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# New gTLDs, International Law and State Sovereignty

The paper aims to present the new gTLD process as an issue of international law and the sovereignty of states. While discussing the significance of the biggest DNS enlargement in Internet's history the author goes to show that the decisions by the California based non-profit that is the Internet Corporation of Assigned Names and Numbers (ICANN) hold international significance and reflect the current state of debate on human rights and national sovereignty. While providing a critical look at ICANN's far reaching independence in authorizing TLD administration and operation, the author argues that a better solution to reconcile the conflicting interests of all the world's cultures is yet to be found.

## Inhaltsübersicht

## 1 New Dawn in Internet governance

[Rz 1] With its policy on allowing more generic Top Level Domain Names (gTLDs) in the Domain Name System (DNS) ICANN opened a new chapter in Internet's evolution. With the possibility to register new gTLDs, representing business or community groups, the map of the Internet reaches new, yet unmarked territories. The so far limited number of 22 gTLDs representing groups of interests or areas of commercial activity is to grow rapidly within the next couple of years as ICANN grants rights to registrars of roughly 1400 new domains. Never before has the expansion of the DNS been this broad but always equally controversial. Whether the 2005 dawning of the .cat or the 2010 end to the .xxx controversy the online community, including potential registrants and end-users, was strongly opinionated and equally divided when it came to the need for and use of each new extension. While .cat was to represent «the culture» of aspiring sovereign region of Spain, the .xxx was designed to direct users to all sex-related services and resources. Both domains rose strong controversies: if a region fighting for independence from Spain is allowed by ICANN to represent its culture online, can other aspiring states also make their claim and be granted a unique online «sovereignty»? Is ICANN authorized to make such a political decision on its own? If not, who should make it or at least who should grant advise to ICANN? In the case of Catalonia it was the Spanish government who eventually coincided with the idea of Catalans promoting their culture online and supported their campaign with a letter to ICANN. The .xxx domain was equally controversial, as all states and nations opposing the very existence of the sex industry as immoral were against the idea of representing it online, let alone creating a particular space where such services would be easily found. Again it was ICANN who were to make this politically sensitive decision on behalf of the global Internet community. Eventually, after 5 years of legal quarrels, such a niche for this particular sector of services was created. Long before the current controversy originating from the new gTLDs, ICANN was confronted with the most challenging questions in contemporary international relations, dealing with the human rights granted to minorities, be it national, ethnical or sexual. While the UN found no unequivocal answer to them, ICANN was in a situation to indirectly provide one and there are more similar challenges to be faced. A task that proved too difficult for the UN, with e.g. its General Assembly Resolution on the Yogyakarta Principles, expressing the rights of the LGBT community, supported by 67 UN member states with 57 rejecting it, is to be decided by ICANN looking into granting the .gay TLD. Among the latter were those states which still penalize homosexual relations and reject granting equal right to sexual minorities. A similarly challenging task will be that of granting a gTLD for the promotion of culture of e.g. Kosovo, Chechnya or Palestine.

## 2 International Law and the Recognition of States

[Rz 2] With the question of statehood being the root of all international law and international relations, there is no clear consensus on the moment or criteria delimiting the rise of a state. While it seems undisputed that a state is the conglomerate of three elements: a territory, a community and effective rule over the two, their actual designations are subject to arbitrary assessment by other states on a case by case basis. Essentially, since the existence of territory and population is easy to asses, it is the question of the level of effectiveness that an authority needs to exercise over the territory and the people that is the crucial element of statehood, as no clear international standard or a litmus paper for testing it exist. National authorities are free to recognize aspiring states based on their own assessment of such effective rule and as a result of individual political will. Hence the questions of statehood of Kosovo or Palestine remain open and controversial, with some states recognizing their authorities as functional and initiating diplomatic or economic relations, and other refraining from doing so. The recognition of one state by another may take on the official form of a declaration provided by officials of the former or simply be expressed by engaging in political or economic relations. The question whether the recognition of other states is crucial to the rise of a new country remains open, with some scholars arguing that the rise of statehood remains objective and a functional state actually exists even when not formally recognized by others. The majority opinion however is that the recognition by others is crucial for state's creation and only a state recognized by its peers may be fully functional in the international community. Hence, effectively, a fourth, functional criteria for statehood is added: the recognition by others. The number of states that need to recognize a new government is also subject to discussion: while some claim it is sufficient to be recognized by any other state, other argue for the majority of the international community declaring their recognition as a necessary condition of a state to be created. With roughly 193 UN members that would give at least 97 recognizing their new member. Eventually, the admittance of a new member to the United Nations may be recognized as the only clear, palpable criteria of a state rising.[1] Until such a recognition a tangible criteria for identifying a state is difficult to find.

