

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the rights to freedom of peaceful assembly and of association

REFERENCE:
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20 December 2019

Dear Mr. Marby,

We are writing in our capacities as the United Nations (UN) Special Rapporteur on freedom of opinion and expression and the Special Rapporteur on the rights to freedom of peaceful assembly and association, pursuant to Human Rights Council resolutions 34/18 and 41/12.

As independent human rights experts appointed and mandated by the United Nations Human Rights Council to report and advise on human rights issues falling within the scope of our mandates, we are sending to you this letter under the communications procedure of the Special Procedures of the United Nations Human Rights Council to seek clarification on information we have received.¹ Special Procedures mechanisms can intervene directly with Governments and other stakeholders (including companies) on allegations of abuses of human rights that come within their mandates by means of letters, which include urgent appeals, allegation letters, and other communications. The intervention may relate to a human rights violation that has already occurred, is ongoing, or which has a high risk of occurring. The process involves sending a letter to the concerned actors identifying the concerns, the applicable international human rights norms and standards, and questions of the mandate-holder(s), and a request for follow-up action. Communications may deal with individual cases, general patterns and trends of human rights violations, cases affecting a particular group or community, or the content of draft or existing legislation, policy or practice considered not to be fully compatible with international human rights standards.

We wish to urge ICANN to take steps to review carefully the proposed transfer by the Internet Society (ISOC) of the Public Interest Registry (PIR) and all its assets to a private equity firm, Ethos Capital. The proposed deal raises serious questions about the ability of civil society organizations and other public interest-minded individuals and entities to continue to enjoy the space for the exercise of the rights to freedom of expression and association offered by the .ORG domain managed by the PIR.

We were pleased to see that ICANN, in a 9 December letter, urged ISOC and Ethos Capital to commit to transparency. Such transparency is necessary, but on its own insufficient, as it must be combined with rigorous review by ICANN to determine whether this deal will promote freedom of expression and access to information online or interfere with the ability of civil society organizations to have a voice in online space. If the answer is negative, or even ambiguous, we would urge ICANN not to authorize the

¹ Further information about the communication procedure is available at:
<http://www.ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx>

transfer of the PIR to Ethos Capital. We would especially urge ICANN to take into account human rights considerations as it reviews the proposed deal. In particular, we want to highlight a few normative principles and concrete steps that should be central to ICANN's review – and indeed should have been central to the considerations of ISOC to sell the PIR in the first place.

For background, the UN Human Rights Council has mandated a Special Rapporteur on freedom of opinion and expression, since the inception of the mandate in 1993, to “gather all relevant information, wherever it may occur, relating to violations of the right to freedom of opinion and expression”. The mandate holders have focused considerable attention on the ways in which the Internet promotes the right of everyone, as Article 19 of the Universal Declaration of Human Rights provides, to “seek, receive and impart information and ideas through any media and regardless of frontiers.”

In addition, the Council has mandated the Special Rapporteur on the rights to freedom of peaceful assembly and association to “seek, receive and respond to information from Governments, nongovernmental organizations, relevant stakeholders and any other parties . . ., with a view to promoting and protecting the rights to freedom of peaceful assembly and of association”. This mandate recently examined the important role played by the digital space in the expansion of the civil society sector.

While the Universal Declaration and the International Covenant on Civil and Political Rights, which strengthens the guarantees of freedom of opinion and expression and the right to association, impose obligations on States, the Human Rights Council has also understood that non-state corporate actors increasingly implicate the enjoyment of human rights.

Thus, in 2011, the Human Rights Council adopted the UN Guiding Principles on Business and Human Rights. The Guiding Principles provide that all businesses have a responsibility to respect human rights, to avoid causing or contributing to adverse human rights impacts, and to seek to mitigate human rights violations that may be directly linked to their operations. In order to meet these responsibilities, the Guiding Principles emphasize that companies should implement policy commitments to meet their human rights responsibilities, due-diligence processes to identify, mitigate, and prevent abuses, and remedy processes to account for potential violations. In addition, companies should disclose policy decisions that implicate freedom of expression and allow users, civil society members, and peer companies to consult on the implementation of transparency measures.

