

Prelude:

This is the working document of CCWG WS2 Design Team for ICANN Human Rights Bylaw Frame of Interpretation. **Please use 'suggest' mode at all times**

Relevant documents:

[Design Team Wiki](#)

[Background paper](#)

[Concerns out potential negative or unintended impacts of HR bylaw](#)

[Analysis of Ruggie Principles for ICANN](#)

[Summary of what was agreed & discussed during WS1 on Human Rights](#)

[CCWG report](#)

[Annex 6](#)

[Annex 12](#)

Text of the new Bylaws Core Value as adopted in May:

(viii) Subject to the limitations set forth in Section 27.2, within the scope of its Mission and other Core Values, respecting internationally recognized human rights as required by applicable law. This Core Value does not create, and shall not be interpreted to create, any obligation on ICANN outside its Mission, or beyond obligations found in applicable law. This Core Value does not obligate ICANN to enforce its human rights obligations, or the human rights obligations of other parties, against other parties.

Text of Section 27.2. as adopted:

"Section 27.2. HUMAN RIGHTS (a) The Core Value set forth in Section 1.2(b)(viii) shall have no force or effect unless and until a framework of interpretation for human rights ("FOI-HR") is (i) approved for submission to the Board by the CCWG-Accountability as a consensus recommendation in Work Stream 2, with the CCWG Chartering Organizations having the role described in the CCWG-Accountability Charter, and (ii) approved by the Board, in each case, using the same process and criteria as for Work Stream 1 Recommendations. (b) No person or entity shall be entitled to invoke the reconsideration process provided in Section 4.2, or the independent review process provided in Section 4.3, based solely on the inclusion of the Core Value set forth in Section 1.2(b)(viii) (i) until after the FOI-HR contemplated by Section 27.2(a) is in place or (ii) for actions of ICANN or the Board that occurred prior to the effectiveness of the FOI-HR.

ICANN Bylaw Language	<u>Proposed</u> Commentary	Working/discussion	Agreed text
'within the scope of its Mission'	<p>ICANN's Mission is focused on defining ICANN's technical functions.</p> <p>The bylaws, including the human rights provision, will be interpreted within the scope of <u>ICANN's</u> Mission.</p>	<p><u>Jorge:</u> → Green</p> <p>The Mission is the core boundary for any HR commitment. No obligation may arise out of the HR core value that is beyond the <u>narrow technical Mission</u> defined in the Bylaws.</p> <p>This idea is stressed when the Bylaws states: "This Core Value does not create ... <u>any obligation on ICANN</u> ... outside its Mission".</p> <p><u>Matthew:</u> <u>Quote the exact mission here we don't need to do more than that for the Fol:</u> <u>"The mission of the Internet Corporation for Assigned Names and Numbers ("ICANN") is to ensure the stable and secure operation of the Internet's unique identifier systems as described in this Section 1.1(a)(the "Mission")."</u> <u>Etc.</u></p>	

- Commented [1]:** replace - incorrect
- Commented [2]:** I think we are not re-litigating Niels text, are we?
- Commented [3]:** well we can't work from something that is not factually or textually correct
- Commented [4]:** Matthew: I'm fine with quoting the exact wording of the Mission. I just wanted to point out that here (in the small group) we intended to work on columns 3 and 4, as I understood Greg and Tatiana.
- Commented [5]:** If we are going to work on column 4, we need to work on what might be acceptable from column 2. So, nothing from Column 2 should be considered "agreed text."
- Commented [6]:** The highlighted text should not be moved to the Agreed text.
- Commented [7]:** Hi Jorge - I am confused - it seems that you have reintroduced the same Ruggie discussion with more elaboration. We have been through the Ruggie principles - I thought our role was to look at other relevant factors as well.
- Commented [8]:** Well - there was a long discussion with Greg. I do not talk directly about the UNGP, but I use what I see useful from them to give interpretation to the Bylaws elements, saying what could be considered as covered, what not, what should go to implementation etc. I feel that this is only fair and a sensible way to approach the text. I could also use the UNGP texts f...
- Commented [9]:** My understanding of our work is the same as Matthew's.
- Commented [10]:** +1 from me, my understanding is the same as Matt's, that makes it three people being on ...
- Commented [11]:** This term is not used in the Mission. We should quote the Mission rather than characteriz...
- Commented [12]:** This quote doesn't really make sense if these words are left out.
- Commented [13]:** I feel it is useful to stress that the HR commitment is bound by the Mission. It clarifies. ...

