

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 about 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](#)

[Previous Draft FoI, based on Ruggie Principles](#)

[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	Proposed Commentary	Working/discussion	Agreed text
<p>'within the scope of its Mission'</p>	<p>The bylaws, including the human rights provision, will be interpreted within the scope of ICANN's Mission:</p> <ul style="list-style-type: none"> • (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: <ul style="list-style-type: none"> (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 		

	<p>(“gTLDs”). In this role, ICANN’s scope is to coordinate the development and implementation of policies:</p> <ul style="list-style-type: none">• 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• 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. <p>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.</p>		
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	<p>(ii) Facilitates the coordination of the operation and evolution of the DNS root name server system.</p> <p>(iii) Coordinates the allocation and assignment at the top-most level of Internet Protocol numbers and Autonomous System numbers. In service 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.</p> <p>(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</p>		
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	<p>requested by Internet protocol development organizations.</p> <p>(b) ICANN shall not act outside its Mission.</p> <p>(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 doubt, ICANN does not hold any governmentally authorized regulatory authority.</p> <p>(d) For the avoidance of doubt and notwithstanding the foregoing:</p> <p>(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;</p> <p>(ii) Notwithstanding any provision of the Bylaws to the contrary, the terms and conditions of the documents listed in subsections (A) through (C)</p>		
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	<p>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 Incorporation ("Articles of Incorporation"):</p> <p>(A)</p> <p>(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;</p> <p>(2) any registry agreement or</p>		
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	<p>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;</p> <p>(B) any renewals of agreements described in subsection (A) pursuant to their terms and conditions for renewal; and</p> <p>(C) ICANN's Five-Year Strategic Plan and Five-Year Operating Plan existing on 10 March 2016.</p> <p>(iii) Section 1.1(d)(ii) does not limit the 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.</p> <p>(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.</p>		
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<p>'within the scope of other Core Values'</p>	<p>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))</p> <p>In contrast, Core Values are subject to the following interpretive rules in the Bylaws:</p> <p>"[...] 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).</p> <p>The other Core Values are: (i) To the extent feasible and</p>	<p>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))</p> <p>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:</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</i></p>	
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Commented [1]: Just mention and quote the balancing test without further interpretation of it.

Commented [2]: The point of a Framework of Interpretation is to assist in the interpretation of the Core Value. Merely quoting the text is insufficient.

Commented [3]: 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.

	<p>appropriate, delegating coordination functions to or recognizing the policy role of, other responsible entities that reflect the interests of affected parties and the roles of bodies internal to ICANN and relevant external expert bodies;</p> <p>(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;</p> <p>(iii) Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment in the DNS market;</p> <p>(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;</p> <p>(v) Operating with efficiency and</p>	<p><i>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 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</p> <p>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 <u>absolute</u>.]</p> <p>The other Core Values are:</p> <p>(i) To the extent feasible and appropriate,</p>	
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Commented [4]: Please just include the balancing test without interpreting it - which is not our task here.

