

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

1st READING CONCLUSIONS :

1. Agreement to rely on target dates instead of hard deadlines, in line with general approach agreed for WS2
2. Discussed comments (including Icann Board, RrSG...) requesting that the inclusion of human rights language into the bylaws be delayed until the proposed framework of interpretation was completed or even only be considered in Work Stream 2.
 - a. Independent lawyer input has been provided and concludes : *While the addition of the proposed human rights bylaw provision should not increase the exposure of ICANN to legal liability, we recognize that special interest groups and individuals might seek to bring non-meritorious claims, but the risk of meritless claims is already a risk that ICANN faces.*
 - b. Board clarified that concern included risk that IRP would interpret the Bylaw language and create "case law policy" while the Fol is finalized.
 - c. Consider Lawyer input suggestion as follows :
 - i. *"expressly limiting the jurisdiction of any internal dispute resolution systems within ICANN (such as the IRP) to preclude claims of human rights violations that are not grounded in a specific violation of an applicable law"*
3. Members and Board are invited to consider whether option c) could be an acceptable way forward
 - a. Confirm recommendation bylaw language as part of WS1, despite concerns expressed
 - b. Defer bylaw language adoption to WS2, when Fol is finalized
 - c. Adopt adjusted bylaw language as part of WS1 to clarify that it can only be enforced or used in an IRP once the Fol is approved (Such as : "This articles becomes effective 30 days after approval of the Fol...").

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Comment [w1]: Certified request : *In their comment to the 3rd CCWG draft report the ICANN Board has raised concerns that the proposed inclusion of language in the bylaws with respect to human rights might lead to an increased risk of ICANN being exposed to legal claims or even law suits. We would appreciate if you could provide us with a brief assessment whether the inclusion of these bylaws as proposed in the 3rd draft report would increase the risk of ICANN being exposed to legal claims or even law suits vis a vis the current situation (taking into account the existing obligations under article 4 of ICANNs articles of incorporation), and if so, how such risk could be mitigated.*

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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.
- 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 CCWG-Accountability proposes that an Interim Bylaw that outlines the specific areas to be addressed is added to the current Bylaws. This Interim Bylaw will exist temporarily in the ICANN Bylaws up until a Framework of Interpretation for the actual Human Rights Bylaw is published.

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. 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.”**

Comment [w2]: Some commenters (including Icaann Board, RrSG...) requested that the inclusion of human rights language into the bylaws be delayed until the proposed framework of interpretation was completed or even only be considered in Work Stream 2

- In order to ensure that the Human Rights-related tasks that are allocated to Work Stream 2 take place, the CCWG-Accountability proposes a Draft Interim Bylaw, which must be adopted as part of Work Stream 1. The Interim Bylaw would convey the following:

“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.” (This Interim Bylaw will exist temporarily in the ICANN Bylaws up until a Framework of Interpretation for the actual Human Rights Bylaw is published.)

Comment [w3]: Agreed in 1st reading to avoid hard deadlines

Deleted: *but in no event later than one year after Bylaw xx is adopted*

- 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

Comment [HJ4]: Have link uploaded to icann.org

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 Draft Bylaw on Human Rights

7 Responding to public comments received on the Second 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:

8 "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

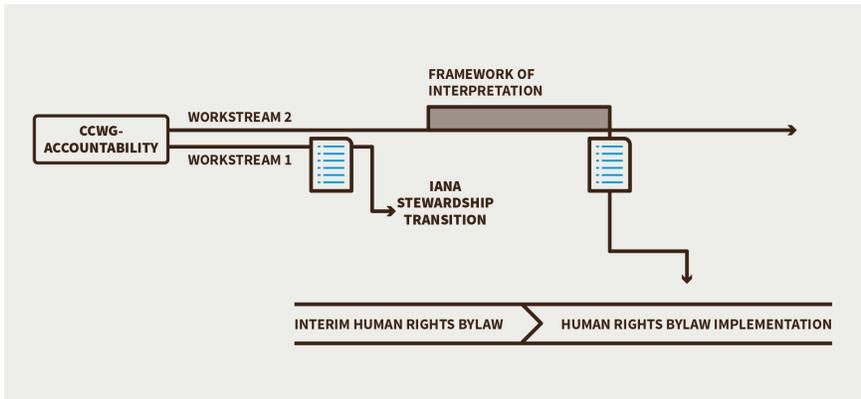
¹ See the 29 July 2015 memorandum here:

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>.

Human Rights by ICANN.”

9 **Operationalizing the Commitment to Human Rights**

- 10 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.
- 11 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.



- 12 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 be used for a limited period of time only, up until the Framework of Interpretation is published.
- 13 The CCWG-Accountability states that the group that will work on developing the Framework of Interpretation must be established as soon as possible so that the Framework can be published no later than one year after the Bylaw is adopted.
- 14 The Human Rights-related activities to be addressed in Work Stream 2 are:
- Developing a Framework of Interpretation 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.

Comment [w5]: To be revised if need be according to discussion point

- 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
- 15 In order to ensure that the Human Rights-related tasks that are allocated to Work Stream 2 take place, the CCWG-Accountability proposes a Draft Interim Bylaw, which must be adopted as part of Work Stream 1. The interim Bylaw would convey the following:

"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."

Deleted: , but in no event later than one year after Bylaw xx is adopted

- 16 This interim Bylaw will exist temporarily in the ICANN Bylaws up until a Framework of Interpretation for the actual Human Rights Bylaw is published.
- 17 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.

4. Changes from the "Second Draft Proposal on Work Stream 1 Recommendations"

- 18 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:
- 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.
- 19 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.
- 20 Finally, the CCWG-Accountability recognizes that a mere commitment in the Bylaws is not sufficient. The development of a Framework of Interpretation is required to ensure that this Bylaw does not expand ICANN's scope or Mission or have a negative impact on ICANN's operations.

5. Stress Tests Related to this Recommendation

21 N/A

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

22 N/A

7. How does this address NTIA Criteria?

23 **Support and enhance the multistakeholder model**

- N/A

24 **Maintain the security, stability, and resiliency of the Internet DNS.**

- N/A

25 **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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26 **Maintain the openness of the Internet.**

- N/A
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27 **NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution.**

- N/A
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