		<p><u>Agree that for now we can just quote the mission and see further whether we require any further interpretation in connection with the bylaw (maybe when it comes to drawing the lines what can/can not be done)</u></p> <p><u>I agree that we should just quote the Mission here as follows:</u></p> <ul style="list-style-type: none"><u>(a) The mission of the Internet Corporation for Assigned Names and Numbers (“ICANN”) is to ensure the stable and secure operation of the Internet’s unique identifier systems as described in this Section 1.1(a) (the “Mission”). Specifically, ICANN:</u> <p><u>(i) Coordinates the allocation and assignment of names in the root zone of the Domain Name System (“DNS”) and coordinates the development and implementation of policies concerning the registration of second-level domain names in generic top-level domains (“gTLDs”). In this role, ICANN’s scope is to coordinate the development and implementation of policies:</u></p>	
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		<ul style="list-style-type: none"> • <u>For which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, security and/or stability of the DNS including, with respect to gTLD registrars and registries, policies in the areas described in Annex G-1 and Annex G-2; and</u> • <u>That are developed through a bottom-up consensus-based multistakeholder process and designed to ensure the stable and secure operation of the Internet's unique names systems.</u> <p><u>The issues, policies, procedures, and principles addressed in Annex G-1 and Annex G-2 with respect to gTLD registrars and registries shall be deemed to be within ICANN's Mission.</u></p> <p><u>(ii) Facilitates the coordination of the operation and evolution of the DNS root name server system.</u></p> <p><u>(iii) Coordinates the allocation and assignment at the top-most level of Internet Protocol numbers and Autonomous System numbers. In service</u></p>	
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		<p><u>of its Mission, ICANN (A) provides registration services and open access for global number registries as requested by the Internet Engineering Task Force (“IETF”) and the Regional Internet Registries (“RIRs”) and (B) facilitates the development of global number registry policies by the affected community and other related tasks as agreed with the RIRs.</u></p> <p><u>(iv) Collaborates with other bodies as appropriate to provide registries needed for the functioning of the Internet as specified by Internet protocol standards development organizations. In service of its Mission, ICANN’s scope is to provide registration services and open access for registries in the public domain requested by Internet protocol development organizations.</u></p> <p><u>(b) ICANN shall not act outside its Mission.</u></p> <p><u>(c) ICANN shall not regulate (i.e., impose rules and restrictions on) services that use the Internet’s unique identifiers or the content that such services carry or provide, outside the express scope of Section 1.1(a). For the avoidance of</u></p>	
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		<p><u>doubt, ICANN does not hold any governmentally authorized regulatory authority.</u></p> <p><u>(d) For the avoidance of doubt and notwithstanding the foregoing:</u></p> <p><u>(i) the foregoing prohibitions are not intended to limit ICANN's authority or ability to adopt or implement policies or procedures that take into account the use of domain names as natural-language identifiers;</u></p> <p><u>(ii) Notwithstanding any provision of the Bylaws to the contrary, the terms and conditions of the documents listed in subsections (A) through (C) below, and ICANN's performance of its obligations or duties thereunder, may not be challenged by any party in any proceeding against, or process involving, ICANN (including a request for reconsideration or an independent review process pursuant to Article 4) on the basis that such terms and conditions conflict with, or are in violation of, ICANN's Mission or otherwise exceed the scope of ICANN's authority or powers pursuant to these Bylaws ("Bylaws") or ICANN's Articles of</u></p>	
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		<p><u>Incorporation (“Articles of Incorporation”):</u></p> <p><u>(A)</u></p> <p><u>(1) all registry agreements and registrar accreditation agreements between ICANN and registry operators or registrars in force on 1 October 2016 [1], including, in each case, any terms or conditions therein that are not contained in the underlying form of registry agreement and registrar accreditation agreement;</u></p> <p><u>(2) any registry agreement or registrar accreditation agreement not encompassed by (1) above to the extent its terms do not vary materially from the form of registry agreement or registrar accreditation agreement that existed on 1 October 2016;</u></p> <p><u>(B) any renewals of agreements described in subsection (A) pursuant to their terms and conditions for renewal; and</u></p> <p><u>(C) ICANN’s Five-Year Strategic Plan and Five-Year Operating Plan existing on 10 March 2016.</u></p> <p><u>(iii) Section 1.1(d)(ii) does not limit the</u></p>	
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		<p><u>ability of a party to any agreement described therein to challenge any provision of such agreement on any other basis, including the other party's interpretation of the provision, in any proceeding or process involving ICANN.</u></p> <p><u>(iv) ICANN shall have the ability to negotiate, enter into and enforce agreements, including public interest commitments, with any party in service of its Mission.</u></p>	
'within the scope of other Core Values'	<p>The Commitments and Core Values section of the bylaws (Section 1.2 (a) and (b), respectively) has several notable references that echo important human rights concepts:</p> <ul style="list-style-type: none"> • <u>Section 1.2 (a)(iv)(A) commits ICANN to act for public benefit. This commitment could also be understood implicitly to mean that ICANN should not act to harm the public, such as harming people's rights.</u> 	<p><u>It is important to stress that the Human Rights Bylaw is a Core Value and not a Commitment. "The Commitments reflect ICANN's fundamental compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN's activities." (Bylaws, Section 1.2(c))</u></p> <p><u>In contrast, Core Values are not intended to apply consistently and comprehensively to ICANN's activities. Rather, the Core Values are subject to the following interpretive rules in the Bylaws:</u></p> <p><u>As a Core Value, the Human Rights</u></p>	

Commented [17]: Just mention and quote the balancing test without further interpretation of it.

Commented [18]: The point of a Framework of Interpretation is to assist in the interpretation of the Core Value. Merely quoting the text is insufficient.

Commented [19]: the balancing test itself is not part of the HR Core Value. Therefore it is not part of the Fol. A different thing would be to obtain a general interpretation of the balancing test from ICANN Legal - but it would be a mere reference.

Commented [14]: It's outside our scope to start interpreting the Commitments generally or the concept of the "public benefit" specifically. This should be deleted.

