Response to the questionnaire issued by the Jurisdiction Subgroup of CCWG-Accountability, Work Stream 2

Just Net Coalition

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The Just Net Coalition[1] (JNC) comprises several dozen organisations and individuals from different regions globally concerned with internet governance, human rights and social justice, and the relationship between them.

We choose to respond only to questions 4a and 4b, which as below.

4 a. Are you aware of any material, documented instance(s) where ICANN has been unable to pursue its Mission because of its jurisdiction?* If so, please provide documentation.

ICANN's mission is "to ensure the stable and secure operation of the Internet's unique identifier systems"[2]. In performing its mission, " ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole"[3]. The laws or the public interest of one country can therefore not be prioritized over those of others. Application of US jurisdiction (or of any other national jurisdiction) over ICANN results in a prioritization of US (or corresponding country's) law and public interest over those of other countries. It thus interferes with the ability of ICANN to pursue its mission "for the benefit of the Internet community as a whole".

In assessing the impact of US jurisdiction over ICANN, the above question 4a needs to be interpreted broadly. It must cover all provable facts that point to the constraints put by the US jurisdiction on ICANN's ability to pursue its mission. This includes past instances where it can be shown that ICANN intended to do something, or actually did, but was stopped by the force of some element of US jurisdiction. However, the effect of law (or jurisdictional authority) is assessed not only in its consequences on actual actions, but also in its force of dissuading or encouraging potential actions.

Let us illustrate this with the commonplace example of traffic law. It will be of a limited meaning to ask how "often" has an anti-speeding law rendered motorists unable to speed over, say, 130 Kmph. The concerned traffic law surely influences the behaviour of drivers, who are much less likely to drive fast than they would be if there were no speed limits, as long one can safely assume (or know) that there is a high enough enforcement efficiency in that jurisdiction.

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1 http://justnetcoalition.org

2 See 1.1(a) of ICANN's Bylaws, at: https://www.icann.org/resources/pages/governance/bylaws-en

3 See 1.2(a) of ICANN's Bylaws

There exist a set of US laws, and executive, legislative and judicial powers, which apply to people and organisations in the US. The US is known to have a high enforcement capacity to ensure that these powers are normally respected and that all the subject actors shape their behaviour and actions in accordance with them. Accordingly, all evidence of existence of such laws, and executive, legislative and judicial powers, which have incidence upon ICANN's policy and implementation role, and are thus able to constrain them, constitute documentary proof for the purpose of this question.

Many in the ICANN community promote the illusion that ICANN's main reliance is on contractual law, where the venue and choice of law are indicated in the contract itself. And that this voluntary choice of venue and law by the contracting parties is the main or even the exclusive jurisdictional concern for ICANN's policy processes. Interestingly in this regard, a participant noted recently on the Internet Society's policy e-list that ICANN makes policy-by-contracts. It is a well-known fact that public law of the country of incorporation and location supersedes any contractual law. To quote from the CCWG's jurisdiction sub-group's evolving paper on “Influence of ICANN's existing jurisdiction”;

> Where a non-U.S. law violates the forum state’s public policy, that law will not be applied. *Kashani v. Tsann Kuen China Enter. Co.*, 118 Cal. App. 4th 531, 543 (“the forum state will not apply the law of another state to enforce a contract if to do so would violate the public policy of the forum state.”).
> a. For example, recognizing strict liability of manufacturers and compensating injured parties for pain and suffering are public policies of California that will be recognized over non-U.S. law. Kasel v. Remington Arms Co., 24 Cal. App. 3d 711, 735 & n.28 (2d Dist. 1972).

If US public policies supersede any non-US law that may be invoked by an ICANN contract, they certainly do also supersede ICANN's own policies. This legal position should settle the matter of supremacy of US policies and laws over ICANN actions, including its policy processes.

The actual number of US laws and state powers having some incidence on ICANN's work of global governance is endless. We are, therefore, unable here to prepare a list of them, doing which will also be inadequate since new laws can be made any time. What we provide below are the more immediately visible instances of US jurisdiction’s influence, or even interference with ICANN's global governance functions.

1. Cases where US courts have already exercised jurisdiction, by taking cognisance of a suit, giving interim/ final orders etc

A full compendium of litigation concerning ICANN is found at:
https://www.icann.org/resources/pages/governance/litigation-en

It is pertinent to see that in almost all these cases, a US court has considered not just matters of private contracts between ICANN and another party but also some elements of US public law, and of (US) public interest. Most significantly, going through these cases shows that ICANN never contested the application of California, USA courts jurisdiction, and California and US public laws, over ICANN's policy and related functions. The concerned courts also took it as an uncontested matter, not to be discussed, that California, USA jurisdiction, and all California and US public policy law, would apply to ICANN's functions and actions (logically so, since ICANN is a California, USA, entity).

