

Elaborating an ICANN Commitment to Human Rights

As a part of the 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 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 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'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. 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

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>.

three supported the more targeted language in option 1. The other 10 comments either opposed or did not support 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 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.

1. **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.*
2. **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, 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*

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.

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)

Based in part on the public comments, the CCWG WP4 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. During the process of drafting alternative formulations in WP4, 17 out of 25 WP4 members³ (68%) responded to a poll about the inclusion of the specific international instruments into the bylaw language stated that the Bylaws text should not contain a reference to a specific document, while only 5 members (20%) supported such a reference. 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, 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 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:

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

Comment [1]: The CCWG did not discuss these points in Dublin.

Comment [2]: so should these comments stay in the doc or are they duplicative of the information already outlined above?

Comment [3]: I think we need to point out to the CCWG that the CCWG did not consider how to analyze and interpret this level of support. Ultimately, this point needs to be replaced by a statement from the CCWG indicating the group's response. As for the “need for more detail,” hopefully we are dealing with that in this revision of the document, and can say so.

Comment [4]: While the poll was an interesting exercise it seems to me that it did not allow us to draw any real conclusions from it given the diversity of the 4 options presented to the CCWG - therefore I wonder about the utility of raising it.

Comment [5]: I am fine with deleting or trimming this section. Discussions of process are less important than discussions of the actual proposals. Forcing readers to wade through long discussions of process makes the report less readable and the actual proposals harder to see and understand.

Comment [6]: as above

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

A number of comments noted the ~~need for greater lack of~~ detail and development relating to the human rights bylaw. This issue was also discussed at various points in the CCWG. , The following ~~rationale and explanation of the Bylaw~~ has been ~~developed by WP4 with the aim in order to provide rationale and greater details concerning the need for and potential effects of a human rights bylaw, as well a greater understanding of the choice of particular bylaw language. follows.~~

Comment [7]: This is already stated above. May be we can use a bit more positive language here, like "need for elaboration" or something like this?

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."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.~~

Human rights obligations and the private sector

~~**Only states have the obligation to actively protect human rights. Nonetheless, if an organization can or may contribute to an adverse human rights impact, it can**~~

⁴ <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>

~~voluntarily decide should take the necessary steps to cease or prevent its contribution, and use its leverage to mitigate any remaining impact to the greatest extent possible. There are several ways of doing so.~~

Human rights and ICANN

In Article 4 of ICANN's Articles of Incorporations it is stated 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.

~~OWP4 recognises that only states have direct 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 organizations are is required to comply with all applicable laws, including those related to human rights. There is a broad agreement within the group that the Bylaw amendment is intended to reaffirm ICANN's existing obligation commitment to comply with applicable the international laws in its operations, which already exists as stated in the Article. 4, above of ICANN's Article of Incorporation. The bylaw amendment is not intended aimed to impose any duty on ICANN to enforce human rights, or any obligation on ICANN to take any particular actions in furtherance of the bylaw.~~

~~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 and develop a human rights policy and specific framework for such commitment.~~

~~[, the implementation of the bylaw aims to structure and clarify ICANN's commitment to respect human rights and develop specific frameworks for such commitment. In this regard, the bylaw is not intended to negatively change or "re-balance" how ICANN or any ICANN structure develops, implements or interprets any policy or advice, or how ICANN carries out its operations.] By way of example, the bylaw is not intended to change and should not have the effect of changing how intellectual property rights are considered, or how ICANN or contracted parties interpret or comply with ICANN contracts.~~

~~it is important to recognize that since ICANN is 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.~~

~~Human rights obligations and the private sector~~

Comment [8]: + 1 to this phrasing

Comment [9]: Suggest to remove - because this seems to imply that the work in WS2 will have no impact whatsoever, which would be odd, right?

Comment [10]: I agree. We have this in the suggestions for the WS2 consideration at the end of this document (esp. the last point for consideration) so it's really odd that first we make such statements and then at the end suggest to examine this issue in the WS2.

Comment [11]: agree

Comment [12]: Greg - is this really necessary? We have been pretty agnostic about calling out specific rights. I think your first sentence has it covered and we are developing specific examples and more detail as to scope and application, etc., in WS2.

Comment [13]: +1

~~Only states have the obligation to actively protect human rights. Nonetheless, where an organization, such as ICANN, determines that it is can or may contribute to an adverse human rights violation impact, it can voluntarily decide should to take the necessary steps to cease or prevent its contribution. Where appropriate, an organization can also choose, and to use its leverage over third parties to mitigate any remaining adverse human rights impact to the greatest 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. There are several ways of doing so.~~

Comment [14]: This is already stated in the paragraph just above.

Comment [15]: Sounds a bit more to the direction of enforcement. Can we make this more neutral? Just musing.

