The internet domain name system and the right to culture

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Derechos Digitales

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1. Introduction

The internet is often seen as a haven for the exercise of fundamental human rights. This includes economic, social and cultural rights (ESCRs), also known as second-generation human rights. The right to culture is recognised in different human rights instruments, and includes the right to participate in cultural life, respect for the cultural heritage of communities including their language, and the respect for traditional knowledge, among others.

The internet is subject to a set of technical rules and standards which are decided on by institutions. Global internet governance involves several independent bodies in charge of the different functional aspects of the internet. One of them is the Internet Corporation for Assigned Names and Numbers (ICANN),[2] responsible for the global coordination of the domain name system (DNS), a key element of the internet's infrastructure and functioning. This is a system to manage unique addresses, shaped as "names" formed from strings of letters and numbers, used to identify each device connected to the internet.

Historically ICANN has had the role of creating and administering top-level domain names (TLDs),[3] which help identify online addresses. In recent years its tasks have broadened to include the administration of new generic top-level domain names (gTLDs) and internationalised domain names (IDN TLDs), enabling the creation of new domains with diverse characters, including from languages such as Arabic, Chinese and Russian.

A special application process has been created for new gTLDs, but there is a concern regarding conflict of interest. This is especially relevant in the case where the interests of private companies wanting to use certain domain names conflict with other different and also relevant interests, and potentially infringe or restrict the right to culture.

This was the case in applications related to the domains dot-patagonia and dot-amazon,[4] both brought before ICANN. Despite its technical mandate, ICANN was effectively called upon to safeguard cultural rights. The details of these cases are the starting point for this research as they constitute a call to states, citizens, communities and groups with special interests of any kind, to protect the rights at stake.

At the same time as new gTLD application procedures were opening, a process know as the IANA Functions Stewardship Transition also began. This is a transition away from the Internet Assigned Numbers Authority (IANA), which is funded by the United States (US) government and whose functions are mostly being carried out by ICANN. The functions of the IANA will shift to a different institution, ruled not by a particular government but by the global multistakeholder community. If this transition is not properly carried out, it could have an impact on the recognition and protection of the right to culture online, and negatively affect disempowered groups' interests. Considering the difficulties faced by ICANN regarding adequate transparency and accountability, the new institution could also be prone to the

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[2] www.icann.org

[3] The tags located on the domain name's right end are called the top-level domains (TLDs) or first-level domains. For example apc.org has two distinct halves or tags separated by a dot; the "org" section corresponds to the TLD in this case. TLDs are the highest level in the DNS structure of the internet.

[4] In both case studies, commercial companies of the same name applied for them as new gTLDs, but these names also referred to Latin American geographical locations and ancestral indigenous communities, activating ICANN's procedures. Further information about both cases is available in section 3 of this paper.

influence of commercial and/or economic interests, rather than protecting and upholding the rights of marginalised groups or communities, and/or society as a whole.

Is ICANN prepared to demand, exercise, preserve, and even enhance cultural rights? Is the right to culture considered an important element when a domain name is requested? Are ICANN's procedures sufficiently transparent to ensure these rights are respected? This is an especially relevant issue for Latin America. The continent is populated by an important number of indigenous peoples with ancestral culture, traditional knowledge and linguistic diversity, besides other social groups with special interests (e.g. minorities of different kinds, communities and marginalised groups like women and children). These groups have limited access to complex systems such as ICANN.[5]

The following report offers a starting point for an analysis of the adequate protection of the right to culture in relation to the new gTLDs, and more broadly regarding ICANN's role as a multistakeholder and technical institution put in the position of upholding and protecting human rights.

This report addresses these issues through three main sections. The first two deal with the right to culture as a human right and the DNS, and present two case studies. These sections are linked to the final section, which identifies the existing situation; considers legal frameworks; identifies gaps and the demands of interested groups; and explores possible nodes of engagement.

It is important to note that this report is primarily written from a Latin American perspective, given the case studies that serve as a starting point for this research, and that it focuses on the cultural rights of disempowered groups which are often in conflict with corporate interests.

2. The right to culture

In this section we discuss the right to culture as defined by international treaties and related organisations; this is followed by a brief analysis on who is entitled to exercise and demand the right to culture ("right holders"), and who is obliged to respect and enforce that right ("duty bearers").

2.1. Definition

Defining the right to culture is challenging. Even relevant official organisations such as the United Nations Educational, Scientific and Cultural Organization (UNESCO) or the Committee on Economic, Social and Cultural Rights (CESCR), a United Nations body formed by experts devoted to evaluate states' compliance with the International Covenant on Economic, Social and Cultural Rights (ICESCR), have not explicitly defined the right to culture.

Thus, even though major human rights treaties contain references to *cultural rights*, this is a broader concept referring to both the right to culture and the right to education, none of them give any definition in a strict sense.

The relevant United Nations (UN) General Assembly treaties that reference a right to culture are the following:

- The Universal Declaration of Human Rights (UDHR, 1948) recognises "Everyone has the right freely to participate in the cultural life of the community…" (Article 27).[6]

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[5] These groups will be generally referred to in this paper, from now on, as "disempowered groups".

[6] "(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

- The International Covenant on Civil and Political Rights (ICCPR, 1966) states that minorities should not be denied of the enjoyment of their own culture (Article 27).[7]
- The International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966) recognises everyone's right "to take part in cultural life" (Article 15).[8]

The regional situation in Latin America is similar to the situation at the international level:

- The American Declaration of the Rights and Duties of Man adopted in 1948 by the Organization of American States (OAS) recognises the right to the benefits of culture in the following terms: "Every person has the right to take part in the cultural life of the community."[9]
- The American Convention on Human Rights, known as the "Pact of San Jose, Costa Rica" (1969), contains in Article 26 a commitment for the state parties to develop progressive measures until the full realisation of social, educational, scientific and cultural rights.
- Article 14 of the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (the "Protocol of San Salvador") refers to the right to culture in very similar terms to Article 15 of the ICESCR, with two additions (underlined): everyone has the right "to take part in the cultural and artistic life <u>of the community</u>" (1.a), and "The steps to be taken by the States Parties to this Protocol to ensure the full exercise of this right shall include those necessary for the <u>conservation, development and dissemination of science, culture and art</u>" (2).

At a national level, the constitutions of the following Latin American countries have explicitly recognised the right to culture: Argentina, Bolivia, Brazil, Colombia, Cuba, Ecuador, El Salvador, Guatemala, Nicaragua, Panama, Paraguay, Peru and Venezuela.

Thus, the right to culture and what it protects refers to the production, access and enjoyment of "culture", understood as goods and services related to it. It also stands for diffuse rights, not attached to a particular person, but to a collective or to a group of individuals, though every human being is entitled to them in the same way. Complementary treaties (such as those related to women, children, racial minorities or persons with disabilities) give a particular angle on the right to culture, but this does not mean that only disempowered groups are entitled to the right to culture. (Nonetheless, this paper will focus on the cultural rights of disempowered groups, due to their difficulties in accessing their rights).

UNESCO says that defining culture is not an easy task: "[Culture] is that complex whole which includes knowledge, beliefs, arts, morals, laws, customs, and any other capabilities and habits acquired by [a

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[7]"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

[8]"1. The States Parties to the present Covenant recognise the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realisation of this right shall include those necessary for the conservation, the development and the diffusion of science and culture. 3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity. 4. The States Parties to the present Covenant recognises the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields."

[9]"Article XIII. Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries. He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author."

human] as a member of society,"[10] while "cultural expressions" refers to "those expressions that result from the creativity of individuals, groups and societies, and that have cultural content."[11]

Culture also includes respect for *intangible cultural heritage*, recognised by UNESCO in the Convention for the Safeguarding of the Intangible Cultural Heritage (2003). This encompasses languages and their diversity, practices, representations, expressions, knowledge (traditional, indigenous, ecological and local), and skills that communities, groups and, in some cases, individuals recognise as part of their cultural and social identity.

For the purposes of this work, the analysis will focus on two specific manifestations of the right to culture: traditional knowledge and linguistic diversity, linking both of them with the protection available via the DNS and new gTLDs.

According to classic human rights generational classifications, the right to culture is grouped with the second generation ESCRs, as opposed to the first generation of civil and political rights. Second generation rights are widely recognised by governments, countries and international organisations, but compliance depends largely on resource availability. Their implementation involves positive action from governments; thus they are different from first generation rights that usually entail states' realising their obligations to respect and guarantee those rights through abstaining from interfering in their exercise and enjoyment.

As Avri Doria, an APC individual member and technical expert, explains:

> By and large, while civil and political rights are susceptible to national law and enforcement, ESCRs often require private investment in order to be implemented, though in some cases government investment is possible and sometimes even sufficient. This makes ESCRs subject to the pressures of budgets, financial institutions, cost-benefit analysis, and competitive models of development.[12]

Finally, as with other human rights, it is important to note that the right to culture is not an absolute right, and can be limited under certain circumstances. However, these limitations must pursue a legitimate aim; must be compatible with the nature of the right; and must be strictly necessary for the promotion of general welfare in a democratic society.[13] This has taken place, for example, when the right of minorities to enjoy their own culture impacts upon the rights of others, or when practices attributed to customs and traditions infringe upon other human rights.

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[10]See www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/cultural-diversity

[11]Article 4(3), UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005.

[12]Doria, A. (2015). *How the technical community frames the Internet and economic, social and cultural rights*. Association for Progressive Communications. https://www.apc.org/en/pubs/how-technical-community-frames-internet-and-econom

[13]For instance, the right to culture can be derogated "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed" (Article 4, ICCPR); and could be limited not as result of a disposition contained in a specific pact but as a result of consideration by the Human Rights Committee or the Committee on Economic, Social and Cultural Rights.

2.2. Right holders and duty bearers

The *right holders* category refers to the individuals who are entitled to exercise a particular right and to demand its fulfilment. In the case of the right to culture, such individuals belong to two main groups: i) citizens or people individually considered; and ii) formally or informally organised individuals whose right to culture can be clearly identified in relation to their interests.

The first category does not need further explanation: human rights belong to actual human beings, and thus the right to culture is recognised for everyone. The second group is more interesting to analyse, considering that it refers to the particular constitution of the right to culture – standing for diffuse or collective interests – that allows communities or groups linked by common interests to hold a shared right – culture in this case. These communities include local communities, indigenous peoples, minorities, women and children, and, in general, disempowered groups. Civil society can also be considered a valid right holder in this category, ideally well organised and strongly involved in cultural policy development.

Commercial companies, despite being considered "organised individuals", cannot be considered right holders, because they stand in a very different position from the above-mentioned organisations: companies or businesses usually have more economic power and influence. Further, the nature of human rights entails that they be exercised by actual human beings, not corporations.

On the other hand, *duty bearers* are responsible for respecting and fulfilling a certain right, in this case the right to culture. Further, as pointed out by Doria, "When discussing ESCRs, it is important to keep in mind the distinction between government obligations and the normative responsibilities of others. While only governments function as 'duty bearers', the private sector should also take responsibility."[14] This responsibility of the private sector highlights the importance of NGOs' advocacy in promoting and defending ESCRs, through demanding more responsibility from different sectors, such as the private sector.

Thus, the following groups can be identified as duty bearers:

1. States, which are called upon to respect and enforce the right to culture within their boundaries. They are also obliged to develop proper cultural policies that they will later enforce and respect. This extends to the provision of modern institutions dedicated to public cultural service, setting the scene for the exercise of rights by right holders. In addition, states usually participate in international forums where trade of goods and services, as well as rules for intellectual property, and even domain names specifically, are the main subjects; they sign treaties in international forums and also set the standards of compliance and enforcement at national level, in conjunction with other states. All of these may have an impact on the enjoyment of the right to culture. Therefore, the state's position is a very particular one, due to the variety of tasks that it faces (e.g. administrative, judicial, legislative, international relationships, etc.). Many of these can affect the right to culture that states are called upon to guarantee.[15]

2. The private sector, in particular companies that have interests that link their business with cultural rights. The two case studies referred to in this paper, dot-amazon and dot-patagonia,

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[14]Doria, A. (2015). Op. cit.

