

**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.

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ICANN Bylaw Language	Proposed Commentary	Working discussion	New round of discussion - Suggested text
'within the scope of its Mission'	<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"> <li>• (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"> <li>(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</li> </ul> </li> </ul>		<p>ICANN's Mission is set forth in Section 1.1 of the ICANN Bylaws (see Annex 1):</p> <p>The Mission establishes the boundaries of ICANN's capability to consider human rights as one of its core values. Due to the broad scope of human rights, attention to this limitation is necessary to ensure that ICANN will not step outside of its defined remit. In this regard, any interpretation of the application of the HR Core Value provided in the Framework of the Interpretation must be checked against ICANN's Mission to ensure compliance with the general limitations provided in this part of the Bylaw. While the Mission provides the outer boundaries for ICANN's activities, it does not create any particular obligations with regard to Human Rights.</p>

	<p>(“gTLDs”). In this role, ICANN’s scope is to coordinate the development and implementation of policies:</p> <ul style="list-style-type: none"><li>• 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</li><li>• 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.</li></ul> <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:</p> <p>(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>	<p>It is important to stress that the Human Rights Bylaw is a Core Value and not a Commitment. <u>"The Commitments reflect ICANN's fundamental compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN's activities."</u> (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><u>"[...] 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,</u></p>
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**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.

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	<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 "many 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:  (i) To the extent feasible and appropriate,</p>	<p><u>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."</u>  <u>Bylaws, Section 1.2(c).</u></p> <p>The Human Rights bylaw <del>may need to be</del> <u>must be</u> balanced against other <del>potentially relevant</del> <u>competing</u> Core Values <u>in a given situation</u>. Furthermore, this interpretive rule recognizes that there must be flexibility in applying the Core Values, based on "many 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."</p> <p>Finally, there is no <u>legal</u> hierarchy among the Core Values <u>according to the Bylaws</u>. The balance must be determined on a case by case basis, without automatically favoring any particular Core Value.</p>
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	<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>	<p><u>As such, <del>a single Core Value</del> it seems to be not very probable that in such a balancing-test a Core Value was to <del>can</del> never create an absolute commitment on the part of ICANN; a Core Value must be balanced against the other Core Values (and the "many factors ... in any given situation") in order to determine the appropriate outcome and resulting guidance. It <del>maybe</del> understood that it is also implicit that a Core Value cannot cause ICANN to violate any Commitment, as Commitments <del>are binding</del> <del>are absolute</del>.</u></p> <p><u>The other Core Values are defined in the <b>Section Bylaw (Annex 2)</b>.</u></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'	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.	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>Respecting human rights may be seen as both a negative obligation and a positive obligation. As a negative obligation, this means not doing certain human rights. Aside from this, there are</p>

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	<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"> <li>"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."</li> </ul> <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><u>Respecting may be seen as meaning observing and abiding by the internationally recognized human rights. The notion of "respect" has a positive aspect (adjusting to, promoting consistent action with) and a negative element (not violating and not infringing).</u></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).</p> <p><u>Similarly the chapter on human rights contained in the OECD Guidelines for Multinational Enterprises contains useful recommendations on how to understand the commitment to respect internationally recognised human rights (see <a href="http://www.oecd.org/corporate/mne/48004323.pdf">http://www.oecd.org/corporate/mne/48004323.pdf</a>).</u></p> <p>[How ever, there should be no presumption that the UNGPs apply to ICANN in any way].</p> <p>The UNGPs <u>are</u> tailored for "business enterprises." [ICANN is a sui generis</p>	<p><del>no particular actions that necessarily flow from "respecting human rights".</del></p> <p><del>Respecting may be seen as meaning observing and abiding by the internationally recognized human rights.</del></p> <p><del>The notion of "respect" has a positive aspect (adjusting to, promoting consistent action with, furthering) and a negative element (not violating and not infringing).</del></p> <p><del>The interpretation of "respect" can also be translated into a positive obligation that focuses on the ICANN policy processes. This obligation can be worded as, for example, "given the necessity to balance the HR core value with other core values, ICANN should account human rights in developing its policies and in decision-making processes," especially since the Core Values are intended to "guide" ICANN in its "decisions and actions."</del></p>
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- Commented [96]: That text was not agreed
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- Commented [7]: This is a purely personal opinion, without any basis in the HR Core Value.
- Commented [8]: The opposite would also be a personal opinion. Stating an interpretation that is devoid of opinion would be a useless exercise.
- Commented [9]: Interpretation does not mean to add personal opinions to a given text, but something that has a basis. The exclusion of anything other than "avoiding violating human rights" is not warranted and therefore should be taken out.
- Commented [10]: I disagree. We are supposed to provide an understanding of how the text should be interpreted. This can certainly start as an opinion, rather than a reliance on a third party text. If it is adopted by the subgroup, then it becomes a recommended interpretation to be presented to the ...
- Commented [11]: Agree with Greg. Any interpretation ...
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- Commented [12]: again: this is a personal opinion. W...
- Commented [13]: This is not merely my personal ...
- Commented [14]: It is a personal opinion that may be ...
- Commented [15]: Do you have any contribution to m...
- Commented [16]: I won't enter into that discussion ...