	<p>excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with 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>	<p>delegating coordination functions to or recognizing the policy role of, other responsible entities that reflect the interests of affected parties and the roles of bodies internal to ICANN and relevant external expert bodies;</p> <p>(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;</p> <p>(iii) Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment in the DNS market;</p> <p>(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;</p>	
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		<p>(v) Operating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with 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>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>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.</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). References to the UNGPs are as one potential resource for interpreting relevant parts of the Bylaw .</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"> "This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved." <p>This can be broken down into two parts: (1) <i>avoiding</i> "infringement" of human rights" and (2) <i>addressing</i> adverse human rights "impacts". 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.</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> <p>It has been suggested that one possible resource for interpreting the Bylaw is the "UN Guiding Principles on Business and Human Rights" (UNGPs). [How ever, there should be no presumption that the UNGPs apply to ICANN in any way]. The UNGPs are 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>[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>	
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- Commented [5]: This is a purely personal opinion, without any basis in the HR Core Value.
- Commented [6]: The opposite would also be a personal opinion. Stating an interpretation that is devoid of opinion would be a useless exercise.
- Commented [7]: Interpretation does not mean to add personal opinions to a given text, but something that ...
- Commented [8]: I disagree. We are supposed to provide an understanding of how the text should be ...
- Commented [9]: again: this is a personal opinion. We should shy away from stating general presumptions ...
- Commented [10]: This is not merely my personal opinion. This is consistent with statements that a ...
- Commented [11]: It is a personal opinion that may be shared by some, but that is not shared by others. An ...
- Commented [12]: Do you have any contribution to make to the FOI other than putting Ruggie in yet again and ...
- Commented [13]: I won't enter into that discussion again. It is only normal and sensible to use the UNGP ...
- Commented [14]: ICANN is a business enterprise. That it has some peculiarity does not change its nature as ...
- Commented [15]: Disagree. You may not agree with this statement. That does not mean there is "no ...
- Commented [16]: I'm not sure I understand. You (and others may say) that ICANN is not a business ...
- Commented [17]: If enough people agree, it has agreement. Similarly, if enough people agree it is a ...
- Commented [18]: Questions like this (i.e. whether ICANN is a business enterprise) may well merit a ...
- Commented [19]: I cannot agree with the absolute terms of this sentence. We should stay at a case-by- ...
- Commented [20]: idem. We do not agree on this outright and absolute wording
- Commented [21]: I could accept, as I have said, that the UNGP is one possible source for guiding interpretati ...

	<p>“respecting” is further defined in UNGP 13 as:</p> <p><i>“(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;</i></p> <p><i>(b) Seek to prevent or mitigate adverse human 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>Subsection UNGP 13 (a) refers to the business’ own activities</p>	<p>One possible resource for interpreting the term “respecting” <u>can be found in the UN Guiding Principle (“UNGP”) 11:</u></p> <ul style="list-style-type: none"> • <i>“This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”</i> <p><u>This can be broken down into two parts: (1) avoiding “infringement” of human rights” and (2) addressing adverse human rights “impacts”. 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.]</u></p> <p>“respecting” is further defined in UNGP 13 as:</p> <p><i>“(a) Avoid causing or contributing to adverse</i></p>	
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Commented [22]: 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".

Commented [23]: It's not our task to understand the UNGP. Unless text here clarifies how to interpret the Bylaw, it should be deleted.

Commented [24]: That's exactly what the text does. 13 a and b help us interpret what "respect" means

Commented [25]: These only help us interpret "respect" if we decide to adopt either or both as interpretive documents, or if we retain any rejected elements as statements of what the Bylaw does not require.

	<p>The Mission as core boundary, as said above, 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 style="padding-left: 40px;">(a) A policy commitment to meet their responsibility to respect human rights;</p>	<p><i>human rights impacts through their own activities, and address such impacts when they occur;</i></p> <p><i>(b) Seek to prevent or mitigate adverse human 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 threaten to decline (much less actually 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</p>	
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Commented [26]: 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>).

Commented [27]: The UNGP Guide say the entity " has a responsibility to use its leverage to encourage the entity that caused or contributed to the impact to prevent or mitigate its recurrence." Practically speaking that leverage would be the threat not to do business or the inability of the target to function without going along with the entity's demands. This may even be a violation of antitrust laws, though it's premature to conduct that analysis.

Commented [28]: Dear Greg: I think your examples are extreme and border the Mission. I feel that we could rule out such types of interpretations that would run counter to the "common carrier" obligations ICANN has.

		<p>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 obligation to use its powers as leverage to force changes in third party behaviour. The UNGP 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/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.] While there may potentially be a</p>	
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		<p><u>“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> <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</p>	
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		<p>http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf).]</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, 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</p>	
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Commented [29]: Please abstain from striking through entire passages. Please just bracket them.

Commented [30]: At this point, if I reject the deletions, the accompanying comments will disappear. Consider them bracketed at the moment. Eventually, we'll need to decide which bracket statements are accepted and which are deleted.

Commented [31]: I have a process request as well. Could you put your insertions into suggest mode where possible. Right now they are inserted into the text as accepted text, with a color (green) added. This is particularly troublesome because my Google-assigned color for suggested text is green. Therefore, it's difficult to tell the difference between your suggestions and ...

