights set forth in the ECHR lies with the member states. Any individual claiming to be the victim of a violation of his/her rights and freedoms by any of the ECHR Contracting states may apply to the ECtHR after exhausting domestic courses of action.

40. In respect of the right to freedom of expression, Article 10 of the ECHR provides:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

41. In respect of the right to freedom of assembly and freedom of association, Article 11 of the ECHR provides:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interest

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

42. Any interference with the exercise of these rights and freedoms must (1) be prescribed by law, (2) be pursued for one of the legitimate aims listed in an exhaustive way in the ECHR and (3) be necessary in a democratic society (proportional to the aims pursued).

43. In determining whether a member state’s action or failure to act is compatible with the conditions laid down in the ECHR, the ECtHR acknowledges that national authorities have a certain degree of discretion to assess whether there is a pressing social need which makes a restriction on fundamental rights and freedoms necessary according to conditions laid down in the ECHR. In the ECtHR’s jurisprudence this is known as the margin of appreciation doctrine. The degree of discretion allowed to member states varies according to the circumstances, the subject matter and other factors.

44. This section of the paper focuses on the ECtHR construction of certain notions such as hate speech, protection of morals, significance of religion and public order in the context of Article 10 and Article 11 cases. It also highlights some of the main considerations of the ECtHR where the right to freedom of expression and the right to freedom of association should be balanced with other rights. This information is relevant for informing deliberations where similar notions and balancing exercises may be at stake when evaluating applied-for new gTLD strings. The comments included in this part of the paper stand without prejudice to any possible future interpretation by the ECtHR and should not be taken as suggestions on possible applications of human rights standards to any particular applied-for new gTLD string.

#### **4.1. Hate speech**

45. The expression of views which negate the fundamental values of the ECHR is excluded from the protective realm of the ECHR as an abuse of rights on the basis of Article 17 of the ECHR.<sup>36</sup> In examining alleged violations of the right to freedom of expression on the basis of Article 10 of the ECHR, the ECtHR may find certain restrictions on expression of views as necessary in a democratic society, in the interests of national security, public safety, the prevention of disorder or crime, the protection of health or morals and the protection of the rights and freedoms of others.<sup>37</sup>

46. The expression of views that constitute incitement to racial hatred<sup>38</sup> and support for terrorism are not protected by Article 10.<sup>39</sup> Reports on proponents of hate speech, even if this includes airing their views, however, are permissible.<sup>40</sup> Texts that are merely polemical without actually constituting hate speech fall within the scope of ECHR protections.<sup>41</sup> Speech favouring the introduction (or restoration) of non-democratic, totalitarian regimes, especially when including calls to violence, is not protected by Articles 10 and 11.<sup>42</sup> However, fierce critique of secular and democratic principles is protected as part of a political discourse.<sup>43</sup>

47. Holocaust denial (negationism) is considered as one of the “most serious forms of racial defamation of Jews and of incitement to hatred of them” and is therefore not protected by Article 10.<sup>44</sup> Rather Article 17 is applied when the goals of the views are manifestly incompatible with the Convention’s fundamental values. Anti-Semitism and stirring up “hatred towards the Jewish people”, as a particular ethnic group, is also not protected.<sup>45</sup> General vehement attacks against religious groups (for example linking Muslims generally to the 11 September 2001 terrorist attacks) are also incompatible with the ECHR’s values.<sup>46</sup>

***Freedom of expression as guaranteed by Article 10 of the ECHR is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broad-mindedness without which there is no democratic society (Handyside v. UK).***

48. Political speech, especially when contributing to a wider debate on the issues raised, which is in consonance with the ECHR’s aims, is protected,<sup>47</sup> as is political speech that neither calls for nor condones violence.<sup>48</sup> The expression of views that might “offend, shock or disturb” others may, in compliance with the conditions of Article 10 of the ECHR, constitute protected speech according to ECtHR jurisprudence.<sup>49</sup>

## **4.2. The protection of morals and public order**

49. The Court has consistently held in different cases regarding the exercise of the right to freedom of expression in the context of publications<sup>50</sup> and exhibitions<sup>51</sup> that it was not possible to find a uniform conception of morals among the domestic laws of ECHR Contracting states. Given that the views taken by their respective laws of the requirements of morals vary from time to time and from place to place, state authorities “are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the “necessity” of a “restriction” or “penalty” intended to meet them.”<sup>52</sup>

50. As in the case of “morals” the ECtHR has stated that it is not possible to discern throughout Europe a uniform conception of the significance of religion in society. Consequently “it is not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others. A certain margin of appreciation is therefore to be left to the national authorities in assessing the existence and extent of the necessity of such interference.”<sup>53</sup> The ECtHR has found that “a wider margin of appreciation is generally available to the ECHR contracting states when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion”<sup>54</sup>

***The ECtHR has consistently held that it was not possible to find a uniform conception of morals or to discern a uniform conception of the significance of religion in society among the ECHR Contracting states.***

51. In these fields, the margin of appreciation of national authorities is wide but not unlimited and their discretion is not unfettered. The ECtHR strictly examines whether the restrictions applied by the national authorities are compatible with the conditions of Article 10 of the ECHR, including whether they are proportional to the legitimate aims pursued.<sup>55</sup>

52. The prevention of disorder or crime is one of the legitimate aims provided for by Articles 10 and 11 of the ECHR. The ECtHR has ruled that an exception to Article 10 can be made in the interest of preventing disorder and protecting the rights of the immigrant community.<sup>56</sup> In this case, the Court highlighted the importance of the circumstances of the expression of the view (in this particular case during an election contest).

