**NCSG Policy Committee Statement on Proposal to Protect Names of the International Federation of the Red Cross and the International Olympic Committee (IOC/RC) at the Top Level**

**23 March 2012**

The Policy Committee (PC) of the Non-Commercial Stakeholder Group (NCSG) strongly recommends that the GNSO Council, the IOC/RC Drafting Team (DT) established by the GNSO, and the ICANN Board and Staff give careful and thorough consideration to the various comments that have been submitted as part of the public comment period opened by the DT on this issue, and either more substantially amend the motion currently pending before the GNSO Council to make clear that the DT’s recommendations be considered for the second round, or reject the motion as proposed by the DT. We make this recommendation not simply because many of the comments were submitted by individual members of the NCSG, but because the strength of the sentiments expressed by these commentators attest to the level, nature and extent of the opposition to the DT’s proposal among the ICANN community. In particular, the fact that (1) a number of these comments came from individuals who are not the usual “known faces” in the ICANN community, and (2) the statement of the At Large Advisory Committee (ALAC) represents a clear consensus of one of the two Advisory Committees to the ICANN Board, indicates very obviously that opposition to the DT proposals is not – as some others within the ICANN community have claimed – simply a minority view held just by established voices within the Non-Commercial Users Constituency (NCUC), one of the two formal constituencies within the NCSG.

We do not propose in this statement to restate the arguments and positions already put forward in these other comments. We wish, however, to remind the DT, the GNSO Council, and the ICANN Board and Staff, that the NCSG’s request to defer the motion that was placed before the GNSO Council at its Costa Rica meeting was not a strategic tactic intended to defeat the motion through ensuring that the vote did not occur, and would not occur until after the close of the new gTLD application period. If that were the case, the NCSG would not have suggested that an adequate comment period would be one that closed on 23 March (i.e. the end of the initial comment period) rather than one that would, under ordinary circumstances within the GNSO rules, extend into a reply period and thus close on 14 April (i.e. after the close of the new gTLD application period).

Rather, and as stated in the NCSG statement read out during the GNSO Council’s Costa Rica meeting, there are both substantive and procedural grounds upon which we base our objection to the DT’s current proposals, and which formed the basis of our request for a deferral of the motion as currently worded. The procedural problems and the irregularities that have already occurred with respect to protections for the IOC and RC have been recognized, discussed and commented on elsewhere. We therefore devote the rest of this comment to emphasizing some of the substantive problems that in our view represent serious flaws with the DT’s proposals.

First, we note that claims that the legal basis upon which the IOC and RC can be afforded special and preferential treatment have not been fully or publicly explored within or by the GNSO. Besides the letter dated 14 September 2011 from the Chair of the Government Advisory Committee (GAC) to the Chair of the GNSO Council[[1]](#footnote--1), which claimed a “unique tapestry” of legal protections grounded in international treaties and various national laws for these two organizations, the actual legal research, findings and analysis that formed the basis for this rationale have never been made public. Indeed, the GNSO Council decided only in Costa Rica – after the DT made its proposal and after the motion was proposed – to request that the GAC furnish this background material. Given that a number of international governmental organizations (IGOs) have in the meantime (in December 2011) officially requested that ICANN afford similar treatment for their names at both the top and second levels in the first round of the new gTLD program[[2]](#footnote-0), on the basis that they too have a protected status similar to the IOC and RC, it is absolutely necessary that the legal basis for such exceptional treatment of the IOC and RC be publicly disclosed, fully vetted and these IGOs and other organizations be given an opportunity to state their case before any such preference is given to just two organizations. Additionally the Non Profit Organizational Constituency (NPOC), another constituency within NCSG, has recommended that "any organization operating globally in the public interest and enjoying International Legal Personality in the country where its Headquarters are located" should be considered eligible for similar protection. At the very least, it ought to be the GNSO Council’s responsibility to vote only after it has been given the full legal background to the IOC/RC protections.

It is no answer to this serious problem to state either that (1) the GAC is only asking for protections for these two organizations for now, or that (2) the GNSO ought not to be seen to be uncooperative with the GAC. Several of the IGOs who were signatories to the December letter are in fact observers to the GAC. It is not currently clear whether and to what extent the question of whether there is GAC consensus on the appropriate legal protections for these organizations vis-à-vis those being requested for the IOC and RC has been fully debated within the GAC, or will be. To the extent that any GNSO action at this point establishes a standard of protection for the IOC and RC that in all likelihood will continue into the second round of new gTLDs, it is naïve and unrealistic for anyone within the GNSO community to believe that this standard will not be used as the baseline threshold for further discussions as to whether there should be additional protections for other organizations, whether in this or future rounds. In this regard, the NCSG’s call for a fuller public comment period actually furthers ICANN’s aim to be an effective global organization[[3]](#footnote-1) and highlights the need for careful, measured and thorough consideration of all the implications of a substantial change in the Applicant Guidebook (AGB) rather than hastening to a short-term and short-sighted resolution simply in response to a GAC request. Further, the ICANN Board has just requested that the GNSO and the GAC furnish it with formal policy advice as to appropriate protections for those IGOs that requested particular protections[[4]](#footnote-2). Although we understand the DT’s belief that its recommendations ought not to take into consideration issues beyond its original mandate, we are incredulous that the DT seems to have chosen to ignore longer-term and broader consequences that will be occasioned if its current recommendations are adopted.

