Elaborating an ICANN Commitment to Human Rights

The CCWG-Accountability extensively discussed the opportunity to include a commitment related to human rights, within ICANN's stated Mission, in the ICANN Bylaws. The group commissioned a legal analysis of whether the IANA Functions Contract causes ICANN to have specific obligations with regard to Human Rights, which would cease to exist upon the termination of the IANA Functions Contract.[1] While no significant issue was found to be directly linked to the termination of the IANA Functions Contract, the group acknowledged the recurring debates around the nature of ICANN's accountability with regard to human rights.

Prior to the Second Draft Report, the group achieved consensus on including in ICANN's Bylaws a commitment to human rights within its defined Mission. In that Report, the group asked for comments on two potential commitment formulations:

1. *Within its mission and in its operations, ICANN will be committed to respect the fundamental human rights of the exercise of free expression and the free flow of information.*

2. *Within its mission and in its operations, ICANN will be committed to respect internationally recognized fundamental human rights.*

CCWG's Response to Public Comments

During the comment period on the Second Draft Report, 23 comments specifically addressed the issue of including Human Rights language in the ICANN Bylaws. Approximately half of these comments supported or did not oppose including human rights language in the Bylaws as part of WS1. The remaining comments expressed a range of opinions: five did not support a Human Rights Bylaw, one did not "in principle oppose" such language by stated it should be dealt with in WS2, another also stated it should be dealt with in WS2 but did not state support or opposition for Human Rights language, one said it was "premature," and two others commented on the issue but did not state support or opposition for Human Rights language in the Bylaws.

[1] The specific question asked and answered in the memo was "What, if any, obligations towards human rights does ICANN currently have by virtue of its status as a U.S. government contractor that would not otherwise exist?" The memo prepared by legal counsel is available here: http://mm.icann.org/pipermail/accountability-cross-community/2015-July/004604.html.

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1. 20 out of 23 comments addressed the two options for Human Rights language in the Bylaws. Seven of these supported the more general language in option 2, while three supported the more targeted language in option 1. The other 10 comments either opposed or did not support the CCWG proposals.

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Several comments raised other issues. Eight out of 23 comments cautioned that a commitment to human rights should not broaden ICANN's remit, scope of activity or mission. Six comments supported reliance on the Universal Declaration of Human Rights, of which three suggested reliance on other documents in addition to the UDHR.[2] Some suggested a reference to the UDHR be added to the text, while others suggested that the UDHR be cited in an underlying rationale and explanation for the Bylaw. Six commenters also stated out that the CCWG must rely only on verbatim text or already agreed language from existing human rights instruments. Two commenters specifically opposed reliance on the UN Guiding Principles on Business and Human Rights (the "Ruggie Principles"). There were no comments that supported reliance on the Ruggie Principles.

Seven comments expressed concerns about lack of detail or development, with statements such as "the CCWG has stopped short of important operational detail" and "there is not yet an agreed definition of ICANN's role in relation to human rights" and that this is "premature" since there is continued debate both in the CCWG and the wider ICANN community.

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2. Consider Level of Support. 10 out of the 23 comments supported inclusion of some language on Human Rights in the Bylaws as part of WS1. 5 comments did not support inclusion of Human Rights in the Bylaws, and 2 additional comments did not support addressing this issue in WS1. 3 comments expressed no support or opposition, though they commented on aspects of the issue (including one of those who stated this was a WS2 issue). One comment stated that it "would not oppose" inclusion of human rights language, while another commenter stated that it "would not actively oppose" the inclusion of human rights language in the Bylaws. Finally, one commenter did not "in principle oppose" Human Rights language but was also one who stated that this was a WS2. *The CCWG should consider how to analyze and interpret this level of support, and how this should guide the CCWG's further work on this subject.*

3. Need for More Detail. Based on several comments, CCWG should develop a more detailed explanation of the rationale and framework for interpretation of a Human Rights Bylaw, including reference to ICANN's role in relation to Human Rights, and limiting the application of the Bylaw to ICANN's mission before text can be added to bylaws. *In*

[2] One comment specifies the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, and the Convention on the Rights of Persons with Disabilities. The other two were not specific.

addition to proposed Bylaws language, WP4 is developing an explanatory document which includes a rationale for adding a human rights commitment to the bylaws and an overview of the discussions on the choice of bylaw language. Furthermore, WP4 expects to provide one or more templates for stress tests. Further work will be undertaken in WS2. To ensure that there is clarity between a passive, internal obligation for ICANN, and an active external enforcement role, the explanatory document could lay out the difference between the role of companies to respect human rights and the role of governments to protect human rights. The explanatory document should also discuss and bridge the divergences in the public comments concerning the choice of Bylaws language and references to specific rights (and to specific Human Rights documents in the Bylaws

Commented [GS1]: The CCWG did not discuss these points in Dublin.

Based in part on the public comments, the CCWG revisited the specific language of the Bylaws, and considered several alternative formulations, since there was not strong support for either of the formulations in the Second Draft Report. This began in WP4, where 17 out of 25 WP4 members[3] (68%) responding to a poll stated that the Bylaws text should not contain a reference to a specific document, while only 5 members (20%) supported reference to a specific document. This could be deemed "consensus" within WP4. However, since there was strong minority support for inclusion of one or more reference documents in the Bylaws, we forwarded several alternative to the CCWG for further discussion in Dublin:

1. Within its mission and in its operations, ICANN will respect internationally recognized human rights.

2. Within its mission and in its operations, ICANN will respect the internationally recognized human rights set out in the Universal Declaration of Human Rights.