[15]A good example of the delicate balance that states are called to reach is in the negotiation and signing of international trade treaties, which usually contain at least one chapter related to intellectual property rights, where cultural rights are exchanged for other commercial privileges.

illustrate the situation where two commercial companies had brands probably inspired by the geographical areas and indigenous peoples of the same name (Amazon and Patagonia). These companies were involved in complicated new gTLD applications that led to them not obtaining the desired gTLD.[16]

3. Organisations linked to the right to culture because of the activities they undertake. Within the domain name system, as a particular manifestation of the right to culture, ICANN plays a key role. However, its situation remains unclear: part of this organisation still resists even the slightest involvement with other functions apart from technical functions, meaning the assignment of names and numbers for the proper functioning of internet connections. This position, of refusing to assume a role as a duty bearer, makes it difficult to incorporate a human rights perspective within ICANN's domain name application procedures. This is starting to change.

In 2014, the Council of Europe released a report concerning ICANN procedures and policies and human rights, linking them from the perspectives of privacy, security and freedom of expression. This report represented a key step in understanding the current situation and identifying gaps in procedures. It left no doubt as to the applicability of a human rights framework to ICANN's activities. Currently, a discussion about the "inclusion of human rights among the organisation's core values in its bylaws"[17] is taking place in ICANN. It is significant that this is taking place within the IANA transition process and is part of improvements in accountability. If adopted, this "would be the first explicit mention of human rights in a technical community organisation's governance document,"[18] representing a huge step forward not only for ICANN, but also for both the entire internet community and for ESCRs. This will be a trailblazing development, representing how access to the internet and its resources, such as domain names, can facilitate the enjoyment of these rights .

Some other institutions that work as collaborators, not duty bearers, help to bring both positions – right holders' and duty bearers' – closer and deserve mention here. Later in this report they will be named again as contributors, helping to promote good practices, such as the interests of disempowered groups, in relation to the right to culture. Called internet registries, these country-level NIC (Network Information Centre) organisations are in charge of country code domain name registration (ccTLDs).[19]

Further, there are five regional organisations called regional internet registries (RIRs),[20] which deal with the registration of internet addresses, not domain names. In the case of Latin America and the Caribbean this organisation is LACNIC,[21] which works to support the development of the internet in the region and give it stability. There is also an organisation called LACTLD,[22] a non-profit organisation that brings together ccTLD administrators from Latin America and the Caribbean to promote policy coordination, formulate strategies for domain name development at a regional scale, represent members' common interests, facilitate exchange between members, and collaborate with similar organisations elsewhere.

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[16]For further information about both cases see section 2 of this paper.

[17]Doria, A. (2015). Op. cit.

[18]Ibid.

[19]For a list of country code registrars see: ccnso.icann.org/about/members.htm

[20]https://www.nro.net/about-the-nro/regional-internet-registries

[21]www.lacnic.net

[22]https://www.lactld.org/en

There is also a "LatinoamerICANN"[23] project, disseminating information and promoting dialogue about domain names, IP numbers and internet governance for Latin America and the Caribbean using the different languages of the region.

Finally, there is a Chilean initiative called CNNN, or Council for IP Numbers and Domain Names,[24] an organisation of mixed composition (public and private) formed by representatives of governmental divisions and national internet organisations with NIC Chile as the executive secretariat. Its main mission is to make policy recommendations about domain names and IP numbers to improve internet functioning in Chile.

3. Domain name system

3.1. Background

The domain name system (DNS) is a key element of the internet's infrastructure and proper functioning. It is a system to manage unique addresses, shaped as names formed from strings of letters and numbers, used to get to every device connected to the internet.

In very simple words, the DNS translates the domain name entered into the corresponding Internet Protocol (IP) address of the resource. This enables the device to then connect the requester to the desired internet resource (such as a website, server or other device). For example, the DNS enables the email system to function properly, so that each message reaches the intended recipient's mailbox.

Currently, domain names are considered valuable assets, and even seen as intangible property, as their importance resembles that of real estate. The scarcity and uniqueness of such domain names exacerbates this situation, opening the scenario to speculative interests. In fact, wealth has been made through speculation in domain names, especially those attracting, even by accident, a lot of internet traffic to their websites. That might be one reason why most new gTLD applications originate with companies, not individuals, and why those applications are usually based on intellectual property interests and security reasons, producing a sort of privatisation of the net. This privatisation has a negative impact on the right to culture as enshrined in multiple international treaties, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR).

In this section, issues related to the DNS will be addressed. First, the organisation in charge of domain name assignment and management, ICANN; then, information about domain names; and finally, a description of the category recently added to the DNS: the new gTLDs, which opens up new options for creating, protecting and making known new designations on the internet, but also heightens tensions in the system, pushing a new model which requires new protection measures for disempowered groups and their right to culture.

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[23]www.latinoamericann.org

[24]www.cnnn.cl

3.2. ICANN

At present, three different organisations are involved in the management processes around the root zone:[25] the NTIA's IANA as the administrator, ICANN as the operator, and the US-based private company VeriSign as the maintainer.[26]

Global coordination of the DNS is in the hands of ICANN. ICANN has responsibility for Internet Protocol (IP) address allocation, protocol identifier assignment, generic and country code top-level domain (gTLD and ccTLD, respectively) name system management, and root server system management functions.

ICANN is dedicated to preserving the operational stability of the internet; promoting competition between all internet actors interested not only in those obtaining domain names but also in the correct functioning of the net; achieving broad representation of global internet communities; and developing policies appropriate to its mission through bottom-up consensus-based processes.

As a private-public partnership, ICANN comprises three sectors: i) the public sector, including representation from more than 100 countries' governments; ii) the private sector, where registries, registrars, internet service providers (ISPs), intellectual property advocates, commercial and business interests, non-commercial and non-profit interests (including civil society), and individual internet users can all be represented; and iii) technical experts.

Thus, ICANN operates on a multistakeholder-based model. It has a community-based consensus-driven approach to policy making that mimics the structure of the internet itself: borderless and open to all. This is a clear reflection of current internet governance practices, and makes ICANN a highly complex organisation, with representatives from the three above-mentioned sectors working together, ideally as equals or peers.

Its structure is complex,[27] but also important to understand, as understanding makes clear the spaces that can be opened up, if necessary, for disempowered groups.

A 16-member Board of Directors manages ICANN. A nominating committee, on which all the constituencies of ICANN are represented, selects eight of these board members. An At-Large Committee, the community of individual internet users who participate in ICANN's policy development work (currently formed by more than 160 groups), and the president/CEO appointed by the Board, fill another two positions of the Board. Six representatives come from the so-called Supporting Organizations, sub-groups that deal with specific sections of the policies under ICANN's purview.[28]

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[25]The root zone can be defined as the top-level domain zone contained in an internet address. Some examples are dot-com, dot-net and dot-org. Before the creation of new gTLDs, the root zone comprised barely a dozen generic TLDs.

[26]This technological private company operates an important portion of the internet's network infrastructure, including root name servers, e.g. dot-com, dot-net, dot-cc, dot-tv, dot.gov and dot-edu, among others. It also provides other security services. VeriSign existed before ICANN (founded 1995), and when ICANN began its activities the company was in a privileged position for the registration of many important TLDs, and many of those, when renewed, have attracted a lot of attention and also controversy. With the arrival of new gTLDs, controversy has returned, because of VeriSign's negotiations with ICANN over the transliteration registry of its dot-com domain name, also known as Internationalized Domain Names or IDNs.

[27]A diagram of ICANN's structure can be found in Annex 1, at the end of this paper.

[28]The Generic Names Supporting Organization (GNSO) deals with policy making on gTLDs; the Country Code Names Supporting Organization (ccNSO) does similar work in the field of country code top-level domains; and the Address Supporting Organisation (ASO) works with policy making on IP addresses. Each of these organisations names two representatives.

ICANN also has a few advisory committees and other advisory mechanisms that provide advice on the interests and needs of stakeholders that do not directly participate in the Supporting Organisations. The Governmental Advisory Committee (GAC) is composed of representatives of a large number of national governments. Its key role is to provide advice to ICANN on issues of public policy, and especially where there may be interactions between ICANN's activities or policies and national laws or international agreements. It usually meets three times a year in conjunction with ICANN meetings, where it discusses issues with the ICANN Board and other ICANN Supporting Organisations, Advisory Committees and other groups. These include the At-Large Advisory Committee (ALAC), composed of individual internet users from around the world. The ALAC is selected by Regional At-Large Organisations (RALOs)[29] along with the Nominating Committee. Other committees include the Root Server System Advisory Committee, which provides advice on the operation of the DNS root server system; the Security and Stability Advisory Committee (SSAC), comprising internet experts who study security issues pertaining to ICANN's mandate; and the Technical Liaison Group (TLG), which is composed of representatives of other international technical organisations that focus, at least in part, on the internet.

Notwithstanding all this cross-cutting participation, ICANN's role is strongly criticised by some stakeholders because of the connection between the organisation and the US government through IANA.[30] As a non-state actor, with no clear source of authority under international law, ICANN is said to have weak claims to formal legitimacy.

Even though the link to the US government is due to historical reasons, it has been seen as an obstacle to the development of the internet since the 2000s.[31] In 2013, the Montevideo Statement on the Future of Internet Cooperation was released and signed by ICANN, promising to accelerate the globalisation of its own and IANA's functions; then in March 2014 the Obama administration announced the transition from NTIA-supervised IANA functions to supervision by the global multistakeholder community, in parallel with the expiration of the funding contract for ICANN in 2015.

This transition process should have been completed on 30 September 2015; unfortunately, that deadline could not be met, and by August 2015 a one-year extension had been given. On 10 March 2016, ICANN's Board chair announced the submission to the US government of "a plan developed by the international

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[29]There are five Regional At-Large Organizations (RALOs) that form the At-Large community. Each one is composed of a number of regional At-Large Structures (ALS) – internet user organisations – and unaffiliated users: African Regional At-Large Organisation (AFRALO); Asian, Australasian and Pacific Islands Regional At-Large Organisation (APRALO); European Regional At-Large Organisation (EURALO); Latin American and Caribbean Islands Regional At-Large Organisation (LACRALO); and North American Regional At-Large Organisation (NARALO).

[30]Originally, and for historical reasons, the responsibility for DNS functions was given to US institutions, as the original architecture of the network was developed in the United States. Initially, they were carried out by the US government itself, and after that by other entities under governmental contract. Since the 1990s, the US government has offloaded much of that responsibility to a third party. This was done in the case of the Internet Assigned Numbers Authority (IANA), funded by the US government under a contract between the Defence Advanced Research Projects Agency (DARPA) and the Information Sciences Institute in 1988, after informal activity over previous decades. In late 1998, the IANA project was transferred to the Internet Corporation for Assigned Names and Numbers (ICANN), under the supervision of the US Department of Commerce through the National Telecommunications and Information Administration (NTIA). Soon after that, ICANN started performing the IANA functions, where IANA operates as an ICANN unit.

[31]During the first part of the decade, there was a rumour about the United Nations, an intergovernmental organisation, trying to take control of ICANN's functions. The UN subsequently refuted this during the World Summit on the Information Society (WSIS) of 2005 in Tunisia. Instead, the UN agreed to participate as a consultant, setting up the international Internet Governance Forum. In recent years, more discussion on the topic of control over ICANN has been taking place, strongly influenced by revelations of pervasive monitoring and surveillance by US intelligence agencies in June 2013.

