SUBMISSION BY THE UNIVERSAL POSTAL UNION (UPU) – 5 September 2012

The UPU, a specialized agency of the United Nations and an intergovernmental organization with 192 member States, takes this opportunity to provide the following comments to the Unredacted version of Board Workshop Paper on IOC/Red Cross Protections Released on 28 August 2012 (the "Unredacted Paper"). **We stress that this submission constitutes the opinion of the UPU only and should not be construed as representing the views of any organization other than the UPU itself.**

These comments are without prejudice to the information previously endorsed by the UPU and provided in the Open Letter from Intergovernmental Organizations on the Expansion of Generic Top Level Domains (the "Open Letter") sent to the President and CEO of ICANN in December 2011; the Common Position Paper regarding Protection of IGO Names and Acronyms in the DNS in the Context of ICANN's gTLD Expansion Plan (the "Common Position Paper") sent by OECD (on behalf of the IGOs named therein) to the Chair of the GAC and to the President of the GNSO on 4 May 2012; the United Nations Letter to ICANN requesting exclusion of lGO names and acronyms from gTLD registrations of 26 July 2012; as well as the "List of International Intergovernmental Organizations that have communicated their names and/or abbreviations under Article 6ter of the Paris Convention", submitted by WIPO to ICANN on 23 August 2012.

However, as a new participant to the RySG and the IOC/RC discussion group, the UPU intends to continue giving its feedback as deemed necessary for due observance of the international legal provisions applicable to the names and acronyms of IGOs (notably Article 6ter of the Paris Convention for the Protection of Industrial Property, as further referred to in Article 16 of the Trademark Law Treaty and Article 2 of the WTO Agreement on Trade Related Aspects of Intellectual Property Rights). In particular, we are of the view that the provision of specialized knowledge by international legal experts is, at this juncture, a crucial element when analyzing these extremely important and potentially wide-reaching questions.

From the outset, we must emphasize from the outset that this submission by the UPU should **not** be construed as taking any position on the protections that names belonging to the Red Cross/Red Crescent (RC), the International Olympic Committee (IOC) or any other organization may receive from ICANN, nor discussing the legitimate reasons that any of those organizations may have in requesting such additional protection under the new gTLD program.

At the same time, we cannot fail to notice that most of the recommendations contained in documents such as the Unredacted Paper seem to reflect, in an unambiguous way, *ex post facto* attempts at justifying legally-flawed decisions in order to narrow even **further** the necessary eligibility "criteria" for protection of certain strings, apparently so that only two organizations would merit receiving such safeguards under the new gTLD process.

In this regard, the UPU expresses again its general support, in principle, for the establishment of a Policy Development Process (PDP) on the creation of additional protections to international and intergovernmental organizations in the new gTLD program (the "PDP"), provided that this is carried out on the basis of fair, objective and justified criteria corroborated by a proper evaluation of factual and legal considerations, and that such PDP would be concluded in sufficient time for the protection to be in place for the first round of gTLDs as well as any subsequent rounds thereof.

Nevertheless, the UPU regrets that the Unredacted Paper (originally issued in June 2011), similarly to what was presented in the Preliminary GNSO Issue Report, contains recommendations which are not only legally and factually inaccurate, but also highly selective and inconsistent in their appreciation of the specific character of IGOs such as the UPU. Moreover, the Unredacted Paper highlights once

more the fact that ICANN, in granting an *ad hoc* protection to two specific non-governmental organizations and so far refusing similar protection to IGOs, disregarded the wide-ranging legal principles and rules applicable to the protection of names and acronyms of IGOs in general.

In any case, the original advice given by the GAC and the Board, along with the reactions of the IGO community over the last two years, ended up raising a few "yellow flags" in other ICANN groups involved with these discussions (even if some of which were not even supposed to deal with governmental matters). In these constituencies, increased attention has been paid to the absence of an appropriate policy development process that takes into account, on **objective** grounds, the issue of specific protection of the names and acronyms of international organizations (including without limitation IGOs such as the UPU).

In other words, the Unredacted Paper presents a number of arbitrary and subjective thresholds for granting such a "special" protection that should, from the perspective of the UPU, be simply rejected as a matter of legal principle. Without prejudice to these principles, we take the liberty of making the following comments on such criteria for purposes of clarity (extracted portions of the Unredacted Paper in italics):

• *The Movement or Organization requesting that one or more of its Intellectual Properties ("Properties") be place on the Reserved Names list must have been well established long before (such as 50 or 100 years) the new gTLD policy was adopted by the Board on 26 June 2008*

Indeed, the "age" of an organization should have nothing to do with established legal frameworks for protection of its names and acronyms – although both the IOC and RC (both of them non-governmental in nature) have been established as "movements" (as per the novel terminology employed by ICANN in the Unredacted Paper) for more than 100 years, this is also the case for IGOs like the UPU (founded in 1874), among many others – still, this criterion is completely irrelevant for the purposes of an objective analysis of the relevant legal frameworks for protection of the names and acronyms of IGOs or international organizations in general, and should not be taken into account for the establishment of any ICANN policy in that regard.

• *The names are widely recognized and closely associated with the Movement or Organization*

Once more, the establishment of a criterion relating to "widely recognized and closely associated" strings is vague and subject to considerable challenges in terms of legal objectivity and actual protection under international treaties (or even domestic jurisdictions); in other words, the protection of strings should be not be dependent on subjective tests and "perception" analyses – the names and acronyms of IGOs such as the UPU are unambiguously protected under the treaties mentioned above (not to mention the various domestic legal statutes which have incorporated such protections as part of a country's reception of its international legal obligations).