	<ul style="list-style-type: none"> Section 1.2(b)(ii) refers to informed participation, and accountability and transparency, and (v) has a reference to non-discriminatory treatment. All of these concepts are part of human rights principles. This subsection also mentions 'cultural diversity' while this concept is not directly referred to in the International Covenant on Economic, Social and Cultural Rights, it is consistent with the spirit and intent of the Covenant. <p>These references in the Commitment and Core Values complement the Core Value of respect for human rights and collectively create an enabling environment for the operationalization of the human rights provision in the bylaws.</p>	<p>bylaw must be applied using the reference to other Core Values also implies a reference to the so-called "balancing test" of Core Values established in the Bylaws:</p> <p><i>"[...] The specific way in which Core Values are applied, individually and collectively, to any given situation may depend on many factors that cannot be fully anticipated or enumerated. Situations may arise in which perfect fidelity to all Core Values simultaneously is not possible. Accordingly, in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN's Mission." Bylaws, Section 1.2(c).</i></p> <p>The Human Rights bylaw must be balanced against other potentially competing Core Values. Furthermore, this interpretive rule recognizes that there must be flexibility in applying the Core Values, based on "may factors" that occur in "any given situation." This is also</p>	
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Commented [22]: I think we can identify the different views with colours and with words. No need for additional columns in my view. But to strike through is not very helpful, especially if third parties want to understand the text. Bracketing is a usual technique (i dentifying who is bracketing - which can be done with a comment of with the initials)

Commented [15]: There's no reason to try and interpret other Core Values in an attempt to find some Human Rights aspects in those Core Values. Specifically, I think this is a misreading of the non-discrimination Core Value, and I think it's a stretch to equate informed participation and accountability and transparency in the context of ICANN with human rights, important though they are. When the Bylaw is applied, if it is consistent with other Core Values then it can be applied without any particular balancing; if it is in conflict with other Core Values, it will need to be balanced against the otehr Core Values.

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		<p><u>made clear in the Core Values section of the Bylaws, which states that the Core Values are intended to “guide” ICANN in its “decisions and actions.” Finally, there is no hierarchy among the Core Values. The balance must be determined on a case by case basis, without automatically favoring any particular Core Value</u></p> <p><u>As such, a Core Value can never create an absolute commitment on the part of ICANN. It is also implicit that a Core Value cannot cause ICANN to violate any Commitment, as Commitments are absolute.</u></p> <p><u>Agree with mentioning this balancing notion.</u></p> <p><u>I do not subscribe to the text in the commentary section and the inferences drawn from them to human rights principles</u></p> <p><u>The other Core Values are:</u> <u>(i) To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of, other responsible entities that reflect the interests of affected parties and the roles</u></p>	
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		<p><u>of bodies internal to ICANN and relevant external expert bodies;</u></p> <p><u>(ii) Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;</u></p> <p><u>(iii) Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment in the DNS market;</u></p> <p><u>(iv) Introducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process;</u></p> <p><u>(v) Operating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with</u></p>	
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		<p>ICANN's other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community;</p> <p>(vi) While remaining rooted in the private sector (including business stakeholders, civil society, the technical community, academia, and end users), recognizing that governments and public authorities are responsible for public policy and duly taking into account the public policy advice of governments and public authorities;</p> <p>(vii) Striving to achieve a reasonable balance between the interests of different stakeholders, while also avoiding capture;</p>	
'respecting'	<p>Section 1.2(b)(vi) mentions ICANN being 'rooted in the private sector.' ICANN's strong orientation toward the private sector means that the UN Guiding Principles on Business and Human Rights (UNGPs), tailored specifically for business enterprises, can provide a meaningful human rights framework for ICANN. The UNGPs, among other things, explain</p>	<p>The Bylaw uses the term "respect" to characterize how ICANN will be "guided" by this Core Value, and contrasts it with "enforcing" Human Rights, which the Bylaw expressly says that ICANN will not do.</p> <p>"Respecting" human rights may be seen as avoiding violating human rights. Aside from this, there are no particular actions that necessarily flow from "respecting human rights."</p>	