Internet community that, if approved, will lead to global stewardship of some key technical Internet functions."[32]

ICANN has opened a process to collect opinions and discuss proposals of transition models and courses of action, currently contained in drafts open for public discussion. The options discussed range from internal solutions, similar to the current function of IANA within ICANN, to external ones, such as transferring ICANN's functions to the UN's specialised unit, the International Telecommunication Union (ITU). This last proposal is resisted by some governments and civil society organisations, who point out the disadvantages in terms of a free and open internet.

One condition of this transition process is that IANA's NTIA replacement cannot be either a government-led or an intergovernmental organisation. Further, as a result of the 2009 Affirmation of Commitments (AoC) between the US Department of Commerce and ICANN, transparency and accountability improvements, and preserving the internet's security and stability are stated commitments.

If this transition process does not take place under transparent conditions, its success will be at stake because of the suspicion that the NTIA and the US government remain in charge of the domain name system; or, in another scenario, it could mean ICANN has been taken over by the private sector, a scenario with direct consequences for the protection of the right to culture.[33]

3.3. Domain names

Regarding the internet's DNS, each address that we enter in "human" form usually has two or more parts, called *tags*, separated by dots. For instance, the domain name apc.org has two distinct halves or tags, separated by a dot. The tags located on the right end are called the top-level domains (TLDs) or first-level domains, which are at the highest level in the DNS structure of the internet. Many different domains can share the same TLD, as is the case with derechosdigitales.org or cis-india.org.[34] This category or level (TLDs) includes:

- **Country code top-level domains (ccTLDs)**: A two-letter domain tag established for geographical locations, like dot-uk for the United Kingdom, dot-us for the United States, or dot-cl for Chile. Nowadays, there are 250 such domains. In the beginning only residents of a country could register under their corresponding ccTLD, but over the years quite a few countries have allowed foreigners to register under these names. The administration of these domains is delegated by ICANN to local organisations or trustees, responsible for operations and for developing policies that establish requirements and fees.

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[32]See: https://www.icann.org/news/announcement-2016-03-10-en

[33]It has been rumoured that this transition would require US Congress approval, as it is privatising governmental property. Although this is not yet official, it seems very likely that the process will not see results until the US government and the Congress approve the outcomes. There are also expectations about VeriSign's position after this transition process. It remains uncertain if the company is going to keep managing the root zone, or if this duty is going to be delegated to some other institution. This is an important issue, as VeriSign edits and distributes the root zone file after it has received authorisation to do so from the NTIA, under the current circumstances. NTIA has stated: "In preparation for the implementation phase of the IANA stewardship transition, NTIA also asked VeriSign and ICANN to submit a proposal detailing how best to remove NTIA's administrative role associated with root zone management, which the groups working on the transition were not asked to address. We asked VeriSign and ICANN to submit a proposal detailing how best to do this in a manner that maintains the security, stability and resiliency of the DNS." Strickling, L. E. (2015, 17 August). An Update on the IANA Transition. *National Telecommunications and Information Administration*. https://www.ntia.doc.gov/blog/2015/update-iana-transition

[34]Second-level domains correspond to the section of the internet address that goes before the final dot followed by the gTLD, and third-level domains, also called domains extensions or subdomains, correspond to the section prior to the second-level ones. E.g.: thirdlevel.secondlevel.firstlevel

- **Generic top-level domains (gTLDs)**: Formed by three characters that anyone can register under, regardless of their nationality. Initially there was a very limited number of these domains available for registration (dot-com, dot-edu, dot-gov, dot-mil), but they have gradually increased over the years (dot-net, dot-int).

Two categories have been recently added to this first-level: the new gTLDs, which are not limited to a certain prefixed list; and internationalised top-level domains (IDN TLD), a top-level domain with a specially encoded format that allows it to be displayed in a non-Latin character set, like Cyrillic and Arabic script, including ccTLDs (country code) and gTLDs (generic). It is these last categories, and particularly the new gTLDs, that are the focus here.

According to their use, gTLDs can be classified as follows:

- Open gTLDs that can be registered by anyone and for any use, without needing to fulfil specific requirements of use for a specific purpose. Here the classic examples are the already mentioned dot-com, dot-net, dot-info and dot-org. Currently there are 21 of these domains available.

- Sponsored top-level domains, also called *restricted open domains.* This refers to domains based on theme concepts proposed by private agencies or organisations that establish and enforce rules restricting the eligibility of those using these TLDs. The paradigmatic example for this category is the domain dot-aero, limiting registrations to members of the air transport industry, and sponsored by the Société Internationale de Télécommunications Aéronautiques.

- Geographic TLD (geoTLD), a generic top-level domain using the name of or invoking an association with a geographical, geopolitical, ethnic, linguistic or cultural community. Found in this category are dot-cat (for Catalan language and culture, and forbidden for feline cat-related issues), dot-asia, dot-kiwi, dot-paris and dot-gal.

This list will be helpful to understand special requirements set by ICANN's application procedure.

There is a general application procedure for gTLD assignation (specific aspects concerning new gTLDs applications will be presented next), and it is important to note that when applying for a gTLD, what is actually being asked is: i) to create and operate a registry business, which requires complying with ICANN's rules; ii) paying a fee, which could be significantly higher than the fee applicable for second or third-level domain names; and iii) signing a contract or Registrar Accreditation Agreement with ICANN. The application for and assignation of gTLDs is significantly different from buying the domain name of a second or third-level, which is a comparatively simple process that involves presenting an application before a registrar or reseller, complying with their terms and conditions and paying a certain fee.

The *registrar* manages the registration of domain names for one or more top-level domains (TLDs), and needs to have previously signed a contract with ICANN so that the organisation "has access to make changes to a registry by adding, deleting, or updating domain name records."[35] A *registry* manages the administrative data for the gTLDs under its authority, and is "the authoritative master database of all domain names registered in each top-level domain. The registry operator keeps the master database and also generates the zone file that allows computers to route Internet traffic to and from top-level domains anywhere in the world."[36] [37]

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[35]ICANN Glossary: Terms Applicable to the gTLD Application Process. https://newgtlds.icann.org/en/applicants/glossary

[36]Ibid.

[37]A simple diagram explaining the subjects involved in the domain name registration process can be found at: https://whois.icann.org/en/domain-name-registration-process

Technical, operational and financial capabilities are also examined through the application process, and it is mandatory for the registrar to implement the Uniform Domain Name Dispute Resolution Policy (UDRP).[38] This states that before a registrar cancels, suspends or transfers a domain name, the dispute must be settled by agreement, court action, or arbitration. This is frequently the case over trademark disputes.[39] One of the most important ICANN dispute resolution providers is the World Intellectual Property Organization (WIPO), acting as an arbitration centre and also as an intellectual property expert and guarantor. Considering that copyright treaties usually refer to the right to participate in culture, and that the same link appears in relation to domain names, WIPO's intervention is both necessary and convenient. Also, it was WIPO itself that gave guidelines for and promoted the use of the UDRP in ICANN.

After completing this application process, the registrar is added to a database, and can start its official operations.

Finally, this application process may face challenges soon. Data on whoever has registered a domain is stored in a database called WHOIS.[40] The information contained in this database has been used for both legitimate and illegitimate ends, the latter affecting the right to privacy, which – like the right to culture – is supposed to be safeguarded according to ICANN's protocols. This further demonstrates that ICANN's work has not only technical effects, but can also affect human rights.[41]

3.4. New gTLDs and application procedure

Two new categories of gTLDs have recently been added, *new gTLDs* and *internationalised domain names (IDNs),* as part of ICANN's effort to introduce new generic top-level domains. Looking forward to this result, a programme that facilitates the creation of new internet extensions is currently being developed, potentially fostering a new way of using the internet, bolstering creativity and increasing space for free speech. It could be used as openly or with as many restrictions as the registrar wants it to have, deciding to sell associated domains or reserving them for their own use alone.

In 2012, at the meeting of the ICANN Board, a New gTLD Programme Committee (NGPC) was formed, comprised of all ICANN Board members who do not have a conflict of interest relating to the new gTLDs, with two additional non-voting intermediaries. The group was given full legal decision-making authority by the Board in matters concerning the New gTLD Programme and the Applicant Guidebook.[42]

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[38]https://www.icann.org/resources/pages/help/dndr/udrp-en

[39]In the case of abusive registrations of domain names (e.g. cybersquatting), the conflict must be addressed by expedited administrative proceedings through filing a complaint with an approved dispute-resolution service provider.

[40]The WHOIS service is a free, publicly available directory containing the contact and technical information of registered domain name holders (referred to as "registrants"). Anyone who needs to know who is behind a website domain name can make a request for that information via WHOIS. The data is collected and made available by registrars and registries under the terms of their agreements with ICANN. See: https://whois.icann.org/en/primer

[41]The latest proposal contemplates limiting privacy and proxy domain protection to websites that are not commercial and transactional, leaving the rest under the rule that the information provided in the application, such as names, addresses, phone numbers and emails are included in this global database and are made public. Some problems may arise, considering that ICANN must decide the extension of the applicable concept of non-commercial websites, and that some of them will leave non-profit organisations receiving donations as included in the definition. If approved, this new policy will facilitate online harassment and intimidation, providing easy access to a vast source of personal data for malicious purposes – a practice denominated "doxing" – without making any distinction between big companies and small businesses frequently operating through the persons directly involved in them. This potential lack of privacy protections may severely affect not only commercial organisations, but also minorities' interests and freedom of expression, and must be watched closely.

[42]See: https://newgtlds.icann.org/en

One of ICANN's major concerns is to ensure that new gTLDs are awarded through a fair and transparent process to organisations that can effectively manage them on behalf of internet users, considering that any public or private organisation, from any part of the world, can apply to create and operate these new domains. Based on that idea a special application procedure has been created, taking into account necessary safeguards to keep the internet operational and safe, in accordance with ICANN's mission.

This procedure, very simply, can be divided in three main sections:[43]

- **Preliminary stage**. Starts with an application submission period, during which all new submissions must be made. This is followed by administrative checking for completeness. It requires, as with the usual TLD application process, the demonstration of the operational, technical and financial capability to run a registry and to comply with additional specific requirements. There is also a payment fee – estimated at USD 185,000.[44] Only corporations, organisations, or institutions in good standing may apply for a new gTLD, not individuals or yet-to-be-formed organisations.

  Of course these requirements and the fee payment emerge as major obstacles for some groups with special interests or disempowered groups, which do not usually have a formally structured organisation nor have access to large funds, inhibiting them from applying for TLDs, or even participating in some way during ICANN's application procedure. This makes the initial statement that anyone can apply for these new domains illusory.

- **Comment period and initial evaluation**. A comment period on each application opens after being publicly posted on ICANN's website. This allows the community to review and comment about the requests for registry, and also allows governments to make notifications, using a forum. Evaluators take into consideration these comments and notifications, which are not considered formal objections, and even allow time for applicant clarifications.

  Governments can also communicate directly with applicants using the contact information that is publicly available, or using the GAC Early Warning procedure, intended to inform applicants that one or more governments believe that their application could be problematic. Because an early warning can lead to the application's withdrawal, ICANN encourages applicants to identify in advance any sensitive issues, and to work with relevant parties beforehand to reduce this possibility.[45]

  This comment and warning period runs parallel with the formal beginning of the procedure, and through an initial evaluation, which can follow a handful of different paths, all of them oriented to get to the third and final stage: the transition to the domain's delegation. The whole process might take several months.

  Initial evaluation comprises two main elements: gTLD string[46] reviews (security and stability, similarity to existing or reserved names), and applicant reviews (financial, technical and

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[43]A basic diagram of this procedure can be found in Annex 2, at the end of this paper.

[44]Additional costs may apply. Some studies even estimate costs could rise up to USD 500,000 depending on the complexity of the application process and/or implementation.

