

Elaborating an ICANN Commitment to Human Rights

As a part of the CCWG-Accountability's work, members and participants extensively discussed the opportunity to include a commitment related to human rights, within ICANN's stated Mission, in the ICANN Bylaws. The group sought legal advice on whether the IANA Functions Contract imposes specific obligations on ICANN with regard to Human Rights that 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 bylaw 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 Response to Public Comments

During the comment period on the Second Draft Report, 23 comments specifically addressed the inclusion of 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. 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 (above), while three supported the more targeted language in option 1. The other 10 comments either opposed or did not support either of the two CCWG options.

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

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>.

supported reliance on the Universal Declaration of Human Rights (“UDHR”), 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,” “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. In response to these comments, the CCWG developed the “Rationale and Explanation” section below.

Based in part on the public comments, the CCWG WP4 also revisited the specific language of the Bylaws. Due to the lack of support for either of the formulations in the Second Draft Report, CCWG considered several alternative formulations. WP4 forwarded several alternative solutions 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 discussion in the CCWG in Dublin, an action item was identified to refine the first of these proposals:

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

This formulation is itself a refinement of the preferred formulation in the Second Draft Report, deleting “be committed to” before “respect” and “fundamental” before “human rights.”.

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.

Rationale and Explanation

As noted above, a number of comments noted the need for greater detail and development relating to the human rights bylaw. This issue was also discussed at various points in the CCWG. The following has been developed in order to provide rationale and greater detail concerning the need for and potential effects of a human rights bylaw, as well a greater understanding of the choice of particular bylaw language .

Human Rights Definition

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."³

[this "definition" is not informative since it doesn't define human rights other than to say they are "inherent to all human beings"; so then the question becomes "what rights are inherent to all human beings"]

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 the domestic laws of a state (e.g. the United Kingdom's Equalities Act or Human Rights Act).

[Rather than providing the description that follows, consider finding a definition that can be quoted or several definitions that can be quoted.] 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.

Human Rights and ICANN

Article 4 of ICANN's Articles of Incorporation provides that:

4. The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.

The CCWG recognizes that only states have direct human rights obligations under international law. However, private sector organizations are required to comply with all applicable laws, including those related to human rights. There is consensus in [WP4]⁴ that the Bylaw

³ <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>

⁴ Note to draft: This should be changed to reflect CCWG position after review by CCWG.

amendment is intended to reaffirm ICANN's existing obligation to comply with applicable international conventions in its operations, as stated in Article 4, above. The bylaw amendment is not intended to impose any additional duty on ICANN to enforce human rights, or any obligation on ICANN to take any particular actions in furtherance of the bylaw separate and apart from its obligation to comply with applicable law.

However, where an organization, such as ICANN, determines that it is contributing to an adverse human rights impact, it should consider taking necessary steps to cease or prevent its contribution. Where appropriate, an organization can also choose to use its leverage over third parties to seek to mitigate any remaining adverse human rights impact to the extent possible. However, there is no obligation on a private sector organization to take any particular action either with regard to its own activities or with regard to the activities of third parties, beyond the obligation not to violate the laws under which the organization operates.

The bylaw intends to reaffirm ICANN's existing obligations within its narrow scope and mission; WS2 will further clarify and elaborate on ICANN's commitment to respect human rights, develop a framework for interpretation of the bylaw, and consider the development of a human rights policy and specific framework for such commitment.

Avoiding the Expansion of ICANN's Mission

The addition of an express commitment to human rights in ICANN's bylaws is not intended to, and should by no means lead to, an expansion of ICANN mission or scope. Therefore adding any reference in the Bylaw to the "protection" or "enforcement" of human rights would be inappropriate. While there is a general agreement that ICANN should respect human rights within its mission, any type of external enforcement or regulatory activity would be highly inappropriate. Any wording that might lead to demands to enforce human rights must be avoided.

The use of the term 'respect' in the proposed Bylaw does not imply any reference to a method or guideline on how ICANN should implement its commitment to human rights. Work Stream 2 will develop the frameworks ICANN will use to interpret the bylaw and to determine what, if anything, ICANN might choose to do to fulfill its commitment under the bylaw. These frameworks must take into account ICANN's unique mission, operation and processes. As such, it must be emphasized that the bylaw amendment is expressly aimed at not imposing any duty of any nature on ICANN, or any other person or entity by virtue of any relationship with ICANN, to enforce human rights in any manner whatsoever.

Mentioning Specific Human Rights

Adding any reference to specific rights (such as singling out freedom of expression) in the bylaws text is inappropriate; one cannot selectively mention, emphasize or apply human rights because they are universal, indivisible, interdependent and interrelated.