53. Although the notion of public order is not specifically provided in Article 10, the ECtHR has referred to it in its jurisprudence. “Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism is based and constitutes a serious *threat to public order*.”<sup>57</sup>

### **4.3. Commercial expression**

54. Commercial expressions in the context of advertising may be protected under the ECHR and consequently their prohibition may constitute an interference with the right to freedom of expression.<sup>58</sup> The ECtHR has also found that general prohibitions of pejorative statements in comparative newspaper advertising may constitute a disproportionate intrusion into freedom of commercial speech of the media sector.<sup>59</sup>

55. Commercial expression is, however, imbued with less protection than the expression of political or religious ideas<sup>60</sup> and states are granted a wide margin of appreciation with regard to treatment of commercial expression<sup>61</sup>. Generally, if not only (or even mainly) commercial interests are at stake, but rather the contribution of ideas to a more general debate on issues of public interest, the margin of appreciation acknowledged by the ECtHR can be greatly reduced.<sup>62</sup>

56. In order to distinguish between commercial and non-commercial elements of expression the ECtHR examines the purpose of expression<sup>63</sup> as well as whether the advertising purpose is primary or secondary.<sup>64</sup> It is not sufficient for expression to take the form of advertisements to consider it to be commercial in nature. The ECtHR reviews the content and the purpose of the views expressed in an advertisement.<sup>65</sup>

57. Also, the ECtHR takes into account the target audience and the role of the press for purposes of determining the level of protection.<sup>66</sup> If expression is directed at the public as a whole (rather than at a limited group of readers) and conveys not only information of a commercial nature, it will more likely be considered non-commercial speech.<sup>67</sup> If expressions concerned are not only “commercial statements”, but they contribute to a societal debate, the ECtHR will limit the margin of appreciation.<sup>68</sup> Under this view critique of a product can thus be considered non-commercial speech, when no alternative products are promoted and the topic is of general societal interest.

58. In hybrid speech cases – when commercial and non-commercial elements of expression cannot be disassociated – they have to be assessed together and considered as part of a whole.<sup>69</sup>

### **4.4. Trademark protection**

59. In a right to property complaint (Article 1 of Protocol No. 1 of the ECHR) against national measures prohibiting the use of domain names on grounds of trademark protection the ECtHR found that the exclusive right to use the domains in question had an economic value and therefore constituted a “possession”.<sup>70</sup> In examining whether the interference with this right was justified under Article 1 of Protocol No. 1, the ECtHR referred to the need to meet the demands of the general interest in protecting trademarks and/or (business) names, affirmed the states’ wide margin of appreciation in this field and was satisfied that the

national authorities had struck a fair balance between the protection of possession and the requirements of the general interest.<sup>71</sup>

60. The ECtHR has examined the conflict between trademarks and the right to freedom of expression outside the domain name context. In this line of cases the Court has systematically held that trademarks constitute intellectual property and thus a “possession” within the meaning of Article 1 of Protocol No. 1 of the ECHR.<sup>72</sup> A prohibition for investigative journalists to submit negative statements regarding a certain trademark was not considered as preventive censorship. Taking into account a number of factors the ECtHR stated that this would only be the case if the applicants were obliged to submit statements which they wished to publish to authorities for approval in advance.<sup>73</sup>

61. Misleading commercial expression included in advertising has been considered by the ECtHR as not protected by Article 10 guarantees of the right to freedom of expression since advertising was considered as a means of discovering the characteristics of services and goods offered to the public.<sup>74</sup> Under this line of cases most forms of expressive use of trademarks fall within the scope of Article 10 but they can be subjected to restrictions in order to protect the “rights of others”, i.e. trademark rights, in accordance with Article 10, paragraph 2.<sup>75</sup>

#### **4.5. Alternative means of expression**

62. Where there is a conflict between property rights on the one hand and the exercise of the right to freedom of expression or the right to freedom of assembly on the other hand, the ECtHR has in certain instances inquired whether alternative means of expression were available to the concerned party.

63. In a case where applicants had been prevented from collecting signatures for a petition inside a shopping mall owned by a private company, the ECtHR did not find a violation of the right to freedom of expression of the applicants. In examining whether the interference had complied with Article 10 requirements, the ECtHR opined that applicants were only prohibited from communicating their views in certain locations and they could have employed alternative means including campaigning in the town centre, calling door-to-door or seeking exposure in the local press, radio and television.<sup>76</sup>

64. Also, the ECtHR examines whether a different terminology from that actually used for purposes of expressing points of view is available when the use of alternative terminology is considered as “necessary in a democratic society” for the protection of the reputation and rights of others. In a case involving an injunction against a politician not to use certain words – i.e. “Nazi-journalism” against a defamatory article in a powerful newspaper – the ECtHR concluded that the injunction had merely prohibited the repetition of the statement or the making of similar statements while the applicant right to voice an opinion had been retained.<sup>77</sup>

65. In a case involving a prohibition on members of armed forces, police and security services to join any political party and engage in any political activity justified by the need to ensure the political neutrality of state officers, the ECtHR considered that there had been no interference with the officers’ right to freedom of expression or freedom of assembly, especially as the police are offered alternative means of expressing their ideas or forming associations than joining a political party.<sup>78</sup>

66. The existence of alternative means of expression does not, however, preclude a thorough and exhaustive examination of whether the guarantees on freedom of expression and the freedom of association as provided for in Article 10 and Article 11 are respected. In fact, the ECtHR carefully examines whether the strict requirements of these provisions of the

ECHR have been respected, namely whether the interference is prescribed by law, whether the interference pursues legitimate aims provided by the ECHR and whether such interference is necessary in a democratic society.<sup>79</sup>

## 5. Sensitive expression and DNS stability

67. The potential adverse impact of applied-for new gTLD strings on the DNS stability and resilience is critical for the evaluation of and deliberations on those strings.<sup>80</sup> The GAC seems to attach particular importance to the issue of culturally objectionable and/or sensitive strings, the absence of which is believed to contribute to the security and stability of the DNS.<sup>81</sup>

68. Considerations in this context appear to stem from concerns about TLD-blocking or filtering, which could take place if sensitive expression would be included in new gTLDs. Where such risks exist<sup>82</sup> it would appear that a choice would have to be made between two options; first, not approving any particular applied-for new gTLD string that comprises sensitive expression in order to preserve the DNS stability and security and second, approving it, which in turn could create DNS stability risks.

69. This part of the paper looks at these issues from the perspective of protecting the right to freedom of expression and the right to freedom of association. It focuses on TLD-blocking issues and implications of non-approval of applied-for sensitive strings with a view to highlighting considerations which may be relevant for GAC advice.

### 5.1. Sensitive expression

70. For purposes of this paper, sensitive expression is understood, in accordance with the GAC Principles Regarding new gTLDs, as all forms of expression to which “sensitivities regarding terms with national, cultural, geographic and religious significance” might apply.<sup>83</sup>

71. When evaluating sensitivity concerns in this context GAC might consider possible content that would be hosted under a domain such as thematic content or service descriptions. The broad nature of sensitivities referred to in the GAC’s Principles Regarding new gTLDs does make a focus on the potential content of a gTLD and sub-domains an area of risk for GAC in terms of human rights obligations. This is because such content will not yet exist at the time of any particular new gTLD application and any future content cannot be accurately known or predicted until the gTLD is operating. Predictions of actual specific content in the future and at 2<sup>nd</sup>, 3<sup>rd</sup>, or 4<sup>th</sup> levels would be largely impossible. GAC advice in this context is likely to be based on assumptions and deduction and, for that reason, problematic. Further, a particular gTLD may not be adequately suggestive of specific content or may be so generic, for example *dotreligion*, that clear advice about human rights implications is not possible.