[45]Public Interest Commitments or PICs can be used to that end. They are "voluntary amendments that applicants can create, sign, and undertake along with the general registry agreement in order to hold their registry operations to certain standards. They seem to originally have been developed as a way to allow applicants to appease GAC members that may be concerned about how their application stands as is, or how ICANN will be able to ensure a potential registry remains compliant with its aspirations and mandate as it defined in its summary of its proposed operations in the TLD application." See: https://icannwiki.com/PIC

[46]A *string* refers to the string of characters comprising an applied-for gTLD. If strings proposed by two or more applicants are identical, similar, or visually resemble one another in such a way that is likely to deceive or cause confusion, this is called a string confusion, and must be resolved through a special process.

operational capacity to operate a registry). This stage can proceed without any problem, or can lead to: i) an extended evaluation, ii) a string contention process, or iii) a dispute resolution procedure.

An applicant that does not succeed in its initial evaluation can request an extended evaluation. If the extended evaluation is not requested, even though it is needed, the application process will not continue or succeed. After extended evaluation the options are that the application passes and can proceed to the next stage, or does not pass and will proceed no further.

String contention applies when there is more than one qualified application for an identical or similar gTLD string, to the point that they could create user confusion if more than one of these strings is delegated into the root zone.[47] ICANN carries out a string review, and after running algorithms and analysis, is able to decide if the string has to go for contention resolution. If two or more applications must go to string contention resolution, all of them must complete all previous evaluation and dispute resolution stages, even when that implies a longer waiting time for some of the applicants.

Regarding the dispute resolution procedure, formal objections must be filed before a dispute resolution service provider (DRSP), not with ICANN directly, by third parties or by other applicants. There are four grounds for objecting to an application: i) *string confusion*, if the gTLD applied for is similar to another existing gTLD or to another application, producing confusion; ii) *legal rights*, due to infringement by the gTLD of the objector's existing legal rights; iii) *limitation of public interest*, if the gTLD applied for violates norms of morality and public order recognised under principles of international law; and iv) *community objection*, from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.

If the dispute resolution determines that the applicant prevails, the application can proceed to the next stage, but if the objector prevails, the application cannot continue or will be bound to a contention resolution mechanism. If there are multiple objections, the applicant must prevail in all of the dispute resolution proceedings in order to continue with the process.

ICANN encourages applicants to resolve these conflicts – string and disputes issues – among themselves, before involving a resolution service provider. ICANN provides a range of solutions, such as mediation, buy-outs, partnerships, and, as a last resort, auctions. These auctions are regulated in String Contention Procedures (Module 4) of the Applicant Guidebook, and have been strongly criticised – with some critics even questioning their legality – because they alter the normal way ICANN examines and delegates a domain name, and fail to address the organisation's goals of promoting competition, innovation and diversity, opening a gap for possible collusion and illegitimate price raising. Some categories of domains are excluded from the auction option. This happens with geographic names in which case the applications will be suspended pending resolution by the applicants.

- **Delegation**. Once the initial evaluation or the string contention resolution procedure is finished, the prevailing applicants will transition to delegation of the requested gTLD. This last stage consists of a registry agreement with ICANN and technical tests. If the pre-delegation testing requirements are not satisfied, they will impede the gTLDs' delegation into the root zone within the time specified in the agreement, and ICANN may, at its sole and absolute discretion, choose to terminate it.

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[47]This concept refers to the highest level of the DNS structure, containing the names and the numeric IP addresses for all the top-level domain names: gTLDs and all the ccTLDs.

If all these steps are successfully achieved, the delegation can be completed and the procedure finished. Depending on the complexity of the application, the estimated length of the process is from nine to 20 months.

Through this process, special situations can occur, altering or adding complexity to the flow:

- The applicant can designate applications as *community based gTLDs* – as opposed to standard ones. There is no standard definition of what "community-based" means; for now it is only possible to say that it does not necessarily refer to non-profit communities.[48]

  This status gives precedence to the application among others, if many coexist. This designation refers to domains operated for the benefit of a community that is clearly delineated, a condition that should be voluntarily declared by the applicant, and must be proved through a Community Priority Evaluation Procedure. This evaluates the community support for and/or opposition to the application, scoring higher if there are one or more institutions or organisations, representing a majority of the overall community addressed, sponsoring an application. This mechanism demonstrates concern about possible human rights infractions, and offers measures to prevent them.

  This status also affects the application process in other stages, such as the objection and dispute resolution stage, especially if the gTLD affects a community and the application has not declared that status. It can also affect the string contention stage, which can conclude in a settlement between parties involved, or a community priority evaluation if selected. If all these steps fail, an auction can take place.

  Finally, the community-based designation also implies restrictions associated with this condition, which will be addressed in the contract signed at the delegation stage.[49]

- Other designations covered by the application form are related to geographic names (geoTLDs). This element, understood as the appropriate consideration given to the interest of governments or public authorities about geographic names, is also part of the initial evaluation stage.

  According to ICANN's Applicant Guidebook, geographic regions listed in ISO 3166 cannot be applied for except as geoTLDs. However, some problems have arisen as recognisable regions – such as Patagonia, one of the case studies analysed in the next section – do not appear under any of the standardised lists, and thus remain unprotected.

  The Geographic Names Panel (GNP) is in charge of determining if a specific gTLD geographic application represents a geographic name, and will evaluate the supporting documentation, including documents given by the governments or public authorities involved. In some cases, this review could lead to a resolution procedure or to an extended evaluation stage.

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[48]This can be easily concluded just by observing the list of community-based gTLDs that has been filed, most of them coming from economic interest groups (e.g. dot-merck, dot-pharmacy, dot-bank, dot-insurance, dot-webs, and dot-hotel). ICANN examines whether the applicant group fulfils the requirement to be considered a community during the evaluation stage. For a complete list see: https://gtldresult.icann.org/applicationstatus/viewstatus

[49]Clause 2.18, ICAAN's gTLD Applicant Guidebook: "[Note: For Community-Based TLDs Only] Obligations of Registry Operator to TLD Community. Registry Operator shall establish registration policies in conformity with the application submitted with respect to the TLD for: (i) naming conventions within the TLD, (ii) requirements for registration by members of the TLD community, and (iii) use of registered domain names in conformity with the stated purpose of the community-based TLD. Registry Operator shall operate the TLD in a manner that allows the TLD community to discuss and participate in the development and modification of policies and practices for the TLD. Registry Operator shall establish procedures for the enforcement of registration policies for the TLD, and resolution of disputes concerning compliance with TLD registration."

3.5. Case studies

The two case studies presented next illustrate the connections that the DNS and the right to culture can have within the new gTLDs procedure.

In both cases, huge international companies were applying for their trademarks as new gTLDs, but those names matched geographical names and ancient Latin American cultures, affecting their right to culture. Fortunately, the opportune action of governments, citizens and ICANN's Independent Objector[50] stopped both applications from reaching the final stages.

3.5.1. dot-amazon

Under ICANN's new gTLD programme, the international online shopping company Amazon[51] applied for this designation string, having as its declared purpose to protect the integrity and reputation of the brand, and to exercise its intellectual property rights. This domain name was allegedly intended to unite all amazon second-level domains followed by a ccTLD (e.g. amazon.es, amazon.uk, etc.) allowing the company a unique platform, and provide a stable and secure foundation for online communication and interaction.

The application received a GAC Early Warning from Brazil and Peru.[52] They stated that this name also designates a significant multinational geographical area, usually known as the Amazon or Amazonia, which includes the territory of nine countries, with most of the area falling under the jurisdiction of the two countries that issued the warning.

For its part, ICANN's Independent Objector filed a Community Objection against the string not only in Latin but also in Japanese and Chinese characters, based on the grounds of community harm and limited public interest.[53]

After this pressure, this NGPC announced that the GAC's advice was going to be accepted, and as a result the application was not able to proceed, considering the potential impact on the indicated region, in particular preventing the use of this domain in the public interest and also for the promotion of the region.

3.5.2. dot-patagonia

Another emblematic case involves a famous outdoor clothing and gear company, Patagonia,[54] as the applicant.[55] In this case, both the community and governments were very active in stopping the application, which affected another South American geographical region, shared by Argentina and Chile.

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[50]The Independent Objector (IO) is a position created specially for new gTLDs and acts in the best interests of global internet users, being able to lodge objections in cases where one has not been filed, but needs at least one comment in opposition to the application made in the public sphere. The IO's duty is limited to filing objections based only on the grounds of Limited Public Interest and Community Objection. Professor Alain Pellet is the current IO. See: https://newgtlds.icann.org/en/program-status/odr/independent

[51]www.amazon.com

[52]https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings?preview=/27131927/27197938/Amazon-BR-PE-58086.pdf

[53]www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/amazon-アマゾ-ン-亚马逊-cty-amazon-eu-sàrl

[54]www.patagonia.com

[55]See the application here: file:///Users/paulajaramillo/Downloads/1-1084-78254_PATAGONIA-2.html

The region called Patagonia covers much of the southern territory shared by both countries in the Southern Cone, with a deep sense of belonging from communities on each side of the Andes Mountains. The outdoors company application threatened to identify Patagonia with a commercial brand instead of the vast southern region.

First, Argentina's GAC representative expressed his concerns regarding the application before ICANN's Board; a formal letter sent by Argentina's Ministry of Foreign Affairs to ICANN's leadership followed.

The application also received nearly 1,500 comments during the public comment period. NIC Argentina called on Twitter followers to comment on and object to the application, offering give-aways in exchange for active participation.

The Argentine representative submitted a GAC Early Warning.[56] In the case of Argentina, the representative pointed out that no national or regional government support had been requested. Regarding this, and via a Public Interest Commitments (PIC) submission,[57] the company said it was hoping to meet with affected governments in order to reach an agreement. That meeting never took place.

The Independent Objector filed a Community Objection based on the same grounds as for the dot-amazon case, on the basis of community harm and limited public interest. A Community Objection was also filed by Argentina's Ministry of Foreign Affairs.

Currently, the application for dot-patagonia shows a withdrawn status.[58] It resembles the case of dot-amazon, in which both applications were unable to proceed unless the companies involved arrived at an arrangement with the governments who had objected to the application.

4. The existing situation: Right to culture and domain names

This section will draw on the previous analysis to address the right to culture and domain names, showing some of the problems that may arise where these two intersect.

Links will be drawn between the right to culture – one of the ESCRs specifically manifested within ICANN's domain names procedures – and civil and political rights. Then, the regulatory frameworks that promote linguistic diversity and traditional knowledge will be introduced as examples of cultural expression by disempowered groups, and linked with ICANN's domain name management. Next, the regulatory and procedural gaps will be examined, to identify relevant problems associated with the domain name system and human rights protection, from the disempowered groups' point of view.

Then, demands from civil society and right holders will be identified, as well as the existence of other important and relevant advocacy actors. Finally, nodes of engagement will be examined, along with the opportunities and challenges for action, related to a better understanding of the right to culture and the importance of its protection within the domain name system.

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[56] https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings?preview=/27131927/27197617/GAC%20EW %20Submission%20PATAGONIA%202.pdf

[57] https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadpicposting/1466?t:ac=1466

[58] https://gtldresult.icann.org/applicationstatus/applicationdetails/1466

4.1. Links between the right to culture and civil and political rights

Civil and political rights, also known as first-generation human rights, basically correspond to those related with liberties and participation in political life, and are understood to be enforced mainly in a negative way, preventing excesses from governments and states, organisations and also private parties, and protecting individuals. Classic examples of this category are the right to life; freedom from discrimination; the right to privacy; freedoms of thought and expression, religion, and the press; the right to fair trial and due process; and the right to vote, among many others.

