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Council of Europe Submission¹ to the Internet Governance Forum
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Introduction

1. States have an important role to play in Internet Governance, as the accepted working definition of the term clearly acknowledges: “the development and application by Governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programmes that shape the evolution and use of the Internet”. Their role is also outlined *inter alia* in the Operating Principles of the Governmental Advisory Committee (GAC) of the Internet Corporation for Assigned Names and Numbers (ICANN), and is highlighted by states’ role in the Internet Governance Forum (IGF).²

2. The existing Internet Governance arrangements, in particular the Articles of Incorporation of ICANN, note the need to conform to relevant principles of international law, applicable international conventions and national law. The Articles of Incorporation also indicate that ICANN should cooperate with relevant international organisations. In addition, the report of the Working Group on Internet Governance (WGIG) recognises that international and regional organisations should play a significant part with regard to Internet Governance.

1. This submission has been prepared by the Secretariat of the Council of Europe (<http://www.coe.int>).

2. In this submission, unless it results otherwise for the context, the term ‘state’ is used in its widest sense, encompassing government, legislative bodies, judicial authorities and other state agencies or agents acting on behalf of the state or its various bodies.

3. For the Council of Europe, it is crucial and indispensable for the issues of the openness, diversity and security of the Internet, as well as access to it, to be addressed from a people-centred perspective and for them to be underpinned by the core values of the Council of Europe, namely to protect and promote human rights, democracy and the rule of law based on shared values and respect for national and cultural specificities.³ This should be the basis upon which the IGF mandate is interpreted and discussed, in particular as regards “foster[ing] the sustainability, robustness, security, stability and development of the Internet”.⁴

4. These core values of the Council of Europe are effective thanks to the European Convention on Human Rights and its supervisory mechanism, the European Court of Human Rights, which provide an international legal framework capable of defining states’ obligations (and determining responsibility for failure to meet their obligations) in respect of the Internet. The Convention is complemented by many normative texts in areas of common interest which create additional international standards reflecting societal changes in line with the shared values of Council of Europe member states.⁵

5. This submission outlines, from the perspective of the Council of Europe, the imperatives to be taken into account in any response to the question of Internet Governance. This perspective broadens the notion of Internet Governance, highlighting the responsibilities that fall to the state and that should be interpreted having regard to states’ obligations under international law. The Council of Europe’s views will be addressed from two angles, namely the public service value of the

3. To achieve this goal, the Council of Europe seeks to promote the adoption of like responses by its 46 member states to common concerns, for the benefit of 800 million individuals (and of the collective or corporate entities) subject to the jurisdiction of those states. The Council of Europe member states are Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, “the former Yugoslav Republic of Macedonia”, Turkey, Ukraine and the United Kingdom.

4. Paragraph 72 a) of the mandate of the IGF stresses the importance to “discuss public policy issues related to key elements of Internet Governance in order to foster the sustainability, robustness, security, stability and development of the Internet” (<http://www.itu.int/wsis/implementation/igf/index.html>).

5. The Council of Europe’s remit includes targeted assistance to member states in developing policies and practice in line with the Organisation’s standards.

Internet and human rights and the rule of law, ending with conclusions and an indication as to further action needed.

The public service value of the Internet

6. The Internet is a common asset which has great potential to serve the common good, positively affecting many aspects of life, including communication, information, knowledge, business and growth. For a vast number of people and entities worldwide, the Internet has become an essential tool. For many others, access to the Internet is a legitimate aspiration linked to their very prospects of development and democratic citizenship.

7. Consequently, it is proposed that everyone should be entitled to expect the delivery of a minimum level of Internet services (for example effective and affordable access, a suitable environment for businesses to operate, etc.) irrespective of both the architecture of the World Wide Web (infrastructure, accessibility, interconnectivity) and the arrangements concerning its construction and development, with regard to the rules or principles that apply – or ought to apply – to the Internet’s use (such as freedom of speech and of association, right to private life and correspondence, consumer protection, security, crime-prevention).

8. The continued development of the Internet should serve to reinforce its sustainability, in particular as regards investment in infrastructure, security (in full respect of human rights principles) and stability as well as multilingualism. The effective delivery of Internet services of public value requires offering access in a range of appropriate languages (that is, including non-ASCII characters) and with suitable tools for all types of user (for example technical means or assistance allowing persons with disabilities full and effective access to such services).

9. It is recognised that the private sector has played a decisive role in the development of the Internet and there is every reason to believe that they will continue to do so. Indeed, this should be encouraged. With the exception of certain countries, the public sector contribution has been far less important. Looking ahead, and given the magnitude of the general interest, shared by individuals, businesses,

governments and civil society, the state will have to play a growing part in the delivery of the public service aspects of the Internet. However, this does not necessarily require a hands on approach; in most cases, the role of facilitator and overseer will suffice. To ensure the delivery of public services by delegation, the state should facilitate and lead a multi-stakeholder framework within which the private sector can operate and, where necessary, should adopt measures to fill gaps left by private operators.

