

Annex 06 – Recommendation #6: Reaffirming ICANN's Commitment to Respect Internationally Recognized Human Rights

3rd READING CONCLUSIONS :

- a. The CCWG considered comments received during the 3rd PCP which were overall in favour of including HR language with a few exceptions which included the ICANN Board.
- ~~b.~~ The CCWG engaged with the Board to specifically address their concerns.
- ~~b.~~ Through discussion and debate ~~were held~~ in three plenary calls. Additionally ~~Through these calls,~~ ICANN's legal team and CCWG's legal advisors privately discussed the concerns raised by ICANN legal in relation to the possibility of having a significant number of IRP challenges initiated on the grounds of Human Rights claims and the problems this could ~~become~~ create without having a Framework of Interpretation in place to properly implement the proposed bylaw provision.
- ~~c.~~ The CCWG developed compromise text based on a proposal by its legal advisors which it believed addressed these concerns. The ICANN Board maintains that this compromise text does not address their concerns while not providing any specific examples of their concerns regarding the alleged unintended consequences. The Group proposed a compromise text trying to address both the Group's and the Board's concerns and based on that proposed text a bylaw will be drafted by the lawyers. Nonetheless, the Board has maintained that their concerns have not been properly addressed with the proposed compromise text without providing examples of their concerns on the alleged unintended consequences they see as the reason to push this issue to WS2.

1. Summary

- The subject of including a commitment to Human Rights in the ICANN Bylaws has been extensively discussed by the CCWG-Accountability.
- The CCWG-Accountability sought legal advice on whether, upon the termination of the IANA Functions Contract between ICANN and the U.S. National Telecommunications and Information Administration (NTIA), ICANN's specific Human Rights obligations could be called into question. It was found that, upon termination of the Contract, there would be no significant impact on ICANN's Human Rights obligations. However, the CCWG-Accountability reasoned that a commitment to Human Rights **should be included** in ICANN's Bylaws in order to comply with the NTIA criteria to maintain the openness of the Internet.

- This proposed Draft Bylaw on Human Rights would reaffirm ICANN's existing obligations within its narrow scope and Mission, and would clarify ICANN's commitment to respecting Human Rights.
- Amendments to the proposed Draft Bylaw text since Draft Two aim to prevent Mission expansion or "Mission creep" by stating that ICANN's commitment to respect internationally recognized Human Rights is conducted "within its Mission and in its operations."
- The proposed Draft Bylaw does not impose any enforcement duty on ICANN, or any obligation on ICANN to take action in furtherance of the Bylaw.
- The proposed Draft Bylaw also clarifies that no IRP challenges can be made on the grounds of this Bylaw until the Framework of Interpretation on Human Rights (FOI-HR) is completed developed and approved as part of Work Stream 2 Activities. It further clarifies that acceptance of the FOI-HR will require the same process as for Work Stream 1 Recommendations (as agreed for all Work Stream 2 Recommendations).
- Additionally, the CCWG-Accountability has identified several work areas that need to be undertaken as part of Work Stream 2 in order to fully operationalize ICANN's commitment to Human Rights, including the development of a Framework of Interpretation.
- ~~To ensure that the work assigned to Work Stream 2 takes place, the Draft Bylaw text has been modified to combine the original proposed text and that of the originally proposed interim bylaw so that a single bylaw establishes both the commitment for ICANN to respect Human Rights and sets the scene to charter a group that will develop the Framework of Interpretation for its proper implementation as part of WS2. Until the Framework of Interpretation is developed, the proposed Draft Bylaw will not enter into force, hence minimizing the possibility of facing unintended consequences as raised by some commenters, including the ICANN Board of Directors.~~

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2. CCWG-Accountability Recommendations