They can be distinguished from the ESCRs, where second-generation rights such as the right to education, to housing, to an adequate standard of living, to health and, of course, to science and culture, are found. The two categories connect in several ways, as the differences are due to political, historical and even academic reasons, rather than a hierarchy of importance.

Specific links between the right to culture (or more broadly, cultural rights) and some civil and political rights such as freedom from discrimination and freedom of expression are easy to understand, as the first, as said before, protects linguistic diversity and even traditional knowledge. This is in fact the scenario corresponding to the two case studies referred to in this paper – dot-amazon and dot-patagonia – where a reference is made to a certain geographical area, which also refers to indigenous communities, their knowledge, language, and particular traditions.

A less robust protection system can severely alter and affect the right to culture of these disempowered groups in Latin America, and others not affected yet, whether on the same continent or elsewhere. This could set the grounds for discriminatory behaviours, in this case within the internet in relation to domain name assignation, and, more specifically, new gTLDs.

There are examples of discriminatory activity within processes that should be protecting the right to culture. For instance, the fees incurred through ICANN's domain names are prohibitive; the requirements to prove the existence of, or the support of, a certain community in a community-based application; and of course auctions that leave no place for the participation of organisations with fewer economic resources.

As long as disempowered groups have limited access to the internet and to the necessary equipment, technology and network infrastructure for that access, freedom of expression is also affected. On top of this, they need to have the knowledge required to use this technology. All these can be obstacles not only when trying to apply for a domain name, but also when filing concerns about their right to communicate their culture or when opposing applications during the ICANN procedure. Domain name application procedures use the internet almost exclusively for communications, information, applications, monitoring the application status, etc.

Of course, if traditional knowledge and the right to culture in general terms are not properly safeguarded and guaranteed by formal or traditional legal mechanisms, disempowered groups entitled to exercise this right will not be able to communicate and let others know about their culture. It is not just their right to do this through the internet that will be affected, but also by any other means of communicating that culture.

Honour and human dignity can be affected when the right to culture is not properly protected. It is perfectly possible to apply for, and even obtain, a new gTLD associated with a disempowered group's

interest, and use it for purposes directly opposed to theirs, even to insult and undermine those cultural interests. This can become a very delicate issue, and, considering the internet's global impact, the negative effects on human rights are both enormous and difficult to measure. As noted by Juan Carlos Lara:

> The internet is currently a critical tool for exercising, mobilising, demanding or seeking information about human rights. Because of its broad spectrum of possibilities, the internet allows people to address demands not for just one category of rights, but for all of them.[59]

In consequence, it appears that the right to culture and the elements that it protects can alter and even affect severely the exercise of some other civil and political rights that need culture to be strong and well protected. That does not happen only to disempowered groups, but being disempowered makes that protection even more important to them, and should be of interest to the entire community.

This situation also demonstrates strong proof of the linkage between human rights and their indivisibility, making the protection and enhancement of them as a whole relevant, using all the means available to achieve that end, including the internet.

4.2. Existing relevant rights frameworks and gaps

4.2.1. Frameworks promoting linguistic diversity and traditional knowledge

Specialised regulations have been developed to adequately protect elements such as traditional knowledge and the right to culture, as conventional intellectual property (IP) laws have proven to be insufficient. This happens because intellectual property regulation focuses on a specific kind of exclusion regime, in which the right holder is usually a specific person or group of individuals (as opposed to a collective regardless of its individuals); and also because the protection guaranteed by IP laws is in force only for a certain period of time.

On the contrary, cultural rights in general, and the rights to traditional knowledge and linguistic diversity in particular, do not participate in the exclusionary logic behind much intellectual property legislation. Rather they respond to common interests where no specific individual can be designated as the right holder, and where the limited time of protection does not take into account the scale of the work that should be protected.[60] At this point, specific international treaties regarding cultural rights take effect. These treaties define mechanisms to defend cultural rights expressed in core international instruments. Examples of such treaties include UN treaties in relation to discrimination based on race[61] or gender,[62]

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[59]Lara, J. C. (2015). *Internet access and economic, social and cultural rights*. Association for Progressive Communications. https://www.apc.org/en/pubs/internet-access-and-economic-social-and-cultural-r

[60]This does not mean that each member of such a collective or group cannot exercise or demand remedy for cultural rights, but rather that it does not work as a scheme of exclusion *erga omnes* as is the case with intellectual property or common property rights.

[61]The Convention on the Elimination of All Forms of Racial Discrimination (CERD, 1965) establishes "The right to equal participation in cultural activities" in Article 5(e)(vi).

[62]The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979) establishes "The right to participate in recreational activities, sports and all aspects of cultural life" in Article 13(c).

indigenous people,[63] children,[64] persons with disabilities,[65] and persons belonging to national or ethnic, religious and linguistic minorities.[66]

In addition to these, the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage must be given special consideration. Dated October 2003 and coming into effect three years later, this Convention is the most remarkable international effort to protect "living heritage", recommending countries to make inventories, work with the communities and give them support.

As a result of this convention, some Latin American works now belong to a list of UNESCO Intangible Cultural Heritage. For example, the musical genres of candombe and tango have been registered by Uruguay and Argentina, the art of weaving the Panama hat by Ecuador, and different cultural expressions by Colombia, Brazil, Peru, Bolivia, Venezuela, Chile, Mexico, Guatemala, Honduras, Costa Rica and Nicaragua.[67]

At a national level, many countries do not have adequate mechanisms to protect traditional knowledge. In Latin America, there are only a few countries with legislation. Panama, Peru, Ecuador, Costa Rica, Brazil and Peru have laws or similar measures related to tangible or intangible heritage. The Andean Community comprising Bolivia, Colombia, Ecuador and Peru has issued four Decisions (numbered 345, 391, 486 and 524) protecting traditional knowledge; meanwhile the other relevant regional bloc, MERCOSUR, has no specific decisions on the topic, but has developed complementary regulation applicable to trademarks, geographical areas and plant diversity protection.

In sum, the framework for protecting cultural assets such as traditional knowledge and linguistic diversity is formed by the specific regulations pertaining to them, at both the national and international levels; IP regulation, although it has generally privatised traditional knowledge for the benefit of a few, including assets that can belong to a group, rather than individuals; and finally, regulation provided by special organisations, such as ICANN, which, even if oriented to goals apparently far from cultural rights, must be considered part of this framework.

Thus, ICANN's domain name application procedure regulations, initially oriented to manage the internet and technical issues related to it, can clearly have an impact on human rights such as culture. At first glance, it seems that new gTLD processes have opened up new opportunities for internet users, including disempowered groups with specific interests, like traditional knowledge and linguistic diversity. For that

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[63]The UN Declaration on the Rights of Indigenous Peoples (2007) responds to the demand for indigenous peoples' cultural rights. It contains important provisions such as Article 31, establishing "the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions."

[64]The Convention on the Rights of the Child (CRC, 1989) refers to indigenous children and their right to "enjoy his or her own culture" (Article 30), the right of the child "to participate freely in cultural life and art" and respect and promotion of the child's right "to participate fully in cultural and artistic life," with a duty for states to "encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity" (Article 31).

[65]The Convention on the Rights of Persons with Disabilities (CRPD, 2006) includes the right "to take part on an equal basis with others in cultural life," detailing other manifestations of the right that allow access to persons with disabilities (Article 30).

[66]The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992) contains references to the protection of culture, not specifically mentioning it as a right to culture, but protecting, promoting and guaranteeing the right to enjoyment and participation of cultural minorities, as well as protecting the national or ethnic, religious and linguistic identity of minorities against any form of discrimination.

[67]More details at: www.unesco.org/culture/ich/index.php?lg=en&pg=00559

purpose even a specific application procedure has been created, considering that any public or private organisation, from any part of the world, can apply to create and operate these new domains, and the process needs to be fair and transparent enough.

Regarding traditional knowledge, it seems to be protected through the community-based application status, which helps strengthen the cultural and social identity of interested groups, including their traditional knowledge and/or language, giving them a way to express their collective identity through the administration of a common domain name, get international recognition, and also generate income from domain name registrations and renewals. Linguistic diversity can also be protected through the incorporation of IDN TLDs allowing the creation of top-level domains in different characters than the usual Latin ones.

However, a detailed look at that procedure gives a very different impression. Instead, gaps affecting disempowered groups are easily visible, and the fear of IP interests prevailing over disempowered interests is strong.

4.2.2. Gaps

Given the framework described above, it is time to identify those spaces that remain without proper regulation, specifically regarding the protection of traditional knowledge and linguistic diversity related to the DNS and ICANN's work.

On a global scale, ICANN's regulation does not include formal mechanisms capable of guaranteeing adequate representation for disempowered groups' interests. The possibility of defending and promoting their interests is left to forums such as the At-Large Community, or by governments in the GAC. But this model does not solve problems that arise when disempowered groups' interests differ or collide with those of states. In the two case studies presented here, fortunately, governments gave their support to disempowered groups and helped them to challenge the applications, but it must be said they also protected their own interests, particularly in terms of tourism revenue.

Further, even though ICANN strives to be a consensus-based organisation, in reality, most of its decisions are based on hierarchical structures. Within ICANN's GAC, only about 100 member countries participate, barely half of the total participating in the United Nations. Only 60 of those show up at the regular ICANN meetings, and, of those, roughly 10% participate actively. In this context, where even national interests are weakly represented, it is easy to imagine the troubles faced by disempowered groups trying to protect their interests and make their voices heard using GAC representation.

An alternative solution to the problem could be the implementation of a disempowered groups' representative, a sort of human rights ombudsman, or a similar figure defending cultural rights. This could be studied and implemented within the ICANN organisational structure and/or procedures. But clearly this can be a difficult task due to the vast interests that might need this kind of representation.

The only similar figures currently existing are the Independent Objector, who does not have such a specifically human rights-oriented task; and the Geographic Names Panel (GNP) for geographical TLDs, which has a very limited scope of action. This, in turn, means that disempowered groups, many in need of special consideration, may well be under-represented or not represented at all before ICANN, particularly through its procedures.

The under-representation of disempowered groups' interests constitutes an important risk for human rights, culture, traditional knowledge and linguistic diversity that needs urgent remedy. The introduction of new gTLDs, IDN TLDs, and even the option of the community-based application status can be seen as important advances for cultural rights, and as ways to strengthen free speech, diversity and creativity, but they also opened a gate for private companies to obtain valuable domain names for their own benefit, potentially at the expense of associated cultural interests.

The new procedure also needs review, as there are gaps within the application procedure that need to be addressed. These include the following:

- Application fees and the associated requirements are prohibitive for many potential users.

- Becoming a registrar and managing a new gTLD is difficult. If that is not a goal for a specific group, expressing concern over or opposition to a certain application is difficult and costly. Also, IP interests seem to be considerably stronger than cultural ones, due to the latter's lack of funds, especially compared with the former – an important difference when domain name registration is in dispute.

- The current rules on geoTLDs need revision to apply to more places requiring protection rather than being strictly limited to the guidelines found in ISO 3166. Prior government support for geographical applications should be required, as a way to protect citizens and minority interests, balancing these with freedom of expression.

It is only "good luck" that only the two mentioned cases, affecting specifically some Latin American cultural interests, have arisen. These two are useful as an example of what can happen if ICANN does not go in depth in its procedures, deliberately incorporating issues beyond technical and economic aspects, such as human rights and disempowered groups' interests.

On the other hand, ICANN's institutional weaknesses such as the lack of accountability and transparency of their processes must be taken into account. This is important to consider, as these are gaps that private corporations can use for their advantage, at the expense of the right to culture and the disempowered groups' interests. The latter frequently do not have the means, either legal or financial, to have access to reasonable representation before institutions like ICANN.