***...content will not yet exist at the time of any particular new gTLD application and any future content cannot be accurately known or predicted until the gTLD is operating.***

72. At the same time, concerns about sensitive expression may be real and significant in particular cases. For example, an application may be very sensitive if it relates to a particular geographic area where there has been armed conflict or war or where geographic or national boundaries are in dispute between countries or within a country. Some insight might be gained from checks on the applicants and statements about the purpose of the proposed gTLD and other requirements in the application process. For example, there were 320 religious organisations with United Nations ECOSOC status in 2010.<sup>84</sup> GAC sensitivities

about any particular *dotreligion* application may vary widely depending on whether an applicant was one of these, a member state or some other private company or civil society organisation.

73. States are well aware of their human rights obligations and many express grave concern at online content which violates human rights, including the right to freedom of expression. Concerns about sensitive expression are significant particularly those related to xenophobia and racism.<sup>85</sup> GAC consideration of new gTLDs must take into account its obligations to protect and promote human rights and fundamental freedoms. Threats of violence, for example, or violent reactions to a proposed application or against a particular applicant might lead a government to have real and serious concerns for the safety and security of its citizens. GAC, as a whole, and the ICANN Board, should be attuned to these sensitivities and consider how best to take these into account in the new gTLD process. However, it is for sovereign states to determine how best to ensure safety and security and uphold the rule of law within their national borders.

74. These matters are relevant when considering sensitive expression where this is comprised in applied-for new gTLD strings, as gTLDs are global public resources. Sensitivities may arise among some but not all GAC members or they may vary widely in nature and degree among GAC members. To determine the nature and degree of any sensitive expression, such expression must be considered in context, including its global context.

## **5.2. DNS blocking and related risks to DNS resilience and stability**

75. Concerns about sensitive expression in new gTLDs might result in some or all GAC members seeking to prevent access to a new gTLD by their citizens and/or by the citizens of other countries by means of DNS blocking and/or filtering (this applies to both TLDs and second level domains). Such measures are aimed at preventing access to Internet content.<sup>86</sup>

76. There are increasing concerns about the level of blocking and filtering on DNS resilience and stability.<sup>87</sup> It is suggested that from a purely technical perspective it is difficult to draw a line between “good DNS blocking” and “bad DNS blocking”.<sup>88</sup> Also, there seem to be concerns about the unintended adverse effects of country level blocking of entire TLDs on broader communities.<sup>89</sup>

77. Nonetheless, DNS filtering and blocking by governments is widespread and common.<sup>90</sup> The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has noted that many filtering and blocking measures are in violation of international human rights standards, notably those on the right to freedom of expression and the right to freedom of association as well as due process.<sup>91</sup> For example, justification for blocking specific content may be unfounded or may be done in an “overly broad and vague manner” so that blocking and filtering is arbitrary and excessive.<sup>92</sup> The blocking or filtering may be done to pursue objectives which are not lawful or which are unclear, and, finally, content is often blocked without the possibility for independent review.<sup>93</sup>

78. The Council of Europe has adopted guidelines addressed to its member states in respect of using and controlling Internet filters in order to fully exercise and enjoy the right to freedom of expression and information.<sup>94</sup> Where domain name blocking or filtering is necessary to respond to abuse or other types of illegal activities and cyber-crime, the provisions of the Budapest Convention on Cybercrime are fully applicable.<sup>95</sup>

79. Governments in certain cases act to prevent access to online content including sensitive domains. An applied-for new gTLD string might involve expression which is sensitive for some or all GAC members to the extent that there may be a high risk of multiple and diverse

filtering and blocking measures seeking to block or filter the TLD by individual governments within their sovereign boundaries or governments acting together. Such action carries risks for DNS resilience and stability about which there are increasing concerns and raises questions in respect of international standards on freedom of expression and access to information as well as freedom of association.

### **5.3. Implications for GAC advice**

80. GAC advice might canvas a wide range of considerations some of which are included in the GAC Principles on New gTLDs, notably the importance of “the security, reliability, global interoperability and stability” of the DNS, promoting consumer choice and geographical diversity and ensuring fairness, transparency and non-discrimination between applicants in the new gTLD process.<sup>96</sup> Concerns relating particularly to sensitive expression should be balanced with these and possibly with a number of other factors. In the light of a human rights-based approach there are a number of specific considerations and factors, which are given below.

81. As noted above, specific GAC sensitivities will depend on the context of each application and will likely vary widely across GAC members. Sensitivities may be expressed in Early Warning notices which need not be from all GAC members or have GAC consensus support and do not formally constitute an objection to an applied-for new gTLD string. Hence, the focus is primarily on GAC advice, in particular on advice that an application not proceed and on advice that an application not proceed unless remediated.<sup>97</sup>

#### **5.3.1. Advice that an application not proceed**

82. GAC’s approach to expression which might raise strong sensitivities to the extent that the GAC should offer advice that the gTLD not proceed is expected to be a new area for both ICANN and GAC. Existing methods for dealing with such expression, in national contexts, may not be appropriate in relation to global public policy on the DNS.<sup>98</sup>

83. From a human rights perspective it is important to recall the United Nations Human Rights Council Resolution: The Promotion, Protection and Enjoyment of Human Rights on the Internet which affirms that the same rights that people have offline must also be protected online in particular freedom of expression.<sup>99</sup> Also, the United Nations Human Rights Committee has recently provided guidance on government action in relation to prohibitions on online content and internet systems.<sup>100</sup> The Committee noted that “[p]ermissible restrictions generally should be content-specific; generic bans on the operation of certain sites and systems are not compatible with permissible limits on Article 19.” It went further by stating that “[i]t is [also] inconsistent with [permissible limits in Article 19] to prohibit a site or an information dissemination system from publishing material solely on the basis that it may be critical of the government or the political social system espoused by the government.”<sup>101</sup>



84. The differences between and among sensitivities of a national, cultural or religious nature and those of a political nature may be difficult to determine. Frequent areas of contention are allegations of corruption and political satire or commentary.<sup>102</sup> The Council of Europe declaration on protection of freedom of expression and domain names is a helpful guide to the application of human rights standards in this area.<sup>103</sup>