Commented [32]: I agree that I should have used the suggest mode from the very start... sorry for that. At least we share the same colour :-) (although I see yo...

Commented [33]: This is not applicable to interpreting the Bylaws.

Commented [34]: 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 ...

Commented [35]: Voluntary elements are outside the scope of interpreting the commitments of the Bylaw.

Commented [36]: 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 ...

Commented [37]: I assume in interpreting the bylaws we are just doing this - interpreting the text, and not expanding the ICANN HR obligations (I won't mentio...

Commented [38]: Our job here is only the new requirements in the Bylaw. Voluntary elements have nothing to do with meeting the requirements of the ...

Commented [39]: I agree, Greg.

Commented [40]: Again: "respect" is a concept we find in the HR Core Value. And its fulfilment, according to the UNGP - one valuable source for interpretation - ...

		<p><i>size and circumstances, including:</i></p> <p><i>(a) A policy commitment to meet their responsibility to respect human rights;</i></p> <p><i>(b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;</i></p> <p><i>(c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.</i></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> <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,</p>	
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Commented [41]: b) could be a possible next step beyond the FoI but for this work it is out of scope

Commented [42]: Agree that 15 (b) looks very much like implementation, as I said in my comments

Commented [43]: This should be deleted as it is out of scope for interpretation. Implementation guidelines should not be in this document.

Commented [44]: Agree - let's put all implementation aspects under a different title - as they may nonetheless be useful during implementation

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Commented [45]: First, this goes to implementation and is beyond scope. As stated, this is inconsistent with the balancing nature of the Core Values.

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Commented [46]: 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 [47]: 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.

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		<p>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>["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:</p> <ul style="list-style-type: none"> (a) Is approved at the most senior level of the business enterprise; (b) Is informed by relevant internal and/or external expertise; (c) Stipulates the enterprise's human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services; (d) Is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties; (e) Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise."] 	
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Commented [48]: Out of scope -- this is not a framework of implementation.

Commented [49]: This should be deleted.

Commented [50]: Redress procedures, if any, are definitely beyond the scope of this group, and beyond what is required by the Bylaw. These could well be beyond the scope of what ICANN can do, even voluntarily.

Commented [51]: What is ruled out in the HR Core Value is "enforcement", not redress - which have different scopes. Section 27.2 implies that reconsideration and IRP may be invoked after the FOI is agreed. Therefore, these redress mechanisms are clearly in scope.

Commented [52]: In my opinion, redress in Ruggie goes to the direction of enforcement. It also opens the door for different claims from the third parties, and this was our main concern when we tried to directly prohibit enforcement. Anyway, voluntary or not, this is outside the scope of the group, I believe. If ICANN ever wants to go there, this shall be another process.

Commented [53]: Tatiana could you elaborate the specific reasons? A generic exclusion of 13 (b) without explaining the substance is difficult for me to understand

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Commented [54]: This entire section on UNGP should be deleted. If the Bylaw is the "statement of policy" referred to and it meets any part of this UNGP that's great, but it doesn't help us interpret the Bylaw. Furthermore, some of this is beyond scope, either ...

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Commented [55]: The Bylaw actually does the opposite of this (except with regard to personnel). As such, t...

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		<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><u>Matthew: Some of the above seems to be going way beyond what we need as an understanding of "respecting". And one dimension we have not looked into is as follows:</u></p> <p><u>To quote Ruggie: "the responsibility of enterprises to respect human rights is reflected at least in part in domestic law or regulations corresponding to</u></p>	
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Commented [56]: agree

Commented [57]: 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 [58]: agree out of scope but possible further work by whom tbd

Commented [59]: I think that before advising who and how would be implementing this, we might actually consider whether this is relevant/doable/within the scope of the mission at all :)

Commented [60]: I mean, if we decide to advise at all. Since this might be out of scope

Commented [61]: 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 [62]: Agree.

Commented [63]: This should be deleted.

Commented [64]: 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 [65]: 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 ma...