The above-mentioned quagmire goes beyond the simple issue of precedent-setting. We accept that this is not the intent of the DT or the GAC at this point. Nonetheless, it is blindingly obvious that any last-minute action by the GNSO at this point to add further protections and provisions into the AGB must necessarily lend greater credence to and become a guidepost for influential claimants who may be protected by different treaties and/or national laws.

We believe that the more appropriate way forward for the GNSO at this late stage is to (1) begin to more fully and regularly engage in dialogue with the GAC as to the appropriate protections for all such claimants, as opposed to endorsing a more piecemeal approach to the issue; and (2) to do so on the basis that it is simply too late to tinker any further with the AGB. A more thorough and comprehensive discussion and consideration of the issue between now and the launch of the second round of new gTLDs would be a much more thoughtful and rational exercise that is likely to yield a more widely-acceptable and in-depth set of criteria for any additional protections for any organization or entity. It would also set the stage for more constructive, positive and forward-looking engagement with the GAC and minimize the likelihood that claimants will bypass the GNSO altogether and plead their case directly with the GAC and/or the ICANN Board, as happened in this case. In this regard, engaging in the discussion as preparation for the second round is also more likely to strengthen the credibility and effectiveness of the GNSO, whereas post-launch scrambling to respond to a GAC request and to amend Board actions is likely to damage it.

Finally, we feel obliged to point out that the current AGB protections for the IOC and RC do not in any way prevent them from engaging in their missions in the global public interest. At the moment, no one can apply for their names in a number of stated languages. In addition, no one can possibly believe that a new gTLD application consisting of a highly-similar name will not be the subject of challenge in a number of ways, ranging from a GAC “early warning” and GAC advice to the Board to a full legal rights objection. The argument, therefore, that the IOC and RC need the additional protections that the DT by rough consensus would purport to give it is a specious one. To the extent that the GNSO community believes it would be a hardship for either group to mount a legal rights objection, the appropriate solution is to find ways to alleviate that hardship, e.g. by lowering or waiving the fees for such an objection, rather than engage in a wholesale re-jiggering of protections that have already been published as of 11 January 2012 and upon which a number of potential applicants have likely relied.

Conceptually, the DT’s recommendations represent a well-considered effort that involved many sectors of the GNSO community. They would in fact form an excellent basis for the GNSO to consider how second round gTLD applications ought to be dealt with. For the foregoing reasons and others we have stated elsewhere, however, we believe that they are inappropriate for the first round in this new gTLD program. We appreciate the effort that each member of the DT has put into this effort, and therefore stand ready to take the DT’s recommendations forward into a broader and more thorough discussion impacting the second and future rounds of the new gTLD program.

Respectfully submitted,

The NCSG Policy Committee[[5]](#footnote-3)

1. See letter from Heather Dryden (GAC Chair) to Stephane Van Gelder (GNSO Council Chair), dated 14 September 2011: <https://gacweb.icann.org/download/attachments/1540128/GAC+advice+on+IOC+and+Red+Cross+Sep.+2011.pdf?version=1&modificationDate=1317031625914>. [↑](#footnote-ref--1)
2. See letter from the Legal Counsels of various public international intergovernmental organizations to the ICANN Board Chair, ICANN CEO and ICANN’s Vice President for Stakeholder Relations, 13 December 2011: <http://www.icann.org/en/news/correspondence/igo-counsels-to-beckstrom-et-al-13dec11-en.pdf>. [↑](#footnote-ref-0)
3. See the ICANN survey on improving its effectiveness as a global organization, released 21 March 2012: <http://www.icann.org/en/news/announcements/announcement-2-21mar12-en.htm>. [↑](#footnote-ref-1)
4. See letter from Steve Crocker, Chair of the ICANN Board, and Rod Beckstrom, CEO of ICANN, to the GAC and GNSO Chairs, dated 11 March 2012: <http://www.icann.org/en/news/correspondence/crocker-beckstrom-to-dryden-van-gelder-11mar12-en.pdf>. [↑](#footnote-ref-2)
5. The NCSG Policy Committee operates through rough consensus and is comprised of all the NCSG Council members, the NCSG Chair, two representatives from each of its formal constituencies, one observer from each constituency-in-formation and other observers as may be invited from time to time by the Policy Committee. [↑](#footnote-ref-3)