10. To the extent that private sector actors are relied upon to deliver services due by the state, they become agents of the latter. In full respect for Council of Europe standards and principles, including the freedom of communication on the Internet⁶ and the importance for states to encourage self-regulation and co-regulation regarding content disseminated on the Internet,⁷ this delegation brings with it a right and duty of oversight for the state concerned. These matters have clear implications for the state in terms of Internet Governance, ranging from the management of top-level domain names, to Internet service providers' commercial policies and accountability vis-à-vis consumers, to enabling cooperation between judicial and law enforcement authorities.

11. Further, there are a number of services which are already, or will be, provided directly by states through the Internet with respect to, for example, initiatives concerning e-government, education and culture, as well as the use of the Internet to facilitate participation in public matters and democratic processes (e-democracy), the Internet as a means of eliminating inequalities (for example distance work for persons with disabilities), etc. Such initiatives are increasingly important as they aim to improve access to information by all, and enhance the opportunities for all, including people with disabilities, to participate in education and in political, cultural and social life. Participation and access to information are essential elements of democracy and citizenship,⁸ and it is a permanent duty of the state to facilitate them.

6. Council of Europe Declaration of the Committee of Ministers on Freedom of Communication on the Internet, 2003 ([http://www.coe.int/t/e/human_rights/media/H-Inf\(2003\)007_en.pdf](http://www.coe.int/t/e/human_rights/media/H-Inf(2003)007_en.pdf)).

7. See Principle 2 of the Council of Europe Declaration of the Committee of Ministers on Freedom of Communication on the Internet.

8. For further information see Council of Europe websites on education for democratic citizenship (http://www.coe.int/t/dg4/education/edc/default_EN.asp?) and the European Year of Citizenship through Education (<http://www.coe.int/T/E/Com/Files/Themes/ECD/>).

12. The notion of the Internet's public service value and the role of key actors in this connection should therefore be discussed in the framework of Internet Governance.

Human rights and the rule of law

13. The exercise of, and respect for, human rights and the rule of law in the information society were constantly reasserted throughout the WSIS process and this should continue to be underlined and stressed in the IGF. The Council of Europe believes that human rights and rule of law principles and standards should be respected and protected online just as they are off line, and that, for example, states should not subject content on the Internet to restrictions which go further than those applied to other means of content delivery.⁹

14. At the European level, the Council of Europe's 46 member states are accountable for their actions and omissions which breach the obligations they have subscribed to under the European Convention on Human Rights and are legally bound to respect and comply with the European Court of Human Rights' case law.¹⁰ States who are party to the Convention (or their institutions or agents) must refrain from conduct which amounts to an interference with a given Convention right (for example the right to private life or correspondence, the right to freedom of speech and information). The state is also under a positive obligation to act in a proactive manner with a view to securing the effective enjoyment of protected rights, for example by taking reasonable measures designed to protect those under their jurisdiction from certain forms of harm in the context of Internet services. The failure to do so may render a state liable under the European Convention on Human Rights. Further, the

9. See Principle 1 of the Council of Europe Declaration of the Committee of Ministers on Freedom of Communication on the Internet.

10. The European Convention on Human Rights can be found at <http://conventions.coe.int/Treaty/en/Treaties/Word/005.doc> and the case law of its enforcement mechanism, the European Court of Human Rights, can be consulted at <http://cmiskp.echr.coe.int/tkp197/default.htm>.

state is under an obligation to adopt concrete measures in order to offer effective remedies and adequate redress to those who have suffered harm.¹¹

15. The case law of the European Court of Human Rights is now beginning to shape the positive and negative obligations of states with regard to the way rights and freedoms are exercised and protected online. So far, the European Court of Human Rights has underlined the right for member states to take action to stop harmful Internet content from reaching children and young people.¹² For its part, the European Court of Justice has ruled that references made to the personal information of others on Internet web pages are subject to data protection rules and therefore to the right to private and family life.¹³ Other cases regarding these and other human rights in online situations will emerge and there are many difficult questions which will sooner or later be addressed, such as positive obligations for states, in particular with regard to interactive services, differing views on morals, traditions and religion in our multicultural societies, and the roles and responsibilities of non-state actors in terms of human rights.

11. In practical terms, a state may be obliged to pay compensation, to adopt measures to prevent further harm or to counter the risk of future harm, or to remedy shortcomings in legal or regulatory frameworks.