## 3 ICANN and the Recognition of States

[Rz 3] Within the DNS there is a resource dedicated to the recognition of statehood. Two-lettered country-code Top Level Domains (ccTLDs) were created for the very particular reason of representing states online. As demonstrated above, statehood remains controversial in international law and with that controversy in mind Jon Postel, one of the creators of the DNS, clearly opposed any political function of the system, stating that «The ICANN is not in the business of deciding what is and what is not a country».[2]Hence he proposed and the community recognized the applicability of the ISO list, created by the International Standardization Organization[3] for the needs

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[1]    Looking at the most recent case of statehood faced by the UN one should refer to the 2012 vote on Palestine, recognized by the UN as an observer to the organization. UN General Assembly Resolution 67/19 dated 29 November 2012 on the «Status of Palestine in the United Nations» was supported by 138 states, with just 9 voting against yet 41 abstaining (5 representatives were absent during the vote). UN Doc. A/RES/67/19.

[2]    Jon Postel, RFC 1591.

[3]    The ISO, although working closely with the UN, is not a UN agency but an independent international, but a non-governmental, organization, dating back to 1947. See: http://www.iso.org/iso/home/about.htm(all Internet sources

of the international postal union, that includes two letter abbreviations representing each state. For a state to be entered onto the ISO 3166 list it must be either a member of the United Nations, one of its organizations or party to the International Court of Justice and its statute, where only UN members may adhere. The ISO 3166 standard together with its reserve list (ISO 3166-1) is the basis of the ccTLD registry run by the Internet Assigned Numbers Authority (IANA) upon ICANN's delegation.[4] Yet when one compares the ISO 3166 list with the ccTLDs listed by IANA there are some significant inconsistencies, such as e.g. the .eu representing an international organization rather than a sovereign state, that is the European Union.[5] Effectively the ICANN does play a role in granting online presence also to states, state aspiring nations, regions and cultures. What is more, it hold the autonomous power of entrusting the authority over such a domain, be it a ccTLD or a gTLD representing a cultural or regional community by autonomously designating a TLD registrars. This autonomy is only slightly limited by the obligation enshrined in the 1994 document by J. Postel entitled «Domain Name System Structure and Delegation»[6] and 1999 ICANN Internet Domain Name System Structure and Delegation (ccTLD Administration and Delegation). According to those documents when it comes to ccTLDs ICANN must ensure that any ccTLD «manager» is on the Internet, has «Internet Protocol (IP) connectivity to the nameservers and email connectivity to the management and staff of the manager», «administrative contact and a technical contact» for the assigned domain, while for ccTLDs «at least the administrative contact must reside in the country involved». A registry administrator must be able to carry out the necessary responsibilities, and have «the ability to do a equitable, just, honest, and competent job».[7]When designating the registrar ICANN requires that for all «significantly interested parties in the domain» to «agree that the designated manager is the appropriate party».[8] Should the registrar fail to provide such a service, it is the ICANN that holds the sole power to change the entity registering a ccTLD.

[Rz 4] Effectively, the role of national governments in assigning ccTLD representing the country they administer is strongly limited, although as per the 1999 ICANN Internet Domain Name System Structure and Delegation (ccTLD Administration and Delegation) the Corporation declares that «The desires of the government of a country with regard to delegation of a ccTLD are taken very seriously» and the ICANN makes them «a major consideration in any TLD delegation/transfer discussions».

[Rz 5] As seen in this brief summary, online «statehood» as per country-code TLDs strongly depends on ICANN's recognition, with the ISO 3166-1 serving as a guideline rather than a binding resource. The ccTLD registries are run based on an agreement with ICANN, with local authorities playing a supporting role in this administration. It is ICANN that creates and redelegates authority over a ccTLD, while making government's suggestion «a major» yet not necessarily binding consideration. Governments do not hold the decisive voice on how and by whom a particular ccTLD is run. One should recognize that this is not necessarily a vice of the current Internet go-

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last visited 11 November 2014).

[4]   IANA is currently one of ICANN's departments, see: https://www.iana.org/about.

[5]   Other ASCII ccTLDs not included in the ISO 3166-1 are .uk, .su, .ac and .tp. Codes present in the ISO 3166-1 yet not used or not assigned in the ASCII cover .bv, .sj, .bl, .mf, .um, .gb, .um.

[6]   RFC 1591.

[7]   RFC 1951.

[8]   RFC 1951.

vernance regime — with the power of delegation or redelegation of a particular ccTLD left out of the hand of local politics, the smooth operation of the DNS is unabridged. At the same time local governments, either through the ICANN Governmental Advisory Committee (GAC) or outside its forum pose demands for more power over the DNS and its strings. The new gTLDs are bound to heat up this discussion.

