

Human Rights Language in ICANN's Bylaws

Introduction

During the comment period on the 2nd draft report of the CCWG on accountability several comments have been made on Human Rights language:

- 11 out of the 23 comments that addressed this point supported inclusion of some language on Human Rights as part of WS1, but there was no consensus on what that language should be. Two comments supported the inclusion of such language but stated that this work should be part of WS2. One comment stated that it would not oppose inclusion of human rights language.
- 10 comments that addressed this point did not support inclusion of human rights language as part of WS1. More specifically: 5 out of 23 comments did not support the inclusion of human rights language in the Bylaws. 1 commenter stated that it “would not actively oppose” the inclusion of human rights language in the Bylaws. In addition, 2 comments did not support the inclusion of human rights language in the Bylaws as part of WS1. Finally, 2 comments did not express either support or opposition for the inclusion of human rights language in the Bylaws.
- 23 of 92 submissions addressed human rights specifically (see comments below). 20 of the 92 submissions generally supported the Second Draft Proposal without specifically mentioning the Human Rights point. (see Overall Support tab)
- 3 of the 92 submissions were against the Second Draft Proposal overall without specifically mentioning the Human Rights point. (see Overall Disagreement tab)
- 7 out of 23 comments supported option 2: *“Within its mission and in its operations, ICANN will be committed to respect internationally recognized fundamental human rights.”*
- One¹ comment supported option 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.”*

Areas of Consensus

1. 11² out of 23 comments that addressed this issue supported the inclusion of a commitment to Human Rights in ICANN's bylaws as part of WS1. One comment stated that it would not oppose inclusion of such language.³

WP4 agreed with rough consensus on the following text to be added to the bylaws:

¹ Edward Morris

² Avri Doria, CDT, Cyberinvasion Ltd, Edward Morris, i2Coalition, Intel, Internet Association, IPC, NCSG, Pranesh Prakash, USCIB

³ JPNIC

Within its mission and in its operations, ICANN will be committed to respect internationally recognized human rights law [reflected in the Universal Declaration of Human Rights (UDHR) [, International Covenant on Cultural and Political Rights,⁴ and the International Covenant on Economic, Social and Cultural Rights.]⁵

To reach consensus within the group on the inclusion of the reference to the specific instruments in the Bylaw language a poll has been distributed among the group. The poll provided the option to choose between:

- 1. No reference to a specific document in the bylaws text regarding human rights*
- 2. If a document reference is included, should it be the UDHR*
- 3. If not UDHR what other document or documents should be referred to (list).*

18 out of 23 WP4 members⁶ responding to the poll expressed in the poll that no reference to a specific document should be included in the suggested bylaw text.

Areas Needing Refinement

Several questions have been raised in the comments that require further refinement and details:

1. Two comments supported inclusion of a commitment to Human Rights, but did not support including this work in WS1; rather, these comments proposed moving all consideration of this topic to WS2.⁷
2. Eight⁸ out of 23 comments cautioned that a commitment to human rights should not broaden ICANN's remit, scope of activity or mission.
3. Two⁹ out of 23 comments expressly stated that ICANN is already required to respect human rights in its operations by virtue of Article 4 of ICANN's Article of Incorporation. (One¹⁰ comment expressly stated that Article 4 did not provide such a requirement and one¹¹ comment stated that Article 4 would need to be amended to specifically mention human rights.)
4. Where it comes to referral to specific documents, there is most support for a mention of the Universal Declaration of Human Rights (6 out of 23)
5. An equal number of commenters also point out that the CCWG must rely only on verbatim text from existing human rights instruments (6 out of 23)
6. More details on the the modalities of how ICANN integrates human rights impact analyses, within its mission is needed before text can be added to bylaws. (6 out of 23). A subset of this group thought this should be done in WS2 (2 out of 6).

⁴ Ditto.

⁵ Ditto.

⁶ WP4 has 46 mailing list members, not including observers.

⁷ Government of Australia, Government of New Zealand

⁸ i2 Coalition, ICANN Board, Intel, Internet Association, LINX, RySG, The Heritage Foundation

⁹ Edward Morris, MPAA

¹⁰ Avri Doria

¹¹ CDT

In addition to proposed language WP4 will provide 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 will provide a template for a stress test. Further work will be undertaken in WS2.

7. New wording proposed in public comments:

Within its mission and in its processes and operations, ICANN will respect and protect fundamental human rights as defined in international law and applicable international conventions and local law. ICANN will also establish processes to clarify and document the rights impact of proposed policies and new operations. ICANN appeals mechanisms may be used for human rights issues relevant to ICANN mission and core values, among which are freedom of expression, free flow of information and privacy on the Internet.

WP4 believes that adding the reference to “protection” of human rights is inappropriate in the bylaws language. Few concerns were raised in the public comments and in the CCWG discussions about the necessity to make a clear distinction between the duty of states to protect (and enforce) human rights, and obligations of other actors to respect human rights. While there is a general agreement, that ICANN should respect human rights within its mission, external enforcement is considered highly inappropriate by WP4. Any wording that might lead to demands to enforce human rights shall be avoided.

