

Human Rights Language in ICANN's Bylaws

From CCWG Second Draft Proposal:

Elaborating an ICANN Commitment to Human Rights

The CCWG-Accountability extensively discussed the opportunity to include ~~into a~~ Commitment commitment related to human rights, within ICANN's stated Mission, in the ICANN Bylaws. The group commissioned a legal analysis of whether the ~~termination of the IANA Functions Contract causes ICANN to have specific obligations~~ would induce changes into ICANN's obligations, within its defined Mission, with regards to Human Rights, ~~which would cease to exist upon the termination of the IANA Functions Contract.~~¹ While no significant issue was found to be directly linked to the termination of the IANA Functions Contract, the group acknowledged the recurring debates around the nature of ICANN's accountability ~~towards the respect of~~ with regard to fundamental human rights ~~within ICANN's Mission.~~

~~In these discussions, some participants raised the following as accountability-related reasons for including a commitment to fundamental human rights in the Bylaws:~~

- ~~• The NTIA criteria to maintain the openness of the Internet, including free expression and the free flow of information;~~
- ~~• The need to avoid extending ICANN's mission into content regulation;~~
- ~~• The importance of assessing the impact of ICANN policies on human rights within its defined mission.~~

~~Prior to the Second Draft Report, the group achieved consensus on including in ICANN's Bylaws a commitment to human rights within its defined Mission. In that Report, the group asked for comments on two~~ Examples of potential Commitment commitment formulations ~~were:~~

- Within its mission and in its operations, ICANN will be committed to respect the fundamental human rights of the exercise of free expression and the free flow of information.*
- Within its mission and in its operations, ICANN will be committed to respect internationally recognized fundamental human rights.*

¹ The specific question asked and answered in the memo was "What, if any, obligations towards human rights does ICANN currently have by virtue of its status as a U.S. government contractor that would not otherwise exist?" The memo prepared by legal counsel is available here: <http://mm.icann.org/pipermail/accountability-cross-community/2015-July/004604.html>.

The group has achieved consensus on including a human rights related Commitment in ICANN's Bylaws within its defined Mission. However no particular wording currently proposed achieved consensus. Reiterating its commitment to articulate concrete proposals as part of its mandate, the CCWG-Accountability is calling for comments on this approach and the underlying requirements.

Introduction **CCWG's Response to Public Comments**

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During the comment period on the Second Draft Report, "CCWG-Accountability 2nd Draft Proposal on Work Stream 1 Recommendations," 23 comments specifically addressed the issue of including Human Rights language in the ICANN Bylaws ~~as part of WS1~~. Approximately half of these comments supported or did not oppose including human rights language in the Bylaws as part of WS1. The remaining comments expressed a range of opinions: five did not support a Human Rights Bylaw, one did not "in principle oppose" such language by stated it should be dealt with in WS2, another also stated it should be dealt with in WS2 but did not state support or opposition for Human Rights language, one said it was "premature," and two others commented on the issue but did not state support or opposition for Human Rights language in the Bylaws.

1. ~~10 out of the 23 comments that addressed this point supported inclusion of some language on Human Rights as part of WS1, but there was no consensus on what that language should be.~~
2. ~~One comment stated that it "would not oppose" inclusion of human rights language.~~
3. ~~One comment did not "in principle oppose" Human Rights language but stated that this work should be part of WS2.~~
4. ~~One comment stated that this work should be part of WS2, and did not express support or opposition for the inclusion of Human Rights language in the Bylaws.~~
5. ~~Two other comments did not express either support or opposition for the inclusion of human rights language in the Bylaws.~~
6. ~~1 commenter stated that it "would not actively oppose" the inclusion of human rights language in the Bylaws.~~

7.1. ~~5 out of 23 comments did not support the inclusion of human rights language in the Bylaws.~~

20 out of 23 comments addressed the two options for Human Rights language in the Bylaws. Seven of these supported the more general language in option 2, while three supported the more targeted language in option 1. The other 10 comments either opposed or did not support the CCWG proposals.:

1. ~~7 out of 23 comments supported option 2: "Within its mission and in its operations, ICANN will be committed to respect internationally recognized fundamental human rights."~~

2. 3 comments supported option 1: “*Within its mission and in its operations, ICANN will be committed to respect the fundamental human rights of the exercise of free expression and the free flow of information.*”
3. 10 comments expressly addressed these options, and either opposed or did not support either option.
4. 3 comments did not address the proposed language.