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- Commented [42]: I am going to edit a bit further after ...
- Commented [43]: It could contrast with many things - ...
- Commented [44]: Disagree. There is a clear basis in ...
- Commented [45]: "Respect" is not qualified or ...
- Commented [46]: I've changed "protect" to "enforce" ...
- Commented [47]: "Enforce" makes much more sense ...
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- Commented [54]: I am going to edit a bit further after ...
- Commented [55]: This is a purely personal opinion, ...
- Commented [56]: The opposite would also be a ...
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	<p>what it means for business enterprises to 'respect human rights.'</p> <p>[The General Principles of the UNGPs state: The UNGPs are grounded in recognition of 'the role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights.' In this section, the meaning of 'respecting' human rights is explored. Compliance with applicable law is explained below.]</p> <p>Unlike the internationally recognized human rights which legally obligate states (see below), the UNGPs do not create new international law obligations or limit or undermine any legal obligations a State may have (UNGP, General Principles). This also means that the UNGPs do not require enterprises to enforce human rights, which is the legal duty of states.</p> <p>Pursuant to the UNGPs, and consistent with existing processes</p>	<p>[]</p> <p>It has been suggested that one possible resource for interpreting the Bylaw is the "UN Guiding Principles on Business and Human Rights" (UNGPs). However, there should be no presumption that the UNGPs apply to ICANN in any way. The UNGPs is tailored for "business enterprises." ICANN is a sui generis institution and cannot be categorized merely as a business enterprise, though it shares some characteristics with business enterprises. The UNGPs also go far beyond interpretation, which is the task for this document. Aspects of the UNGPs that go into implementation or requiring particular activities thus must be disregarded for purposes of the Framework of Interpretation.</p> <p>[]</p> <p>Finally, it should be absolutely clear that satisfying or complying with the UNGPs is neither the intention or a requirement of the Bylaws or of this Framework of Interpretation. As such, the Bylaw does not guide ICANN to seek to comply with the UNGPs. References to the UNGPs are purely as one potential resource for interpreting relevant parts of the Bylaw.</p> <p>[]</p> <p>One possible resource for interpreting the term "respecting" can be found in the UN Guiding Principle ("UNGP") 11:</p> <ul style="list-style-type: none"> <i>"This means that they should avoid</i> 	
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- Commented [66]: again: this is a personal opinion. W ...
- Commented [67]: This is not merely my personal ...
- Commented [68]: It is a personal opinion that may be ...
- Commented [69]: Do you have any contribution to m ...
- Commented [70]: I won't enter into that discussion ...
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- Commented [77]: ICANN is a business enterprise. T ...
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	<p>and protocols, including, but not limited to, the MultiStakeholder Bottom-Up Policy Development Process, the ICANN Empowered Community can voluntarily express its commitment to respect human rights, and identify, prevent, mitigate and account for how it addresses adverse human rights impacts through the process of human rights due diligence. In doing so, the ICANN Empowered Community can prioritize areas of focus, such as ICANN operations, internal procedures, and/or new policy, consistent with ICANN's Mission. In addition, while operational level grievance mechanisms may be established to address human rights grievances for internal matters, no such mechanism shall apply for the purpose of enforcing claims of human rights violations against third parties or as between one party and another party.] (Anne A-S)</p> <p>ICANN's commitment to apply the UNGPs to its operations and policies in the foregoing manner is consistent with the letter and the spirit of the human rights provision of the bylaws</p>	<p><i>infringing on the human rights of others and should address adverse human rights impacts with which they are involved."</i></p> <p>This can be broken down into two parts: (1) <i>avoiding "infringement" of human rights</i> and (2) <i>addressing adverse human rights "impacts"</i>. In looking at this possible resource, we will need to consider separately the applicability of each prong to the Bylaw. Furthermore, the terms "impacts and "involvements" are both ambiguous and potentially broad-ranging. [These may go well beyond the scope of the Bylaw] and thus may need to be limited or set aside if this particular statement is used to interpret the meaning of "respect" in the Bylaw]. [Of course, our task is not to interpret the UNGPs, it is to interpret the Bylaw. As such, emphasis on seeking to understand and interpret any of the UNGPs may not be prudent or appropriate.]</p> <p>"respecting" is further defined in UNGP 13 as: <i>"(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;</i> <i>(b) Seek to prevent or mitigate adverse human</i></p>	
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Commented [105]: There are elements for understanding the UNGP and their scope, like the "Interpretative Guide". The two prongs are specified in UNGP 13 (a) and (b). With UNGP 13 we have seen that there might be an issue with 13 (b), although I remain unconvinced as 13 (b) is mostly a moral element in interpreting "respect".

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Commented [107]: That's exactly what the text does. 13 a and b help us interpret what "respect" means

Commented [38]: Discussion about what ICANN may voluntarily do are beyond the scope of Interpreting the Bylaw itself.

	<p>as well as with the UNGPs. Unless required by applicable law, all human rights policies shall be developed pursuant to the MultiStakeholder Model bottom-up process and shall be effective upon subsequent adoption by the ICANN Board.</p>	<p><i>rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."</i></p> <p><i>As noted above, with regard to (a), we need to look at each aspect to see if any aspect should be applied to ICANN's "respecting human rights." It is possible that Section (a) may be helpful in interpreting ICANN's "respect" for human rights.</i></p> <p><i>[However, section (b) [will not] be applied to ICANN's respect for human rights. ICANN has a global mission and cannot be required to decline to do business with entities that may not have the same commitment to human rights, nor is it appropriate to use ICANN's powers as leverage to force changes in third party behavior].</i></p> <p>Jorge: Subsection 13 (b) remains relevant as it highlights that "respect" implies also a non-legal obligation with regard to HR impacts directly linked to ICANN's operations. I do not agree with the view that 13 (b) imposes any obligation or "requirement" to decline to do business with any entities. There is neither an</p>	
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Commented [109]: I do not think that 13 (b) imposes any obligation or "requirement" to decline to do business with any entities. There is neither an obligation to use its powers as leverage to force changes in third party behaviour. The Interpretative Guide just says the following: ...the business enterprise "does not have responsibility for the impact itself: that responsibility lies with the entity that caused or contributed to it. The enterprise therefore does not have to provide remediation (although it may choose to do so to protect its reputation or for other reasons). However, it has a responsibility to use its leverage to encourage the entity that caused or contributed to the impact to prevent or mitigate its recurrence. This may involve working with the entity and/or with others who can help." (see UNGP interpretative guide, [UNGPIG] p. 18, available at <http://www.ohchr.org/Documents/Issues/Business/RtRIInterpretativeGuide.pdf>).