These principles and norms of international human rights law provide a framework for our own concerns with the proposed sale of the PIR to a private equity firm. Substantial reporting has raised questions about the opacity of the deal and its failure to involve those most concerned – in particular civil society organizations that have registered .ORG sites – in the evaluation of the proposed transaction. In our view, these are questions that directly implicate the freedom of expression and the ability for civil society organizations to have a place online that is not subject to the pressures of a commercial environment that could very well silence them.

First, the proposed deal has been anything but transparent. ISOC's agreement to sell the PIR to a well-connected private equity firm was not the subject to any prior notice or evaluation by concerned organizations or members of the public. Such opacity runs counter to the UN Guiding Principles. In particular, Principle 21 of the Guiding Principles provides that "business enterprises should be prepared to communicate [their human rights commitments] externally, particularly when concerns are raised by or on behalf of affected stakeholders." The amount of communication from the parties to the deal, ISOC and Ethos Capital, has been marginal at best. As a result, any review should require the parties to open up the deal to full review by ICANN and all interested stakeholders, whether civil society, governmental or inter-governmental.

Second, because of the lack of transparency, it is unknown whether the parties to the deal undertook any kind of actions to perform human rights due diligence. The Guiding Principles (Principle 15) call for businesses to adopt a "due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights." They further call upon businesses to "identify and assess any actual or potential adverse human rights impacts with which they may be involved," including by "draw[ing] on internal and/or independent external human rights expertise" and "involve[ing] meaningful consultation with potentially affected groups and other relevant stakeholders" (Principle 18). There has been nothing in the public record to suggest that ISOC or Ethos Capital conducted anything like human rights diligence. How will the transaction implicate current .ORG registrants? How will it implicate future registrants? Will there be changes in the management of the domain that might, over time, prove costly for non-profit organizations and thus undermine their ability to make use of it? These are just a few of the overarching questions that human rights due diligence should address. We would suggest that such due diligence is essential to ensuring protection of freedom of expression and association – and further that, given the lack of a record of such actions, ICANN may be best placed to perform that function for this proposed deal.

Third, we also have concerns about this proposed deal on the merits. This is all the more surprising because ISOC has long managed the PIR with a steady hand and according to multi-stakeholder principles. As a result, the PIR has long offered a trusted platform for organizations to build a safe and secure online presence. PIR management of the .ORG domain has been essential for non-commercial organizations, and the .ORG domain remains an important tool for non-profit and non-governmental organizations to disseminate their work and offer services online that they may not otherwise be in a position to afford. Unfortunately, the lack of transparency, coupled with ICANN's lifting of the price caps on registry fees earlier this year, cause us serious concern about the future management of the .ORG domain. There has been little in the public record to demonstrate that the kinds of constraints exercised by the PIR will continue when placed under the management of a private equity firm designed to maximize shareholder value rather than the public interest. It is with this in mind that we strongly urge ICANN not only to require total transparency for the approval of the deal but also to conduct a rigorous analysis of the protections for freedom of expression and association moving forward.

Many in civil society have raised a number of very serious concerns about this proposed deal, concerns that we share. We will not repeat those concerns here but would

only urge ICANN to fully involve those views and those organizations – that is, all interested stakeholders – in the evaluation of the proposed transfer of the PIR to Ethos Capital. At a minimum, it seems that the deal requires a public call for comment and a genuine engagement with the views of concern.

As you perform that review, we stand ready to provide any support you deem necessary and appropriate.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would therefore be grateful for your observations on the following matters:

1. Please provide information any additional information that may be relevant.
2. Please provide information on the measures taken to ensure the transparency of the deal in accordance with the UN Guiding Principles on Business and Human Rights
3. Please provide information on whether any human rights due diligence has been made, as required by the UN Guiding Principles on Business and Human Rights.
4. Please provide information on measures taken to include the views of all relevant stakeholders in the process moving forward.

Please accept, Mr. Marby, the assurances of our highest consideration.

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion
and expression

Clement Nyaletsossi Voule
Special Rapporteur on the rights to freedom of peaceful assembly and of association