	<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>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> <p>One possible resource for interpreting the term "respecting" can be found in the UN Guiding Principle ("UNGPs") 11:</p> <ul style="list-style-type: none"> <li>"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."</li> </ul> <p>This can be broken down into two parts: (1) <u>avoiding "infringement" of human rights</u> and (2) <u>addressing adverse human rights</u></p>	<p><del>avoiding</del></p> <p><del>The language can be constructed by combining both negative and positive obligations: "given the necessity to balance the HR core value with other core values, ICANN should, within its mission, avoid human rights violations and, where necessary, take into account human rights in developing its policies and in decision-making processes."</del></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 or do not apply to ICANN in anyway.]</p> <p>The UNGPs is tailored for "business enterprises", <del>especially for those that manufacture goods and perform services for others, and function with contractors and supply chains, allowing businesses to end contracts with partners that are involved in HR violations and</del> creating a framework for voluntary commitment of private companies to <del>respect enforce</del> human rights.</p>
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Commented [17]: ICANN is a business enterprise. That it has some peculiarity does not change its nature as a private corporation. So there is no agreement on this statement.

Commented [18]: Disagree. You may not agree with this statement. That does not mean there is "no agreement with this statement."

Commented [19]: I'm not sure I understand. You (and others may say) that ICANN is not a business enterprise. I think the opposite. Therefore a statement with only your opinion has no agreement.

Commented [20]: If enough people agree, it has agreement. Similarly, if enough people agree it is a business enterprise, it has agreement. If there's no agreement either way, then there's no agreement on a position whether or not ICANN is a business enterprise. It may also be a business enterprise for some purposes and not others, e.g. as an employer or a purchaser of cleaning products, it may be a business...

Commented [21]: Questions like this (i.e. whether ...

Commented [22]: I cannot agree with the absolute ...

Commented [23]: idem. We do not agree on this ...

Commented [24]: I could accept, as I have said, that ...

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Commented [99]: Not agreed language. What is the ...

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	<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>“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><u>In the Fol we could address instances where such potential broadness and ambiguity may create specific risks taking into account ICANN's limited Mission.</u></p> <p><u>[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 style="padding-left: 40px;">“(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;</p> <p style="padding-left: 40px;">(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</p>	<p><del>- ICANN maybe considered as a sui generis institution and arguably cannot be categorized merely as a business enterprise, though it shares important<del>some</del> characteristics with business [enterprises].</del></p> <p>The UNGPs <del>also go far</del> extend beyond the interpretation of the HR Core Value contained in the Bylaws, which is the task for this <del>Fold</del>document. Aspects of the UNGPs that go into implementation or requiring particular activities thus are <del>not immediately relevant must be disregarded</del> for purposes of the Framework of Interpretation.</p> <p><del>Finally, it should be absolutely clear that satisfying or complying with the UNGPs is neither the intention nor 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 UNGP References to the UNGPs are purely as one potential resource for interpreting relevant parts of the Bylaw.]</del></p>
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**Commented [102]:** expert advice on this notion would be very useful.

**Commented [25]:** 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 [26]:** It's not our task to understand the UNGP. Unless text here clarifies how to interpret the Bylaw, it should be deleted.

**Commented [27]:** That's exactly what the text does. 13 a and b help us interpret what "respect" means

**Commented [28]:** 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.

**Commented [103]:** Not agreed language and unnecessary for the Fol

**Commented [104]:** No agreed at all

**Commented [105]:** the title of the column is changed to "suggested text" because the 3rd column started being a mess and not workable at all. It was hard to follow the document. So no one provides this as an agreed text. May be you could be so kind to bracket instead of deleting, Jorge. Thanks.