**Council of Europe Declaration: “Expressions contained in the names of Internet websites, such as domain names and name strings, should not, a priori, be excluded from the scope of application of legal standards on freedom of expression and the right to receive and impart information and should, therefore, benefit from a presumption in their favour.”**

85. What is clear is that the GAC principle of respecting sensitivities regarding terms of national, cultural, geographic and religious significance could not, from a human rights perspective, be a basis for advising prohibition of politically sensitive gTLDs. This is particularly so as it relates to the question of access to a global public resource (a new gTLD) which would affect all Internet users in all countries, not only those in specific countries or regions. In the Council of Europe context, member states of the Organisation have agreed to a commitment to protect the universality, integrity and openness of the Internet by, *inter alia*, “tak[ing] all reasonable measures to ensure that the development and application of standards, policies, procedures or practices in connection with the management of resources that are critical for the functioning of the Internet incorporate protection for human rights and fundamental freedoms of Internet users in compliance with the standards recognised in international human rights law.”<sup>104</sup>

86. GAC advice against sensitive political expression would likely raise questions in respect of upholding international human rights standards which prohibit generic bans on content and information. ICANN Board decisions might be open to strong legal challenge if GAC advice of that kind were the basis of a decision to decline or otherwise disadvantage an application. Precisely where this line is to be drawn in any particular case may be difficult to determine. States do, however, have positive obligations to ensure that the right to freedom of expression is guaranteed even in the context of activities carried out by private entities (such as ICANN), *inter alia*, by ensuring that no unreasonable limitations on freedom of expression or censorship are imposed. For these reasons the ICANN Board should engage carefully and constructively with the GAC in order to understand fully the basis for GAC concerns about sensitive expression and to be able to address those in full compliance with requirements of international human rights standards.

### **5.3.2. Advice that an application not proceed unless remediated**

87. An affirmative human rights approach would suggest that, where advice that an application not proceed unless remediated is considered, remediation steps should be consistent with international human rights standards. For example, remediation measures should be consistent with reasonable limitations permitted in the UDHR and other public policy standards referred to in the Guidebook. In case of doubt, guidance should be drawn from other standards such as Articles 19 and 20 of the ICCPR.

88. The GAC principles on new gTLDs require applicants to pledge that they will adopt, before a new gTLD’s introduction, procedures to enable blocking of names of national and geographic significance at the second level.<sup>105</sup> In this respect, the required commitment by the applicants should not exceed the conditions of international human rights standards.

89. Also, a strong evidence-based approach could be considered to establish a cogent causal connection between the sensitivities, the gTLD application and actual harm to

identifiable persons. The weaker the direct causal connection is the weaker and less sustainable is the justification for any interference or limitation or broadly based recommendations for remediation. In this respect, some insight can be gained from checks on the applicants and statements about the purpose of the proposed gTLD and other requirements in the application process.

90. GAC concerns about applicants and the purpose of a new gTLDs, however, need to link to human rights standards. Questions relating to the nature of the applicant, his/her location, the purpose of the gTLD and the relevance of these to sensitivities should be given due consideration with regard to freedom of expression and freedom of association, particularly in community applications cases.

91. The protection of the right to freedom of association is not limited to the traditional notion of public spaces (such as public highways, roads or other tangible spaces). The United Nations Special Rapporteur on the rights to freedom of peaceful assembly and association has recently concluded that the rights to freedom of peaceful assembly and association apply to online spaces<sup>106</sup> and has called on states to recognise that these rights and freedoms can be exercised through new technologies, including the Internet.<sup>107</sup>

92. A community based gTLD application may raise specific issues concerning freedom association for groups. This is especially the case where a gTLD relates to affirming the rights of communities of interest or free expression which cannot be fully exercised or enjoyed in specific states. Such factors would weigh against advice that an application not proceed.<sup>108</sup>

93. Thus, a human rights compliant approach to GAC advice would be preferable. This would provide the GAC with opportunities to explore a wider range of options for advice which can reflect more nuanced and complex considerations. For example, a tiered set of options for remediation that comply with international human rights standards on freedom of expression and freedom of association when offering advice on new gTLDs would appear to be appropriate. Remediation requests and suggested areas for applicants to address should only move from the most permissive and most rights affirming approach to a more restrictive approach when appropriate.

***A human rights affirming approach would suggest that it is better to accept a sensitive expression and deal with consequences, including national internal political ones, where human rights holders, ordinary citizens, may have an opportunity to debate their concerns, participate in national dialogue on actions to address these and seek effective remedies.***

94. In sum, advice that an application should not proceed would be expected to be a rare and exceptional case, taken only where expression is manifestly illegal, just as complete prior censorship and blanket prohibitions on expression are forbidden under international law.

95. On balance, it would be preferable for GAC to develop advice to the ICANN Board which upholds the right to freedom of expression and the right to freedom of association while accepting and managing any risks related to sensitive strings, than to a priori limit the rights and freedoms of their citizens (and global Internet users) by advising that a new gTLD application not proceed or be unreasonably or unfairly remediated.

96. As duty bearers states must, when in doubt, favour upholding the rights and freedoms of persons under their jurisdiction, rather than their own sensitivities. The Council of Europe declaration on freedom of expression and domain names emphasises this point, noting that

final decisions on blocking domain names must be undertaken by competent authorities, relate to clearly identifiable content and be proportionate.<sup>109</sup>

## 6. Conclusions

97. In international human rights law, states are duty bearers and have obligations to protect, respect and promote the human rights and freedoms of persons under their jurisdictions. States have these obligations when they participate in entities with specialised technical mandates. In light of this role of states, the GAC advice must be given special consideration by the ICANN Board.

98. Where new gTLDs can be used as means of expressing views or as spaces for online association they have a human rights and fundamental freedoms dimension which should be considered together with other technical matters. The evaluation of applied-for new gTLD strings as well as registrations at the second and third level domains may involve content-related judgments and choices. While ICANN's judgment should not be interfered with unjustifiably, ICANN should exercise its role with due regard for fundamental rights and freedoms and in full compliance with international standards. In particular, any interference with the exercise of the right to freedom of expression and the right to freedom of association should be tested against the requirements of international human rights law.

99. In a Council of Europe context, such interferences must meet the conditions of Articles 10 and 11 of the ECHR, notably be prescribed by law, pursued for one of the legitimate aims specifically provided in those provisions and be necessary in a democratic society. In supervising the compatibility of Council of Europe member states measures with these conditions the ECtHR recognises national authorities' margin of appreciation to make the initial assessment of the pressing social need which makes a restriction on these rights and freedoms necessary under Articles 10 and 11. The ECtHR has found that certain notions, such as morals and significance of religion, lack a uniform conception and interpretation in the Council of Europe member states and therefore benefit from a larger margin of appreciation.

