

Issue: Proposal for protection of red cross and red crescent names at second level

Questions and answers

Submitted by International Committee of the Red Cross
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1. Introduction

On behalf of the International Committee of the Red Cross (ICRC), the International Federation of Red Cross and Red Crescent Societies (IFRC) and the American Red Cross (collectively, the "Red Cross/Red Crescent"), the purpose of the present document is to provide some elements of response to the questions put by the Drafting Team's pertaining to the protection of the red cross, red crescent and red crystal denominations and related names from registration as Second Level Domain names.

We take note with regret of ICANN's recent Board decision of 10 April to maintain the Applicant Guidebook unchanged, and thus despite the GNSO's recommendation to extend the protection of the Red Cross/Red Crescent names in new gTLD's. We nevertheless hope that the recommendation by the GNSO for the reaffirmation and extension of the current moratorium on the registration of the red cross and red crescent names and related denominations (hereafter "designations") will be endorsed in the nearest future and thus in due consideration for the global public interest which the protection of these denominations constitutes.

2. *What is the legal justification and rationale for the protective regime due to the designations ?*

Reference is made herewith to the GNSO Council Board Resolution adopted in Singapore on 20 June 2011, as well as to the advisory memorandum submitted by the Chair of the Government Advisory Committee to the Chairman of the GNSO Council on 14 September 2011, which provides a thorough analysis of the legal protections awarded to the designations under international humanitarian law and under the domestic law of a wide number of countries.

The GAC memorandum also included the recommendation that the new gTLD Registry Agreement add a new schedule of second level reserved names. The following speaks to the current proposals and options put forward to the Drafting Team pertaining to second level gTLDs. It is indeed felt that the legal and policy considerations defining the protection of the designations under international humanitarian law should be made to extend this regime to the second level and that the denominations should be designated in the future as reserved or "forbidden" names at the second level in all new gTLD's. The Red Cross/Red Crescent looks forward to actively participating in this important discussion.

As highlighted in our past communications to the Drafting Team, practice shows that misuse of the red cross/red crescent designations is not a theoretical question and that misuse or fraudulent use of the denominations is common occurrence, and thus sometimes with adverse consequences to the image and humanitarian operations of the International Red

Cross and Red Crescent Movement and its respective components in the field. Practice shows that such instances often occur on the internet at the second level for ccTLDs as well as existing gTLDs and that this poses a significant burden on the Red Cross/Red Crescent to address and put a stop to such abuses.

While the proposal set forth by the Drafting Team relates to both the IOC and Red Cross and Red Crescent names, the following relates only to the Red Cross/Red Crescent designations (i.e., red cross, red crescent, red crystal, red lion and sun, Magen David Adom).

3. *What is the primary function of the red cross/red crescent designations ?*

The protection awarded to the designations of the Red Cross/Red Crescent finds its legal foundations in universally ratified international treaties – namely the 1949 Geneva Conventions, today ratified by 194 States. These distinctive designations sit at the very heart of international humanitarian law and the protection of victims of war. The emblems enjoy two distinct purposes:

- to serve as the emblem of protection of the medical services of armed forces on the battlefield;
- to serve as the emblem of identification of the respective components of the International Red Cross and Red Crescent Movement.

It is therefore logical that States in the GAC are today mobilised in order to uphold the protection of those designations. If one were to refer here to language of the gTLD Applicant Guidebook, one could say that the global public interests at stake here rest primarily in a concern to uphold the protection of victims of war and of those caring for them on the battlefield. Any misuse or misrepresentation of those protected designations, or any imitations thereof, are liable due to the confusion they create within the community as well as in the minds of combatants on the battlefield, to undermine both the protection of victims and the access of the Red Cross and Red Crescent to situations of humanitarian crises and to affected communities.

The above carries the following two conclusions:

- the protection awarded to the red cross, red crescent or red crystal designations or related denominations does not result from any trademark protection or registration;
- due to the global public interest highlighted above, primary stakeholders are the States that are parties to the 1949 Geneva Conventions, which therefore carry under international humanitarian law the primary obligation and the responsibility to enforce the protection of the said denominations in their own domestic jurisdiction and legal orders - as shown by the GAC advisory note and the list of domestic laws in force in many jurisdictions worldwide.

The Red Cross / Red Crescent have of course a strong vested interest in upholding the protection of their designations, primarily as they are themselves entitled to display the designations and to use the latter for indicative purposes.

4. Besides those persons and services which may use the emblems and their denominations in their protective function, who else is entitled to use of the names of the red cross or the red crescent for indicative purposes?

The respective components of the International Movement of the Red Cross and Red Crescent Movement enjoy the entitlement under the 1949 Geneva Conventions to use the designations as a means of identification (this is referred to under international humanitarian law as the “indicative use” of the emblems and their names). Again, this indicative use flows from international law and not from a legal rights' argument, which would be grounded, for example, in domestic trademark laws.