		<p>obligation to use its powers as leverage to force changes in third party behaviour. The UNGP Interpretative Guide just says the following:</p> <p>...the business enterprise “does not have responsibility for the impact itself: that responsibility lies with the entity that caused or contributed to it. The enterprise therefore does not have to provide remediation (although it may choose to do so to protect its reputation or for other reasons). However, it has a responsibility to use its leverage to encourage the entity that caused or contributed to the impact to prevent or mitigate its recurrence. This may involve working with the entity and/or with others who can help.” (see UNGP interpretative guide, [UNGPIG] p. 18, available at http://www.ohchr.org/Documents/Issues/Business/RtRinterpretativeGuide.pdf).</p> <p>Comment:</p> <p>Subsection UNGP 13 (a) refers to the business’ own activities [and is linked to the obligation to “remediate” under UNGP 15 (c) below .] <u>While there may potentially be a “linkage” in the UNGP, that does not mean that Section 15(c) should have any application in interpreting the Bylaw . Furthermore, remediation is a type of implementation, which is beyond our scope.</u></p>	
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		<p><u>[As note below, Subsection 13(b) applies to third party activities. As previously stated, this goes beyond ICANN's respect for human rights, and should be read as a limitation of ICANN's Core Value. In other words, ICANN could choose to take on any of these activities (unless otherwise prohibited), but they are not part of the Core Value.]</u></p> <p>Subsection UNGP 13 (b) refers to HR impacts caused by third parties linked to the business enterprise (which has neither caused nor contributed to the HR impact). Here the business enterprise "does not have responsibility for the impact itself: that responsibility lies with the entity that caused or contributed to it. The enterprise therefore does not have to provide remediation (although it may choose to do so to protect its reputation or for other reasons). However, it has a responsibility to use its leverage to encourage the entity that caused or contributed to the impact to prevent or mitigate its recurrence. This may involve working with the entity and/or with others who can help." (see UNGP interpretative guide, [UNGPIG] p. 18, available at http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf);</p> <p>[The Mission as core boundary, as said above,</p>	
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Commented [110]: Please abstain from striking through entire passages. Please just bracket them.

Commented [111]: This is not applicable to interpreting the Bylaws.

Commented [112]: Here perhaps I would welcome a bit more of an explanation. As said in my comments 13 (b) can be seen as a quite voluntary element. This idea is underlined in the Interpretative Guide to the UNGP (that I refer to), especially when it is said that here the business enterprise "does not have responsibility for the impact itself: that responsibility lies with the entity that caused or contributed to it. The enterprise therefore does not have to provide remediation (although it may choose to do so to protect its reputation or for other reasons). However, it has a responsibility to use its leverage to encourage the entity that caused or contributed to the impact to prevent or mitigate its recurrence. This may involve working with the entity and/or with others who can help." (see UNGP interpretative guide, [UNGPIG] p. 18, available at <http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf>);

Commented [113]: Voluntary elements are outside the scope of interpreting the commitments of the Bylaw.

Commented [114]: Why are they out of scope? I don't see any impediment in the HR value that would disallow us from also considering voluntary elements, as long as they are linked with the core value. Here

Commented [115]: I assume in interpreting the bylaws we are just doing this - interpreting the text, and not expanding the ICANN HR obligations (I won't mention here what I think about the extent of those voluntary

Commented [116]: Our job here is only the new requirements in the Bylaw. Voluntary elements have nothing to do with meeting the requirements of the Bylaw..

Commented [117]: I agree, Greg.

Commented [118]: Again: "respect" is a concept we find in the HR Core Value. And its fulfilment, according to the UNGP - one valuable source for interpretation - implies obligatory aspects (13 (a)) and voluntary one

		<p>should in any case act as limit to any specific implementation of this principle.]</p> <p>Under UNGP 15 “respecting” implies that “Business enterprises should have in place policies and processes appropriate to their size and circumstances, including:</p> <p>(a) A policy commitment to meet their responsibility to respect human rights;</p> <p>(b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;</p> <p>(c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.</p> <p>Comment:</p> <p>{ For subsection (a) on the “policy commitment” see comment on UNGP 16 below.}</p> <p>{ For subsection (b) on “due diligence process” see UNGP 17, which would need to be developed (as implementation) by the community and ICANN staff.</p>	
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Commented [119]: don't think we can assume this and therefore should be very clear in what we mean

Commented [120]: To what extent? I feel the FoI would be a good place to stress this "Mission as core boundary" idea - or do you have a different approach to this?

Commented [121]: agree with this

Commented [122]: b) could be a possible next step beyond the FoI but for this work it is out of scope

Commented [123]: Agree that 15 (b) looks very much like implementation, as I said in my comments

Commented [124]: These are out of scope for interpreting the Bylaw.

Commented [125]: Out of scope. There is nothing in the Bylaw that requires ICANN to have a "policy commitment." Our job is not to figure out whether ICANN will satisfy the Ruggie Principles, that is exactly backwards.

Commented [126]: Greg, I agree that this is out of scope, however, but I assume we have a kind of "commitment" anyway. My problem is that Ruggie interprets this commitment in a very extensive way, and I believe such a meaning was considered out of the scope already when the bylaw was drafted. But this again brings us to discussion what comes first - bylaw or Ruggie. I believe our frame is the bylaw and Ruggie come only as a possible source, not a golden standard.