12. In *Perrin v. the United Kingdom* (Application No. 5446/03), where the applicant challenged a 30-month prison sentence in connection with pornographic material exhibited on a United States based web site, the Court found the complaint under Article 10 (the right to freedom of expression and information) of the European Convention on Human Rights manifestly ill-founded. The applicant contended, *inter alia*, that his site complied with domestic United States legislation. The Court held that the fact that the dissemination of the images in question may have been legal in other places did not mean that, in proscribing such dissemination within its own territory and in prosecuting and convicting the applicant, the United Kingdom had exceeded the margin of appreciation afforded to it.

The Court considered that the existence of other protective measures (such as parental control software packages, making the accessing of the sites illegal and requiring Internet Service Providers (ISPs) to block access) had not rendered it disproportionate for the authorities to resort to criminal prosecution, particularly when those other measures have not been shown to be more effective.

The Court added that the web page at issue was freely available to anyone surfing the Internet and that it included the very type of material which might be sought out by young persons whom the national authorities were trying to protect.

The Court also observed that it would have been possible for the applicant to avoid the harm and, consequently, the conviction, while still carrying on his business, by ensuring that none of the photographs were available on the free preview page.

13. In the *Lindqvist* judgment, (case c-101/01) the European Court of Justice ruled for the first time on the scope of the Data Protection Directive and freedom of movement for such data on the Internet. The Court held that the act of referring, on an Internet page, to various persons and identifying them by name or by other means (giving their telephone number or information about their working conditions and hobbies) constitutes “the processing of personal data wholly or partly by automatic means”. Moreover, the Court noted that it is for the national authorities and courts responsible for applying the national legislation implementing the directive to ensure a fair balance between the rights and interests in question, including fundamental rights (for example the right to freedom of expression).

16. Thus, when considering the emerging trends in Internet use and in anticipation of potential human rights violations in connection with its use, Council of Europe member states need to prepare themselves to deal with, for example, situations related to Articles 2 (the right to life) or 3 (prohibition of inhuman or degrading treatment) with regard to incitement on web sites to suicide or self-harm, to Article 8 (the right to private life and correspondence) with regard to disseminating other people's personal information or illegal eavesdropping or control of communication, or to Article 10 (the right to freedom of expression and information) when confronted with online hate speech inciting violence in blogs.

17. The security and stability aspects of the Internet can also be interpreted in a human rights context. They could also involve state responsibility under the European Convention on Human Rights if it can be established that the state has failed to take appropriate measures within its power to protect those under its jurisdiction from, for example, personality theft, online fraud, or e-attacks causing loss or damage, for example through spam or virus.

18. Proactive Internet Governance measures to ensure that states discharge their duties vis-à-vis the public and the common good require international cooperation, for example by developing both appropriate mechanisms – such as the Council of Europe Convention for the protection of individuals with regard to the automatic processing of personal data,¹⁴ the Council of Europe Convention on Cybercrime,¹⁵ supplemented

14. The Convention for the protection of individuals with regard to the automatic processing of personal data, opened for signature in 1981, was the first legally binding international instrument in the field of data protection and it is the only one with a potentially worldwide scope of application. It lays down minimum standards to protect the individual against abuses which may accompany the collection and processing of personal data and regulates the transfrontier flow of personal data. Thirty-eight Council of Europe member states have already ratified this convention and 13 have ratified its Additional Protocol, which entered into force in July 2004 and deals with supervisory authorities and transborder data flows. Both instruments are also open for accession by non European states that have an adequate level of protection of personal data. Further information on these instruments can be found at www.coe.int/dataprotection.

15. The Convention on Cybercrime is a unique binding instrument, *open to non European states, which is* recognised in many international fora as the ideal instrument to provide a worldwide response to a form of criminality which is worldwide in nature. It lays down common minimum technical and legal standards to fight crimes committed via the Internet and other communication networks or technologies. Its objective is to pursue a common criminal policy by adopting appropriate legislation (e.g. as regards violations of network security, computer-related fraud, child pornography and infringements of copyright) and fostering international cooperation; its Additional Protocol deals with

by the Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, and the Council of Europe Convention on Action against Trafficking in Human Beings^{16, 17} – and normative texts which elaborate and map out the principles and values of the Internet.¹⁸ In the Council of Europe, intergovernmental work continues to be carried out at an increasing pace and will provide additional responses to Internet Governance issues, for example in addressing the dangers of new types of cybercrime, and in determining the rights and responsibilities of key actors (governments, industry, civil society) in the information society.

Conclusions and further action

19. The European Convention on Human Rights and other Council of Europe instruments, including the Cybercrime Convention (*with its global vocation*), certainly provide a framework, at the European level, for examining state responsibilities and

acts of a racist and xenophobic nature. The Cybercrime Convention entered into force on 1 July 2004 and its Additional Protocol on 1 March 2006. Fifteen countries have ratified the Convention, and 7 have ratified the Protocol. Further information concerning the Cybercrime Convention, as well as the full text of the convention and its Additional Protocol, can be found at <http://conventions.coe.int/Treaty/en/Treaties/Word/185.doc> and at <http://conventions.coe.int/Treaty/en/Treaties/Word/189.doc>.