# 4 ICANN and the recognition of cultures

[Rz 6] Effectively online statehood is not only represented by ccTLDs. With the 2005 precedent of the .cat, a successful culmination of years long Catalonian campaign for online independence, also «cultures» of particular regions or minorities have found their way online. With the cyberspace being delimitated through domains, it is natural for all those communities yearning recognition and/or independence in the «real» world to seek it also online, through a unique domain they can administer and enhance. The .cat was a relatively easy case, with the Spanish government consenting to ICANN's decision on granting the gTLD. Yet the precedent opened up a way for other minority groups to seek recognition online. Within the last «sunrise period» — a time dedicated to filing domain proposals to ICANN — few of such politically controversial proposals were filed, most of them opposed by one or few GAC members. Those controversial proposals include **.gay**, .lgbt, .amazon, .patagonia, .persiangulf, .islam all opposed to by the GAC or its members, with the non-controversial .corsica and .scot[9] also representing interesting cases for consideration. It is to be expected that other controversial applications will follow in the next rounds of DNS enlargement, including.abk for Abkhazya, .che for Chechnya or .sos for South Ossetia . An interesting case is that of a .ks ccTLD for Kosovo, the youngest internationally recognized state, yet not a UN member. One could imagine its government or a community group skipping the lengthy political procedures of UN membership and applying directly for a .kos gTLD.

[Rz 7] Currently however ICANN will need to deal with the numerous objections to the .gay, coming primarily from Arab states, where e.g. Saudi Arabia's Communications and Information Technology Commission (CITC) claimed that «Many societies and cultures consider homosexuality to be contrary to their culture, morality or religion. The creation of a gTLD string which promotes homosexuality will be offensive to these societies and cultures. We respectfully request that Icann refuse the application for this gTLD.»[10] Most of the objections originate from cultural differences among states and reflect differing values those cultures rely upon. Other refer to differing views on political issues, such as the .persiangulf objections, coming from Bahrain, Oman, Qatar and UAE claiming the attempt to standardize a Iranian term they opposed to as alternative to «Arabian Gulf». Similarly South American states opposed .amazon, claiming the domain would deprive them of the right to refer to a water resource crucial to the region, offering it for commercial gain to a private company. The .amazon objection was one of few recognized by ICANN so far and ignited a heated debate over alleged rights to geographical names (Nov. 2014).

[Rz 8] To resolve such controversial issues ICANN called upon an «Independent Objector», an

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9   Max Smolaks, Scotland To Get Its Own «.scot» Top-Level Domain Name, TechWeek Europe, 28 January 2014, http://www.techweekeurope.co.uk/news/scotland-get-top-level-domain-name-137498.

10  Saudi Arabia opposes .gay internet domain name, BBC News, 14 August 2012, http://www.bbc.com/news/technology-19259422.

international law professor Alain Pellet, who produced detailed expert opinions on most controversial proposed gTLDs.[11] For example he considered the .gay objections «based on offense created on religious or socio-cultural norms that are not internationally shared or uniform and are not recognized in any international law».[12] Similarly, according to his expert opinion all the «controversial» domains ought to be granted as they reflect cultural differences rather than lawfully protected interests. The interpretation of .islam or .lgbt was subject to cultural differences and an issue of differing understanding of human rights rather than a clear violation of international law.

[Rz 9] Significantly, the non controversial .corsica and .scot, representing cultural groups online were filed with support of the local governments and as such rose little controversies. The need to present a letter of support from local government when filing for a gTLD representing a geographical region was clearly stated the Applicant Guidebook — a set of rules applicants needed to follow in order to successfully register a desired domain with the ICANN. Hence the Applicant Guidebook ought to be considered a document of international significance, although originating from a US based non-profit corporation of a unique global status.

## 5 The Role of ICANN and the Road Ahead

[Rz 10] Looking at the new gTLDs procedures one must recognize the unique role ICANN is playing in international policy making. Through its decisions its shaping not only the millions of dollars worth online market, but is also giving answers to crucial international law questions. Decisions on the granting of online presence to sexual or national minorities seem the simple answer to most difficult questions in international law. Repeating the Internet's motto ICANN is seeking rough consensus ensuring the code keeps on running flawlessly. One must note however that the questions answered by ICANN no longer hold a solely commercial value. As was the case with domain name disputes resolution so far, it is no longer an issue of trade mark law and geographically shredded intellectual property laws. When asked about the .gay admissibility ICANN is answering questions on the limits of human rights. It seems therefore clear that ICANN is seeking expert advice on the current state of the human rights debate.[13] The dawn of new gTLDs is also the dawn of a new era in international lawmaking with a California based non-profit breaking new ground. One is left to hope the difficult decisions reflect the best in international law's development and will remain free from its flaws and shortcomings, keeping the DNS out of the hands of governments while respecting individual rights and freedoms of Internet users.

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[11] Alain Pellet, The Independent Objector's Comments on Controversial Applications, http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-comments-on-controversial-applications/.

[12] Alain Pellet, Final Activity Report, The Independent Objector and ICANN's New Generic Top Level Domains Program, http://mm.icann.org/pipermail/gnso-newgtld-dg/attachments/20140728/2891156d/io-final-activity-report-0001.pdf.

[13] Roy Balleste, Inter Mundos: ICANN's Accountability is a Matter of Human Rights, CircleID, 10 July, 2014, http://www.circleid.com/posts/20140710_inter_mundos_icanns_accountability_is_a_matter_of_human_rights/.