

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:

1. 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.
2. One comment stated that it “would not oppose” inclusion of human rights language.
3. One comment did not “in principle oppose” Human Rights language but stated that this work should be part of WS2.
4. 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.
5. Two other comments did not express either support or opposition for the inclusion of human rights language in the Bylaws.
6. 1 commenter stated that it “would not actively oppose” the inclusion of human rights language in the Bylaws.
7. 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:

1. 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.*”
2. 3 comments 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.*”
3. 10 comments expressly addressed these options, and either opposed or did not support either option.
4. 3 comments did not address the proposed language.

Areas of Consensus

1. 10² 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.³

² Avri Doria (public comment endorsed by Joy Liddicoat and Timothy McGinnis), CDT, Cyberinvasion Ltd, Edward Morris, Intel, Internet Association, IPC, NCSG, Pranesh Prakash, USCIB

Areas Needing Refinement

Proposed Human Rights Language for the Bylaws. Since the Second Draft Proposal provided two different formulations of a potential Human Rights Commitment in the Bylaws, it is important for the CCWG to consider the public comments on these alternatives:

1. 7⁴ 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.
2. 3⁵ comments 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.*” This includes one commenter that did not support including Human Rights language in the Bylaws in WS1.
3. 10⁶ comments expressly addressed these options, and either opposed or did not support either option. (2 of these commenters supported inclusion of Human Rights language in the Bylaws in WS1 and 1 did not express support or opposition.)
4. 3 comments did not address the language options.
5. One commenter who supported option two and two commenters who supported option 1 also suggested alternative formulations 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.*⁷
 - *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

Other Issues Requiring Refinement. In addition to the Bylaws language, several comments raised issues that require further refinement and detail:

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⁴ Avri Doria, CDT, IPC, NCSG (but with a greater preference for a variation on option 2), Pranesh Prakash, RySG, USCIB

⁵ Edward Morris, Cyberinvasion Ltd., The Heritage Foundation

⁶ BC, COA, Government of Australia, Government of New Zealand, i2Coalition, ICANN, Intel, Internet Association, LINX, MPAA.

⁷ Avri Doria

⁸ Edward Morris, NCSG

1. Eight⁹ out of 23 comments cautioned that a commitment to human rights should not broaden ICANN's remit, scope of activity or mission.
2. Two¹⁰ 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, one¹¹ comment expressly stated that Article 4 did not provide such a requirement and one¹² comment stated that Article 4 would need to be amended to specifically mention human rights.)
3. Where it comes to referral to specific documents, there was most support for a mention of the Universal Declaration of Human Rights (6 out of 23).¹³ Three of these commenters suggested reference to other documents in addition to the UDHR.¹⁴ Some of these were suggestions that a reference to the UDHR be added to the text, while others were suggestions that the UDHR be cited in the underlying rationale and explanation for the Bylaw.
4. An equal number of commenters (6) also stated out that the CCWG must rely only on verbatim text or already agreed language from existing human rights instruments.¹⁵ One of these comments cited the consensus reached in the Netmundial statement as a basis for using "already agreed language within the United Nation System": "Human Rights are universal as reflected in the Universal Declaration of Human Rights and that should underpin Internet governance principles. 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."¹⁶
5. Two commenters specifically opposed reliance on the UN Guiding Principles on Business and Human Rights (the "Ruggie Principles").¹⁷

Areas of Divergence

8 out of 23 comments that addressed this point opposed inclusion of human rights language in the Bylaws as part of WS1:

1. 5¹⁸ out of 23 comments did not support the inclusion of human rights language in the Bylaws.
2. In addition, 2 comments stated that this issue should be deferred to WS2.¹⁹ Of these two commenters, one stated "We do not in principle oppose the inclusion of a reference

⁹ i2 Coalition, ICANN Board, Intel, Internet Association, LINX, RySG, The Heritage Foundation

¹⁰ Edward Morris, MPAA

¹¹ Avri Doria

¹² CDT

¹³ Business Constituency, Afnic, Internet Association, IPC, MPAA, USCIB

¹⁴ Afnic, Internet Association, USCIB

¹⁵ Afnic,

¹⁶ Afnic

¹⁷ Business Constituency, MPAA

¹⁸ Business Constituency, COA, LINX, MPAA, Heritage Foundation

to human rights in ICANN's Bylaws.²⁰ The other stated that while "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."²¹