WP4 has discussed the language “fundamental human rights” vs. “human rights” and decided that the latter is more appropriate. “Fundamental human rights” are reflected differently in several geographical areas, such as by the European Charter of Fundamental Rights, or the Canadian Charter of Rights and Freedoms.

WP4 also considers adding a reference to specific rights to the bylaws text will not be appropriate: one cannot selectively mention or apply human rights because they are universal, indivisible, interdependent and interrelated.

8. New wording proposed in public comments:

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.

WP4 chose not to mention a specific right or several rights because one cannot selectively mention or apply human rights since they are universal, indivisible, interdependent and interrelated.

9. New wording proposed in public comments:

Within its mission and in its operations, ICANN will be committed to respect internationally recognized fundamental human rights, in particular freedom of expression and privacy

WP4 chose not to mention a specific right or several rights because one cannot selectively mention or apply human rights since they are universal, indivisible, interdependent and interrelated.

10. Proposed reference to Rights that people have offline must also be protected offline, in accordance with international human rights legal obligations, including the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, and the Convention on the Rights of Persons with Disabilities. (1 out of 23)

WP4 suggests to make this reference in the explanatory document to the bylaws language, but not in the bylaw. There is no need to refer to the equal protection of rights offline and online in Bylaw since there has been a broad agreement on this at the international level.¹²

Areas of Divergence

10 out of 23 comments did not express support for the inclusion of human rights language in the Bylaws as part of WS1.

More specifically: 5¹³ out of 23 comments did not support the inclusion of human rights language in the Bylaws. 1 commenter stated that it “would not actively oppose” the inclusion of human rights language in the Bylaws.¹⁴ In addition, 2 comments did not support the inclusion of human rights language in the Bylaws as part of WS1.¹⁵ Finally, 2

¹² https://www.hrw.org/sites/default/files/related_material/UNGA_upload_0.pdf retrieved on October 7, 2015

¹³ Business Constituency, COA, LINX, MPAA, Heritage Foundation,

¹⁴ auDA

¹⁵ Government of Australia, Government of New Zealand.

comments did not express either support or opposition for the inclusion of human rights language in the Bylaws.¹⁶

Several comments expressed concerns about the implications and efficacy of a human rights commitment:

1. While two comments mention that specifically mentioning free expression and the free flow of information in the Bylaws is needed to ensure that free speech and the free flow of information is respected throughout ICANN's operations (2 out of 23), others suggest broader wording to avoid human rights cherry-picking (# out of 23).

WP4 choses not to mention a specific right or several rights because one cannot selectively mention or apply human rights since they are universal, indivisible, interdependent and interrelated.

2. It is believed that only states have direct human rights obligations (1 out of 23)

WP4 recognises that states have human rights obligations under the international law. However, while it's a duty of the state to respect, protect and fulfil human rights, private sector is required to comply with all applicable laws related to human rights. There is a broad agreement within the group that the Bylaw amendment will reaffirm ICANN's commitment to comply with the international law in its operations, which already exists in the Art. 4 of ICANN's Article of Incorporation. The amendment is not aimed to impose any duty to enforce human rights.

3. Perceived risk that adding human rights to bylaws language might create demands from the civil society for human rights enforcement outside of the ICANN's mission and scope of activities.

WP4 stresses the necessity to make it clear in the bylaw language that ICANN commits only to respecting human rights within its mission. WP4 intends to avoid any bylaw wording that might lead to demands to enforce human rights.

Options for CCWG Consideration

Based on the public comments analysis some further areas for exploration were identified, such as:

1. Collaboration in WS2 with Cross Community Working Party on ICANN's Corporate and Social Responsibility to Respect Human Rights

¹⁶ Afnic, RySG

WP4 aims to take all recommendations, suggestions and comments into consideration and invites everyone to join the work as described in the CCWG procedure documents.

2. Adding a clause specifically noting human rights in section 4 of the Articles of Incorporation

WP4 believes that Art. 4 of the Articles of Incorporation outlines the general obligation to carry out the activities in conformity with international conventions and local law and there is no need to cherry-pick specific international instruments such as those related to human rights and provide a reference to them. Specific obligation to respect human rights should be outlined in the Bylaw.

3. The bylaws language shall refer to an obligation to respect human rights within the ICANN mission to avoid any demands to enforce (protect) human rights.

WP4 fully supports this suggestion.

4. 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 the role of companies to respect human rights and the role of governments to protect human rights.

WP4 will reflect this issue in the explanatory document

5. A need to discuss and bridge the divergences in the public comments concerning the choice of language and references to specific rights. This should be reflected in the explanatory document.

WP4 recognises this need. Discussion on choice of language will be summarised in the explanatory document.