16. The Council of Europe Convention on Action against Trafficking in Human Beings can be found at <http://conventions.coe.int/Treaty/EN/Treaties/Word/197.doc>.

17. In the framework of this convention, the Council of Europe is studying the misuse of the Internet for the recruitment of victims of trafficking in human beings.

18. Examples of Council of Europe standard-setting instruments relating to Internet Governance include the following: Recommendation for the protection of privacy on the Internet, 1999, (<http://cm.coe.int/ta/rec/1999/99r5.htm>); Declaration on freedom of communication on the Internet, of 2003, ([http://www.coe.int/t/e/human_rights/media/H-Inf\(2003\)007_en.pdf](http://www.coe.int/t/e/human_rights/media/H-Inf(2003)007_en.pdf)); Declaration on human rights and the rule of law in the information society, 2005 (<http://wcd.coe.int/ViewDoc.jsp?id=849061&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>); Resolution ResAP(2001)3 Towards full citizenship of persons with disabilities through inclusive new technologies (<http://wcd.coe.int/ViewDoc.jsp?id=233261&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>); Recommendation Rec(2006)5 on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015 (<http://wcd.coe.int/ViewDoc.jsp?id=986865&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>); Congress of Local and Regional Authorities Recommendation 128 (2003) on the revised European Charter on the Participation of Young People in Local and Regional Life (<http://wcd.coe.int/ViewDoc.jsp?id=39661&BackColorInternet=e0cee1&BackColorIntranet=e0cee1&BackColorLogged=FFC679>).

guiding state policies regarding the Internet, and the European Court of Human Rights' case law will undoubtedly soon provide some practical responses to Internet Governance issues.

20. The Council of Europe's other standard-setting documents also offer guidance and contribute to responding to Internet Governance issues. Moreover, areas might be identified in respect of which the adequate response could be a binding international instrument.

21. However, much remains to be done and there are still many unanswered questions regarding the interpretation of rights in online situations which the IGF discussions could help to explore and map out. Important issues to address, and their human rights implications, include the privacy of correspondence or communications over the Internet (for example how a state should deal with third party interference) and the right to freedom of expression and information (for example censorship by non-state actors such as Internet service providers regarding their notice and takedown actions). Security and stability related issues should also continue to be examined from a human rights perspective.

22. Multi-stakeholder cooperation will no doubt remain the best way forward to respond to many of these issues. Nevertheless, in the same way the international community has applied sanctions to certain countries for their conduct in respect, for example, of armed conflicts or terrorism, there might be scope for concerted international action vis-à-vis states that host (or fail to combat) cyber-criminal or cyber-terrorist activities. This will be particularly relevant as regards activities that endanger the security and stability of the Internet. Such a concerted international approach could serve to discourage unilateral action or inaction on the part of states that may feel that their own responsibility might otherwise be engaged.

23. A state can discharge many of its responsibilities by promoting new forms of solidarity, partnership and cooperation. Through open discussions and exchanges of information, a multi-stakeholder governance approach will help to shape regulatory

and non-regulatory models and address challenges and problems arising from the rapid development of the information society.¹⁹

24. In this context, from an international law perspective, it can be said that ICANN operates *de facto* by delegation on behalf of the international community and, ultimately, on behalf of each of the states and other stakeholders that make up the Internet community. On the basis of this construction, current arrangements can be maintained but, for this to be a satisfactory solution, governments should ensure that there are safeguards in place so that ICANN conforms to the highest standards; only in this way can states be satisfied that they will not be held accountable for shortcomings that could have been avoided.

25. It is worth underlining once again that delegation does not preclude the responsibility of individual states under international human rights law. In consequence, adequate oversight is necessary. Given that it would not be practicable for each and every state concerned to exercise such oversight, ICANN (or any other body entrusted with Internet Governance functions globally) should ultimately be answerable to the international community.

26. Overall, the Internet is an extension of our existing public spaces which transcends national jurisdictions and political sensibilities. It has shown itself to be a forum of choice for freedom of expression, global communication, disclosure of information and transparency – all basic elements fundamental to democratic ideals.

27. To conclude, the Council of Europe takes the view that it is of primary importance to draw on international conventions and practices when bringing all stakeholders together within a framework of shared expectations regarding the Internet and its governance. This will offer the most democratically acceptable way forward.

19. See “Part II. A multi-stakeholder governance approach for building the Information Society: the roles and responsibilities of stakeholders” of the Declaration of the Council of Europe Committee of Ministers on Human Rights and the Rule of Law in the Information Society, 2005 (<http://wcd.coe.int/ViewDoc.jsp?id=849061&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>).