Areas of Consensus

1. 4² out of 23 comments that addressed this issue supported the inclusion of a commitment to Human Rights in ICANN’s bylaws as part of WS1. In addition, one comment stated that it “would not oppose” inclusion of such language.³

Areas Needing Refinement

Proposed Human Rights Language for the Bylaws. Since the Second Draft Proposal provided two different formulations of a potential Human Rights Commitment in the Bylaws, it is important for the CCWG to consider the public comments on these alternatives:

1. 7⁴ out of 23 comments supported option 2: “*Within its mission and in its operations, ICANN will be committed to respect internationally recognized fundamental human rights.*” This includes one commenter that did not support including Human Rights language in the Bylaws in WS1.
2. 3⁵ comments supported option 1: “*Within its mission and in its operations, ICANN will be committed to respect the fundamental human rights of the exercise of free expression and the free flow of information.*” This includes one commenter that did not support including Human Rights language in the Bylaws in WS1.
3. 10⁶ comments expressly addressed these options, and either opposed or did not support either option. (2 of these commenters supported inclusion of Human Rights language in the Bylaws in WS1 and 1 did not express support or opposition.)
4. 3 comments did not address the language options.
5. One commenter who supported option two and two commenters who supported option 1 also suggested alternative formulations for the Human Rights commitment:

² Avri Doria (public comment endorsed by Joy Liddicoat and Timothy McGinnis), CDT, Cyberinvasion Ltd, Edward Morris, Intel, Internet Association, IPC, NCSG, Pranesh Prakash, USCIB

³ JPNIC

⁴ Avri Doria, CDT, IPC, NCSG (but with a greater preference for a variation on option 2), Pranesh Prakash, RySG, USCIB

⁵ Edward Morris, Cyberinvasion Ltd., The Heritage Foundation

⁶ BC, COA, Government of Australia, Government of New Zealand, i2Coalition, ICANN, Intel, Internet Association, LINX, MPAA.

- *Within its mission and in its processes and operations, ICANN will respect and protect fundamental human rights as defined in international law and applicable international conventions and local law. ICANN will also establish processes to clarify and document the rights impact of proposed policies and new operations. ICANN appeals mechanisms may be used for human rights issues relevant to ICANN mission and core values, among which are freedom of expression, free flow of information and privacy on the Internet.*⁷
- *Within its mission and in its operations, ICANN will be committed to respect internationally recognized fundamental human rights, in particular freedom of expression and privacy.*⁸

Other Issues Requiring Refinement. In addition to the Bylaws language, several comments raised other issues that require further refinement and detail: Eight⁹ out of 23 comments cautioned that a commitment to human rights should not broaden ICANN's remit, scope of activity or mission. Two¹⁰ out of 23 comments expressly stated that ICANN is already required to respect human rights in its operations by virtue of Article 4 of ICANN's Article of Incorporation. (In contrast, one¹¹ comment expressly stated that Article 4 did not provide such a requirement and one¹² comment stated that Article 4 would need to be amended to specifically mention human rights.) Where it comes to referral to specific documents, there was most Six comments supported reliance on for a mention of the Universal Declaration of Human Rights (6 out of 23), of which three.¹³ Three of these commenters suggested reference to reliance on other documents in addition to the UDHR.¹⁴ Some suggested of these were suggestions that a reference to the UDHR be added to the text, while others suggested were suggestions that the UDHR be cited in the an underlying rationale and explanation for the Bylaw. Six An equal number of commenters (6) also stated out that the CCWG must rely only on verbatim text or already agreed language from existing human rights instruments.¹⁵ One of these comments cited the consensus reached in the Netmundial statement as a basis for using "already agreed language within the United Nation System": "Human Rights are universal as reflected in the Universal Declaration of Human Rights and that should underpin Internet governance principles. Rights that people have offline must also be protected online, in accordance with international human rights legal obligations, including the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, and the Convention on the Rights of Persons with Disabilities."¹⁶ Two commenters specifically opposed reliance on the UN Guiding Principles on Business and Human

⁷ Avri-Deoria

⁸ Edward Morris, NCSG

⁹ i2-Coalition, ICANN Board, Intel, Internet Association, LINX, RySG, The Heritage Foundation

¹⁰ Edward Morris, MPAA

¹¹ Avri-Deoria

¹² CDT

¹³ Business Constituency, Afnic, Internet Association, IPC, MPAA, USCIB

¹⁴ One comment specifies the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, and the Convention on the Rights of Persons with Disabilities. The other two were not specific.