Avoiding the Expansion of Protects vs. Respect? Not expanding ICANN's Mission

~~The addition of a commitment to human rights in ICANN's bylaws should by no means lead to an expansion of ICANN mission or scope. Therefore WP4 believes that adding any the reference in the Bylaw to "protection" of human rights is would be 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, any type of external enforcement or regulatory activity would be is considered highly inappropriate by WP4. Any wording that might lead to demands to enforce human rights shall must be avoided. Similarly, the usage of the terms 'respect' in the proposed Bylaw does not imply any reference to a method or guideline on how ICANN should implement its commitment to respect human rights. Work Stream 2 will develop the Specific frameworks ICANN will use to for fulfilling this, commitment and for interpretation of the bylaw and to determine what, if anything, ICANN might choose to do to fulfill its commitment under the bylaw. shall be developed on a later stage in WS2. 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.~~

Comment [16]: I think an express statement in WS1 is needed so people don't try to use this language to vindicate HR claims in the meantime. How about: 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.

Comment [17]: I think this might work David

Comment [18]: David, thanks. Added to the text.

Comment [19]: I added David's suggestion here but may be someone can find a better place for this.

Human rights and fundamental rights

~~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 in several geographical areas, such as by the European Charter of Fundamental Rights, or the Canadian Charter of Rights and Freedoms. Or 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.” To ensure that there is no misunderstanding about what the rights that are mentioned entail, WP4 recommends to use the terms human rights.

Comment [20]: I don't think we need this paragraph.

Comment [21]: Greg, I wasn't sure either, but then I thought that it might be useful because we deleted the word "fundamental" from the draft language proposed by CCWG in two options.

Mentioning Specific Human Rights

WP4 considers adding any reference to specific rights (such as singling out freedom of expression) into the bylaws text as inappropriate will not be appropriate; one cannot selectively mention, emphasize or apply human rights because they are universal, indivisible, interdependent and interrelated.

[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?

Road to explanation and implementation – Workstream 1 and Workstream 2

WP4 insists on the inclusion of a high level statement, which provides for ICANN's commitment to respect human rights, to be included in ICANN's bylaws which states ICANN's commitment to human rights. This should be part of Workstream 1. The bylaw will reflect ICANN's commitment to carry its operations within its mission in accordance with live up to international human rights standards and international human rights law.

WP4 also recognizes that such a commitment is not sufficient. It and demands an human rights policy as well as a framework for interpretation of the bylaw to ensure that this bylaw will not expand ICANN's scope or mission or negatively impacts ICANN's operations.

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.

Summary and Recommendations

Working party 4 of tThe CCWG recommends the following addition to the ICANN bylaws:

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

Further work remains to be done as part of WS2 to specify ICANN's human rights policy and develop a framework of interpretation for this Bylaw and to consider the process for ICANN to consider any actions it could or should take to implement the Bylaw. In order to ensure that the appropriate framework will be developed before the the Bylaw becomes effective., eWP4 proposes the an inclusion it is proposed of that a transitional Bylaw must be adopted is also included as part of WS1, to. This transitional Bylaw would guarantee that the Bylaw will only become effective after 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 the CCWG-Accountability or another-a cross-community working group chartered by one or more Supporting Organizations or Advisory Committees and tasked with that matter. Said group must be established in order to and develop an appropriate framework of interpretation no later than one year after Bylaw xx is adopted. Bylaw XX will not become effective until such framework is developed and implemented.

Issues proposed for consideration in WS2:

Comment [22]: which ones are not?

Comment [23]: In Dublin, we were tasked with "refining" the language of the proposed Bylaw. We need to do so.

Comment [24]: I am not completely against this, but I would like a guarantee that the framework will actually be developed and implemented.

Comment [25]: + 1 to Niels. We need to get this obligation in a transitional bylaw.

Comment [26]: Mere suggestions. Can be deleted. I actually think this shall be discussed on the call on Monday :) I thought that if we rephrase the following questions they might fit nicely to the WS2 considerations. Again, just a mere suggestion.

- 1) Development of a framework of interpretation for the bylaw.
- 2) What policies and ~~Policy/~~ frameworks, if any, does ICANN need to develop to-for fulfilling the its commitment to respect human rights.
- 3) Consistent with ICANN's processes and protocols, how should these ~~The~~ frameworks ~~should be~~ will be discussed and drafted to ensure ~~with- the broad multistakeholder involvement in the process of all interested parties.~~ ~~how to~~ What does this bylaw accomplish?
- 4) What effects, if any, will the adoption of this Bylaw have on ICANN as (i) an employer or (ii) a purchaser or contractor for goods and services?
- 5) What effect, if any, will this Bylaw have on ICANN's policy development processes, including Policy Development Processes for gTLD and ccTLD policy development?
- 6) What effect, if any, will this Bylaw have on ICANN's contracts with registries, registrars and any other "Contracted Parties"?
- 2) What effect, if any, will this Bylaw have on ICANN's processes for implementing policies adopted by ICANN, including those approved by the ICANN Board?
- 3) What effect, if any, will this Bylaw have on ICANN's consideration of GAC advice?
- 7) How, if at all, will this Bylaw ~~change~~ ~~w-change~~ how ICANN's operations are carried out?

Issues to address in WS2:

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.

Comment [27]: I don't like the word "change" because it might look like ICANN will go to the dogs if HR language will be implemented. May be we use "influence" or "have impact on ICANN operations"?

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Comment [28]: do we need to answer this questions? Some of them look very substantial to me. I think this substance should be addressed in the 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.