One of the worst criticisms of ICANN's activities is that it might be controlled by the domain name registry industry, which pays it large sums for the privilege of managing and reselling top-level domain systems. This discussion was revived when the new gTLD application process opened up, considering the almost limitless opportunities for the internet's commercial development in the field of domain names. Given the lack of support within ICANN for disempowered groups, the possibility of private understandings arising between applicants involved in a domain dispute heightens concerns over the infringement of cultural rights. Even worse, auctions as a last resort for solving disputes worsens this scenario. Further, the transition process being faced by IANA looks to some sceptics as a transition to corporate control of ICANN.

In this scenario, it is even more important to give proper space for disempowered groups and to provide a guarantee of the neutral position of an institution like ICANN. ICANN must work to balance all interests involved in all applications they process. It is important to note once again that ICANN's fundamental role is to protect human rights while preserving the internet's stability and ensuring its proper functioning, through multistakeholder democratic processes.

Looking at issues from either a regional or a local level reveals the existence of gaps of a different nature. Latin America is home to a sizeable number of indigenous peoples, and they make up one of the continent's most important disempowered groups, with traditional culture and linguistic diversity that are not always protected, and whose importance is not usually recognised. This situation is aggravated by ICANN's lack of specific safeguards for traditional knowledge and linguistic diversity during its application procedures, leaving their protection to general treaties and dependent upon national recognition. In these circumstances, regulatory gaps at the national level in terms of protecting traditional knowledge are reiterated on the internet. Access is still a major problem in Latin America, with around half the population connected. This is extremely important when domain names are being discussed, and when the whole procedure takes place online. Such issues of connectivity seem to have not even registered with ICANN, and they affect not only Latin America, but also other continents with even worse connectivity. As already noted, internet access is an important tool for the enjoyment and exercise of ESCRs.

At a national level, similar reasoning is also applicable. Countries do not harmonise the processes in place to obtain a second-level ccTLD and states do not provide sufficient protection for the interests of disempowered groups. Rather, historically, they have tended to serve corporate interests through almost unconditional support for trademark rights and the application of the *first come, first served* principle. Also, the financial expenses involved in these processes include not only applying for a domain name, but also defending this interest in cases of alleged infractions, usually involving arbitration.

Thus, it is important to empower organisations (listed in the next section) dedicated to promoting and defending good practices.

4.3. Demands from civil society and right holders

Civil society and right holders are making demands in two principal areas. First, that international and national level regulation needs strengthening and improvement with regard to protecting the right to culture. Internationally the right is protected, but special procedures within organisations that might be considered as technical, such ICANN, need more attention considering the importance of internet access and their resources, such as domain names, for the proper realisation of ESCRs.

In some countries there is an explicit recognition of the right to culture in the constitution, e.g. Mexico, but in several cases the right is protected only through the indirect application of international treaties, e.g. Chile. The explicit protection of this right needs to be universal, and civil society advocacy plays an important role in achieving this.

A second area is the need to improve general protection standards for DNS applications. Today any applicant from around the globe can ask for a second-level domain name followed by the relevant ccTLD. This can then affect the right to culture and knowledge belonging to certain groups, but because of the first come, first serve principle applicable to the domain names procedure, these rights are not considered in the application. Further, the local institutions in charge of allocating these internet addresses are not subject to strong accountability, making the process of balancing the competing interests obscure.

In addition, there is an important obstacle for minorities interested in applying for a particular domain name to overcome: the fees. While ccTLD and second-level domain costs are not excessively high, there

is still the possibility of being dragged into an arbitration process that involves extra expense. The registration process for a new gTLD involves payments of a minimum of USD 185,000, a considerable investment that must be considered alongside the legal and technical requirements needed to set in motion and later manage both the application and the gTLD itself. That amount increases if the new gTLD requires translation to non-Latin characters (IDN TLD).

A similar situation occurs when it is necessary to defend specific interests before one of ICANN's DRSPs. This can also involve costs to present suitable opposition and set in order the relevant arguments.

Obviously, these barriers are much easier to surpass for big companies than for ordinary people, individual entrepreneurs, or, of course, disempowered groups, even if they have access to financial resources and are able to fulfil ICANN's requirements. Thus, it is important to enhance the influence and support the activities of organisations with non-commercial interests that can help disempowered groups defend their interests. Such groups will be identified in the next section.

Also, ICANN's transition process brings up challenges on its own, and requires close tracking from civil society. Location, not necessarily from a geographical point of view, but rather referring to the transition from national-based to international channels, should also be analysed. Accountability is another important element for the legitimacy of ICANN's activities.

Even ICANN's application process should be looked at closely. Some voices have noted the importance of some procedural safeguards, understood as the possibility for affected parties to have decisions independently arbitrated. If analysis concludes that procedures require amendment, this must be strongly advocated for by both civil society and rights holder.

4.4. Other advocacy actors and conflicts and collaborations between campaigns

This section will examine organisations with non-commercial interests that can be of enormous help in defending disempowered groups' interests.

Within ICANN, the Cross Community Working Party on ICANN's Corporate and Social Responsibility to Respect Human Rights (CCWP-HR)[68] is important in this regard. It focuses on issues and solutions related to the corporate and social responsibilities of ICANN, including policies, procedures, operations, and the responsibility to respect human rights. Recently it has achieved a milestone goal: the ICANN Board has agreed to making a commitment to respect human rights part of the organisation's by-laws.[69] Also within ICANN, there is the Non-Commercial Users Constituency (NCUC),[70] a stakeholder group located within the Generic Names Supporting Organization (GNSO), which represents the interests and concerns of non-commercial registrants and non-commercial internet users of gTLDs.

At the Latin American level, the promotion of other organisations who are collaborators of right holders and duty bearers can contribute to close the gaps detected in connection with the right to culture and its defence.

This is the case with NIC country offices, LACNIC, LACTLD, the LatinoamerICANN project, and CNNN, to name a few. It is in these organisations that we can find real possibilities for non-profit organisations and

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[68] https://community.icann.org/display/gnsononcomstake/CCWP+on+ICANN%27s+Corporate+and+Social+Responsibility+to+Respect+Human+Rights

[69] ARTICLE 19. (2016, 4 February). Press release: ICANN Board agrees to human rights commitment. https://www.article19.org/resources.php/resource/38249/en/icann-board-agrees-to-human-rights-commitment

[70] www.ncuc.org

services, individuals, disempowered groups, and internet users to find enough support to be able to apply for and run a TLD, even when their interests are in opposition to companies and other organisations. If they are not interested in applying for or running a TLD, they can at least state their position and have the chance to be heard in international forums, and, of course, within ICANN's procedures and units.

It is also important to note that government support for disempowered groups such as minorities and different indigenous or ethnic groups is fundamental, because this support gives them access to GAC forums and ICANN's Early Warning mechanisms. This, in turn, allows them to express and defend those interests. Besides, governments are entitled to give support to applications involving community interests, which is why it is so important to make those interests stronger, visible and relevant to the general population, so that they are properly represented by their governments.

Some other advocacy actors in the field of the right to culture associated with top-level domain names like new gTLDs are directly related to disempowered groups, such as indigenous people, sexual minorities, women and children.

In the first case, indigenous people often lack access to the internet and knowledge on how to navigate within it. There are also cultural differences over what is considered a "property right", compared with definitions of the rest of the society they live in. On the other hand, they could benefit from the introduction of new gTLDs because they are not recognised through the ccTLDs, since they do not form part of a "country" in the sense required by ICANN to proceed with the creation of the respective domain, although they can be related to geographical names.

These new domains open space for these communities to protect designations closely related to them, and can also create value or protect the value already associated with such names. However, a major limitation is the current cost of the application procedure, which does not include differentiated fees or benefits that could help or allow access for these applications.

There is another conflict for indigenous people related to the possible lack of formal organisation of these communities. This could be in response to cultural and social valuations, and can severely impact the applicants' efforts to obtain a gTLD.

In a similar way, other communities defined more through sociocultural or ethnic attributes than indigenous or race-based ones, including religious communities, might be interested in the interaction between the right to culture and domain names. This has happened to Catalans through their interest in the dot-cat domain, in which case the domain's assignment radically changed the way they communicate with people interested in their cultural activities, using the web.

Other social groups like sexual minorities may also be interested in domain name discussions and processes. Even though the link between this large but vague group and cultural rights, in its most classical conception, may not be readily apparent, this can be done if the conception is opened up to other manifestations, bonding people together around certain interests or even through pop culture.

Finally, groups promoting and defending women and children may be advocacy actors in this field. They also face a lack of opportunities and funds to share their activities with dominant society. Thus, certain feminine and childhood practices can be considered as cultural manifestations.

It is important to emphasise the use of principles such as non-discrimination in processes like the one ICANN is running to apply for a domain name. It is also important that economic or financial non-

discrimination policies apply in future, considering the high costs involved in a domain name application, making it almost impossible for a lot of these communities.

4.5. Possible "nodes of engagement"

Identifying the spaces available to civil society movements and/or within policy for campaigning, and the opportunities and challenges relating to each of them, in not an easy task regarding the intersection between the right to culture and DNS application procedures.

One challenge corresponds to the need for a stronger right to culture, requiring a lot more study and promotion about the importance of ESCRs in general, and traditional knowledge and linguistic diversity in particular. This would be a way to reinforce the value and importance of cultural rights for all societies, specially Latin American ones rich in both these cultural practices.

But more than analysis and campaigning is required. There is also the challenge of improving domestic legislation on the right to culture and its different elements, especially in those countries with significant indigenous populations. This would also be a good exercise in strengthening democracy.

There are two ideas that could be concrete starting points here: constitutional recognition of the right to culture in every Latin American country, and the institutionalisation of a peoples' representative (e.g. ombudsperson or other who fulfils this requirement), defending the cultural rights of disempowered groups before mainly technical institutions like ICANN. These two regulatory measures could represent a huge step forward for cultural rights, and give affected communities the opportunity of being properly represented in ICANN's domain name application processes.

Civil society must struggle, as CWGP did in ICANN, to introduce and promote ESCRs within institutions not directly related to this subject, but whose work affects cultural rights, like WIPO and the United Nations Educational, Scientific and Cultural Organization (UNESCO).

In the same sense, it is key to emphasise at national level the importance of the interests and rights of minorities and disempowered groups, especially in a context such as Latin America with large indigenous populations, full of traditional ancestral knowledge and linguistic diversity in need of protection through and within new technologies like the internet and domain names, education, and ECSRs in general.

Then, from the angle of the DNS, campaigning for an improved assignment system is vital. This includes the search for balance between public and private interests, avoiding privileging companies trying to protect their intellectual property and commercial assets at the expense of protections for the right to culture and associated elements.

A few ideas can be proposed as starting points, but, of course, they should not come at the expense of technical requirements that would ensure a network's proper operation. First, the ICANN domain name application procedure should consider separating denominations related to cultural heritage, declaring them as non-applicable from the beginning. A system to manage these reserved domains in the community interest could be also implemented. Another idea would be to force registrants obtaining a domain name where cultural interests are involved, to keep it as open as possible (the opposite to the restricted open domains category), allowing everyone interested in obtaining the name to do so through an associated second-level domain.

Another challenge is to obtain support from states to protect domains related to indigenous and disempowered groups in general, to help them meet the expenses of getting a gTLD or protecting their interests and rights from controversial applications through proper monitoring in cases where the affected community does not apply directly for the domain itself.

Both decisions – to apply for or to object to another's application – require financial and technical support on a scale far above the usual activities or budgets of these groups. Thus, they need extra support to adequately protect their interests, trying to make use of the same slogan applicable to companies, intellectual property and trademark protection: avoid the dilution of certain tags or representative names, in this case the tags related to disempowered groups.

5. Conclusion

After the previous analysis, it is possible to arrive at some conclusions about what the adequate protection of the right to culture should be when disempowered groups' interests are at stake, and the internet and its resources are involved.