3. Within its mission and in its operations, ICANN will respect the internationally recognized human rights set out in the Universal Declaration of Human Rights, the International Covenant on Cultural and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

4. Within its mission and in its operations, ICANN will respect the internationally recognized human rights set out in the Universal Declaration of Human Rights, the International Covenant on Cultural and Political Rights and the International Covenant on Economic, Social and Cultural Rights and will carry out its work guided by the UN Guiding Principles on Business and Human Rights.

After a discussion in the CCWG in Dublin, no decision was taken regarding any specific formulation for the Human Rights Bylaw. However, an action item was identified to refine the following alternative formulation in WP4 and then bring the refined language back to the full CCWG for further consideration:

[3] WP4 has 46 mailing list members, not including observers.

Within its mission and in its operations, ICANN will respect internationally recognized human rights.

It should be noted that this formulation is the same as the second formulation in the Second Draft Report, except for the deletion of "be committed to" before "respect."

Rationale and Explanation

A number of comments noted the lack of detail and development relating to the human rights bylaw. This issue was also discussed at various points in the CCWG. In response to this concern, a further rationale and explanation of the Bylaw follows.

Defining Human Rights

One broadly accepted definition of Human Rights is the following, from the United Nations Office of the High Commissioner on Human Rights:

"Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible."[4]

Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. They may also be protected in domestic laws at the federal or state level (e.g. the United Kingdom's Equalities Act or Human Rights Act).

Human rights are basic rights and freedoms to which all people are entitled, free of discrimination.

They include civil and political rights, such as the right to life, liberty and freedom of expression; and social, cultural and economic rights including the right to participate in culture, the right to food, and the right to work and receive an education.

However caution in the use of the terminology is advised: terms of art such as "human rights" are often given very precise but subtly differing definitions by different commentators and in different jurisdiction.

Absolute vs. Qualified Rights

Some human rights are regarded as absolute. For example, the right to life, the right to freedom from slavery, the right of freedom from torture.

Other human rights are regarded as "qualified" rights. For example, the right to free expression and the right to a private life can both be "interfered" with, providing the interference is in accordance with law, necessary, and proportionate. Indeed the balancing between competing human rights is often required and must be carried out, delicately.

[4] http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx

Human rights obligations and the private sector

[Rights imply corresponding obligations. That is, if a citizen has rights, the public authority has obligations.]

To the layman, this is non-obvious. But simply put: private sector organizations have no human rights obligations, unless they adopt them voluntarily or they are embodied in laws applicable to those private sector organizations. Human rights obligations are, by definition, part of the relationship between the citizen and the State. With my usual caveat that I am not a lawyer, I do not believe this section is quite accurate. Firstly, while the primary obligation to ensure human rights rests with the state, it is routine in the application of rights in law to require certain behaviors of companies and corporations....nondiscrimination, for instance, is required of all our businesses through the application of provincial and municipal law, religious rights are set in school policy and labor laws, etc. I think it is very important to describe how the obligations that the state takes on with respect to fundamental rights get passed on to companies and societies of all kinds, particularly in the traditionally regulated industries. (Transportation, telecom, etc.

ICANN - where we are now?.

As an international, private sector organization, what human rights obligations does ICANN currently have?

[Actually, despite section 5, above, ICANN does have obligations, to the extent they are embodied in the laws which ICANN must obey. Article 4 of Articles of Incorporation.]

What role, if any, does NTIA oversight play in ICANN in relation to human rights? What is the effect, if any, of the transition on ICANN's and human rights?

ICANN - where do we want to be at the point of transition?

High-level objective - new bylaw.

At the very least we need a high level statement of objective. If properly agreed between us, a new fundamental bylaw will almost write itself.

) I think it is important to recognize that as a multi-stakeholder organization that exists partly as a replacement for a regulatory agency, there is (or should be) a heightened expectation that ICANN will adhere to basic human rights principles, as a multilateral international body would be expected to adhere to relevant international law. This might belong in the next section on purpose or objective.

What does this bylaw accomplish?

Will ICANN's approach to policy development and implementation change in any way?

Will this have any effect on ICANN as a corporation, including as an employer and as a purchaser of goods and services?

Will this change the way any of ICANN's policies and operations are carried out?

The Interplay between Human Rights and Fundamental Rights

Legal persons have fundamental "human" rights in the same way as natural persons, except for rights that can only apply to individuals, such as the right to marry and found a family. So, it is clear, for example, that a corporation has definitely the same right not to be deprived arbitrarily of its property (whether tangible or intangible) as a natural person.

For example: according to Wex, a US-centric definition might be: *"Fundamental rights are a group of rights that have been recognized by the Supreme Court as requiring a high degree of protection from government encroachment. These rights are specifically identified in the Constitution (especially in the Bill of Rights), or have been found under Due Process."* Exactly my point. The expression "fundamental rights" usually refers to the context of a particular jurisdiction/legal system

Work Stream 2 and Transitional Bylaw

Further work remains to be done as part of WS2. Specifically, the development of a framework of interpretation for this Bylaw must be one of the tasks undertaken in WS2. In order to ensure that the appropriate framework will be developed, it is proposed that a transitional Bylaw is also included as part of WS1. This transitional Bylaw would guarantee that proper work is done to develop the required framework of interpretation in WS2. The proposed transitional Bylaw would convey the following:

Bylaw xx will be implemented in accordance to the framework of interpretation developed by a cross-community working group chartered by one or more Supporting Organizations or Advisory Committees and tasked with that matter. Said group should develop an appropriate framework of interpretation no later than one year after Bylaw xx is adopted.