**DRAFT PROBLEM STATEMENT RELATING TO THE PROTECTION OF CERTAIN RED CROSS NAMES AND ACRONYMS AT THE SECOND LEVEL IN GENERIC TOP LEVEL DOMAINS (draft as of 12 January 2017)**

**The Problem:**

The Governmental Advisory Committee (GAC) advice to the ICANN Board and Generic Names Supporting Organization (GNSO) policy recommendations to the ICANN Board in relation to the protection of the Movement names at the second level of gTLDs are in conflict. To assist the respective parties and the community gain a better understanding of the conflicting positions, this facilitated discussion between designated representatives of the GNSO and the GAC is intended to consider two issues:

(1) the appropriate form and extent of any protections that are to be conferred in this instance; and

(2) how to provide that protection in the context of the applicable legal rights framework, mindful not only of ICANN's narrow mission but also of ICANN’s commitment *[to carry out] its activities in conformity with relevant principles of international law and international conventions and applicable local law,* as encapsulated in ICANN’s Bylaws.

…. Is intended to consider the following issues:

1. The form and extent of protections considered appropriate in this instance by the IGO/INGO PDP WG, and subsequently the GNSO Council
2. The form and extent of protections considered appropriate in this instance by the GAC as reflected in GAC advice
3. Discuss the areas of difference.
4. Discuss how to provide protections in the context of the applicable legal rights framework, mindful not only of ICANN’s narrow mission but also of ICANN’ s commitment to … as encapsulated in ICANN’s bylaws.

**The Scope:**

The allocation, management and operation of generic top level domains (gTLDs) must take into account the need to ensure that neither the registration of a domain name at the second level, nor the manner in which it is used, infringes the legal protections accorded to the designations “Red Cross”, “Red Crescent”, “Red Lion and Sun” and “Red Crystal” and, by implication, to the names of the respective components of the International Red Cross and Red Crescent Movement (hereafter Movement) under universally agreed norms of public international law and under the laws in force in multiple jurisdictions.

Any gTLD policies for the protection of the official names of the respective components of the Movement, including

* the names of the 190 recognized National Societies (in relevant national languages), and of
* the names of the International Committee of the Red Cross and of the International Federation of Red Cross and Red Crescent Societies (in the 6 official languages of the Movement) and the latter’s usual acronyms (ICRC/CICR/MKKK and IFRC/FICR),

should reflect the scope of the legal protections afforded to these terms under international law while balancing any legitimate rights and interests of other domain name registrants.

**Proposed Method:**

The GAC and the GNSO are being requested to engage in a dialogue based on this Problem Statement and agreed Briefing Materials, assisted by a facilitator.

**The Issue in Context:**

On [7 July 2013](https://www.icann.org/resources/board-material/minutes-new-gtld-2013-07-17-en), the New gTLD Program Committee of the ICANN Board confirmed that the interim protection for IGO identifiers pursuant to Specification 5 of the New gTLD Registry Agreement would continue while the GAC, NGPC, ICANN staff and community continue to actively work through outstanding implementation issues. This temporary reservation remains in place and the names can be found at: <https://www.icann.org/sites/default/files/packages/reserved-names/ReservedNames.xml>.

On 20 November 2013, the GNSO Council unanimously approved 25 recommendations concerning the Protection of IGO and INGO Identifiers in All gTLDs, which were the result of a GNSO Policy Development Process. Seven of these recommendations related to the Red Cross Red Crescent Movement (RCRC), which were considered by the PDP WG in two parts:

* Scope 1 Identifiers: “Red Cross”, “Red Crescent”, “Red Lion and Sun” and “Red Crystal” (Language: UN6)
* Scope 2 Identifiers: 189 recognised National Red Cross and Red Crescent Societies; International Committee of the Red Cross; International Federation of Red Cross and Red Crescent Societies: ICRC, CICR, CICV, MKKK, IFRC, FICR (Language: In English as well as in their respective national langugaes; ICRC & IFCR protected in UN6)

These recommendations afforded protections at the top level for the exact match, full name of the Red Cross, Red Cresent, Red Lion and Sun and Red Crystal by making them ineligible for delegation in the Applicant Guidebook section 2.2.1.2.3 *Strings Ineligible for Delegation*; it was also recommended that an exception procedure should be created for cases where a protected organization wishes to apply for their protected string at the top level.

The recommendations also provided for protection of exact match, full name of the Red Cross, Red Crescent, Red Lion and Sun and Red Crystal at the second level through Specification 5 of the Registry Agreement as reserved names with an additional recommendation that an exception procedure be created for cases where a protected organization wishes to apply for their string at the second level.