¹⁵ Afnic, Internet Association, USCIB

¹⁶ Afnic,

¹⁷ Afnic

Rights (the "Ruggie Principles"). There were no comments that supported reliance on the Ruggie Principles.¹⁸

Areas of Divergence

8 out of 23 comments that addressed this point opposed inclusion of human rights language in the Bylaws as part of WS1:

1. 5¹⁹ out of 23 comments did not support the inclusion of human rights language in the Bylaws.
2. In addition, 2 comments stated that this issue should be deferred to WS2.²⁰ Of these two commenters, one stated "We do not in principle oppose the inclusion of a reference to human rights in ICANN's Bylaws."²¹ The other stated that while "we welcome a discussion of ICANN's role in respecting human rights, and the possible inclusion of human rights as a bylaw within ICANN, we have some reservations with the inclusion of text at this late stage in the CCWG process."²²
3. One comment stated that it was "premature."²³

One commenter stated that it "would not actively oppose" the inclusion of human rights language in the Bylaws, and also stated that "additional progress is required" and that "important operational detail must be available" to allow the community to decide whether or not to support changes such as this.²⁴

Finally, 3 comments did not express support, non-opposition or opposition for the inclusion of human rights language in the Bylaws.²⁵

Seven comments expressed concerns about lack of detail or development that the topic was not sufficiently developed by the CCWG at this time, with statements such as "the CCWG has stopped short of important operational detail"²⁶ and "there is not yet an agreed definition of ICANN's role in relation to human rights"²⁷ and that this is "premature"²⁸ since there is continued debate both in the CCWG and the wider ICANN community.²⁹ A subset of this group thought this should be done in WS2 (2 out of 6).

¹⁸ Business Constituency, MPAA

¹⁹ Business Constituency, COA, LINX, MPAA, Heritage Foundation

²⁰ Government of Australia, Government of New Zealand.

²¹ Government of Australia.

²² Government of New Zealand.

²³ ICANN Board

²⁴ auDA

²⁵ Afric, i2Coalition, RySG

²⁶ auDA

²⁷ Government of Australia

²⁸ ICANN Board

²⁹ auDA, COA, Government of Australia, Government of New Zealand, ICANN Board, IPC, The Heritage Foundation

Several comments expressed concerns about the implications and efficacy of a human rights commitment:

1. While 3³⁰ comments state that specifically mentioning free expression and the free flow of information in the Bylaws is needed to ensure that free speech and the free flow of information is respected throughout ICANN's operations, 5 others³¹ suggest broader wording to avoid human rights "cherry-picking."
2. One commenter stated that only states have direct human rights obligations.³²
3. One commenter stated that a "broad commitment to human rights" will lead civil society to demand that ICANN take affirmative action to realize human rights commitments beyond ICANN's mission and scope of activities and beyond what many stakeholders would "likely anticipate or would consider reasonable."³³

Options for CCWG Consideration

Based on the public comments analysis, WP4 identified analysis some further areas for consideration and exploration:

1. **Revisit Bylaws Language.** 7 out of 23 comments supported the more general option (#2: "Within its mission and in its operations, ICANN will be committed to respect internationally recognized fundamental human rights.") while only 3 comments supported the more specific option (#1: "Within its mission and in its operations, ICANN will be committed to respect the fundamental human rights of the exercise of free expression and the free flow of information.") However, 10 comments expressly opposed or did not support either option. *It is worth noting that as many commenters were unsupportive of both formulations as supported both formulations. This relative lack of support for either formulation indicates that more work needs to be done to work on the Bylaws formulation. This may also reflect discomfort with the lack of specificity about the rationale and interpretation of the Bylaw, including concerns about application beyond ICANN's mission. A survey was conducted within WP4 regarding potential formulations; this survey is discussed below.*
2. **Consider Level of Support.** 10 out of the 23 comments supported inclusion of some language on Human Rights in the Bylaws as part of WS1. 5 comments did not support inclusion of Human Rights in the Bylaws, and 2 additional comments did not support addressing this issue in WS1. 3 comments expressed no support or opposition, though they commented on aspects of the issue (including one of those who stated this was a WS2 issue). One comment stated that it "would not oppose" inclusion of human rights language, while another commenter stated that it "would not actively oppose" the inclusion of human rights language in the Bylaws. Finally, one commenter did not "in

³⁰ Avri Doria, Edward Morris, NCSC

³¹ Business Constituency, COA, IPC, MPAA, Pranesh Prakash

³² Internet Association.

