Summary of the Council of Europe Report: DGI(2014)12

ICANN’s procedures and policies in the light of human rights, fundamental freedoms and democratic values

The Council of Europe has contracted for the production of a report which outlines the human rights implications of ICANN’s policies and procedures[[1]](#footnote-1). The report is a very useful introduction to the issues which arise, and discusses a number of potential mitigations. As the report points out, the role of ICANN in the field of internet governance is becoming increasingly important, and stakeholders in the global Internet community look to ICANN to demonstrate maturity and accountability commensurate with this responsibility. Among the recommendations in the conclusion are the following:

• Include reference to human rights in ICANN’s Bylaws

• Define public interest objectives

• Improve the human rights expertise and early engagement in the Government Advisory Committee (GAC)

• Develop an early engagement mechanism for the safeguard of human rights

• Review ICANN’s legal basis and explore innovative solutions for developing an

international or quasi-international status of ICANN.

Among the stakeholder groups at ICANN, only the NCSG provided comments on the interim report. The aim of this brief summary is to encourage those who have not read the full report, to take a look at some of the arguments, and consider whether or not a more focused attention to human rights and democratic values might be fruitful in avoiding a number of policy pitfalls which occur when these fundamental rights and values are not addressed.

The report focuses on several basic human rights, and the procedures and policies appear to impact them. Freedom of expression, religion, and association come into focus as ICANN accepts applications for the new generic top level domains, as specified in the guidebook for that process. Decision-making during the first round of these new domains has been fraught with controversy, and Chapter 2 discusses many of the issues which have arisen, with an analysis of several decisions of the European Court of Human Rights which are helpful in analyzing the ICANN procedures. This section comprises about half of the 47 page report.

Chapter 3 discusses data protection and the procedures which ICANN has put in place with respect to collection, retention, and public disclosure of personal data of domain name registrants. The mechanism to enforce these practices is the Registrars Accreditation Agreeement or RAA, which the report discusses in the context of European jurisprudence dealing with established data protection principles of proportionality, necessity, legitimate and limited purpose. The RAA requires all registrars to process personal data as set out in the contract, and if the data protection law in their jurisdiction dictates against the procedures, they must provide proof to ICANN of this and apply for an exemption. In particular, the requirement to publish personal data of registrants in the WHOIS Directory, accessible to anyone over the Internet regardless of purpose, has been the subject of much debate and comment by the Article 29 Working Party of data commissioners.

The report discusses at some length the requirement to retain personal data beyond the period necessary for data processing, solely for the purpose of facilitating future potential law enforcement access, deeming this to be excessive and not in compliance with human rights law. Finally, the chapter also discusses the issue of surveillance in the context of recent revelations of western intelligence agencies.

The next chapter examines the responsibilities of ICANN and the Government Advisory Committee, particularly with respect to ICANN’s acting “in the public interest” as required by its bylaws. The “public interest” has not been defined by ICANN, and the report contains much useful information about how the public interest is interpreted by European Courts. There is considerable current emphasis on advancing ICANN’s accountability process and procedures, partly in response to the IANA transition requirements, and partly in response to the recent Accountability and Transparency Report. It is the view of many of the stakeholders at ICANN that further discussion of the public interest, whether to attempt to define it in context or set a framework for its evaluation, and this report is a useful input to that discussion.

Conclusion

The respect for Human Rights can be an important benchmark to clarify the meaning of serving the public interest in the scope of ICANN’s activities. The Internet has become essential for individual’s every day activities and for the full enjoyment of rights. This key resource should be managed in a way that is people-centered and is consistent with globally recognized human rights and fundamental freedoms. Although corporations are not legally bound by international treaties on Human Rights, these conventions have set a moral and ethical global standard. In many jurisdictions, those conventions have been mirrored in country or regional constitutions, where corporations may in fact be required to meet similar standards of human rights.

More specifically, International treaties on human rights inspire the UN Guiding Principles on Business and Human Rights, unanimously adopted in 2011. This document sets a global reference in terms of corporate responsibilities, which include the need to respect human rights. These standards should certainly guide the work developed by ICANN when dealing with the specific set of issues that fall under its remit.

From the perspective of most civil society organizations active at the Internet Governance Forum (IGF) or at ICANN, the conversation about human rights in the context of ICANN’s policies and procedures is long overdue. To participate in this discussion, you may do any of the following:

* Participate at the upcoming human rights discussion hosted by the NCSG at ICANN 52 in Singapore. A detailed schedule will soon be published at the ICANN website, <http://singapore52.icann.org/en>
* Join the human rights mailing list, at xxx
* Contact zzz
1. This document is based on the key points raised by the report “ICANN’s procedures and policies in the light of human rights, fundamental freedoms and democratic values”, written by Dr. Monika Zalnieriute and Thomas Schneider and facilitated by the Council of Europe. The report has been put forth as an input for discussion of the ICANN community during public sessions in ICANN 50 (London) and ICANN 51 (Los Angeles) and is accessible at http://www.coe.int/t/informationsociety/icann-and-human-rights.asp. [↑](#footnote-ref-1)