The PDP WG did not recommend the same level of protection for the Scope 2 Identifiers. However, acknowledging that some level of protection was desirable the PDP WG recommended that these names be placed into the Trademark Clearinghouse mechanism such that:

(1) a potential registrant of a second level domain matching one of these names or acronyms would receive a Claims Notice consistent with protections afforded trademark owners via a 90 day claims period; and

(2) the affected organization would receive a Notice of Registered Name if the registrant nevertheless proceeds with the attempted registration.

On 30 April 2014, the ICANN Board [adopted](https://www.icann.org/resources/board-material/resolutions-2014-04-30-en" \l "2.a) the GNSO recommendations that were consistent with GAC advice and requested additional time to consider those that were inconsistent with GAC advice, which for the purpose of this facilitated discussion at the recommendations related to the Scope 2 Identifiers.

The GAC’s rationale for seeking permanent protection for the terms and identifiers most closely associated with the International Red Cross and Red Crescent Movement is grounded in the protections of the designations “Red Cross” and “Red Crescent” under international treaty law and under multiple national laws. In March 2014, the GAC clarified expressly that such protections should also apply to the 189 (now 190) National Societies’ names (in English and in the respective official language or languages of the countries in which each National Society is recognized and operating), and to the names of the two (2) international components of the Movement (in the 6 official United Nations languages). In respect to the acronyms of the Movement’s international components (ICRC, CICR, MKKK, as well as IFRC and FICR), the GAC’s advice was for a protection similar to the proposed cost-neutral mechanisms it recommended be developed for International Governmental Organization acronyms.

**On the specific international legal grounds for the protection of the Red Cross and Red Crescent designations at all times that do not flow from, and cannot be equated with, trademark protections**

As the GAC has expressed on different occasions to the Board (including in its past ICANN Conference representations and “Communiqués”; see in particular the GAC’s London Communiqué of 25 June 2014), the protections accorded to the Red Cross and Red Crescent designations and identifiers *are not grounded* in national or international trademark protections, but in the distinct international legal protections afforded to the words “Red Cross”, “Red Crescent”, “Red Lion and Sun” and “Red Crystal” under the 1949 Geneva Conventions and their Additional Protocols of 1977 and 2005.

Specific mention may be made in this context to Article 53 of the first Geneva Convention of 1949 which specifically prohibits *“[t]he use by individuals, societies, firms or companies either public or private, other than those entitled thereto under the present Convention, of the emblem or designation “Red Cross” […], or any sign or designation constituting an imitation thereof, whatever the object of such use and irrespective of its date of adoption, shall be prohibited at all times”*. The same prohibitions extend under the first Geneva Convention to the designations “Red Crescent” and “Red Lion and Sun” and under Additional Protocol III to the designation “Red Crystal”. The first Geneva Convention and Additional Protocol III further formulates an international obligation for the States to take all measures necessary for the prevention and repression at all times, of the abuses of the said designations.

In additional to the legal argumentary detailed above, the argument has been consistently been made that that ICANN’s legal rights protection mechanisms were not only inadequate, but were also of a nature to unduly place the onus of responsibility to monitor and pursue instances of misuse of the Red Cross and Red Crescent names and identifiers on the Movement’s organizations, and thus, thereby diverting precious resources of the Red Cross and Red Crescent organizations from their primary humanitarian purpose.

**Current ICANN Mechanisms Developed to Reflect Existing Legal Protections:**

When registering a gTLD domain, a Registered Name Holder represents that, to the best of the Registered Name Holder's knowledge and belief, neither the registration of the Registered Name nor the manner in which it is to be directly or indirectly used infringes the legal rights of any third party.

Where the allegation concerns infringement of trademark rights, ICANN has an existing consensus policy (the Uniform Domain Name Dispute Resolution Policy (UDRP)) that allows trademark holders to initiate a dispute resolution process where:

(i) the registered domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; AND

(ii) the registrant has no rights or legitimate interests in respect of the domain name; AND

(iii) the domain name was registered and is being used in bad faith.

Examples of bad faith include: (1) instances where a Registered Name Holder intentionally attempts to attract, for commercial gain, Internet users to the Registered Name Holder's website by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of the website or of a product or service on the website; or (2) circumstances indicating that the domain name was registered primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant/mark-holder for valuable consideration in excess of documented out-of-pocket costs directly related to the domain name.

In addition to the UDRP, the 2012 New gTLD Program incorporated new and additional trademark rights protection mechanisms. For example, entering one’s trademark into the new Trademark Clearinghouse database ensures that a trademark holder will be notified when a domain name is registered that matches their trademark, and potential registrants are advised of trademark rights that may exist in a domain name as part of the registration process. A new dispute resolution policy based substantially on the UDRP – the Uniform Rapid Suspension system (URS) - was also introduced for the 2012 New gTLD Program.

The above-mentioned protection mechanisms are based on the existence of legal rights based on numerous national trademark laws and international treaties related to trademarks.