100. In respect of applied-for new gTLDs strings which raise sensitivities, it is important to take into account the specific context bearing in mind the global nature of gTLDs and the DNS. Blanket prohibitions on the use of words, names or forms of expression on a global public resource on the grounds of political sensitivity would raise questions in respect of international human rights standards on the right to freedom of expression and the right to freedom of association. GAC advice that an applied new gTLD string should not proceed on grounds of other sensitivities would need to be considered on a case by case basis. Differences between sensitivities of a national, cultural or religious nature and those of a political nature may frequently be very difficult to determine. A human rights approach to GAC advice would provide the GAC with opportunities to explore a wider range of options for advice which can reflect more nuanced and complex considerations.

## **Glossary of terms used**

ccTLD – country code Top Level Domain

DNS – Domain Name System

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

gTLD – generic Top Level Domain

ICCPR – International Covenant on Civil and Political Rights

IDN – Internationalised Domain Name

New gTLDs – new generic Top Level Domains

TLD – Top Level Domain

UDHR – Universal Declaration on Human Rights

<sup>1</sup> In order to resolve domain name disputes at the second level ICANN has developed a limited policy, on a narrow set of grounds with a small number of dispute resolution providers, i.e. the Universal Dispute Resolution Policy, available at <http://www.icann.org/en/help/dndr/udrp/policy>. Many other legal remedies and dispute mechanisms for TLD disputes exist in many countries via judicial and non-judicial mechanisms.

<sup>2</sup> See GAC Operating Principles. The Preamble states that "ICANN's decision making should take into account public policy objectives including, among other things, [...] freedom of expression", see also Principle 1, available at [https://gacweb.icann.org/download/attachments/4817162/GAC\\_Operating\\_Principles\\_1.pdf?version=1&modificationDate=1321640996000](https://gacweb.icann.org/download/attachments/4817162/GAC_Operating_Principles_1.pdf?version=1&modificationDate=1321640996000).

<sup>3</sup> See WSIS-05/TUNIS/DOC/6(Rev. 1)-E. See also, Report of the Working Group on Internet Governance (2005), page 4 at para 10. For the specific suggested roles of governments see para 30, 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.

<sup>4</sup> This Declaration is available at <https://wcd.coe.int/ViewDoc.jsp?id=1835773&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

<sup>5</sup> This Declaration is available at <https://wcd.coe.int/ViewDoc.jsp?id=1835805&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

<sup>6</sup> The new gTLDs Applicant Guidebook (the Guidebook), available at <http://newgtlds.icann.org/en/applicants/agb/> see, Dispute Resolution Procedures, Module 3, section 3.5.3, page 3-22. GAC members may raise concerns with the GAC about any application and "The GAC as a whole will consider concerns raised by GAC members and agree on GAC advice to forward to the ICANN Board of Directors". Early Warning Notices by individual states are also possible; see Applicant Guidebook, Module 1, sub-section 1.1.2.4.

<sup>7</sup> Resolution A/HRC/20/L.13 of 2012 by the Human Rights Council on 5 July 2012, available at <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G12/147/10/PDF/G1214710.pdf?OpenElement>.

<sup>8</sup> Governmental Advisory Committee "GAC Principles Regarding New gTLDs" 28 March 2007, Clause 2.1(a) and (b).

<sup>9</sup> Articles 19 and 20 of the UDHR, Articles 19, 20 and 21 of the ICCPR.

<sup>10</sup> Compare, for example, Article 10 of the European Convention on Human Rights and Article 9 of the African Charter on Human and Peoples' Rights. These regional standards are, in turn, further elaborated as each sovereign nation determines in national legislation.

<sup>11</sup> Charter of the United Nations, 1945, available at: <https://www.un.org/en/documents/charter/>.

<sup>12</sup> See for example and by way of analogy, those listed in the Applicant Guidebook, note 6 above. See in particular, Module 3, section 3.5.3, pg 3.

<sup>13</sup> Although it is the underlying Internet Protocol address on the World Wide Web which provides direct access to a website, it is little or hardly used. Domain names are not unique as a system for increased identification functionality. A comparable effect is provided by alphanumeric use of telephone numbers, for example 0800-FLOWERS, or the use of local geographical names instead of house numbers for finding geographical locations.

<sup>14</sup> This part of the paper should not be taken as an exhaustive overview of the case law in the subject area.

<sup>15</sup> Cour d'Appel de Paris, Arrêt du 20 Avril 2003 Société Groupe Danone ct. Association Le Réseau Voltaire pour la liberté d'expression, p.12, available at <http://www.foruminternet.org/telechargement/documents/ca-par20030430.pdf>. This case concerned the usage of domain names [www.jeboycoctedanone.com](http://www.jeboycoctedanone.com) and [www.jeboycoctedanone.net](http://www.jeboycoctedanone.net).

<sup>16</sup> Décision n° 2010-45 QPC du 6 octobre 2010, official translation into English is available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/201045qpc.pdf>, see paragraph 6. "Article L.45 of the Postal and Electronic Communications Code vests bodies appointed by the Minister in charge of electronic communications with the task of assigning and managing domain names "of first level internet domain addresses corresponding to the national territory". It merely provides that the assigning by said bodies of a domain name is carried out "in the general interest, under publicised non discriminatory rules designed to ensure compliance by the applicant with intellectual property rights". This article then leaves it to a Decree issued after consultation with the Conseil d'Etat to specify the conditions of application of this provision. Although Parliament has thus protected intellectual property rights, it has entirely delegated the power to supervise the conditions in which domain names are assigned, refused or withdrawn. No other statutory provision offers guarantees ensuring the absence of any infringement of freedom of enterprise and **Article 11 of the Declaration of 1789**. Parliament thus failed to exercise its powers to the full. Article 45 of the Postal and Electronic Communications Code must thus be held to unconstitutional."(emphasis added). Article 11 of Declaration of Human and Civil Rights of 26 August 1789 reads: "The free communication of ideas and of opinions is one of the most precious rights of man. Any citizen may therefore speak, write and publish freely, except what is tantamount to the abuse of this liberty in the cases determined by Law."

<sup>17</sup> President of the Court in The Hague, Inholland vs. Kaasjager, KG 05/447, 21 June 2005. Available at [www.domjur.nl](http://www.domjur.nl).