First, the internet could currently be the best way to exercise and enjoy ESCRs. Domain names are no exception to that, and there is a real link between them and the right to culture. New gTLDs are the proof of the value of these denominations. Interests at stake deserve careful regulation to look out for all interests involved in the application procedures.

As with all new procedures, this will need further evaluation and adjustment. There are gaps that need to be closed. It is important through these processes of revision that civil society and right holders are fully aware of the issues that need to be improved, and that this needs to be done having sufficient consideration of a human rights perspective, even though ICANN's main duties are technical.

Those issues include the need to enhance the right to culture, particularly at a national level, giving it an adequate level of protection and making it consistent with international treaties that protect cultural interests, in as far as they benefit society as a whole, and promoting the exercise of other human rights, like education, freedom of expression, and non-discrimination.

In the same sense, the right to culture must include as a minimum recognition of linguistic diversity and the protection of traditional knowledge.

This regulatory task needs to be faced by states, as a clear part of their role as duty bearers which requires an active and permanent commitment. This must be aligned with the interests of the citizens they represent. In this process, the participation of civil society, as representatives of those citizens, is essential.

Once the right to culture is established within these regulatory frameworks, it will be easier to claim a place within specific technical international forums, like the one analysed in this paper. If human rights elements are not taken into account in those procedures, ICANN will end up being a private companies' assignor, and, even worse, will conclude a frenetic privatisation of the internet, excluding cultural and common interests, leaving disempowered groups with no protection of their interests. If that happens, the internet, as mass media, will lose a lot of its natural potential, and will end up being an online companies' directory, while human rights, and specifically ESCRs, will be violated.

There are enormous risks, but also opportunities, that can come from the strong link between the right to culture – with all its different manifestations – and the DNS. For the organisations involved in the domain name assignment procedure, this is an opportunity to properly protect disempowered groups' rights, and, through this, really achieve a better and more open internet. The challenge is to incorporate the sheer number and diversity of those groups, and working out how to do this in the best way; and, in parallel, balance those interests with those involved in the IANA transition process and the pressure this creates.

It is also an opportunity for civil society and right holders, whose role in achieving an appropriate level of protection for the right to culture is key. This demands more institutionalised promotion of this right, giving it adequate protection, claiming its proper place in the universe of human rights at both the national and international levels, and demanding more guarantees for its exercise through increasingly important technological means.

For all actors, it is also an opportunity to reach a more explicit equilibrium between economic interests and other objectives, such as cultural and linguistic pluralism and diversity.

An extensive and profound evaluation of ICANN's new gTLDs application process, and also activities concerning the IANA transition, will soon be needed, considering the impact they have on human rights, including the right to culture. Indeed, they represent a big opportunity for opening up the internet, but the real gain this represents must be measured by community interests as much as for big businesses, searching for ways to correct imbalances that might have occurred.

This will in fact be quite a challenge for ICANN, as this is an opportunity for it to be more than a domain names broker, mainly orientated to commercial top-level domains, and start being an organisation that is able to go beyond technical issues, balancing social interests that may be involved, and that need to be represented online. This involves not only an impeccable transition process, with no place for distrust, but also an improvement of its functioning, leaving behind the odd relationship that it currently has with the US government and with private corporations such VeriSign, which acts in multiple roles (root zone maintainer, domain names registrar, and even applicant for new gTLDs).

In sum, ICANN – like other apparently technical organisations whose activities affect human rights – needs to understand and assume its real role within the scenario of the right to culture; in parallel, countries need to enhance national and regional legal frameworks for cultural rights, and bring these issues to international forums, pushing for the needed changes. Such actions would help secure cultural rights and increase protections at all levels: international, regional, national and local, closing a tight circle around them. This would also provide defined and general criteria for resolving cases where there is tension between the right to culture and other interests, avoiding a case-by-case scenario, where none of the parties involved has a clear notion about what can be resolved.

To conclude, this report does not pretend to propose a definitive solution to the questions raised, but raises them for discussion and as a starting point for the search for possible solutions. There are still a lot of questions that remain unanswered because of the dynamic processes surrounding ICANN and the DNS.
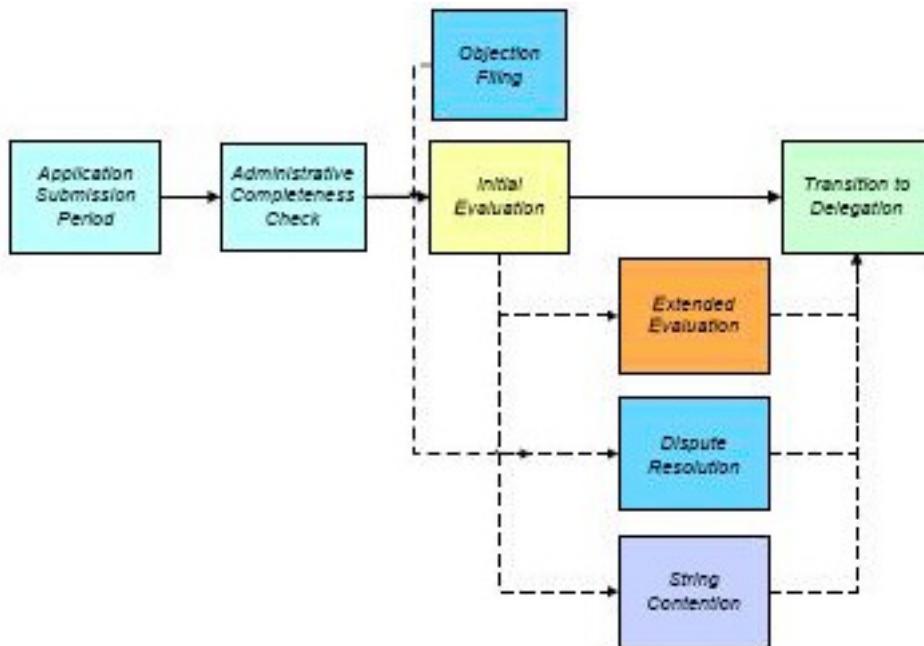
6. Appendices

6.1. ICANN's organisational structure diagram
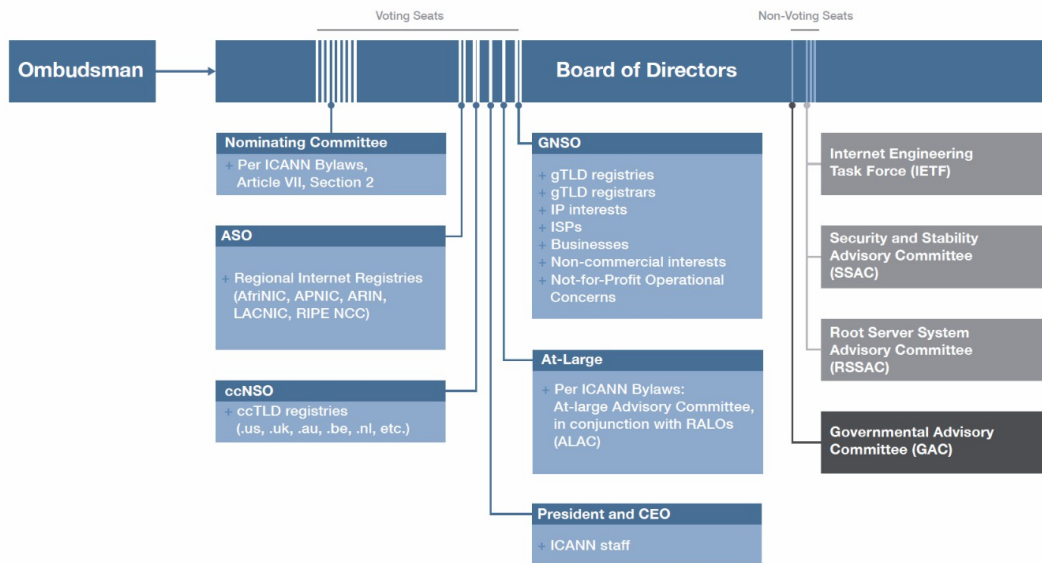
Source: www.icann.org

6.2. ICANN's new gTLD application process diagram

Source: www.domisfera.com/borrador-proceso-nuevas-extensiones

6.3. Questionnaires

Interview Nº 1

Interviewee: Mr. Patricio Poblete

Position: Director of NIC Chile

Date: 9 August 2015

Via: email

1. How important do you think the IANA transition process is?

   This is a very important process, which would complete a plan that started with the White Paper back in 1998. At that time, it was assumed that the total transfer of management responsibility for the root of the DNS would be completed in a couple of years, but it has taken much, much longer than that. Even though it has been mostly symbolic, the oversight of the US government over the IANA is a legacy from times when the internet was not the global resource that it is today, and it is most appropriate that this "stewardship" should be transitioned to the community.

2. What do you think it is reasonable to expect from this transition process?

   I expect that for the most part things will continue operating as today, with ICANN running the IANA, but with strong mechanisms for quality assurance, with oversight provided by the whole stakeholder community and with the possibility, however unlikely, that the IANA could be separated from ICANN in case there were persistent problems with its management.

3. Which effects (positive or negative) for citizens and civil society do you think it is possible to expect from this transition process?

   In the short run, users of the internet should not notice any difference, as stability is a key concern, and also since the US government has never interfered with the day-to-day functioning of the IANA. In the long run, the whole stakeholder community, civil society included, should notice, for instance, that they have a say in the periodic review of the IANA performance. However, as the direct customers of the IANA are the registries (for names and for numbers) and the IETF, most people would not be in close contact with the workings of the IANA.

4. How do you evaluate ICANN's current transparency and accountability, and what improvements will you expect in the future?

   Over the years, ICANN has made great advances in transparency and accountability, especially after the Affirmation of Commitment was introduced. However, the current discussion about the IANA stewardship transition has revealed that there remain important

areas that need improvement, and there is a cross-community working group (CCWG-Accountability) that is working on specific measures that need to be introduced. These measures are seen as a necessary condition for the adoption of the transition plan.

5. How do you perceive possible infractions of human rights and minority interests (racial, sexual, ideological and/or religious) considering the new gTLDs?

The new gTLDs can be seen as another medium to which freedom of expression should apply, and in that sense running a gTLD should, in principle, be open to anyone, including, of course, minority groups. There are, however, technical and business requirements that are necessary to protect registrants from registry failure or misconduct, and these will be practical obstacles for any would-be new gTLD registry. On the other hand, having a gTLD is not a necessary condition for a group to be able to express itself on the web, so we should not overstate the need to have a gTLD.

6. How do you perceive the way in which the current system faces the possible violation of human rights and fundamental interests of the groups mentioned in the prior question?

Even though the internet is a global resource, every actor is located under some jurisdiction, and this means that real world threats to human rights tend to apply also to the virtual world of the internet. While in earlier times we could naively believe that the internet would be free of censorship, for instance, now China and others have shown to the world that this assumption was wrong. In this context, ICANN can do its best to provide opportunities for everyone in the new gTLD field, but there isn't much it can do if a group faces repression in its home country.

7. Do you consider as possible the introduction of an active representative of those minorities' interests in the new gTLD application process? (Not only the possibility for those interests to be heard in forums such as at-large, or represented by governments in the GAC, and more specifically oriented than the currently existing independent objector).

I have not yet seen evidence of the need for such a representative.

8. Which is your general perception about the new gTLD application process: successful/perfectible/still-in-progress/failed?

I think it is too early to tell. Undoubtedly, the disputes involving some of the new gTLD applications will point the way for some changes in the process, but overall, I think we will have to wait until the system reaches some sort of steady state and we can evaluate the new gTLD landscape.