This provides clear proof, if one was ever required, that the entire range of public law of the US,

and the jurisdiction of every relevant US court, fully apply to ICANN functions and actions. In carrying out its mission, ICANN therefore must act within these laws. Accordingly, as much as traffic laws constrain the behavior of every motorist, US public law and its courts – and generally, the US jurisdiction – constrain ICANN actions. The US jurisdiction constrains ICANN in carrying out its mission in so far as it cannot undertake any action in pursuance of the mission that is contrary to US law. ICANN's mission, and the actions flowing from it, are supposed to be determined by global community processes, and not by US law and its interpretation by US courts. Herein lies the contradiction, hidden in plain sight.

If in none (or very few) cases did US court actually force ICANN to change its actions, it is because in most cases the *facts* of ICANN's actions were found by US courts not to violate US law. The need for ICANN's actions to remain within US laws was never contested. To the best of their very capable judgement, ICANN's battery of lawyers ensure that every of its actions adheres to US law. Such pre-configuring of ICANN's actions to US law is as much a problem as any subsequent action of a US court forcing ICANN's hand. Even with such preconfiguring, as far as US law clearly applies on ICANN, it cannot be assumed that the *facts* of the cases that ICANN finds itself embroiled in will always be judged in its favour.

The above is the most pertinent assessment from perusal of various ICANN related cases in US courts, and it applies to all US court cases involving ICANN. We briefly touch below on a few cases of actual litigation involving ICANN to illustrate this assessment.

a) .AFRICA case

See the below links for reference.

https://www.icann.org/news/announcement-2-2016-03-05-en

https://www.prlog.org/12539064-united-states-court-has-granted-an-interim-relief-for-dca-trust-on-africa.html

In this case, an US court temporarily prevented ICANN from delegating the .AFRICA top-level domain (TLD) for ZA Central Registry (ZACR). This prevented ICANN from pursuing its mission because it prevented ICANN from making a decision by applying its documented policies and remaining accountable to the Internet community through its own mechanisms.

b) Iran and Congo ccTLD cases

See these links.

https://www.icann.org/resources/pages/icann-various-2014-07-30-en
https://www.icann.org/en/system/files/files/appellants-brief-26aug15-en.pdf

https://www.icann.org/resources/pages/itoh-v-icann-2012-02-25-en

In these two cases, suits were brought against those who run country top level domains (ccTLDs), respectively, Iran and Congo, which are considered sovereign functions as per Tunis Agenda para 63. The applicants requested “attachment” of ccTLDs and IP addresses, which is essentially equivalent to requesting their re-delegation. In both these cases, ICANN was sought to be forced into some action in relation to these ccTLD owners, which would have been a breach of its own processes, and pursuance of its mandate. What is significant is that the US courts accepted their jurisdiction in the matter of ccTLDs of sovereign nations, which points to a clear possibility that at a different time, with a different set of contested facts, a US court might force ICANN to interfere with another country's ccTLD. This is clearly unacceptable, but as long as ICANN is under US jurisdiction it remains quite possible.

c) Competition law cases

See.

https://www.icann.org/resources/pages/namespace-v-icann-2012-11-02-en
https://www.icann.org/en/news/litigation/manwin-v-icm

In these cases, US courts tested ICANN's policy processes and their operationalisation against public laws of the US, in the area of economic regulation, especially as related to competition. This again shows that US courts have no hesitation to assess ICANN's actions in relation to US public law, which leaves the possibility very much open of interference in these areas. This also makes it clear that ICANN needs to pre-configure US law in making its policies and their operationalisation, which violates its mandate of serving the global "Internet community as a whole".

2. Cases where executive agencies of US impinge upon ICANN's actions

ICANN has to obtain clearance from Office For Foreign Assets Control (OFAC) of the US government to interact with any entity, including any individual, from a country that is under OFAC sanctions. For instance, any individual from any such country supported by ICANN for attending any ICANN meeting, even outside the US, needs to be covered under such clearance. OFAC clearance is also needed for ICANN's engagement with agencies running ccTLDs of the concerned countries. No party from any of the sanctioned countries have applied for gTLDs, but the problems that such an application will run into are obvious. It is perhaps due to the existence of OFAC that no entity from these countries have applied, which underlines the prospective and not just retrospective impact of law.

The below is from ICANN's gTLD applicants handbook[4] (emphasis added).