3. One comment stated that it was "premature."²²

One commenter stated that it "would not actively oppose" the inclusion of human rights language in the Bylaws, and also stated that "additional progress is required" and that "important operational detail must be available" to allow the community to decide whether or not to support changes such as this.²³

Finally, 3 comments did not express support, non-opposition or opposition for the inclusion of human rights language in the Bylaws.²⁴

Seven comments expressed concerns that the topic was not sufficiently developed by the CCWG at this time, with statements such as "the CCWG has stopped short of important operational detail"²⁵ and "here is not yet an agreed definition of ICANN's role in relation to human rights"²⁶ and that this is "premature"²⁷ since there is continued debate both in the CCWG and the wider ICANN community.²⁸ A subset of this group thought this should be done in WS2 (2 out of 6).

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

1. While 3²⁹ 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, 5 others³⁰ suggest broader wording to avoid human rights "cherry-picking."
2. One commenter stated that only states have direct human rights obligations.³¹
3. One commenter stated that a "broad commitment to human rights" will lead civil society to demand that ICANN take affirmative action to realize human rights commitments beyond

¹⁹ Government of Australia, Government of New Zealand.

²⁰ Government of Australia.

²¹ Government of New Zealand.

²² ICANN Board

²³ auDA

²⁴ Afric, i2Coalition, RySG

²⁵ auDA

²⁶ Government of Australia

²⁷ ICANN Board

²⁸ auDA, COA, Government of Australia, Government of New Zealand, ICANN Board, IPC, The Heritage Foundation

²⁹ Avri Doria, Edward Morris, NCSG

³⁰ Business Constituency, COA, IPC, MPAA, Pranesh Prakash

³¹ Internet Association.

ICANN's mission and scope of activities and beyond what many stakeholders would "likely anticipate or would consider reasonable."³²

Options for CCWG Consideration

Based on the public comments analysis, WP4 identified analysis some further areas for consideration and exploration:

1. Revisit Bylaws Language. 7 out of 23 comments supported the more general option (#2: "Within its mission and in its operations, ICANN will be committed to respect internationally recognized fundamental human rights.") while only 3 comments supported the more specific 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.") However, 10 comments expressly opposed or did not support either option. *It is worth noting that as many commenters were unsupportive of both formulations as supported both formulations. This relative lack of support for either formulation indicates that more work needs to be done to work on the Bylaws formulation. This may also reflect discomfort with the lack of specificity about the rationale and interpretation of the Bylaw, including concerns about application beyond ICANN's mission. A survey was conducted within WP4 regarding potential formulations; this survey is discussed below.*
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 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,*

³² The Heritage Foundation.

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

4. Clarify Limited Mission and Scope. Respond to concerns that adding human rights to bylaws language might create demands from civil society (and potentially others) for human rights enforcement outside of the ICANN's mission and scope of activities. Respond to comments that the bylaws language should refer to an obligation to "respect" human rights within the ICANN mission to avoid any demands to "enforce (protect)" human rights. *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. Collaboration. One commenter suggested collaboration in WS2 with the NCSG's Cross Community Working Party on ICANN's Corporate and Social Responsibility to Respect Human Rights. *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.*
6. WP4 Survey. *Within WP4, we conducted a survey on various alternatives for formulation of a Human Rights Bylaw. The survey results were as follows:*
 - *Question 1 - Should there be a reference to a specific document in the Bylaws text regarding human rights proposed by the CCWG (Yes or No)?*
 - *Yes: 5*
 - *No: 17*
 - *Undecided: 1*
 - *No preference: 2*
 - *Question 2 - If a document reference is included should it be the UDHR (yes or no)?*
 - *Yes: 13*
 - *No: 8*
 - *Not Applicable: 4*
 - *Question 3 - If not UDHR what other document or documents should be referred to (list)?*
 - *UDHR, ICCPR, ICESCR: 7*
 - *Ruggie Principles: 3*
 - *Opposed to Ruggie Principles: 1*
 - *Not Applicable: 8*
 - *None: 4*
 - *Don't Know: 1*

17 out of 25 WP4 members³³ (68%) responding to the 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 are forwarding several alternative formulations are being forwarded to the CCWG for further discussion:

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.*

³³ WP4 has 46 mailing list members, not including observers.