**Commented [106]:** Sorry. But the fourth column was intended for agreed text. We should have discussed such a procedural change beforehand. Anyway, I'm limiting the striking in suggest mode(not deleting) to texts that were clearly objected to before. In addition, I'm trying to provide alternatives.

		<p><i>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 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:</p>	
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**Commented [29]:** 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, [UNGP] p. 18, available at <http://www.ohchr.org/Documents/Issues/Business/RtRIinterpretativeGuide.pdf>).

**Commented [30]:** 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 [31]:** 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>...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 <a href="http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf">http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf</a>).</p> <p><b>Comment:</b></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> <p><u>[As note below, Subsection 13(b) applies to third party activities. As previously stated, this goes beyond ICANN’s respect for human</u></p>	
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		<p>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. ]</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 <a href="http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf">http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf</a>). ]</p> <p><del>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</del></p>	
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**Commented [32]:** Please abstain from striking through entire passages. Please just bracket them.

**Commented [33]:** 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 [34]:** 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 mine. Thank you.

**Commented [35]:** 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 your edits in pink)

		<p>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, [UNGPIC] p. 18, available at <a href="http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf">http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf</a>.)</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 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>	
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**Commented [36]:** This is not applicable to interpreting the Bylaws.

**Commented [37]:** 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 ...

**Commented [38]:** Voluntary elements are outside the scope of interpreting the commitments of the Bylaw.

**Commented [39]:** Why are they out of scope? I don't see any impediment in the HR value that would ...

**Commented [40]:** I assume in interpreting the bylaws we are just doing this - interpreting the text, and not ...

**Commented [41]:** Our job here is only the new requirements in the Bylaw. Voluntary elements have ...

**Commented [42]:** I agree, Greg.

**Commented [43]:** Again: "respect" is a concept we find in the HR Core Value. And its fulfilment, according to ...

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**Commented [44]:** b) could be a possible next step beyond the FoI but for this work it is out of scope

**Commented [45]:** Agree that 15 (b) looks very much like implementation, as I said in my comments

**Commented [46]:** This should be deleted as it is out of scope for interpretation. Implementation guidelines ...

**Commented [47]:** Agree - let's put all implementation aspects under a different title - as they may ...

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		<p><i>[(c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.]</i></p> <p><b>Comment:</b></p> <p><i>[For subsection (a) on the "policy commitment" see comment on UNGP 16 below.]</i></p> <p><i>[For subsection (b) on "due diligence process" see UNGP 17, which would need to be developed (as implementation) by the community and ICANN staff.]</i></p> <p><i>[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.]</i></p> <p><i>[Under UNGP 16 the characteristics of the "policy commitment" mentioned in UNGP 15 are further defined:]</i></p> <p><i>["16. As the basis for embedding their responsibility to respect human rights, business enterprises should express their</i></p>	
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**Commented [48]:** 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 [49]:** 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 [50]:** 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...

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**Commented [51]:** Out of scope -- this is not a ...

**Commented [52]:** This should be deleted.

**Commented [53]:** Redress procedures, if any, are ...

**Commented [54]:** What is ruled out in the HR Core ...

**Commented [55]:** In my opinion, redress in Ruggie g ...

**Commented [56]:** Tatiana could you elaborate the ...

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**Commented [57]:** This entire section on UNGP shoul ...

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		<p><i>commitment to meet this responsibility through a statement of policy that:</i></p> <ul style="list-style-type: none"> <li><i>(a) Is approved at the most senior level of the business enterprise;</i></li> <li><i>(b) Is informed by relevant internal and/or external expertise;</i></li> <li><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></li> <li><i>(d) Is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties;</i></li> <li><i>(e) Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise."</i></li> </ul> <p><b>Comment:</b></p> <p><i>[Subsections (a) and (b) seem to be covered by the Bylaw HR commitment and its Fol]</i></p> <p><i>[Subsections (c) to (e) would be an issue for further development and implementation by</i></p>	
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**Commented [58]:** The Bylaw actually does the opposite of this (except with regard to personnel). As such , this g should be rejected for that reason.

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**Commented [59]:** agree

**Commented [60]:** 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.

		<p>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 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>] think we need to be cautious in over broadly defining what "respecting" means]</p>	
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Commented [61]: agree out of scope but possible further work by whom tbd

Commented [62]: 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 [63]: I mean, if we decide to advise at all. Since this might be out of scope

Commented [64]: I think we need to leave out implementation related refernces and points entirely. It is out of scope and we need to be as concise as possible.

Commented [65]: Agree.

