

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 Fol. based on Ruggie Principles](#)

[Draft Human Rights Policies and Processes Document](#)

[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 |
|---|--|
| 'within the scope of its Mission' | <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 Core Value to respect human rights. 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 scope and mission. In this regard, any interpretation of the application of the Human Rights Core Value - provided in the Framework of Interpretation - must be checked against ICANN's Mission to ensure compliance with the general limitations provided in this part of the Bylaw.</p> |
| 'within the scope of other Core Values' | <p>It is important to stress that the Human Rights Bylaw is a Core Value and not a Commitment. <i>"The Commitments reflect ICANN's fundamental compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN's activities."</i> (Bylaws, Section 1.2(c))</p> <p>In contrast, Core Values are not necessarily 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 style="text-align: center;"><i>"[...] The specific way in which Core Values are applied, individually and collectively, to any given</i></p> |

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).

The Human Rights bylaw needs to be balanced against other Core Values in the case where not all Core Values can be fully adhered to simultaneously. Furthermore, this interpretive rule recognises 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.”

The Bylaws also prominently stress that the Core Values have to be “respected” (“ICANN will act in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values” as described in Bylaws, Section 1.2).

Finally, there is no legal hierarchy among the Core Values according to the Bylaws. The balance must be determined on a case by case basis, on the basis of proportionality, without automatically favoring any particular Core Value. The result of a balancing-test must not cause ICANN to violate any Commitment, as Commitments are binding.

The other Core Values are set forth in Annex two of this document.

| | |
|---|--|
| 'respecting' | ICANN will respect human rights, as required by applicable law (see below on applicable law). In order to do so, ICANN should avoid violating human rights, and take human rights into account in developing its policies as well as in its decision-making processes. |
| 'internationally recognized human rights' | <p>There are a range of International human-rights declarations and covenants that could be relevant to ICANN's Human Rights Core Value.¹ 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 expected to embed human rights in their national legislation.</p> <p>The reference to "internationally recognized human rights" in the bylaw should not be read in isolation; rather it must be considered together with, and limited by, the reference "as required by applicable law." As a consequence, under the Human Rights Core Value, international human rights instruments are not directly applicable to ICANN beyond what is provided for in applicable law. Rather, only those human rights that are "required by applicable law" will be relevant to ICANN.</p> |

¹ Including:

- [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>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> <p>Nevertheless, ICANN understands that internationally recognised human rights, including those expressed in the Universal Declaration of Human Rights, can guide its decisions and actions.</p> |
| <p>'as required by applicable law'</p> | <p>"Applicable law" refers to the body of law that binds ICANN at any given time, in any given circumstance and in any relevant jurisdiction. It consists of statutes, rules, regulations, etcetera, as well as judicial opinions, where appropriate. It is a dynamic concept inasmuch as laws, regulations, etcetera, change over time.</p> <p>Applicable law can have disparate impacts on ICANN around the globe: for example, if ICANN employs personnel in different jurisdictions then it must observe the appropriate labour laws in those various locales. 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.</p> <p>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.</p> |
| <p>'This Core Value does not create, and shall not be interpreted to</p> | <p>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 or applicable law.</p> |

| | |
|--|--|
| <p>create, any obligation on ICANN outside its Mission or beyond obligations found in applicable law”</p> | |
| <p>‘This Core Value does not obligate ICANN to enforce its human rights obligations or the human rights obligations of other parties, against other parties’</p> | <p>This part of the bylaw draws the clear line between “respect” for human rights as a Core Value and any attempt to extend the Bylaw into requiring ICANN to impose on or coerce third parties 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.</p> |

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:

(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.*

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.

(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

(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 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;