Commented [66]: Hi Matthew: I feel we should be very specific. Is there anything concrete that I do not consider "implementation" (and therefore outside the...

Commented [67]: 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 ou...

		<p>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>[]</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.] <p>[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]</p>	
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- Commented [68]: Hi Matthew: I feel we should be very specific. Is there anything concrete that I do not consider "implementation" (and therefore outside the ...
- Commented [69]: Jorge - we agreee largely but my ...
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- Commented [87]: Jorge - we agreee largely but my ...
- Commented [88]: Hi Matthew: I feel we should be ve ...
- Commented [89]: Jorge - we agreee largely but my ...
- Commented [90]: This could be a basis for some sort ...
- Commented [91]: Hi Matthew: I feel we should be ve ...
- Commented [92]: Jorge - we agreee largely but my ...

<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 Fundamental Principles and Rights at Work (applicable to ICANN's employees and workers) <p>These rights are contained in human</p>	<p>[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.]</p> <p>[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.]</p> <p>[UNGP 24 sets some criteria on prioritization of reactions to HR impacts. Also something to be considered in implementation].]</p> <p>[]</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 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>	

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- Commented [93]:** this should be the basis for our understanding of what they are - agree
- Commented [94]:** 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 [95]:** That would mean cherry-picking, has no basis in the HR Core Value and cannot be agreed. The greater relevance of some instruments over others would be seen in implementation (starting with the HR risk assessment).
- Commented [96]:** Cherry picking refers to picking some rights out of a particular document and not others. It is absolutely core to our task to determine what instruments are to be used to interpret the Bylaws.
- Commented [97]:** I do not agree with that narrowing of "cherry-picking". The HR Core Value talks about internationally recognized HR - that is an open list and construction of that term should align with UNGP 12 ...
- Commented [98]:** Let me be clear on my comment ...
- Commented [99]:** I am not narrowing cherry-picking. ...
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- Commented [100]:** I don't see the need for further ...
- Commented [101]:** As said in my commentary, the ris ...
- Commented [102]:** While this can be kept in the back ...
- Commented [103]:** Delete. We should not be providin ...
- Commented [104]:** I don't think listing the entire list ...
- Commented [105]:** Interesting point about the univers ...
- Commented [106]:** I don't think listing the entire list ...
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	<p>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>'as required by applicable law'</p>	<p>The term "applicable law" as used in this context refers to that body of law that binds ICANN at any given time and in any given circumstance. It may be 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. "Applicable law" is changeable over</p>		

	time and can work disparate impacts around the world. While the concept of “applicable law” eludes cataloging it is as certainable in the context of a specific question or issue.		
‘This Core Value does not create, and shall not be interpreted to create, any obligation on ICANN outside its Mission’	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.	See above on Mission as core boundary. <u>I think we need more specific guidance on this sentence, given that it is only a three sentence Bylaw</u>	
‘or beyond obligations found in applicable law’	The application of the human rights bylaw to ICANN’s operations and policies does not create legal obligation beyond those found in laws applicable to ICANN.		

Commented [108]: 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 [109]: This is true but irrelevant to interpreting the Bylaw itself. Discussions of what ICANN might do voluntarily should not be part of the document.

<p>'This Core Value does not obligate ICANN to enforce its human rights obligations' [against other parties]</p>	<p>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 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>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)) [As noted above, UNGP 13(b) shall not be used to interpret ICANN's "respect for human rights." Furthermore, 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.]]</p> <p>[]</p> <p>I don't see 13b as being in scope as actions under 13b would be contrary to the intent of the bylaw text.]</p> <p>[]</p> <p>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 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</p>	
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Commented [111]: For the reasons stated repeatedly I do not see any impediment to use UNGP 13 (b) as an element for defining the concept of "respect", without prejudice to the possibility of adjusting and/or excluding certain extreme interpretations of 13 (b) - which we would need to specify.

Commented [112]: 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

Commented [113]: Here perhaps I would a bit more of an explanation. As said in my comments 13 (b) can

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Commented [114]: agree + 100

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Commented [110]: This should be rejected as part of the document, or it should be kept in as a statement

		<p><u>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>	
<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>	