³³ The Heritage Foundation.

principle oppose” Human Rights language but was also one who stated that this was a WS2. *The CCWG should consider how to analyze and interpret this level of support, and how this should guide the CCWG’s further work on this subject.*

3. **Need for More Detail.** Based on several comments, CCWG should develop a more detailed explanation of the rationale and framework for interpretation of a Human Rights Bylaw, including reference to ICANN’s role in relation to Human Rights, and limiting the application of the Bylaw to ICANN’s mission before text can be added to bylaws. *In addition to proposed Bylaws language, WP4 is developing an explanatory document which includes a rationale for adding a human rights commitment to the bylaws and an overview of the discussions on the choice of bylaw language. Furthermore, WP4 expects to provide one or more templates for stress tests. Further work will be undertaken in WS2. To ensure that there is clarity between a passive, internal obligation for ICANN, and an active external enforcement role, the explanatory document could lay out the difference between the role of companies to respect human rights and the role of governments to protect human rights. The explanatory document should also discuss and bridge the divergences in the public comments concerning the choice of Bylaws language and references to specific rights (and to specific Human Rights documents in the Bylaws*

Commented [GS1]: The CCWG did not discuss these points in Dublin.

4. **Clarify Limited Mission and Scope.** Respond to concerns that adding human rights to bylaws language might create demands from civil society (and potentially others) for human rights enforcement outside of the ICANN’s mission and scope of activities. Respond to comments that the bylaws language should refer to an obligation to “respect” human rights within the ICANN mission to avoid any demands to “enforce (protect)” human rights. *WP4 stresses the necessity to make it clear in the bylaw language that ICANN commits only to respecting human rights within its mission. WP4 intends to avoid any bylaw wording that might lead to demands to enforce human rights.*

5. **Collaboration.** One commenter suggested collaboration in WS2 with the NCSC’s Cross Community Working Party on ICANN’s Corporate and Social Responsibility to Respect Human Rights. *WP4 aims to take all recommendations, suggestions and comments into consideration and invites everyone to join the work as described in the CCWG procedure documents.*

6. **WP4 Survey.** *Within WP4, we conducted a survey on various alternatives for formulation of a Human Rights Bylaw. The survey results were as follows:*

● **Question 1** – *Should there be a reference to a specific document in the Bylaws text regarding human rights proposed by the CCWG (Yes or No)?*

○ *Yes: 5*

○ *No: 17*

○ *Undecided: 1*

○ *No preference: 2*

● **Question 2** – *If a document reference is included should it be the UDHR (yes or no)?*

- ☞ Yes: 13
- ☞ No: 8
- ☞ Not Applicable: 4

● Question 3 - If not UDHR what other document or documents should be referred to (list)?

- ☞ UDHR, ICCPR, ICESCR: 7
- ☞ Ruggie Principles: 3
- ☞ Opposed to Ruggie Principles: 1
- ☞ Not Applicable: 8
- ☞ None: 4
- ☞ Don't Know: 1

Based in part on the public comments, the CCWG revisited the specific language of the Bylaws, and considered several alternative formulations, since there was not strong support for either of the formulations in the Second Draft Report. This began in WP4, where 17 out of 25 WP4 members³⁴ (68%) responding to the poll stated that the Bylaws text should not contain a reference to a specific document, while only 5 members (20%) supported reference to a specific document. This could be deemed “consensus” within WP4. However, since there was strong minority support for inclusion of one or more reference documents in the Bylaws, we ~~are forwarding~~ forwarded several alternative ~~formulations are being forwarded~~ to the CCWG for further discussion in Dublin:

1. *Within its mission and in its operations, ICANN will respect internationally recognized human rights.*
2. *Within its mission and in its operations, ICANN will respect the internationally recognized human rights set out in the Universal Declaration of Human Rights.*
3. *Within its mission and in its operations, ICANN will respect the internationally recognized human rights set out in the Universal Declaration of Human Rights, the International Covenant on Cultural and Political Rights and the International Covenant on Economic, Social and Cultural Rights.*
4. *Within its mission and in its operations, ICANN will respect the internationally recognized human rights set out in the Universal Declaration of Human Rights, the International Covenant on Cultural and Political Rights and the International Covenant on Economic, Social and Cultural Rights and will carry out its work guided by the UN Guiding Principles on Business and Human Rights.*

After a discussion in ~~ng with~~ the CCWG in Dublin, no decision was taken regarding any specific formulation for the Human Rights Bylaw. However, an action item was identified to refine decision was made to propose to include the following alternative formulation in

³⁴ WP4 has 46 mailing list members, not including observers.

WP4 and then bring the refined language back to the full CCWG for further consideration in the Bylaws:

Within its mission and in its operations, ICANN will respect internationally recognized human rights.

It should be noted that this formulation is the same as the second formulation in the Second Draft Report, except for the deletion of “be committed to” before “respect.”

Rationale and Explanation

A number of comments noted the lack of detail and development relating to the human rights bylaw. This issue was also discussed at various points in the CCWG. In response to this concern, a further rationale and explanation of the Bylaw follows.