- Include a Bylaw with the following intent in Work Stream 1 Recommendations:
 - "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. This provision 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. This Bylaw provision will not enter into force until a Framework of Interpretation ~~for Human Rights (FOI-HR) is developed by the CCWG-Accountability as a consensus recommendation in Work Stream 2 (including Chartering Organizations approval) and it is approved by the ICANN Board using the same process and criteria it has committed to use to consider the Work Stream 1 recommendations.~~ ~~is 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. ICANN shall support the establishment and work of such a Group to facilitate development of the Framework of Interpretation as promptly as possible..~~"

- ~~This proposed Draft Bylaw combines the previous proposal of adding a bylaw and an interim bylaw into a single proposed text that intends to address the concerns raised by some commenters, including the ICANN Board of Directors, on not generating unintended consequences by including bylaw language that could be subject to multiple interpretations without the proper Framework of Interpretation in place.~~
- **Note:** This proposed Draft Bylaw will be reviewed by both CCWG's lawyers and ICANN legal department and then submitted to the CCWG for approval before its submission to the Board for approval process.

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- Include the following in Work Stream 2 Activities:
 - 1 The CCWG-Accountability identified several work areas that it recommends should be undertaken as part of Work Stream 2 in order to fully operationalize ICANN's commitment to Human Rights:
 - Development of a Framework of Interpretation for the Human Rights Bylaw.
 - Consider which specific Human Rights conventions or other instruments should be used by ICANN in interpreting and implementing the Human Rights Bylaw.
 - Consider the policies and frameworks, if any, that ICANN needs to develop or enhance in order to fulfill its commitment to Human Rights.
 - Consistent with ICANN's existing processes and protocols, consider how these new frameworks should be discussed and drafted to ensure broad multistakeholder involvement in the process.
 - Consider what effect, if any, this Bylaw will have on ICANN's consideration of advice given by the Governmental Advisory Committee (GAC).
 - Consider how, if at all, this Bylaw will affect how ICANN's operations are carried out.
 - Consider how the interpretation and implementation of this Bylaw will interact with existing and future ICANN policies and procedures.

3. Detailed Explanation of Recommendations

- 2 As part of the discussion on the inclusion of a Human Rights Bylaw, the CCWG-Accountability requested analysis from its legal counsel about whether, upon the termination of the IANA Functions Contract between ICANN and the NTIA, ICANN's specific Human Rights obligations could be called into question. The key aspects are as follows:
- Only nation 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.
 - Upon termination of the Contract, there would be no significant impact on ICANN's Human Rights obligations.¹

3 However, the CCWG-Accountability reasoned that a commitment to Human Rights **should be included** in ICANN's Bylaws in order to comply with the NTIA criteria to maintain the openness of the Internet. These criteria include free expression and the free flow of information.

4 Further, the CCWG-Accountability emphasized that adding a commitment to Human Rights to the ICANN Bylaws should not lead to an expansion of ICANN's Mission or scope. While there was general agreement that ICANN should commit to respect Human Rights within the limited scope of its Mission, any type of external enforcement or regulatory activity would be wholly out of scope.

5 The CCWG-Accountability also disagreed with any attempt to single out any specific Human Rights (such as "freedom of expression") in the proposed Draft Bylaw text on the basis that Human Rights cannot be selectively mentioned, emphasized, or applied since they **are universal, indivisible, interdependent, and interrelated**.

6 The CCWG considered comments received during the 3rd PCP which were overall in favour of including HR language with a few exceptions which included the ICANN Board.

7 The CCWG engaged with the Board to specifically address their concerns thorough discussion and debate in three plenary calls. Additionally, ICANN's legal team and CCWG's legal advisors privately discussed the concerns raised by ICANN legal in relation to the possibility of having a significant number of IRP challenges initiated on the grounds of Human Rights claims and the problems this could create without having a Framework of Interpretation in place to properly implement the proposed bylaw provision.