		<p>For subsection (c) on “remediation” see UNGP 21, 22 and 29—this could be considered as covered by the redress procedures established under the Bylaws, that would in turn be limited by the Mission.]</p> <p>Under UNGP 16 the characteristics of the “policy commitment” mentioned in UNGP 15 are further defined:</p> <p><i>“16. As the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a statement of policy that:</i></p> <ul style="list-style-type: none"> <i>(a) Is approved at the most senior level of the business enterprise;</i> <i>(b) Is informed by relevant internal and/or external expertise;</i> <i>(c) Stipulates the enterprise’s human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services;</i> <i>(d) Is publicly available and communicated internally and externally to all personnel, business partners and other</i> 	
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Commented [127]: Out of scope -- this is not a framework of implementation.

		<p><i>relevant parties; (e) Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise;</i></p> <p>Comment:</p> <p>Subsections (a) and (b) seem to be covered by the Bylaw HR commitment and its Fol.</p> <p>Subsections (c) to (e) would be an issue for further development and implementation by community and staff.</p> <p>Under UNGP 19 additional elements regarding the obligation to respect are spelled out which refer to the integration of the HR commitments into internal processes. This should be addressed in implementation work by the community and staff.</p> <p>Other instrumental principles linked to implementation are UNGP 20 (tracking effectiveness of responses) and 24 (communication and reporting).</p> <p>Matthew: Some of the above seems to be going way beyond what we need as an understanding of "respecting". And one</p>	
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Commented [128]: Out of scope for the reasons mentioned above.

Commented [129]: agree

Commented [130]: But is this relevant. Our task is most definitely not to determine the extent to which the Bylaw satisfies the Ruggie principles. Do (a) and (b) help us interpret the Bylaw? If not, they should not be part of this document.

Commented [131]: agree out of scope but possible further work by whom tbd

Commented [132]: I think that before advising who and how would be implementing this, we might actually consider whether this is relevant/possible/within the scope of the mission at all :)

Commented [133]: I mean, if we decide to advise at all. Since this might be out of scope

Commented [134]: I think we need to leave out implementation related references and points entirely. It is out of scope and we need to be as concise as possible.

Commented [135]: Agree.

Commented [136]: This should be deleted.

Commented [137]: Hi Matthew: I feel we should be very specific. Is there anything concrete that I do not consider "implementation" (and therefore outside the proper Fol) that you think should be out? If yes, what and why?

Commented [138]: Jorge - we agree largely but my point is that much of this is out of scope so we just don't need to refer to it. Anything more than what our mandate is is likely to be possibly confusing and engendering further unnecessary discussion. This is not to say that it is not useful to whatever discussion may come later, but for the purposes of our work I think we should leave references of implementation out.

		<p>dimension we have not looked into is as follows:</p> <p>To quote Ruggie: “[the responsibility of enterprises to respect human rights is reflected at least in part in domestic law or regulations corresponding to international human rights standards.” Which comes back to applicable law.]</p> <p>[Therefore complying with local laws in jurisdictions in which IANN operate will contribute to respecting human rights.]</p> <p>[]</p> <p>I think we need to be cautious in over broadly defining what “respecting” means</p> <p>There are parts of Ruggie that clearly go beyond possible interpretation of the Bylaw. It would be best not to mention these at all. If we do mention them, we will need to categorize them as follows:</p> <ol style="list-style-type: none"> 1. Possible guidance in implementing the Bylaw. These must be within the scope of the interpretation of the Bylaw.. 2. Voluntary actions. These could be considered by ICANN, but there is no basis in the Bylaw for favoring these actions. 3. Do not use. These would be inconsistent with the limited guidance of the Bylaw or with ICANN’s mission and commitments, or otherwise inconsistent with ICANN’s role in the DNS ecosystem. 	
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Commented [139]: Hi Matthew: I feel we should be very specific. Is there anything concrete that I do not consider "implementation" (and therefore outside the proper FoI) that you think should be out? If yes, what and why?

Commented [140]: Jorge - we agreee largely but my point is that much of this is out of scope so we just don't need to refer to it. Anything more than what our mandate is is likely to be possibly confusing and engendering further unnecessary discussion. This is not to say that it is not useful to whatever discussion may come later, but for the purposes of our work I think w...

Commented [141]: Hi Matthew: I feel we should be very specific. Is there anything concrete that I do not

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Commented [143]: Hi Matthew: I feel we should be very specific. Is there anything concrete that I do not

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Commented [145]: Hi Matthew: I feel we should be very specific. Is there anything concrete that I do not

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		<p><u>I continue to propose that we not devote our resources to an analysis of Ruggie, and instead devote our time to interpreting the Bylaw itself.</u></p>	
<p>'internationally recognized human rights'</p>	<p>The internationally recognized human rights that are relevant to ICANN are:</p> <ul style="list-style-type: none"> • Universal Declaration of Human Rights • International Covenant on Civil and Political Rights • International Covenant on Economic, Social and Cultural Rights • International Convention on Elimination of All Forms of Racial Discrimination • Convention on the Elimination of all Forms of Discrimination Against Women • Convention on the Rights of Persons with Disabilities • UN Declaration on the Rights of Indigenous Peoples • ILO's Declaration on 	<p><u>Under UNGP 12 "internationally recognized human rights" is "understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work."</u></p> <p><u>Under UNGP 18 a HR risk assessment should be produced, which would help in identifying what HR are more relevant for ICANN, without excluding other HR (i.e., "no cherry-picking"). This should be addressed in implementation work by the community and staff.</u></p> <p><u>UNGP 24 sets some criteria on prioritization of reactions to HR impacts. Also something to be considered in implementation.</u></p> <p><u>I do not mind the conventions/international instruments to be listed here, once it is mentioned that they are binding only for states and can</u></p>	