• *One or more Properties of the Movement or Organization must be protected by legislation in at least 30 countries, on at least four continents*

The reference to "one or more Properties" apparently means, again, that perhaps other requested strings are not really protected by international or domestic legislation, even though they would **still** receive protection by ICANN. This criteria also ignores two basic facts: 1) that, in many jurisdictions, ratification of an international treaty is **not** dependent on the enactment of specific domestic laws replicating the former; and that 2) notably in the case of IGOs such as the UPU, whose names and acronyms are collectively protected under international law, there is no reason nor need for them to be specifically "named" in such domestic legislation.

As expressed before by the UPU: the main reason behind the fact that some non-governmental organizations may have two "tiers" of protection stems from the simple fact that those organizations are not subject to the general legal protection accorded under article 6ter of the Paris Convention (as is the case for IGOs such as the UPU), and that the existing treaties applicable to those non-governmental organizations may not be sufficient to afford the intended protection. In fact, the numerous legislative references to the aforementioned non-governmental organizations in domestic jurisdictions arise exactly from the fact that they would actually require specific protection at the domestic level, as they do not fall under the same legal umbrella as IGOs such as the UPU.

From the perspective of IGOs, this also explains why, as a matter of principle, there is no need for "specific laws" to deal with the protection of their names and acronyms in multiple jurisdictions (even though many countries have enacted related domestic legislation as indicated in the aforementioned submissions by IGOs). And it is worth recalling again: the fact that IGOs enjoy BOTH treaty-level and specific domestic law protections should not imply or be interpreted as constituting acceptance of the ICANN "two-tier" test, which cannot be regarded as valid legal doctrine nor interpreted as an acceptable parameter under the international legal principles applicable to IGOs.

• *One or more Properties of the Movement or Organization must be protected by one or more treaties adopted by at least 60 countries*

Yet another arbitrary/subjective threshold is presented as a criteria in the Unredacted Paper (why 60 countries?) and defined retroactively to exclude other organizations from string protection – it is equally worth noting, e.g., that the Treaty of Nairobi does NOT provide for the protection of any names or strings associated with the Olympic games, but just the Olympic symbol (likewise for "Red Crescent", "Red Crystal" and "Red Lion and Sun", which are not universally protected by the Geneva Convention).

• *The Movement or Organization must be a non-profit institution (or the equivalent) operating in the public interest and the reservations of names must serve the public interest*

The concept of public interest should be deemed as an absolute presumption in the case of treaty-based IGOs such as the UPU (bearing in mind, for instance, that the Vienna Convention on the Law of Treaties recognizes in its preamble the "fundamental role of treaties in the history of international relations", as well as the "ever-increasing importance of treaties as a source of international law and as a means of developing peaceful cooperation among nations, whatever their constitutional and social systems") – unfortunately, this "criteria" simply creates another potential source of arbitrary value judgments within ICANN, as it could be employed to consider one organization as being more "humanitarian" or "public interest"-oriented than another – needless to say, this question should not even merit analysis, as it completely disregards the sovereign will of States to establish IGOs for the common/collective good.

Furthermore, as explained on previous occasions, IGOs such as the UPU are funded essentially with public (taxpayer) funds, through contributions to their budgets from member States. It is particularly important that IGO funds be used efficiently and with transparency, primarily on achieving the important public interest missions of those organizations.

• *GAC advice must have been received indicating the GAC's strong support for the Movement's or Organization's request to have one or more of its Properties placed on a Reserved Names list*

Another retroactively-established argument which purports to justify protection only for those entities having ALREADY received the "strong" formal support of the GAC, in detriment of existing international legal obligations or even domestic law provisions. This also neglects, again, an absolute

need for objective treatment of these questions on an accurate and non-*ad hoc* legal basis – notably, in that any such approach to be proposed or adopted by ICANN (including without limitation the GAC) must be consistent with its Articles of Incorporation and Bylaws, which determine that the organization shall carry out its activities in conformity with the **relevant principles of international law and applicable international conventions and local law**. We also reiterate that the "GAC Principles Regarding New gTLDs" already called on ICANN to ensure the protection of IGO names and acronyms in the Domain Name System.

• *"Counsel conducted online searches for legislation using both national databases of legislation (where accessible) and various search engines, using pertinent search terms."* and *"These latter searches yielded only a few 'hits' on national legislation protecting those names."*

Needless to say, counsel would never be able to find many specific references to the UPU, the United Nations or other IGOs, since these are globally covered by the aforementioned international legal provisions (notably Article 6ter of the Paris Convention), as well as general domestic IPR legislation (where necessary) as applied to the protection of the names and acronyms of "international" or "intergovernmental organizations".

In summary, the considerations above reflect some of the essential reasons behind this submission by the UPU, especially when the potential implications arising out of uninformed advice presented in the Unredacted Paper may result in a "definitive" policy that completely ignores widely-accepted international legal principles – accordingly, the relevant legal rules and principles applicable to the protection of names and acronyms of IGOs such as the UPU must be observed as such and without any need to enter into detailed discussions concerning the substance of the artificial criteria referred to above.

The UPU hopes, once more, that the information and views provided in these comments will be helpful in refining any recommendations to be provided on this matter, and supports the initiation of the PDP as per the international legal provisions and objective principles referred to herein.