—The CCWG developed compromise text based on a proposal by its legal advisors which it believed addressed these concerns. The ICANN Board maintains that this compromise text does not address their concerns while not providing any specific examples of their concerns regarding the alleged unintended consequences. As a result from the third public comment period, the CCWG received a vast majority of comments supporting the proposed inclusion of a bylaw to commit ICANN on respecting Human Rights. However some commenters, including the ICANN Board of Directors raised concerns on the unintended consequences that including a bylaw on the matter could bring in lack of a Framework of Interpretation to properly implement the proposed bylaw.

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¹ See the 29 July 2015 memorandum here: https://community.icann.org/download/attachments/53783718/Memo_%20%20%20ICANN%20%20Human%20Rights%20Obligations.pdf?version=1&modificationDate=1438504619000&api=v2. All other legal documents provided are available at <https://community.icann.org/x/OiQnAw>.

This proposed Draft Bylaw on Human Rights would reaffirm ICANN's existing obligations within its narrow scope and Mission, and would clarify ICANN's commitment to respecting Human Rights.

~~In trying to reconcile the different positions and take into account the comments received, the CCWG discussed the issue through three plenary meetings in which the different alternatives proposed were analyzed.~~

~~7 Through these calls, ICANN's legal team and CCWG's legal advisors discussed the concern raised by ICANN legal in relation to the possibility of having a number of IRPs initiated on the grounds of Human Rights claims and the problem this could become without having a Framework of Interpretation in place to properly implement the proposed bylaw provision.~~

~~8 After considering lawyers input the Group proposed a compromise text trying to address both the Group's and the Board's concerns and based on that proposed text a bylaw will be drafted by the lawyers. Nonetheless, the Board has maintained that their concerns have not been properly addressed with the proposed compromise text without providing examples of their concerns on the alleged unintended consequences they see as the reason to push this issue to WS2.~~

This proposed Draft Bylaw on Human Rights would reaffirm ICANN's existing obligations within its narrow scope and Mission, and would clarify ICANN's commitment to respecting Human Rights.

~~9 Amendments to the proposed Draft Bylaw text since Draft Two aim to prevent Mission expansion or "Mission creep" by stating that ICANN's commitment to respect internationally recognized Human Rights is conducted "within its Mission and in its operations."~~

~~10 The proposed Draft Bylaw does not impose any enforcement duty on ICANN, or any obligation on ICANN to take action in furtherance of the Bylaw.~~

~~11 The proposed Draft Bylaw also clarifies that no IRP challenges can be made on the grounds of this Bylaw until ~~the~~ Framework of Interpretation on Human Rights (FOI-HR) is ~~completed~~ developed and approved as part of Work Stream 2 Activities. It further clarifies that acceptance of the FOI-HR will require the same process as for Work Stream 1 Recommendations (as agreed for all Work Stream 2 Recommendations).~~

~~12 Additionally, the CCWG-Accountability has identified several work areas that need to be undertaken as part of Work Stream 2 in order to fully operationalize ICANN's commitment to Human Rights, including the development of a Framework of Interpretation.~~

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213 Draft Bylaw on Human Rights

~~314 Responding to public comments received on the ThirdSecond Draft Proposal that expressed concerns about potentially expanding ICANN's Mission and the risk of appearing to prioritize some Human Rights over others, the CCWG-Accountability presents the following proposed Draft Bylaw for consideration:~~

~~415 "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. This provision 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. This Bylaw provision will not enter into force until a Framework of Interpretation for Human Rights (FOI-HR) is developed by the CCWG-Accountability as a consensus recommendation in Work Stream 2 (including Chartering~~

~~Organizations approval) and it is approved by the ICANN Board using the same process and~~