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- Commented [147]: This could be a basis for some sort of agreement...
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- Commented [148]: this should be the basis for our understanding of what they are - agree
- Commented [149]: We need to look at each document that this includes, and consider which ones should be interpreted as "internationally recognized human rights" applicable to ICANN. Beyond the UDHR, we may not have agreement.
- Commented [150]: That would mean cherry-picking, ...
- Commented [151]: Cherry picking refers to picking ...
- Commented [152]: I do not agree with that narrowing ...
- Commented [153]: Let me be clear on my comment ...
- Commented [154]: I am not narrowing cherry-picking ...
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- Commented [155]: I don't see the need for further ...
- Commented [156]: As said in my commentary, the ris ...
- Commented [157]: While this can be kept in the back ...
- Commented [158]: Delete. We should not be providin ...
- Commented [159]: I don't think listing the entire list ...
- Commented [160]: Interesting point about the univers ...
- Commented [161]: I don't think listing the entire list ...
- Commented [162]: Interesting point about the univers ...
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	<p>Fundamental Principles and Rights at Work (applicable to ICANN's employees and workers)</p> <p>These rights are contained in human rights instruments that bind states, and not private actors. Nonetheless, ICANN can refer to them as international benchmarks in its operations and strive to respect them, without being legally bound by them. ICANN's human due diligence can be carried against these rights in order to ascertain whether ICANN's operations or policies create an outcome that is not consistent with these rights.</p> <p>*Note that UNDRIP is technically a declaration adopted by the UN General Assembly and not a legally binding treaty.</p>	<p><u>serve only as a source of interpretations as to what human rights are and which human rights we are referring to (without cherry picking, as you might remember).</u></p>	
<p>'as required by applicable law'</p>	<p><u>As already mentioned, the UNGPs are grounded in recognition of enterprise responsibility to comply with all applicable laws. This is a</u></p>	<p><u>Applicable law should be understood at least to refer to the law from jurisdictions where ICANN does business consistent with what is established in the corresponding agreements, contracts etc and consistent with rules of</u></p>	

	<p>universal principle that applies to all individuals and organs of society.]</p> <p>To the extent any applicable law reflects internationally recognized human rights (such as applicable law on freedoms of assembly, association, ideas and expression, labor, nondiscrimination, privacy, protection of minors and vulnerable people, etc.), and they are applicable to ICANN directly (as opposed to ICANN's business partners), these legally bind ICANN.</p>	<p>international private law.]</p> <p>NOTE: David MaCauley intended to provide thoughts. ICANN Legal could be asked as well, as the mention of "applicable law" is used in a variety of existing agreements and provisions.</p> <p>{</p> <p><u>Here is David's text from his e-mail: "My understanding of the concept of applicable law refers to that body of law that binds ICANN at any given time and in any given circumstance. It could consist of statutes, rules, regulations and the like, as well as decisional orders/rulings of courts having appropriate jurisdiction, that take effect through the power of a legitimate governmental entity.</u></p> <p><u>It is a changeable concept inasmuch as laws, regulations, etc. change over time. It can be fairly long-lasting, such as California corporate-governance rules impacting ICANN, or it can be fairly short-term in effect: if ICANN chooses to organize a meeting of its board, staff and community in Hyderabad then the board, staff, and community must observe Indian travel regulations affecting visitors.</u></p> <p><u>Applicable law can work disparate impacts on ICANN around the globe: for example, if</u></p>	
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Commented [164]: agree - although it would be good to be able to find a definition we can refer to

Commented [165]: I think David provided something to replace this. I'll do that later this evening.

Commented [166]: This has now been done..

Commented [167]: I see that matthew already did this.

Commented [163]: We are interpreting the Bylaw not the UNGPs. This should be deleted.

		<p>ICANN employs personnel in Singapore, Turkey, Uruguay, Belgium, etc. then it must observe appropriate (and potentially conflicting) personnel laws in those various places.</p> <p>Applicable law is thus be a large body of law that eludes our ability to catalogue, but it is ascertainable in the context of a specific question or issue."</p>	
'This Core Value does not create, and shall not be interpreted to create, any obligation on ICANN outside its Mission'	<p>As stated above, application of the human rights Core Value does not create any legal obligation of ICANN outside its Mission. It is assumed that it is implicit in ICANN's Mission that it will operate within the bounds of applicable laws; furthermore, it is also assumed that ICANN has the discretion to voluntarily make commitments to respect human rights and to carry out human rights due diligence.</p>	<p>See above on Mission as core boundary.</p> <p>I think we need more specific guidance on this sentence, given that it is only a three sentence Bylaw</p>	
'or beyond	<p>The application of the UNGPs to ICANN's operations and policies</p>	<p>See above on applicable law.</p>	

Commented [168]: BTW - I think this is a good description but we will need some more succinct definition - would be good to find an accepted one as such

Commented [169]: While a succinct definition would be useful, I think a discussion based at least in part on David's submission is useful and appropriate. It should be clear that a definition would be used in addition to a discussion, not instead of it.