Commented [66]: This should be deleted.

Commented [67]: 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 [68]: Jorge - we agreee largely but my ...

Commented [69]: Hi Matthew: I feel we should be ve ...

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		<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"> <li>1. [Possible guidance in implementing the Bylaw. These must be within the scope of the interpretation of the Bylaw.. ]</li> <li>2. [Voluntary actions. These could be considered by ICANN, but there is no basis in the Bylaw for favoring these actions. ]</li> <li>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. ]</li> </ol> <p>[continue to propose that we not devote our resources to an analysis of Ruggie, and instead devote our time to interpreting the Bylaw [tself]</p> <p><a href="#">Tatiana: while I certainly agree that "respecting human rights" might be interpreted as avoiding human rights violations, I suggest that we can make a positive obligation out of this. Because I am extremely concerned about Ruggie and I have never supported their applicability, I assume we can focus on the ICANN policy processes, and can</a></p>	
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**Commented [80]:** 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 ...

**Commented [81]:** Hi Matthew: I feel we should be very specific. Is there anything concrete that I do not ...

**Commented [82]:** Jorge - we agreee largely but my point is that much of this is out of scope so we just ...

**Commented [83]:** Hi Matthew: I feel we should be very specific. Is there anything concrete that I do not ...

**Commented [84]:** Jorge - we agreee largely but my point is that much of this is out of scope so we just ...

**Commented [85]:** Hi Matthew: I feel we should be very specific. Is there anything concrete that I do not ...

**Commented [86]:** Jorge - we agreee largely but my point is that much of this is out of scope so we just ...

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**Commented [88]:** Jorge - we agreee largely but my point is that much of this is out of scope so we just ...

**Commented [89]:** Hi Matthew: I feel we should be very specific. Is there anything concrete that I do not ...

**Commented [90]:** Jorge - we agreee largely but my point is that much of this is out of scope so we just ...

**Commented [91]:** Hi Matthew: I feel we should be very specific. Is there anything concrete that I do not ...

**Commented [92]:** Jorge - we agreee largely but my point is that much of this is out of scope so we just ...

**Commented [93]:** This could be a basis for some sort of agreement..

**Commented [94]:** Hi Matthew: I feel we should be very specific. Is there anything concrete that I do not ...

**Commented [95]:** Jorge - we agreee largely but my point is that much of this is out of scope so we just ...

		<p>propose something like “taking into account the necessity to balance the HR core value with other core values, ICANN should take into account human rights in developing its policies and in decision-making processes”. The reason for such suggestion is also the fact that the Core Values are intended to “guide” ICANN in its “decisions and actions.” This can be translated for HR as “avoid human rights violation in policymaking” but I think the “taking into account HR” wording actually create a better framework than the strong language of “avoiding”.</p>	
‘internationally recognized human rights’	<p>The internationally recognized human rights that are relevant to ICANN are:</p> <ul style="list-style-type: none"> <li>• <a href="#">Universal Declaration of Human Rights</a></li> <li>• <a href="#">International Covenant on Civil and Political Rights</a></li> <li>• <a href="#">International Covenant on Economic, Social and Cultural Rights</a></li> <li>• <a href="#">International Convention on Elimination of All Forms of</a></li> </ul>	<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</p>	<p>There are several generations of international human-rights related frameworks (UDHR and second-generation instruments) that could be relevant to ICANN’s HR Core Value. However, none of these instruments has a direct application to ICANN, because they only create obligations for States. By committing to one or more of these international instruments, nation states are supposed to “embed” human rights in different areas of their national legislation. The scope of application at</p>

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**Commented [146]:** I still feel that UNGP 12 gives a good guidance on what instruments are meant.

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**Commented [107]:** this should be the basis for our understanding of what they are - agree

**Commented [108]:** 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 [109]:** 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 [110]:** 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 [111]:** 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 as the most widely accepted standard in this regard.

**Commented [112]:** Let me be clear on my comment above - I am suggesting that we take the minimum as suggested by Ruggie - not the entire list

**Commented [113]:** I am not narrowing cherry-picking. I am using it in the sense that it has been consistently used in this WG.