> ***ICANN must comply with all U.S. laws, rules, and regulations.*** One such set of regulations is the economic and trade sanctions program administered by the Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury. These sanctions have been imposed on certain countries, as well as individuals and entities that appear on OFAC's List of Specially Designated Nationals and Blocked Persons (the SDN List). ***ICANN is prohibited from providing most goods or services to residents of sanctioned countries or their governmental entities or to SDNs without an applicable U.S. government authorization or exemption.*** ICANN generally will not seek a license to provide goods or services to an individual or entity on the SDN List. In the past, when ICANN has been requested to provide services to individuals or entities that are not SDNs, but are residents of sanctioned countries, ICANN has sought and been granted licenses as required. ***In any given case, however, OFAC could decide not to issue a requested license.***

The US government has an absolute right to determine which country it may, at any time, put under OFAC sanctions. The recent US government order placing travel restrictions on residents of a number of countries points to how rapidly such situations can change.

In the circumstances, ICANN's global governance functions stand on extremely shaky grounds, when one government, whenever it wants, can decide which country(ies), and its residents, to exclude from the benefits of such governance.

3. Cases of US law or executive power causing interference in downstream layers of DNS (below ICANN), which makes likely that such actions will get directed at ICANN in future, in cases

[4] https://newgtlds.icann.org/en/applicants/agb/guidebook-full-11jan12-en.pdf

where ICANN alone can execute enforcement (like in the case of gTLDs)

US executive agencies have routinely considered the DNS as a legitimate lever to exercise its coercive powers. Especially for entities outside the US that it seeks to impact, and who are provided DNS service from an entity within the US, it has unhesitatingly employed US jurisdiction over the US based DNS provider to pull the DNS plug on the "erring non US based entities".

Please see the below news reports on hundreds of such cases.

> https://www.wired.com/2012/03/feds-seize-foreign-sites/
> http://opinion.latimes.com/opinionla/2010/11/seizing-domain-names-without-coica.html

ICANN, as a US non profit, is no different than a US-based registry or registrar located in the US, in terms of how a US authority can and will employ it for coercive actions against "errant entities". Since most entities use a .com, .net, etc domain name, till now the means of enforcement have been through the corresponding registries, mostly Verisign. However, in case of gTLDs operated by a registry outside the US, ICANN alone can provide the means of coercive action – that of disabling the gLTD. There is no question that, as Verisign has so often been forced by US agencies to disable domain names, sooner or later so will ICANN be forced. Doing this just to uphold US law would constitute a constraint on ICANN's responsibility to act in the interest of global Internet community.

Entities lower than ICANN in the DNS chain have often acted under OFAC threat in manners that seems inappropriate vis a vis global accountability of DNS. Below are some such examples:

- Due to OFAC sanctions over Crimea, there was a major disruption in the domain name service in Crimea as US based registries and registrars withdrew their service, on a very short notice.

See http://minsvyaz.ru/en/events/32631/ and
http://www.interfax.com/newsinf.asp?id=568197 .

- When ResellerClub moved its main place of activity to the US it decided to cancel all domain name registrations that were held by people residing in countries under sanctions, https://blog.resellerclub.com/important-changes-in-resellerclubs-countries-of-operation/ .

- Even registries not located in the US, such as those based in the Netherlands and Turkey, are following OFAC sanctions due to their contractual relationship with ICANN, http://www.internetgovernance.org/2017/01/13/icanns-jurisdiction-sanctions-and-domain-names/ .

This further points to how the menacing shadow of OFAC (and similar other US enforcement agencies, existing and those which may come to exist in the future) permanently hangs over ICANN's functions and actions.

4. A suggestive list of regulatory bodies that can direct ICANN on matters under their purview, which is very likely as ICANN allocates new sectoral gLTDs.

The Federal Communications Commission (FCC) was instituted when telephony was the principal medium of telecommunication. It has reinterpreted its mandate to cover the new facts and situations that the Internet brings forth. The FCC has an express mandate over the numbering system of telephony. If it finds it necessary, it could extend that mandate to cover IP addresses and possibly also domain names, or the functions of ICANN. Current references to this area in FCC documents speaks about forbearance, and not denial, of its authority over IP addresses. The very meaning of

forbearance is that it can be vacated, and authority on the corresponding area exercised. It is untenable that ICANN should function as a key global governance body under this ever-present threat that it can be pulled into being regulated by the FCC wherever the latter decides it fit to do so.