Commented [170]: A Core Value provides guidance and must be balanced against other Core Values. As such a Core does not create any legal obligation at all.

Commented [171]: This is true but irrelevant to interpreting the Bylaw itself. Discussions of what ICANN might do voluntarily should not be part of the document.

obligations found in applicable law'	does not create legal obligation beyond those found in laws applicable to ICANN.]	<u>Agree.</u> <u>Again, I think we should explore more specific guidance, rather than a mere cross-reference.</u>	
'This Core Value does not obligate ICANN to enforce its human rights obligations' [against other parties]	The Core Values do not create any new legally enforceable rights or duties of ICANN and ICANN will not be legally obligated to enforce human rights obligations against other parties. While UNGP Principle 13(b) refers to adverse human rights impacts that are directly linked to ICANN's operations, products or services by its business relationships, and suggests that termination of the relationship is an option, ICANN must also take into account "credible assessments of potential adverse human rights impacts of terminating such business relationships" (commentary to Principle 19). On the assumption that the negative human rights impacts of termination outweigh the benefits, ICANN can consider remaining in the business relationship, consistent with its	See above on Mission as core boundary and the proper interpretation to give to the concept of "respecting" HR, especially as regards third parties (see above on UNGP 13 (b)). <u>As noted above, UNGP 13(b) shall not be used to interpret ICANN's "respect for human rights."</u> Furthermore, <u>13(b) is contrary to the Bylaws text and ICANN's role in the DNS. Thus, 13(b) should be read as a statement of actions that ICANN should not take -- not merely as a statement of actions that ICANN is not required to take.</u>] [] <u>I don't see 13b as being in scope as actions under 13b would be contrary to the intent of the bylaw text.</u>] [] <u>Just a comment: I believe this is one of the keys for the interpretation of the bylaws, especially with regard to the line between respect and enforcement, because in my opinion some of the</u>	

Commented [172]: This has no place in the FoI. A decision to apply the UNGPs to ICANN's operations and policies is completely beyond the scope of this group. Our task is only to interpret the Bylaws.

Commented [174]: Here perhaps I would a bit more of an explanation. As said in my comments 13 (b) can be seen as a quite voluntary element. This idea is underlined in the Interpretative Guide to the UNGP (that I refer to), especially when it is said that here the business enterprise "does not have responsibility for the impact itself: that responsibility lies with the entity that caused or contributed to it. The enterprise therefore does not have to provide remediation (although it may choose to do so to protect its reputation or for other reasons). However, it has a responsibility to use its leverage to encourage the entity that caused or contributed to the impact to prevent or mitigate its recurrence. This may involve working with the entity and/or with others who can help." (see UNGP interpretative guide, [UNGPiG] p. 18, available at ...)

Commented [175]: Here perhaps I would a bit more of an explanation. As said in my comments 13 (b) can be seen as a quite voluntary element. This idea is underlined in the Interpretative Guide to the UNGP ...

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Commented [176]: agree + 100

Commented [177]: If 13(b) is mentioned at all, it should be cited in the negative, i.e., as something that is (a) not required by the Bylaw, and (b) actually prohibited by the Bylaw and thus not to be adopted by ICANN, ...

Commented [178]: agree + 100

Commented [179]: If 13(b) is mentioned at all, it should be cited in the negative, i.e., as something that is (a) not required by the Bylaw, and (b) actually prohibited by the Bylaw and thus not to be adopted by ICANN, ...

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	<p>Mission, and seek to implement one or more actions, such as engagement, capacity building, exercising its leverage outside the business relationships, etc., with respect to its business relationships.</p>	<p><u>Ruggie - which have been extensively mentioned in the first project of this document - rather border with enforcement than respect. This is also connected to the boundaries of the ICANN's mission. So I believe we have two limitations while interpreting the bylaw: the mission limitation and the prohibition on enforcement, and this is the "matrix" that any interpretation shall be checked against.</u></p> <p>On 13 (b) as said above: the business enterprise "does not have responsibility for the impact itself: that responsibility lies with the entity that caused or contributed to it. The enterprise therefore does not have to provide remediation (although it may choose to do so to protect its reputation or for other reasons). However, it has a responsibility to use its leverage to encourage the entity that caused or contributed to the impact to prevent or mitigate its recurrence. This may involve working with the entity and/or with others who can help." (see UNGP interpretative guide, [UNGPIG] p. 18, available at http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf).</p>	

Commented [180]: agree + 100

Commented [181]: If 13(b) is mentioned at all, it should be cited in the negative, i.e., as something that is (a) not required by the Bylaw, and (b) actually prohibited by the Bylaw and thus not to be adopted by ICANN, even voluntarily.

Commented [182]: agree + 100

Commented [183]: If 13(b) is mentioned at all, it should be cited in the negative, i.e., as something that is (a) not required by the Bylaw, and (b) actually prohibited by the Bylaw and thus not to be adopted by ICANN, even voluntarily.

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Commented [173]: This should be rejected as part of the document, or it should be kept in as a statement of what ICANN cannot do -- not what it should do.

<p>'or the human rights obligations of other parties, against other parties'</p>	<p>See immediately above.</p>	<p>See above on Mission as core boundary and the proper interpretation to give to the concept of "respecting" HR, especially as regards third parties (see above on UNGP 13 (b))</p>	
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