Interview Nº 2

Interviewee: Mr. Carlos A. Afonso

Position: Chair of the Internet Society Brazilian Chapter

Date: 13 August 2015

Via: email

1. How important do you think the IANA transition process is?
2. What do you think it is reasonable to expect from this transition process?
3. Which effects (positive or negative) for citizens and civil society do you think it is possible to expect from this transition process?

[Responding to the three questions] It is important to just a portion of the technical components of internet governance, namely domain names, address numbers and protocols.

A recent OECD document (Digital Economy Outlook 2015) inadequately confuses this transition with a transition of the whole "technical resources" of the internet, which goes far beyond just IP numbers and addressing mnemonics.

However, historically there is a strong political sensitivity, in which some governments view that the management of these specific resources should be in the hands of a UN organisation, while other governments, civil society organisations and part of the technical community expect total independence from any government at the end of this transition in a multistakeholder governance system with equal participation of all sectors.

This transition is relevant given the pyramidal nature of the domain name system (DNS), whose top server and its root zone file are based in the USA, operated by a private US company (VeriSign), and whose policy is set by a US corporation (ICANN) under contract with the US government.

A "successful" transition in the eyes of the US government (and there is no way a transition will conclude without approval of the US government) will probably result in ICANN being overseen by a US subsidiary of itself, like a sort of institutional ombudsman – in practical terms, management of the worldwide DNS would remain under US laws. This is probably going to be the outcome. It will probably involve a revamping of the accountability mechanisms and internal governance of ICANN. In practical terms, again, it will have very little effect in how political leverage is exerted over the DNS by the US.

4. How do you evaluate ICANN's current transparency and accountability, and what improvements will you expect in the future?

The business constituencies within ICANN are dominant – particularly the holders of top-level domains (registries) and the intellectual property rights sector. The so-called multistakeholder governance of the organisation is thus strongly skewed towards these interests, and staff usually tends to favour these interests as well, sometimes overrunning even the Board or the GNSO. I do not think this will change, as the main purpose of ICANN is to be a broker of mainly commercial top-level domains, as today its presence in running the IP addressing system is basically delegated to the consortium of five regional internet number registries.

The current CCWG proposal presents three alternatives of a new Board membership structure, all of them presenting problems of balance of multistakeholder representation.

5. How do you perceive possible infractions of human rights and minority interests (racial, sexual, ideological and/or religious) considering the new gTLDs?

6. How do you perceive the way in which the current system faces the possible violation of human rights and fundamental interests of the groups mentioned in the prior question?

[Responding to 5 and 6] This is a long-running discussion within ICANN, and the dominant interests regularly play it down with the argument that ICANN is a "technical manager" of the DNS and accountability regarding those interests lies in the direct administrators of those resources (domain and address registries). However, it is not clear how to map the totality of these interests in the TLD decision-making process – probably this is a case-by-case basis situation which ICANN should contemplate as part of the assignment process, while general human rights considerations should always be present as part of this process.

7. Do you consider as possible the introduction of an active representative of those minorities' interests in the new gTLD application process? (Not only the possibility for those interests to be heard in forums such as at-large, or represented by governments in the GAC, and more specifically oriented than the currently existing independent objector.)

To be fair, the number of minorities worldwide is quite large. Who would be capable of representing such immense diversity? How to sort this out in a way that most interests are contemplated in an isonomic fashion? Far easier to present demands than to carry them out. On the other hand, membership in structures like ALAC and NCSG is open to anyone, and perhaps the way to do it is for the diverse groups that have an interest in this to join one of those ICANN structures.

8. Which is your general perception about the new gTLD application process: successful/perfectible/still-in-progress/failed?

Still in progress. "Successful" is a complicated concept in this context. It will reach conclusion if the US government considers it "successful"...

Interview Nº 3

Interviewee: Mr Gonzalo Navarro

Position: Member of the ICANN Board of Directors

Date: 29 July 2015

Via: Skype and email

Free translation by Paula Jaramillo.

1. How important do you think the IANA's transition process is?

    Its importance is symbolic and technical at the same time. Symbolic since it was an essential part of certain multilateral and multistakeholder level negotiation processes such as WSIS, representing an element that has always been controversial: the role that the United States government must have or not concerning some issues like administration and management of critical resources.

    But this not only involves the United States government but also the technical community who use IANA's functions, basically interested in the robust, resilient and untroubled operation of the internet, as a whole, and that IANA's operations keep their technical development in the same way they do nowadays.

    So it is necessary to balance that the internet keeps on being technically robust and resilient, as it is today, and that IANA's functions continue to develop in a normal way, with no interruptions and honouring the agreements related to IANA function service levels existing between ICANN and others like the IETF and RIRs (Regional Internet Registries).

    On the other hand, there is the symbolic importance of an international policy topic such as the United States government's role in the control and administration of IANA's functions, currently under a service provider contract between the Commerce Department of this country and ICANN.

    What is done through this process is transferring the control from the United States government to the community, using a process defined by the community itself under certain parameters settled by the US government in order to evaluate the proposal and then send it to the Congress for approval. Those parameters basically involve that the institution that controls IANA's functions cannot be any country, group of countries or a multilateral body, but one selected by the community through a multistakeholder process previously hearing all the opinions.

2. What do you think it is reasonable to expect from this transition process?

    Clear specifications about the principal's control over IANA's functions seems reasonable to expect from this process, allowing the community to reach an understanding about which

ones are the characteristics of the organisation in charge of this administration, setting clear rules about it.

It is also reasonable to expect that this process has a certain degree of development and implementation, meaning not only to approve an organisation like this but also to determine in detail in the future what are its capacities, limits, how it will start to function, if there will be a board formed by community members and government for example, who will be the representatives, their power, etc. These details are very important and must be kept under analysis in the future once the community proposal is delivered, very soon.

3. Which effects (positive or negative) for citizens and civil society do you think it is possible to expect from this transition process?

In general, the entire process can be seen from different points of view. Civil society has an important participation in ICANN as part of the community and also as part of other communities that form the internet governance system, maybe not in such a technical way as the IETF but they do participate.

It is possible to expect that the process will result in an evaluation about the utility, or not, of the multistakeholder system to reach some consensus about global policy topics.

Regarding civil society, the expected effects contemplate that a portion of it has a positive influence over this new body, or at least some representation on it, similar to the one it already has in relation to IANA's functions and ICANN in general. In those, civil society is a Board member creating a kind of duplicity in a positive way.

Currently there are two groups working on transition issues. One is the Community Working Group, specifically on transition and fulfilment of United States government parameters for it. At the same time the Cross Community Working Group (CCWG) focuses on what ICANN should be changing, not only but including IANA's transition, looking for more transparency, participation and information about some of the ICANN Board's functions. This is a very important result to expect, and all groups including civil society have to come out with their proposals soon.

4. How do you evaluate ICANN's current transparency and accountability, and what improvements will you expect in the future?

The discussion about these topics is already taking place, and has always been present.

CCWG's creation precisely aims at greater control, transparency and accountability in ICANN's and the Board's tasks. Two previous processes with recommendations for improving these areas came from the community through two working groups (RTRT 1 and 2).

So if you look at CCWG's work, an improvement of transparency and accountability rules is expectable, in this on-going process.

5. How do you perceive possible infractions of human rights and minority interests (racial, sexual, ideological and/or religious) considering the new gTLDs?

Within the new gTLD programme several application categories coexist (open, closed, community, geoTLDs), each one with their own rules in order to demonstrate that a certain community supports the creation of a new domain. ICANN's external groups make the evaluations independently.

The Applicant Guidebook sets the application rules and takes precautions concerning some possible human rights infractions, and also sets the requirements for gTLD special categories, making necessary the support or sponsoring of a particular represented community.

In general, and not referring to any application in particular, some conflicts have arisen involving more than one company applying for the same gTLD and there is conflict about who represents a certain community more or less; conflicts about whether the representation is or is not enough just as the Applicant Guidebook requires, etc. Everything goes to an independent evaluator who determines how to proceed.

The same thing has occurred with geographical situations, in a general way that is what happened with dot-amazon and dot-patagonia, where there was a GAC recommendation advising not to pursue with these applications because of their high sensitivity or the lack of compliance with the Applicant Guidebook requirements. This is a good example of the current situation.

The new gTLDs programme is in implementation, and after this first stage with close to 1,900 applications and around 200 already accepted, an evaluation will be required, and of course one of the conflictive issues has been the community gTLDs y geoTLDs, as was expected.

That will be the moment to determine if a modification of part of or the whole system is needed, or the implementation of new requirements, and the consultation of the communities that could be affected or not and the mechanisms that could be implemented.

I have the impression that the safeguards are sufficient, but this will be analysed and discussed when the stage is finished.

6. How do you perceive the way in which the current system faces the possible violation of human rights and fundamental interests of the groups mentioned in the prior question?

I think I have already answered the questions right before.

7. Do you consider as possible the introduction of an active representative of those minorities' interests in the new gTLD application process? (Not only the possibility for those interests to be heard in forums such as at-large, or represented by governments in the GAC, and more specifically oriented than the currently existing independent objector.)

I think a lot of issues need to be previously solved, like who is going to qualify what a minority is, and the way for determining who is the minority's representative. It is the community who must determine if these processes are necessary or not, not ICANN.

It opens new questions and possibilities: why should a minority have representation beyond the GAC that already represents all countries and where national representatives should be encouraging respect for human rights? What kind of human rights? What kind of human rights infraction? What should be protected: the right to culture or traditional knowledge? How does international law apply to the new gTLD programme? Etc.

A new universe is just opening up and I think that this is going to be a key element in the future of the programme, considering the Council of Europe published a report last year about ICANN's functions from a human rights perspective.

I think this is going to be a central issue in the future considering ICANN's general functions and new gTLDs, and that people think ICANN equals all of the internet and do not realise its functions are technically very limited and mixed with copyright and world domain names infractions issues.

There are some other topics, such as human rights, freedom of expression, data protection, security, consumer protection, that are going to affect this new gTLD system, and it is already happening. They are going to be key in a second stage, and will be the issues under evaluation once the first stage is finished.

Now, back to the question, I don't know if the introduction of a minorities' representative is possible. It must be taken into consideration that the new gTLDs process was proposed by the community, not ICANN, so GAC's functions, the way the system has been implemented, the requirements an application must fulfil and those established to prove communities' representation, they were all imposed by the community. That was a very important step considering this is a global programme, so the community proposed the ideas and the Board only execute them.

At the beginning of a programme of such magnitude it is only possible to glimpse what the main problems will be: copyright, community or country issues, saving of key elements such as highly regulated markets (e.g. dot-finance and dot-bank domains were very discussed), registrar's obligations, applicant's data protection, jurisdictional issues (some conflicts between national laws, e.g. United States and Europe).

The programme is already in progress and a lot of reasonable doubts have emerged; at the end of the process a deep evaluation needs to be done.

8. Which is your general perception about the new gTLD application process: successful/perfectible/still-in-progress/failed?

This question can be analysed from several points of view. If it is considered that the proposal accomplishes the goal of expanding the net's competition capacity, increasing the quantity of domain names, giving more opportunities to persons and businesses that had no access to a certain generic domain because it was already taken under dot-com, it is about to be evaluated and determined how effective it is.

Seen from the industry's point of view it is also a still-in-progress subject because this new gTLDs process is changing in many ways how the domain names industry is going to work in the future. If it will continue with the model of selling millions of domains in order to be successful, or if a special price is charged for using a certain domain considered as premium and not for the rest of them, gTLDs' fair fees, copyright issues, dispute resolution mechanisms or warning mechanisms, and a lot of other things that are going to modify the way domain names are currently perceived.

A similar thing is going to happen with the more and more specialised search engines. There is a lot that is about to happen. From this angle this is a still-in-progress process, which I would not yet qualify as successful or failed.

It seems that the only thing for sure right now is that the way the internet's domain names are now known is about to change.