<sup>18</sup> Name.Space, Inc., v. Network Solutions, Inc. and National Science Foundation, 202 F.3d 573, 577 (2d Cir. 2000), available at <http://www.yale.edu/lawweb/ibalkin/telecom/namespace.pdf>.

<sup>19</sup> Various cases are mentioned in for example: V. Karavas & G. Teubner, 'http://www.CompanyNameSucks.com: The Horizontal Effect of Fundamental Rights on 'Private Parties' within Autonomous Internet Law' in: German Law Journal, 04/12, pp. 1335-1358. Online: [http://www.germanlawjournal.com/pdfs/Vol04No12/PDF\\_Vol\\_04\\_No\\_12\\_1335-1358\\_European\\_Teubner\\_Karavas.pdf](http://www.germanlawjournal.com/pdfs/Vol04No12/PDF_Vol_04_No_12_1335-1358_European_Teubner_Karavas.pdf); W. Sakulin, 'Trademark Protection and Freedom of Expression: An Inquiry into the Conflict between Trademark Rights and Freedom of Expression under European, German, and Dutch Law', Amsterdam, 2010. Online: <http://dare.uva.nl/document/169804>, p. 13, 207-213, 223-224, 286-289.

<sup>20</sup> See the Guidebook, note 6 above, Module 2, section 2.2.1.2.3. For example the use of the word 'olympic' is prohibited among others.

<sup>21</sup> Ibid. See Module 1, section 2.2.1.3.1.

<sup>22</sup> The ICANN Board in explaining reasons for not following GAC advice regarding the potential risk/threat of TLD blocking to the universal resolvability and stability of the DNS stated that "[t]he issue of governments (or any other entity) blocking or filtering access to a specific TLD is not unique to the issue of the .XXX sTLD. Such blocking and filtering exists today. While we agree that blocking of TLDs is generally undesirable, if some blocking of the .XXX sTLD does occur there's no evidence the

result will be different from the blocking that already occurs.” See 18 March 2011 ICANN Board Rationale for Approving Registry Agreement with ICM’s for .XXX sTLD, Section V, 4, c, at page 16.

<sup>23</sup>See GAC Communiqué - San Francisco, March 16, 2011, stating that “with the revised proposed ICANN ICM Registry agreement, the Corporation could be moving towards assuming an ongoing management and oversight role regarding Internet content” available at [https://gacweb.icann.org/download/attachments/1540152/GAC\\_40\\_San\\_Francisco\\_Communique.pdf?version=1&modificationDate=131225023000](https://gacweb.icann.org/download/attachments/1540152/GAC_40_San_Francisco_Communique.pdf?version=1&modificationDate=131225023000).

<sup>24</sup> Guidebook, note 6 above, see Module 3, section 3.2.

<sup>25</sup> Ibid. section 3.2.2.1. The gTLD string applied for is confusingly similar to an existing TLD or to another gTLD string applied for in the same round of applications.

<sup>26</sup> Ibid., section 3.2.2.2. The gTLD string applied for, infringes on the existing legal rights of the objector

<sup>27</sup> W. Sakulin, Trademark Protection and Freedom of Expression: An Inquiry into the Conflict between Trademark Rights and Freedom of Expression under European, German, and Dutch Law, Amsterdam, 2010. Online: <http://dare.uva.nl/document/169804>, p. 210.

<sup>28</sup> Guidebook, note 6 above, see Module 3, section 3.5.3.

<sup>29</sup> Ibid.

<sup>30</sup> See 18 March 2011 ICANN Board Rationale for Approving Registry Agreement with ICM’s for .XXX sTLD, Section V, A, pg. 18 “The negative community impact will most likely be on those that do not support the idea of the introduction of the .XXX sTLD. However, refusing to approve registry agreements with strings that do not have unanimous community support, is not an acceptable option as ICANN continues to move toward the introduction of even more new gTLDs.”

<sup>31</sup> The model registry agreement between ICANN and a new gTLD Registry Operator covers issues related to words or names that are reserved for purposes of registration, see Specification 5’ Schedule of Reserved Names at the Second Level in gTLD Registries of the Model Registry Agreement, available at <http://newgtlds.icann.org/en/applicants/agb/base-agreement-specs-11jan12-en.pdf>. Certain words could be also excluded from use in order to comply with name protection mechanisms mandated by ICANN or established by Registry Operators themselves for purposes of protection of legal rights in trademarks, *ibid.*, see Specification 7 ‘Minimum Requirements for Rights Protection Mechanisms’

<sup>32</sup> For example, the Charter of the .xxx TLD states, *inter alia*, that the Registry Operator will “protect free expression rights as defined in the United Nations Declaration of Human Rights”. See .XXX Registry Agreement between the Internet Corporation for Assigned Names and Numbers, a California nonprofit public benefit corporation (“ICANN”), and ICM Registry LLC of 31 March 2011, Appendix S, Part 1, 2, available at <http://www.icann.org/en/about/agreements/registries/xxx>

<sup>33</sup> See 18 March 2011 ICANN Board Rationale for Approving Registry Agreement with ICM’s for .XXX sTLD, available at [www.icann.org/en/groups/board/.../icm-rationale-18mar11-en.pdf](http://www.icann.org/en/groups/board/.../icm-rationale-18mar11-en.pdf). In its rationale for approving this Registry Agreement, the ICANN Board stated that “placing further specification regarding other types of “offensive” material would require ICANN to take a role in content management”, see section 1, pg. 12. “ICANN’s compliance role is not about content per se but about registry compliance with and enforcement of its policies regarding the use of second-level registrations. As with any other TLD, registrants and others will likely turn to ICANN for assistance with content-related issues, regardless of the merit of such requests. Therefore, entering into the proposed registry agreement for the .XXX sTLD, while it may increase the overall numbers of requests to ICANN for content-related assistance, does not represent ICANN’s movement towards a content management or oversight role.” Section 4.c, page 18.

<sup>34</sup> In this context, see the discussion on the first amendment protection for intermediaries, such as search engines E. Volokh & D. Falk, Google, First Amendment Protection for Search Engine Search Results, 20 April 2012. Online: <http://ssrn.com/abstract=2055364>; J. van Hoboken, Search Engine Freedom, on the implications of the right to freedom of expression for the legal governance of Web search engines, Thesis defended 23 March 2012, pp. 320-328. Online: <http://dare.uva.nl/record/411972>.