As indicated above, the Red Cross/Red Crescent has a vested interest in ensuring the protection of the designations from all forms of misuse or misrepresentation. In this regard, it should be recalled:

- the role and mandates of the components of the International Red Cross and Red Crescent Movement (namely the International Committee of the Red Cross - ICRC, the International Federation of Red Cross and Red Crescent Societies and the 188 National Red Cross and Red Crescent Societies recognised within the Movement) are defined in international treaties and under the Statutes of the Movement (adopted by States on the occasion of the Movement's International Conference). These include a unique status and specific mandates to act in situations of crises, be they armed conflicts and other situations of violence, natural disasters and other humanitarian emergencies.
- the role and responsibilities devolved upon the components of the Red Cross and Red Crescent in support of their national authorities to monitor and to undertake appropriate *démarches* in the event of misuse of the emblems and their names in any all form, including on the internet, and thus, in support of public authorities. The ICRC enjoys in this respect a particular mandate as guardian or curator of international humanitarian law, including the latter's protective legal regime on the emblems and their denominations. National Red Cross and Red Crescent Societies, often with the support of the ICRC and the International Federation, enforce the protection of the emblems and the designations.
- as it is the case for the emblems of the red cross and red crescent themselves, the latter's denominations and designations must at all times be protected from misuse or misrepresentations. Such misuses also represent risks of potential damage to the reputation and perception of the Red Cross/Red Crescent and to their operations in favour of vulnerable persons and communities affected by armed conflict, natural disasters and other humanitarian emergencies. Any misuse of the designations at any time erodes the respect that belligerents and civilians have for the Red Cross / Red Crescent, thus compromising its ability to fulfil their humanitarian mission. This is in particular the case if one considers that the red cross and red crescent emblems and their denominations are frequently the object of misuse by private companies on the internet, and thus often with malversative aims. To refer to the wording of the Applicant Guidebook, these are designations, which, in practice, are particularly vulnerable to internet fraud and abuse, as illustrated inter alia by the numerous instances of fraudulent use witnessed in recent humanitarian crises, such as the South-East Asian tsunami, the earthquake in Haiti or the tsunami and ensuing nuclear crisis which affected Japan last year.

Considering the distinct humanitarian roles and mandates of the respective components of the International Red Cross and Red Crescent Movement, preserving and protecting the red

cross and red crescent denominations hence represents another central dimension of the global public interest that the protection of these names represents.

5. Are the denominations red cross and red crescent and related denominations particularly at risk of abuse on the internet and what is the practice of the respective components of the International Red Cross and Red Crescent Movement in addressing such instances ?

Under the Geneva Conventions of 1949 and their Additional protocols, States have clear obligations and enjoy the primary responsibility to prevent and repress the misuse of the red cross and red crescent names. In the implementation of these duties, Governments are generally assisted by the Red Cross and Red Crescent actors, which enjoy a statutory responsibility to act. Such a role is in particular devolved upon the ICRC in its role as guardian of international humanitarian law and to National Red Cross or Red Crescent Societies in support of their respective public authorities.

In accordance with international humanitarian law, the protection of the denominations must be implemented and instances of misuse repressed on the Internet as in any other context.

Practice in this regard demonstrates that the red cross, red crescent and red crystal denominations are frequently abused and that this is increasingly happening. Recent humanitarian crises of a global scope demonstrate the ease with which scams making use of the denominations for fraudulent aims can be set up.

The components of the International Movement of the Red Cross and Red Crescent frequently encounter instances of misuse and infringements of the denominations whether the use of e-mail addresses or domain names and are faced with the challenge of tackling such misuse in support of competent authorities.

While misuse or fraud on the Internet is typically perpetrated by people using e-mail addresses, the use of domain names is common. Such examples include:

- websites of organisations making use of the denominations without entitlement.

As an example of a recent instance of misuse we may cite the case of an Italian based organisation by the name "Garibaldi Red Cross". Due to the engagement of the said organisation in community projects in different countries around the globe (e.g. in Peru and other countries in South-America) and the risk of confusion between the said organisation and its activities and the local Red Cross or Red Crescent Societies in the countries concerned, a sustained strategy was developed to address the issue both in the countries concerned and in Italy, where the organisation is incorporated. The issue has not yet been settled despite sustained efforts on the part of the Italian Red Cross to put an end to this misuse and to convince the said organisation to opt for a different emblem and name. (<http://redcrossgaribaldi.org>).

- websites espousing a Red Cross or Red Crescent identity for fraudulent or malversative aims.