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	<ul style="list-style-type: none"> <li><a href="#">Racial Discrimination</a></li> <li><a href="#">Convention on the Elimination of all Forms of Discrimination Against Women</a></li> <li><a href="#">Convention on the Rights of Persons with Disabilities</a></li> <li><a href="#">UN Declaration on the Rights of Indigenous Peoples</a></li> <li><a href="#">ILO's Declaration on Fundamental Principles and Rights at Work</a> (applicable to ICANN's employees and workers)</li> </ul> <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</p>	<p>staff ]]</p> <p>[UNGP 24 sets some criteria on prioritization of reactions to HR impacts. Also something to be considered in implementation]. ] ]</p> <p>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). ] ]</p> <p>[Fatiana: There are several generations of international human-rights related frameworks (UDHR and second-generation instruments) that may be relevant to ICANN's HR Core Value. However, none of these instruments has a direct application to ICANN, because they create obligations for states only. By committing to the international instruments, the nation states are supposed to "embed" human rights in different areas of their national legislation. The scope the of application aton the national level is very broad: from criminal law to privacy legislation, from freedom of</p>	<p>the national level is very broad: from criminal law to privacy legislation, from freedom of speech to protection of social rights, to name but a few.</p> <p>The reference to "internationally recognized human rights" in the bylaw should not be read in isolation; rather it must be read with, and limited by, the reference "as required by applicable law." As a consequence, international human rights instruments are not directly applicable to ICANN. Rather, only those human rights that are "required by applicable law" will be applicable to ICANN, and then only "as those particular "applicable laws" carry out such human rights.</p> <p>Furthermore, depending on the jurisdiction in which ICANN operates, the law applicable to its operations may vary and thus the human rights applicable to ICANN's operations will vary as well.</p>
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- Commented [114]: I don't see the need for further elaboration - a risk assessment is something beyond the FoI
- Commented [115]: As said in my commentary, the risk assessment is something for implementation. But I feel it is good to keep this idea in the back of our minds, because it addresses the need for future specification of what HR are most relevant for ICANN, without breaking our consensus that we should not "cherry-pick" HR.
- Commented [116]: While this can be kept in the back of our minds, it goes beyond interpretation into very specific implementation. This is out of scope and should not be in this document.
- Commented [117]: Delete. We should not be providing implementation advice.
- Commented [118]: I don't think listing the entire list
- Commented [119]: Interesting point about the univers
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	Assembly and not a legally binding treaty.	speech to protection of social rights, to name but a few. ] The impossibility of the direct application of international instruments and the fact that the international instruments are transposed into the different areas of the national laws is well reflected in the bylaw clause "respecting internationally recognized human rights as required by applicable law".	
'as required by applicable law'	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 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.	I support the suggestions from Paul and Greg and those who call for legal help to analyse this issue more thoroughly in addition to the definition suggested by David.	<p><u>"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. For example, if ICANN chooses to organize a meeting of its board, staff and community in Hyderabad, then the board, staff, and</u></p>

**Commented [130]:** I don't think listing the entire list instruments is helpful, particularly as they are not universally endorsed - a shorter more concise version is likely to be more "understandable" and less concerning and or confusing

**Commented [131]:** Interesting point about the universal endorsement, I overlooked this one. Do you suggest that we go for the "minimum"? what kind of implications will it have? Just wondering. I think this might be a point for discussion in the group.

**Commented [132]:** I don't think listing the entire list instruments is helpful, particularly as they are not universally endorsed - a shorter more concise version is likely to be more "understandable" and less concerning and or confusing

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**Commented [134]:** I don't think listing the entire list ...

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			<p><u>community must observe Indian travel regulations affecting visitors.</u></p> <p><u>Applicable law can have disparate impacts on ICANN around the globe: for example, if ICANN employs personnel in Singapore, Turkey, Uruguay, Belgium, etc. then it must observe appropriate (and potentially conflicting) personnel laws in those various places.</u></p> <p><u>Applicable law is thus a large body of law that eludes our ability to catalogue, but it is ascertainable in the context of a specific question or issue.</u></p> <p><u>This limitation requires an analysis to determine whether any human right that is proposed as a guide or limitation to ICANN activities or policy is “required by applicable law.” If it is, then abiding by the Core Value should include avoiding a violation of that Human Right. If the human right is not required by applicable law, then it does not raise issues under the Core Value. However, ICANN may still give this human right consideration, even though it is under no guidance to do so pursuant to the Core Values.</u></p>
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			<p><u>QUESTION: Do we want the Framework of Interpretation to specify the “applicable laws” by jurisdiction that require human rights to be applied to ICANN’s activities? On the one hand, those considering the issue can wait until there is a particular context or issue and then determine what the applicable laws are at that time. On the other hand, we could attempt to exhaustively catalogue the entirety of applicable laws that codify human rights as law. A middle approach may be best. This group could provide a high-level concordance between particular internationally recognized human rights principles and particular applicable laws.</u></p>
<p>‘This Core Value does not create, and shall not be interpreted to create, any obligation on ICANN outside its Mission’</p>	<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</p>	<p>See above on Mission as core boundary.</p> <p><u>I think we need more specific guidance on this sentence, given that it is only a three sentence Bylaw</u></p>	<p><u>This sentence restates the basic concept that the Human Rights core value cannot create or be used to create any obligations that go beyond the limits of ICANN’s Mission.</u></p>