<sup>35</sup> See paragraph 30 of Recommendation CM/Rec(2011)7, available at <https://wcd.coe.int/ViewDoc.jsp?id=1835645&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>

<sup>36</sup> *Garaudy v. France* (no. 65831/01), 24.06.2003, admissibility decision.

<sup>37</sup> See also Recommendation No. R 97 (20) of the Committee of Ministers of the Council of Europe on “hate speech” states that “hate speech” is understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.

<sup>38</sup> *Féret v. Belgium* (no. 15615/07), 16.07.2009.

<sup>39</sup> *Leroy v. France* (no. 36109/03), 02.10.2008.

<sup>40</sup> *Jersild v. Denmark* (no. 15890/89), 23.09.1994.

<sup>41</sup> *Lehideux et Isorni v. France* (no. 24662/94), 23.09.1998.

<sup>42</sup> *Refah Partisi (The Welfare Party) and Others v. Turkey* (nos. 41340/98, 41342/98, 41343/98 and 41344/98), 13.02.2003; *Communist Party of Germany v. the Federal Republic of Germany* (no. 250/57), 20.07.1957 ; B.H; M.W; H.P; G.K. v. Austria (no. 12774/87), 12.10.1989.

<sup>43</sup> *Gündüz v. Turkey* (no. 35071/97), 04.12.2003.

<sup>44</sup> *Garaudy v. France* (no. 65831/01), 24.06.2003, admissibility decision.

<sup>45</sup> *Pavel Ivanov v. Russia* (no. 35222/04), 20.02.2007, admissibility decision.

<sup>46</sup> *Norwood v. the United Kingdom* (no. 23131/03), 16.11.2004, admissibility decision.

<sup>47</sup> *Otegi Mondragon v. Spain* (no. 2034/07), 15.03.2011.

<sup>48</sup> *Faruk Temel v. Turkey* (no. 16853/05), 01.02.2011.

<sup>49</sup> *Handyside v. the United Kingdom* (no. 5493/72), 07.12.1976, para. 49.

<sup>50</sup> *Ibid.*, para. 48.

<sup>51</sup> *Muller and others v. Switzerland*, (No. 10757/84, 24.05.1988, para.35.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Otto-Perminger-Institut v. Austria* (no. 13470/87) 20.09.1994, para.50.

<sup>54</sup> *Wingrove v. United Kingdom* (no. 17419/90), 25.11.1996, para. 58.

<sup>55</sup> In *Open Door and Dublin Well Woman v. Ireland* (no. 14234/88 ) 29.10.1992, para.68. involving allegations on restrictions on the right to receive and impart information on issues related to abortion the ECtHR found that the imposition by the concerned state of a permanent prohibition to provide advice in this context was too large and disproportionate

<sup>56</sup> Féret v. Belgium (no. 15615/07), 16.07.2009.

<sup>57</sup> Garaudy v. France (no. 65831/01), 24.06.2003.

<sup>58</sup> Casado Coca v. Spain (no. 15450/89), 24.02.1994). The distribution of advertising materials by a barrister which resulted in disciplinary proceedings against him was considered by the Court as commercial expression that was protected by the ECHR.

<sup>59</sup> Krone Verlag GmbH & Co KG v. Austria (no. 3) (no. 39069/97), 11.12.2003.

<sup>60</sup> X and Church of Scientology v Sweden (no. 7805/77), 05.05.1979, admissibility decision; Casado Coca v. Spain (no. 15450/89), 24.02.1994).

<sup>61</sup> Dichand and Others v. Austria (no. 29271/95), 26.02.2002, para. 39.

<sup>62</sup> VgT Verein gegen Tierfabriken v. Switzerland (no. 24699/94), 28.06.2001, para. 71.

<sup>63</sup> In X and Church of Scientology v Sweden (no. 7805/77), 05.05.1979, admissibility decision, the Commission introduced the distinction between advertisements aimed at promoting a religion and those aimed at selling a product.

<sup>64</sup> Stambuk v. Germany (no. 37928/97), 17.10.2002, para. 41.

<sup>65</sup> Lehideux et Isorni v. France (no. 24662/94), 23.09.1998.

<sup>66</sup> Markt Intern Verlag GmbH and Klaus Beermann v. Germany (no. 10572/83), 20.11.1989.

<sup>67</sup> Jacobowski v. Germany (no. 15088/89), 23.06.1994.

<sup>68</sup> Hertel v. Switzerland (no. 25181/94), 25.08.1998.

<sup>69</sup> Lehideux et Isorni v. France (no. 24662/94), 23.09.1998.

<sup>70</sup> Paeffgen GmbH v. Germany, decision as to the admissibility of application nos. 25379/04, 21688/05, 21722/05 and 21770/05, 18.09.2007.

<sup>71</sup> Ibid.

<sup>72</sup> Anheuser-Busch Inc. v. Portugal, (no. 73049/01), 11.01.2007, para. 46.

<sup>73</sup> Markt Intern Verlag GmbH, Günter Weber and Hans-Wilhelm Beyen v. Germany (no. 12278/86), 27.05.1991, admissibility decision.

<sup>74</sup> Krone Verlag GmbH & Co KG v. Austria (no. 3), (no. 39069/97), 11.12.2003, para. 31.

<sup>75</sup> See Wolfgang Sakulin, Trademark Protection and Freedom of Expression, Wolters Kluwer 2011, at 113.

<sup>76</sup> Appleby and others v. the United Kingdom (no. 44306/98), 06.05.2003, para.48.

<sup>77</sup> Wabl v. Austria, (no. 24773/94), 21.03.2000, para. 44.

<sup>78</sup> Rekvényi v. Hungary (25390/94) 20.05.1999, para. 49, the Court considered that applicants could freely articulate their political opinions and preferences for instance by expounding election programmes, promoting and nominating candidates, organising election campaign meetings, voting and standing for elections to Parliament, local authorities and the office of mayor, participating in referenda, joining trade unions, associations and other organisations, participating in peaceful assemblies, making statements to the press, participating in radio or television programmes or publishing works on politics.

<sup>79</sup> Ibid, paras. 27-62.

