

Human Rights Language in ICANN's Bylaws

From CCWG Second Draft Proposal:

Elaborating an ICANN Commitment to Human Rights

The CCWG-Accountability extensively discussed the opportunity to include into a Commitment related to human rights, within ICANN's stated Mission, in the ICANN Bylaws. The group commissioned a legal analysis of whether the termination of the IANA Functions Contract would induce changes into ICANN's obligations, within its defined Mission, with regards to Human Rights.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 towards the respect of fundamental human rights within ICANN's Mission.

In these discussions, some participants raised the following as accountability-related reasons for including a commitment to fundamental human rights in the Bylaws:

- The NTIA criteria to maintain the openness of the Internet, including free expression and the free flow of information;
- The need to avoid extending ICANN's mission into content regulation;
- The importance of assessing the impact of ICANN policies on human rights within its defined mission.

Examples of potential Commitment formulation were:

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.*

The group has achieved consensus on including a human rights related Commitment in ICANN's Bylaws within its defined Mission. However no particular wording currently proposed achieved consensus. Reiterating its commitment to articulate concrete proposals as part of its mandate, the CCWG-Accountability is calling for comments on this approach and the underlying requirements.

¹ The memo prepared by legal counsel is available here:
<http://mm.icann.org/pipermail/accountability-cross-community/2015-July/004604.html>.

Introduction

During the comment period on the “CCWG-Accountability 2nd Draft Proposal on Work Stream 1 Recommendations,” 23 comments specifically addressed the issue of including Human Rights language in the ICANN Bylaws as part of WS1:

- 10 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.
- One comment stated that it “would not oppose” inclusion of human rights language.
- One comment did not “in principle oppose” Human Rights language but stated that this work should be part of WS2.
- One comment stated that this work should be part of WS2, and did not express support or opposition for the inclusion of Human Rights language in the Bylaws.
- Two other comments did not express either support or opposition for 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.
- 5 out of 23 comments did not support the inclusion of human rights language in the Bylaws.

20 out of 23 comments addressed the two options for Human Rights language in the Bylaws:

- 7² 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.*” This includes one commenter that did not support including Human Rights language in the Bylaws in WS1.

Areas of Consensus

1. 10³ 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. In addition, one comment stated that it “would not oppose” inclusion of such language.⁴

Areas Needing Refinement

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

1. Two comments did not support including this work in WS1; rather, these comments proposed moving all consideration of this topic to WS2.⁵ Of these two commenters, one

² Avri Doria, CDT, IPC, NCSG (but with a greater preference for a variation on option 2), Pranesh Prakash, RySG, USCIB

³ Avri Doria, CDT, Cyberinvasion Ltd, Edward Morris, Intel, Internet Association, IPC, NCSG, Pranesh Prakash,

⁴ JPNIC

stated “We do not in principle oppose the inclusion of a reference to human rights in ICANN’s Bylaws.”⁶ The other stated that “we welcome a discussion of ICANN’s role in respecting human rights, and the possible inclusion of human rights as a bylaw within ICANN, we have some reservations with the inclusion of text at this late stage in the CCWG process.”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. (In contrast, 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) Three of these commenters suggested reference to other documents in addition to the UDHR.
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 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).
7. Two comments suggested alternative wording for the Human Rights commitment:
 - *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.*
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
8. Proposed reference to Rights that people have offline must also be protected online, in accordance with international human rights legal obligations, including the International

⁵ Government of Australia, Government of New Zealand

⁶ Government of Australia

⁷ 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

Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, and the Convention on the Rights of Persons with Disabilities.¹²

Areas of Divergence

10 out of 23 comments that addressed this point 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 proposal to include human rights language in WS1; these commenters suggested that this issue should be deferred to WS2.¹⁵ Of these two commenters, one stated “We do not in principle oppose the inclusion of a reference to human rights in ICANN’s Bylaws.”¹⁶ The other stated that “we welcome a discussion of ICANN’s role in respecting human rights, and the possible inclusion of human rights as a bylaw within ICANN, we have some reservations with the inclusion of text at this late stage in the CCWG process.”¹⁷ Finally, 3 comments did not express either support or opposition for the inclusion of human rights language in the Bylaws.¹⁸

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

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

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

¹² Afnic

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

¹⁴ auDA

¹⁵ Government of Australia, Government of New Zealand.

¹⁶ Government of Australia.

¹⁷ Government of New Zealand.

¹⁸ Afnic, i2Coalition, 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. More details on 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).

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.

3. Adding a clause specifically noting human rights in section 4 of the Articles of Incorporation.¹⁹

WP4 believes it is more appropriate to address ICANN's human rights commitment in the Bylaws.

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

1. While two comments state 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 (1# 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 international law. However, while it's a duty of the state to respect, protect and fulfil human rights, the private sector is required to comply with all applicable laws, including without limitation those related to human rights. WP4 believes language can be drafted that does not 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.

5. New wording proposed in public comments:

¹⁹ CDT.

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. Several 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.

6. 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.

7. Proposed reference to Rights that people have offline must also be protected online, 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.²⁰ (1 out of 23)

WP4 suggests to make this reference in the explanatory document to the bylaws language, but not in the bylaw itself. 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.²¹

8. 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.

²⁰ Afnic

²¹ https://www.hrw.org/sites/default/files/related_material/UNGA_upload_0.pdf retrieved on October 7, 2015

WP4 fully supports this suggestion.

In addition to the above options provided in the public comments, WP4 would like to offer the following options to the CCWG, which resulted from our discussion and consideration of the comments.

- 1. 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

- 2. 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.

- 3. WP4 reached consensus on proposing the following drafts to be considered by the CCWG as options to be added to the bylaws:*

- 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.*

To reach consensus within the group on the inclusion of the reference to the specific instruments in the Bylaw language a poll was 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 members²² responding to the poll expressed in the poll that no reference to a specific document should be included in the suggested bylaw text.

11 out of 23 WP4 members responding to the poll expressed in the poll that if there was a document to be included as reference this should be the UDHR.

13 out of 23 WP4 members responding to the poll expressed in the poll that if it wasn't the UDHR the document to be referred to, several other documents should be included as reference.²³

²² WP4 has 46 mailing list members, not including observers.

²³ Documents suggested were Ruggie, ICCPR, ICESCR and UN Guiding Principles on Business and Human Rights