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Commented [147]: 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.

	and to carry out human rights due diligence. ]		
'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.	<u>Tatiana: in my opinion, this particular piece of the bylaw tries to balance the nature of Core Values with the notion of applicable law. While Core Values per se do not create obligations, there are the guidances that have to be taken into consideration for ICANN's processes and decisions, the applicable law might, in fact, create some human rights related obligations for ICANN. While the previous piece of the bylaw tries to limit "respect" for HR by the boundaries of the ICANN mission, this clause sets another boundaries, namely, those provided by the applicable law. Thus, if the applicable law as defined for the purpose of this FoI creates any obligation for ICANN with regard to human rights, ICANN will have to obey the law. Otherwise, beyond the applicable law neither Core Value nor the piece of bylaw do not intend to create any extensive and far-reaching human rights obligations</u>	<u>This particular piece of the limits the Core Value with the boundary of applicable law. While Core Values do not create obligations, they do provide guidance that has to be taken into consideration in connection with ICANN's processes and decisions. Thus, if the applicable law as defined for the purpose of this FoI creates any obligation for ICANN with regard to human rights, ICANN will have to obey the law. Otherwise, beyond applicable law, the Core Value does not (indeed, cannot) create any human rights obligations.</u>

**Commented [148]:** This is true but irrelevant to interpreting the Bylaw itself. Discussions of what ICANN might do voluntarily should not be part of the document.

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<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 Bylaw's 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>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>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>	<p>This part of the bylaw draws the clear line between "respect" for human rights as a core value (which, as noted above, might result in the negative obligation to avoid human rights violation or in the positive obligation to act in furtherance of/take into account human rights considerations, e.g., in a policy development processes) and any attempt to extend the Bylaw into requiring ICANN to cajole, pressure, coerce or otherwise use its influence on third parties ICANN is involved with to avoid human rights violations on the part of those third parties.</p> <p>The Core Value does not suggest or represent any enforcement obligation by ICANN in any sense. This provision puts clear parameters on the scope of the Bylaw and ensures that its application will be limited to respect for human rights only within the mission and activities of ICANN; enforcement by ICANN against human rights violations by associated parties' are outside of the scope of the Bylaw.</p>
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Commented [150]: 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 [151]: 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

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		<p><a href="#">bylaw: the mission limitation and the prohibition on enforcement, and this is the “matrix” that any interpretation shall be checked against.</a></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 <a href="http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf">http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf</a>).</p>	
‘or the human rights obligations of other parties, against other parties’	See immediately above.	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><a href="#">As in the interpretation of the above provision, this bylaw wording sets the boundaries of the Core Value and ensures that ICANN is not responsible for enforcing against other parties’ human rights violations, and will not be used as an instrument to resolve other parties’ human rights violations.</a></p>

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ANNEX 1.

Section 1.1 of the ICANN Bylaws (ICANN mission)

*(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:*

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*(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:*

- 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.*

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*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.*

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*(ii) Facilitates the coordination of the operation and evolution of the DNS root name server system.*

*(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.*

*(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.*

(b) ICANN shall not act outside its Mission.

(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.

(d) For the avoidance of doubt and notwithstanding the foregoing:

(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;

(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 Incorporation ("Articles of Incorporation"):

(A)

(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;

(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;

(B) any renewals of agreements described in subsection (A) pursuant to their terms and conditions for renewal; and

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(C) ICANN's Five-Year Strategic Plan and Five-Year Operating Plan existing on 10 March 2016.

(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.

(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.

## **ANNEX 2** **Other Core Values**

(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 of bodies internal to ICANN and relevant external expert bodies;

(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;

(iii) Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment in the DNS market;

(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;

(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;

(vi) While remaining rooted in the private sector (including business stakeholders, civil society, the technical community, academia, and end

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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;

(vii) Striving to achieve a reasonable balance between the interests of different stakeholders, while also avoiding capture;