One among a range of very recent instances included for example an organisation claiming to be operating in various conflict theatres under the name "European Red Crescent", including of press reports of its activities in a number of Middle Eastern and African countries, and including a donation link. Subsequent efforts the Red Cross and Red Crescent to locate the organisation in the field or by the French Red Cross to contact the organisation at its alleged Paris Headquarters proved unsuccessful. The website of the "European Red Crescent" is today no longer accessible online (<http://www.croissant-rouge-européen.org>).

National Societies are hence frequently faced with instances of scam e-mails and websites, thus absorbing many resources in tracing perpetrators and achieving appropriate remedy – hence resources which could have otherwise reached the vulnerable persons and communities the Red Cross and Red Crescent is intended to serve. The American Red Cross is currently compiling illustrations of misuse on the Internet, which it has recently faced, including the approximate cost of filing and pursuing UDRP complaints or other enforcement actions to stop the abuse. Further data is also currently being collected from other National Red Cross and Red Crescent Societies and will be submitted as soon as possible.

It is further highlighted that the International Committee of the Red Cross is already disbursing large sums of money annually to maintain ownership and supervise over 250 names under the existing gTLD system. Furthermore, certain domain names related to the denominations and to the International Red Cross and Red Crescent Movement and its components have also been purchased in the past by third parties and the process to recover these names has in some instances proven burdensome.

6. *Why are existing mechanisms enshrined in the Applicant Guidebook deemed "insufficient" to ensure the protection of the denominations from registration at the second level ?*

The elements provided above pertaining to the frequent abuse and misuse of the red cross, red crescent and red crystal names and related denominations represent a key argument to the effect that these names require to be reserved and duly protected from registration at both first and second level, and thus as a preventive measure.

Should the new top level domain names offer the possibility to register the red cross/red crescent denominations and result in the registration of hundreds of unauthorised new second level domains, the costs involved for the Red Cross and Red Crescent in monitoring and effectively addressing unauthorized domain names could rapidly become prohibitive. Such expenses would also have to be taken from the budgets of the respective Red Cross and Red Cross organisations and prove difficult to justify to our donors.

While we have only partial information on the rights protection mechanisms foreseen for intervention at the second level, in particular the Uniform Rapid Suspension system, it is understood that the initiation and conduct of such proceedings will represent a substantial investment in human and financial resources, which could once again become prohibitive under the multiplication of the new gTLD's.

This, it is felt requires that the protection of the denominations be duly foreseen and enshrined within ICANN's rules and procedures in advance of registration, through the definition of the red cross, red crescent and red crystal names and related denominations as reserved names, the consideration of these names under a String Similarity review and, as regards second level domain names, the adoption of a new schedule of second level reserved names to the new gTLD Registry Agreement.

7. What is the Red Cross/Red Crescent's view of the respective proposals put forward, further to the GAC's recommendations, to support the protection of the red cross, red crescent and red crystal names and related denominations at the second level ?

As a result of the above, we wish herewith to express our support and endorsement for the following propositions and options stipulating in particular that

- The red cross and red crescent names should be reserved at the second level in all new gTLDs and that the schedule of second level reserved names in the new gTLD Registry Agreement should be made to include all of the red cross and red crescent denominations set forth in Schedule A in the 6 UN languages (Section 2.2.1.2.3 of the Applicant Guidebook); (in line with Question 1, Option 2(a)(1) of the Q & A received on 25 February);
- The reserved names should be treated as "modified forbidden names" that can only be registered by the applicable organisations or their component parts (namely the respective components of the International Red Cross and Red Crescent Movement: the International Committee of the Red Cross, National Red Cross and Red Crescent Societies and their International Federation) (in line with Question 2, Option 2 of the Q & A received on 25 February).
- The Red Cross and Red Crescent also strongly recommends that the protection of the reserved/forbidden names be extended to cover not only identical terms or matches, but also strings similar or liable to confusion with the reserved names, and therefore be subjected to any future String Similarity review to be implemented at the second level. This is in our view indispensable to preserve the denominations from misuse and imitations. New registries should also be encouraged and supported to broaden the protection, not only against similar strings and imitations of the denominations ("confusingly similar strings"), but also to the translations of the reserved ("forbidden names") in additional languages. As had been discussed in the past, a list of translations of the reserved names in respective languages is being developed and could be provided in this view.

In conclusion, Red Cross/Red Crescent wishes to thank the Drafting Committee for this opportunity to comment on this important issue.

NB: For a full overview of the protective regime of the red cross, red crescent and red crystal names and related denominations under international humanitarian law, see *inter alia* the Study on the use of the emblems: Operational and commercial and other non-operational issues. See in particular Question 50: "How should misuse of the emblem and the name on the Internet be dealt with?" (pp. 309-313). The Study is accessible at <http://www.icrc.org/eng/resources/documents/publication/p4057.htm>.

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