The FCC is just the more obvious US regulatory agency that can exercise authority over ICANN. As the digital phenomenon, and with it the significance of Internet names, begins to pervade every social sector, transforming it and becoming a central feature of it, the mandate of practically every US regulatory agency could impact ICANN's functions. This holds especially as sector-based gTLDs are allowed (often with their own rules for inclusion, for example .pharmacy) and when gTLDs are granted to entities that are key players in different sectors. Consequently, whether it is the Food and Drugs Authority or the Federal Trade Commission or the Federal Energy Regulatory Commission, or various state utility commissions in the US, and so on, there is no end to very possible US jurisdictional incursions upon ICANN's functions. A sector regulator in the US, say in the area of health/ pharmaceuticals, transportation, hotels, etc, may find issues with the registry agreement conditions that ICANN allows for a sectoral gTLDs that is in the area of its mandate. Such a sector regulator might be able to force ICANN to either rescind or change the agreement, and the conditions under it.

4 b. Are you aware of and able to document the existence of an alternative jurisdiction where ICANN would not be so prevented from pursuing its Mission? If so, please provide documentation.

There are three alternative jurisdictional arrangements that we present here, whereby ICANN will not be prevented from pursuing its mission of serving the global Internet community as a whole, as it is so prevented in its current jurisdictional status.

1. Incorporation under international law

The best and most sustainable arrangement would be for ICANN to be incorporated under international law, which will need to be negotiated specifically for this purpose among countries. This is also the most democratic arrangement. It can be done without touching the current multistakeholder governance structure and community accountability mechanisms of ICANN.

A number of international organisations exist on the basis of international law, governing various social sectors and aspects. Two such well-known organizations are not intergovernmental organizations: the International Committee of the Red Cross[5], and the International Federation of Red Cross and Red Crescent Societies[6]. While most international organizations have inter-governmental governance mechanism, it is up to the enabling international law to decide the governance mechanism of an organisation formed under it. It need not necessarily be inter-governmental: the Red Cross provides examples of non-governmental governance mechanisms. A new international law could mandate ICANN to keep running as it does currently, in a multistakeholder fashion.

As an international organisation, ICANN would have a host country agreement with the country of its physical seat[7] (which can continue to be the US). It would accordingly not be subject to any of the jurisdictional problems that we have described above, in terms of pursuing its mission of global governance of Internet names and numbers.

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5 https://www.icrc.org/en/document/statutes-international-committee-red-cross-0

6 http://www.ifrc.org/Global/Governance/Statutory/2015/Constitution-2015_EN.pdf

7 The immunities granted by Switzerland to the two cited Red Cross organisations are at: https://www.admin.ch/opc/fr/classified-compilation/19930062/index.html and https://www.admin.ch/opc/fr/classified-compilation/20002706/index.html

2. Obtaining immunity under US International Organisations Immunity Act

It is possible for ICANN to seek immunity from US jurisdiction under the US International Organisations Immunity Act. This can be done in a partial manner so that ICANN retains its nexus with California non profit law, to enable its internal governance processes, including the newly instituted Independent Review Panel.

There are instances of US non profits having been given immunity under this Act, even as they continue to be registered as US non profit and rely on US law for their overall governance. One such organisation is the International Fertilizer and Development Centre, which was cited as an example of possible jurisdictional immunity for ICANN to look at by an ICANN-commissioned report which can be seen at https://archive.icann.org/en/psc/corell-24aug06.html .

As mentioned, such immunity from US jurisdiction could be granted in a manner that excludes from the immunity California non profit law (or any other laws that ICANN's effective working requires to be excluded from the immunity). Such an exclusion can be a part of the US government order providing immunity, or ICANN itself can waive its immunity to that extent. A useful discussion on such circumscribed immunity can be found in pp. 90-100 (waiver by governing instrument is discussed in pp. 86-97) of this report: https://gnso.icann.org/en/issues/igo-ingo-crp-access-initial-19jan17-en.pdf

If ICANN obtains such legal immunity under the mentioned US Act, the above listed jurisdictional issues, described in response to question 4a, could be avoided.

3. Keep a standing back-up option to move out in case of US jurisdiction intervention

ICANN can institute a fundamental by-law that its global governance processes will brook no interference from US jurisdiction. If any such interference is encountered, parameters of which can be clearly pre-defined, a process of shifting of ICANN to another jurisdiction will automatically be set into motion. A full set-up – with registered HQ, root file maintenance system, etc – will be kept ready as a redundancy in another jurisdiction for this purpose.[8] Chances are overwhelming that, given the existence of this by-law, and a fully workable exit option being kept ready at hand, no US state agency, including its courts, will consider it meaningful to try and enforce its writ. This arrangement could therefore act in perpetuity as a guarantee against jurisdictional interference without actually ICANN having to move out of the US.

[8] This can be at one of the existing non US global offices of ICANN, or the location of one of the 3 non-US root servers.