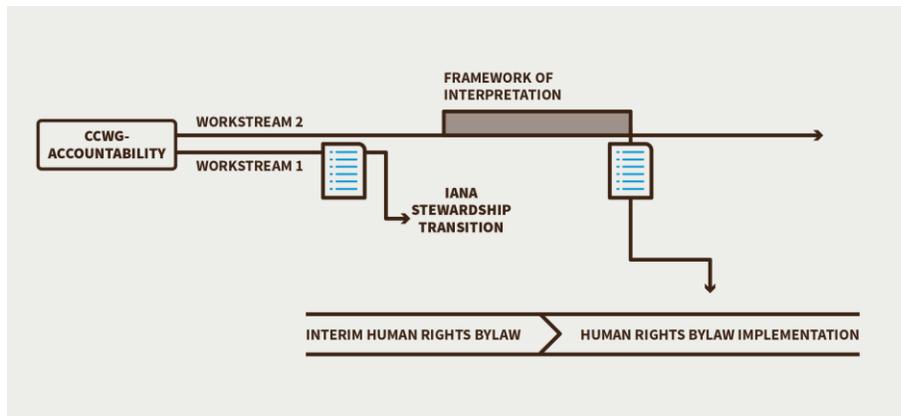
Commented [BT5]: This would address the concerns by AG and TJB regarding the previous wording. I have removed the last sentence as I think it is now properly addressed as part of the approve Recommendation 12 on WS2.

516 **Operationalizing the Commitment to Human Rights**

17 ~~To ensure that these Work Stream 2 activities are implemented, the CCWG-Accountability requires that a Bylaw be adopted as part of Work Stream 1. The Bylaw proposed for adoption as part of Work Stream 1 will not enter into force until the FOI-HR is approved.~~

618 The CCWG-Accountability has identified several activities that it recommends be undertaken as part of Work Stream 2 that will fully operationalize ICANN’s commitment to Human Rights. Work Stream 2 focuses on accountability topics for which a timeline for developing solutions and full implementation may extend beyond the IANA Stewardship Transition.

719 ~~To ensure that these Work Stream 2 activities are implemented, the CCWG-Accountability requires that a Bylaw be adopted as part of Work Stream 1.~~



8 ~~The new Bylaw will state that the proposed Draft Human Rights Bylaw is to be implemented in accordance with the Framework of Interpretation, which will be developed as part of Work Stream 2. The Bylaw proposed for adoption as part of Work Stream 1 will not enter into force until the Framework of Interpretation is developed and approved by the community.~~

Commented [w6]: To be revised if need be according to discussion point

9 ~~The proposed Draft Bylaw states that the group that will work on developing the Framework of Interpretation must be established rapidly, in order to develop an appropriate framework of interpretation as promptly as possible. This group should be chartered to work according to process procedures in Work Stream 1, by which the proposed draft is prepared, and then published.~~

Commented [BT7]: Should probably expand to cover process as per AG comment.

4020 The Human Rights-related activities to be addressed in Work Stream 2 are:

- Developing a Framework of Interpretation (FOI-HR) for the Bylaw.

- Considering which specific Human Rights conventions or other instruments should be used by ICANN in interpreting and implementing the Bylaw.
- Considering the policies and frameworks, if any, that ICANN needs to develop or enhance in order to fulfill its commitment to Human Rights.
- Considering how these new frameworks should be discussed and drafted to ensure broad multistakeholder involvement in the process, consistent with ICANN's existing processes and protocols.
- Considering what effect, if any, this Bylaw will have on ICANN's consideration of advice given by the GAC.
- Considering how, if at all, this Bylaw will affect how ICANN's operations are carried out

Once a Framework of Interpretation for Human Rights (FOI-HR) is developed by the CCWG-Accountability as a consensus recommendation in Work Stream 2 (including Chartering Organizations approval) and it is approved by the ICANN Board using the same process and criteria it has committed to use to consider the Work Stream 1 recommendations.