<sup>80</sup> The Guidebook note 6 above. See Module 1, section 2.2.1.3.1

<sup>81</sup> See note 8 above, in particular Clause 2.1 (b): New gTLDs should respect a) the provisions of the Universal Declaration of Human Rights which seeks to affirm "fundamental human rights, in the dignity and worth of all human beings and in the equal rights of men and women" b) the sensitivities regarding terms with national, cultural, geographic and religious significance." See also GAC letter to ICANN Board, 4 August 2010 Re: Procedures for Addressing Culturally Objectionable and/or Sensitive Strings: The GAC firmly believes that the absence of any controversial strings in the current universe of top level domains (TLDs) to date contributes directly to the security and stability of the domain name addressing system (DNS) and the universal resolvability of the system". Available at <http://www.icann.org/en/correspondence/gac-to-dengate-thrush-04aug10-en.pdf>

<sup>82</sup> Although it appears that more than the mere existence of TLD blocking risks could be demanded to justify non-approval of a TLD. In the case of the .xxx TLD, the ICANN Board responded to GAC concerns regarding threats to the universal resolvability and stability of the Internet, by stating that there was lack of evidence that the blocking of this TLD would be different from blocking that was already happening. See 18 March 2011 ICANN Board Rationale for Approving Registry Agreement with ICM's for .XXX sTLD, Section V, 4, at page 16.

<sup>83</sup> See note 8 above, clause 2.1 (b).

<sup>84</sup> Marie Juul Petersen, "International Religious NGOs at the United Nations: A study of groups of religious organisations" in The Journal of Humanitarian Assistance (Feinstein International Centre, 17 November 2010).

<sup>85</sup> See, for example, the statements of Philippines and China (on behalf of 40 countries) at the Human Rights Council Panel on Freedom of Expression and the Internet, 29 February 2012, available at: <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session19>.

<sup>86</sup> Frank La Rue "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression" (26 April 2011, A/HRC/17/27) para 29. Blocking refers to measures taken to prevent certain content from reaching an end-user. This includes preventing users from accessing specific websites, Internet Protocol (IP) addresses, domain name extensions, the taking down of websites from the web server where they are hosted, or using filtering technologies to exclude pages containing keywords or other specific content from appearing. See also, ICANN Security and Stability Committee "DNS Blocking: Benefits Versus Harms – An Advisory from the Security and Stability Advisory Committee on Blocking of Top Level Domains at the Domain Name System" ICANN SAC 050, 14 June 2011 which states that "technical approaches to DNS blocking are intended to affect users"; See also "Security and Other Technical Concerns Raised by DNS Filtering Requirements in the PROTECT IP Bill". (Crocker S, and others, May 2011), available at <http://domainincite.com/docs/PROTECT-IP-Technical-Whitepaper-Final.pdf>

<sup>87</sup> For example, Internet Society Internet Society Perspectives on Domain Name System (DNS) Filtering 15 September 2011, available at [http://www.internetsociety.org/sites/default/files/pdf/dns-filtering\\_20110915.pdf](http://www.internetsociety.org/sites/default/files/pdf/dns-filtering_20110915.pdf); Frank La Rue Report, above note 86.

<sup>88</sup> Ibid, SSAC Advisory note 86 above: "All technical approaches to DNS blocking, and even more so attempts to circumvent the blocking, will have some impact on the security and/or stability of users and applications, and on the coherency or universal resolvability of the global namespace. The SSAC cannot draw a line between "good DNS blocking" and "bad DNS blocking," at any TLD layer, although the Committee can offer to investigate the observable impacts of various approaches to blocking, and it can suggest guidelines to use in evaluating which approaches to blocking are likely to incur the fewest unintended consequences and least harm outside the blocked domain."

<sup>89</sup> Ibid. "If implemented without some formal ethical framework to minimize harm to external parties, blocking may induce more adverse effects than intended on broader communities, exacerbating the problem(s) that such blocking is intended to solve."



---

<sup>90</sup> Global Information Society Watch 2011 "Internet Rights and Democratisation: focus on freedom of expression and association online (Association for Progressive Communications and Hivos 2011).

<sup>91</sup> See note 86 above, para 31.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

<sup>94</sup> See [Recommendation CM/Rec\(2008\)6](#) of the Committee of Ministers to member states on measures to promote the respect for freedom of expression and information with regard to Internet filters, adopted on 26 March 2008.

<sup>95</sup> Council of Europe Convention on Cyber Crime, 2004. According to article 15(1) of this Convention "Each Party shall ensure that the establishment, implementation and application of the powers and procedures provided for in this Section are subject to conditions and safeguards provided for under its domestic law, which shall provide for the adequate protection of human rights and liberties, including rights arising pursuant to obligations it has undertaken under the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, the 1966 United Nations International Covenant on Civil and Political Rights, and other applicable international human rights instruments, and which shall incorporate the principle of proportionality."

<sup>96</sup> See note 8 above, principles 2.5 and 2.6.

<sup>97</sup> The Guidebook, note 6 above, see Module 3, section 3.1, page 3-2.

<sup>98</sup> Above note 86. The United Nations Special Rapporteur on Freedom of Expression, for example, has emphasised that "[...] due to the unique characteristics of the Internet, regulations or restrictions which may be deemed legitimate and proportionate for traditional media are often not the case with regard to the Internet [...] The Special Rapporteur also comments, in a footnote, that "this does not apply to registration with a domain name authority for purely technical reasons or rules of general application which apply without distinction to any kind of commercial operation" This reference is confusing but appears to suggest that domain naming authorities can require registration or licensing in some respects

<sup>99</sup> See above note 7.

<sup>100</sup> Human Rights Committee, General Comment 34, 21 July 2011 CCPR/C/GC/34.

<sup>101</sup> Ibid, paras 39 and 43.

<sup>102</sup> See, for example the controversy concerning objections to The Spear a painting by Brett Murray which removed from the Goodman Art Gallery, Johannesburg, in May 2012 following threats of violence against gallery staff. Defamation action was filed gallery by the African National Congress: Govender, Peroshni. "[Presidential penis portrait riles S. Africa's ANC](#)". Reuters. Retrieved 19 May 2012

<sup>103</sup> See note 5 above.

<sup>104</sup> Recommendation CM/Rec (2011)8 of the Committee of Ministers to member states on the protection and promotion of the universality, integrity and openness of the Internet, adopted on 21 September 2011, available at <https://wcd.coe.int/ViewDoc.jsp?id=1835707&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>

<sup>105</sup> See note 8 above, Principle 2.7(a)

<sup>106</sup> Special Rapporteur on the rights to freedom of peaceful assembly and association, 21 May 2012, A/HRC/20/27, paras 32 and 52.

<sup>107</sup> Ibid at para 84(k)

<sup>108</sup> See also the Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, available at <https://wcd.coe.int/ViewDoc.jsp?id=1606669>

<sup>109</sup> See note 5 above.