Defining Human Rights

One broadly accepted definition of Human Rights is the following, from the United Nations Office of the High Commissioner on Human Rights:

“Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.”³⁵

Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. They may also be protected in domestic laws at the federal or state level (e.g. the United Kingdom's Equalities Act or Human Rights Act).

Human rights are basic rights and freedoms to which all people are entitled, free of discrimination.

They include civil and political rights, such as the right to life, liberty and freedom of expression; and social, cultural and economic rights including the right to participate in culture, the right to food, and the right to work and receive an education.

However caution in the use of the terminology is advised: terms of art such as “human rights” are often given very precise but subtly differing definitions by different commentators and in different jurisdiction.

Absolute vs. Qualified Rights

Some human rights are regarded as absolute. For example, the right to life, the right to freedom from slavery, the right of freedom from torture.

Other human rights are regarded as “qualified” rights. For example, the right to free expression and the right to a private life can both be “interfered” with, providing the interference is in accordance with law, necessary, and proportionate. Indeed the

³⁵ <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>

balancing between competing human rights is often required and must be carried out, delicately.

Human rights obligations and the private sector

[Rights imply corresponding obligations. That is, if a citizen has rights, the public authority has obligations.]

To the layman, this is non-obvious. But simply put: private sector organizations have no human rights obligations, unless they adopt them voluntarily or they are embodied in laws applicable to those private sector organizations. Human rights obligations are, by definition, part of the relationship between the citizen and the State. With my usual caveat that I am not a lawyer, I do not believe this section is quite accurate. Firstly, while the primary obligation to ensure human rights rests with the state, it is routine in the application of rights in law to require certain behaviors of companies and corporations....nondiscrimination, for instance, is required of all our businesses through the application of provincial and municipal law, religious rights are set in school policy and labor laws, etc. I think it is very important to describe how the obligations that the state takes on with respect to fundamental rights get passed on to companies and societies of all kinds, particularly in the traditionally regulated industries. (Transportation, telecom, etc.

ICANN - where we are now?.

As an international, private sector organization, what human rights obligations does ICANN currently have?

[Actually, despite section 5, above, ICANN does have obligations, to the extent they are embodied in the laws which ICANN must obey. Article 4 of Articles of Incorporation.]

What role, if any, does NTIA oversight play in ICANN in relation to human rights? What is the effect, if any, of the transition on ICANN's and human rights?

ICANN - where do we want to be at the point of transition?

High-level objective - new bylaw.

At the very least we need a high level statement of objective. If properly agreed between us, a new fundamental bylaw will almost write itself.

) I think it is important to recognize that as a multi-stakeholder organization that exists partly as a replacement for a regulatory agency, there is (or should be) a heightened expectation that ICANN will adhere to basic human rights principles, as a multilateral international body would be expected to adhere to relevant international law. This might belong in the next section on purpose or objective.

What does this bylaw accomplish?

Will ICANN's approach to policy development and implementation change in any way?

Will this have any effect on ICANN as a corporation, including as an employer and as a purchaser of goods and services?

Will this change the way any of ICANN's policies and operations are carried out?

The Interplay between Human Rights and Fundamental Rights

Legal persons have fundamental "human" rights in the same way as natural persons, except for rights that can only apply to individuals, such as the right to marry and found a family. So, it is clear, for example, that a corporation has definitely the same right not to be deprived arbitrarily of its property (whether tangible or intangible) as a natural person.

For example: according to Wex, a US-centric definition might be: "Fundamental rights are a group of rights that have been recognized by the Supreme Court as requiring a high degree of protection from government encroachment. These rights are specifically identified in the Constitution (especially in the Bill of Rights), or have been found under Due Process." Exactly my point. The expression "fundamental rights" usually refers to the context of a particular jurisdiction/legal system

Work Stream 2 and Transitional Bylaw

Further work remains to be done as part of WS2. Specifically, ~~the~~ development of a framework of interpretation for this Bylaw must be ~~is~~ one of the tasks that could be potentially undertaken underin WS2. In order to ~~assure~~ensure that the appropriate framework will be developed, it is proposed that a transitional Bylaw is also included as part of WS1. This transitional Bylaw would guarantee that proper work is done to develop the required framework of interpretation in WS2. The proposed transitional Bylaw would ~~read as follows~~convey the following:

Bylaw xx will be implemented in accordance to the framework of interpretation developed by a cross-community working group chartered by one or more Supporting Organizations or Advisory Committees and tasked ~~for~~with that matter. Said group should develop an appropriate framework of interpretation ~~in no later longer~~ than one year after Bylaw xx is ~~enacted~~adopted.