- ~~14— In order to ensure that the Human Rights-related tasks that are allocated to Work Stream 2 take place, the CCWG-Accountability has amended its proposed Draft Bylaw, as per the third proposal document, to combine the originally proposed text of the Draft Bylaw and that of the originally proposed interim bylaw so that a single bylaw provision now establishes both the commitment for ICANN to respect Human Rights and sets the scene to charter a group that will develop the Framework of Interpretation for its proper implementation as part of WS2. Until the Framework of Interpretation is developed, the proposed Draft Bylaw will not enter into force, hence minimizing the possibility of facing unintended consequences as raised by some commenters, including the ICANN Board of Directors.~~
- ~~12— This Draft Bylaw proposed for adoption as part of Work Stream 1 will not enter into force until the Framework of Interpretation is developed and approved by the community.~~
- ~~13— Finally, the CCWG-Accountability 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.~~

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4. Changes from the “~~Third~~Second Draft Proposal on Work Stream 1 Recommendations”

- ~~14— In the Second Draft Proposal, the CCWG-Accountability proposed two possible ways that a reference to Human Rights could be added into ICANN's Bylaws, which were rejected:~~
- ~~21— The CCWG considered comments received during the 3rd PCP which were overall in favour of including HR language with a few exceptions which included the ICANN Board.~~
- ~~22— The CCWG engaged with the Board to specifically address their concerns thorough discussion and debate in three plenary calls. Additionally, ICANN's legal team and CCWG's legal advisors privately discussed the concerns raised by ICANN legal in relation to the possibility of having a significant number of IRP challenges initiated on the grounds of~~

Human Rights claims and the problems this could create without having a Framework of Interpretation in place to properly implement the proposed bylaw provision.

- The CCWG developed compromise text based on a proposal by its legal advisors which it believed addressed these concerns. The ICANN Board maintains that this compromise text does not address their concerns while not providing any specific examples of their concerns regarding the alleged unintended consequences. 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.
- Within its Mission and in its operations, ICANN will be committed to respect internationally recognized fundamental Human Rights.

15— In the third draft these options have been replaced with the following bylaws:

- "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."
- "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."
- This interim Bylaw will exist temporarily in the ICANN Bylaws up until a Framework of Interpretation for the actual Human Rights Bylaw is published.

16— As a result from the third public comment period, the CCWG received a vast majority of comments supporting the proposed inclusion of a bylaw to commit ICANN on respecting Human Rights. However some commenters, including the ICANN Board of Directors raised concerns on the unintended consequences that including a bylaw on the matter could bring in lack of a Framework of Interpretation to properly implement the proposed bylaw.

17— In trying to reconcile the different positions and take into account the comments received, the CCWG discussed the issue through three plenary meetings in which the different alternatives proposed were analyzed.

18— Through these calls, ICANN's legal team and CCWG's legal advisors discussed the concern raised by ICANN legal in relation to the possibility of having a number of IRPs initiated on the grounds of Human Rights claims and the problem this could become without having a Framework of Interpretation in place to properly implement the proposed bylaw provision.

19— After considering lawyers input the Group proposed a compromise text trying to address both the Group's and the Board's concerns and based on that proposed text a bylaw will be drafted by the lawyers. Nonetheless, the Board has maintained that their concerns have not been properly addressed with the proposed compromise text without providing examples of their concerns on the alleged unintended consequences they see as the reason to push this issue to WS2.

[2023](#) ~~File COA/C challenge to the Board's Table of Forward-looking Developments and DNS-related changes to DNS~~

5. Stress Tests Related to this Recommendation

[2424](#) N/A

6. How does this meet the CWG-Stewardship Requirements?

[2225](#) N/A

7. How does this address NTIA Criteria?

[2326](#) **Support and enhance the multistakeholder model**

- N/A
-

[2427](#) **Maintain the security, stability, and resiliency of the Internet DNS.**

- N/A

[2528](#) **Meet the needs and expectation of the global customers and partners of the IANA services.**

- The global customers and partners of the IANA services have expectations with respect to Human Rights. The implementation of these recommendations will partially address these expectations.
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[2629](#) **Maintain the openness of the Internet.**

- N/A
-

[2730](#) **NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution.**

- N/A
-