Refining the Human Rights Bylaw

Following Dublin, WP4 addressed its "action item" and considered whether and how to refine the proposed bylaw formulation ("*Within its mission and in its operations, ICANN will respect*

internationally recognized human rights.”). WP4 considered whether the reference to “mission”

should be changed to “limited technical mission” but decided not to do so, as this is implicit in ICANN’s mission. WP4 also considered whether to add a reference to the Universal Declaration of Human Rights and/or other internationally recognized human rights conventions or instruments. WP4 decided not to do so, as it would be preferable to make any such references in the framework being developed in WS2. Therefore, the proposed language remains as follows:

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

WP4 also considered whether to add a statement that would clarify that ICANN is not taking on any obligation to “protect” or “enforce” human rights. WP4 decided that this would be necessary and appropriate and proposes the following language:

This commitment does not in any way create an obligation for ICANN, or any entity having a relationship with ICANN, to protect or enforce human rights beyond what may be required by applicable law. In particular, this does not create any additional obligation for ICANN to respond to or consider any complaint, request or demand seeking the enforcement of human rights by ICANN.

WP4 also considered whether a “transitional bylaw” should be adopted to ensure that the necessary tasks allocated to WS2 are in fact supported and completed. WP4 decided that this was necessary and appropriate as well, and proposes the following language:

Bylaw xx will be implemented in accordance with the framework of interpretation to be developed as part of “Work Stream 2” by the CCWG-Accountability or another cross-community working group chartered for such purpose by one or more Supporting Organizations or Advisory Committees. This group must be established promptly, in order to develop an appropriate framework of interpretation as promptly as possible, but in no event later than one year after Bylaw xx is adopted.

Finally, WP4 considered whether the effective date of the human rights bylaw should be delayed for one year until the work allocated to WS2 was completed, in order to assuage concerns that the bylaw could be misconstrued in the interim. This delay was not adopted by WP4, although there was a minority position in favor of such a delay, which would have added a sentence such as the following:

[Bylaw XX will not become effective until [the earlier of 18 months after adoption o] such framework is developed.]

The Road to Explanation and Implementation - Workstream 1 and Workstream 2

The CCWG recommends the inclusion of a high level statement in ICANN’s bylaws that states ICANN’s commitment to respect human rights. The adoption of this bylaw amendment would be included in WS1. The bylaw will reflect ICANN’s commitment to carry out operations within its mission in accordance with international human rights standards and international human rights law.

The CCWG also recognizes that a mere commitment in the bylaws is not sufficient. The development of frameworks for interpretation and implementation are required to ensure that this Bylaw does not expand ICANN's scope or mission or have a negative impact on ICANN's operations. This development process will be part of WS2.

Summary and Recommendations

The CCWG recommends the following additions to the ICANN bylaws in **Work Stream 1**:

Within its mission and in its operations, ICANN will respect internationally recognized human rights. This commitment does not in any way create an obligation for ICANN, or any entity having a relationship with ICANN, to protect or enforce human rights beyond what may be required by applicable law. In particular, this does not create any additional obligation for ICANN to respond to or consider any complaint, request or demand seeking the enforcement of human rights by ICANN.

In order to ensure that the tasks allocated to WS2 take place, a transitional Bylaw must be adopted as part of WS1, which would convey the following:

Bylaw xx will be implemented in accordance with the framework of interpretation to be developed as part of "Work Stream 2" by the CCWG-Accountability or another cross-community working group chartered for such purpose by one or more Supporting Organizations or Advisory Committees. This group must be established promptly, in order to develop an appropriate framework of interpretation as promptly as possible, but in no event later than one year after Bylaw xx is adopted.

The CCWG recommends that the following Issues be resolved as part of **Work Stream 2**:

- 1) Development of a framework of interpretation for the bylaw.
- 2) Consider which specific human rights conventions or other instruments should be used by ICANN in interpreting and implementing the bylaw.
- 3) Consider the policies and frameworks, if any, that ICANN needs to develop in order to fulfill its commitment to respect human rights.
- 4) Consistent with ICANN's processes and protocols, consider how should these frameworks should be discussed and drafted to ensure broad multistakeholder involvement in the process.
- 5) Consider what effect, if any, this Bylaw will have on ICANN's consideration of GAC advice.
- 6) Consider how, if at all, this Bylaw will affect how ICANN's operations are carried out.
- 7) Consider how the interpretation and implementation of this bylaw will interact with existing and future ICANN policies and procedures.