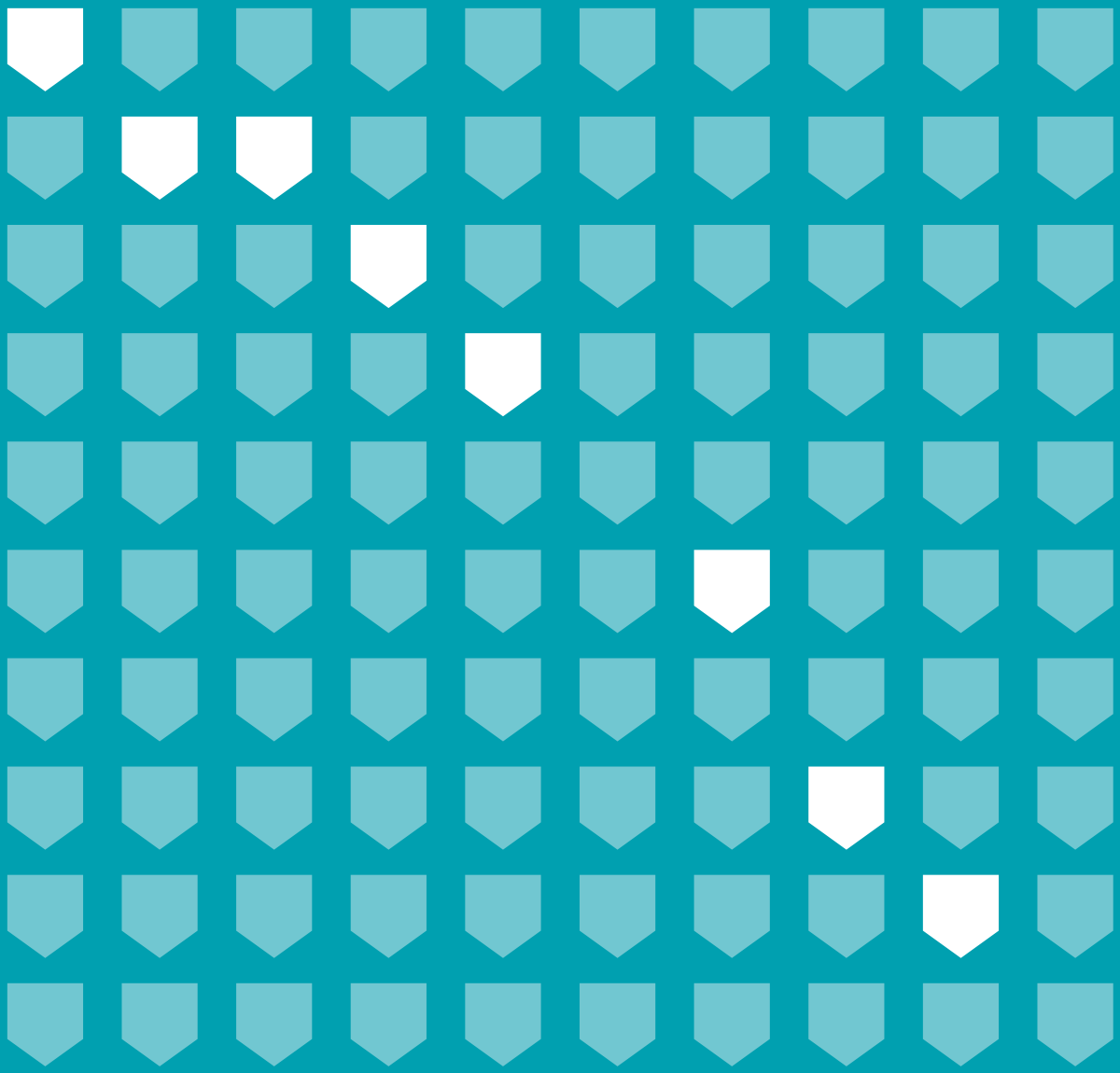

ICANN's Corporate Responsibility to respect Human Rights: Recommendations for developing Human Rights Review Process and Reporting

The Cross Community Working Party on ICANN's Corporate and Social Responsibility to Respect Human Rights

This paper was produced by the Cross Community Working Party on ICANN's Corporate and Social Responsibility to Respect Human Rights (CCWP-HR). ARTICLE 19 contracted the Institute for Human Rights and Business (IHRB) to draft this paper with input from the participants of CCWP-HR.

Executive Summary

The Cross Community Working Party on ICANN's Corporate and Social Responsibility to Respect Human Rights (CCWP-HR) prepared this paper for presentation and discussion at ICANN54 in Dublin in October 2015. This paper is intended to build on and complement the previous reports published by the Council of Europe and ARTICLE 19 on ICANN's responsibility to respect human rights.

The CCWP-HR recognises the on-going discussion within ICANN on the best way to develop and implement policies relating to ICANN and human rights, and prefers to adopt a measured approach, working in incremental stages.

The paper sets out the reasons that the UN Guiding Principles on Business and Human Rights (UNGPs) are the most appropriate framework for ICANN to follow in its mission to develop human rights policies and processes, and then presents options as to how ICANN can begin to implement them. One of the initial aims of this paper was to develop a template for human rights impact assessments (HRIA) and Corporate Social Responsibility (CSR) reporting.

Given the current state of ICANN's discussions on human rights, this paper proposes implementation in stages, applying a human rights-based approach to a specific part of its operation (i.e. the policy development process), and creating a report on its process, rather than tackling the whole issue of HRIAs and CSR concurrently. A human rights review process, and human rights reporting, will contribute to the goal of carrying out HRIAs and a full CSR strategy/reporting. Human rights debates and decisions by ICANN's board, management, and the global Internet community should take place within the overall policy debate and decision framework, not separately.

This approach ensures that human rights are considered as an integral part of the ICANN organisational values, and that human rights risks are managed as part of the overall ICANN's enterprise risk management.

Recommendations

- As a first step, ICANN should undertake a review of human rights impacts in the policy development process. This approach is more streamlined than an HRIA and can be completed by ICANN staff, and/or the CCWP-HR with a community review (see Section 4, Annex A and Annex B for more detailed steps).
- ICANN should focus on the core rights, which are freedom of expression and privacy, while keeping in mind other applicable rights from international human rights conventions (see Annex A).
- ICANN should develop a human rights report (see Section 5), initially based on the results of the review process.
- Before reporting, ICANN should take stock of available data, including an analysis of which elements from the annual report would be relevant to include in a human rights report, and any other of ICANN's activities that touches on human rights such as the WHOIS reform. This stock-taking will highlight gaps in data collection that ICANN can work towards improving.
- As an extension of the human rights report, as well as building on the internal momentum, ICANN should develop an approach towards transparency reports detailing law enforcement requests (see Section 6).
- In the longer term, ICANN should consider an organisation-wide human rights policy, based on a comprehensive HRIA, as well as CSR strategy that could lead to a full CSR reporting.

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1. Introduction

ICANN – The Internet Corporation for Assigned Names and Numbers – was created in 1998 as a non-profit public benefit corporation under Californian law, and under the mandate of the US government to take responsibility for the technical management of Internet domain names and addresses. ICANN is best known for creating policies governing the introduction of new generic Top Level Domains (gTLDs) into the Domain Name System (DNS), as well as coordinating the assignment of technical Internet protocol parameters, and allocating Internet numbering resources (IANA).

ICANN is something of a "hybrid" organisation. On one hand, it is set up like a business with global operations: the technical management of Internet domain names and addresses, complete with a board, management, supporting staff, and customers. It enters into contractual arrangements with registries and registrars, whose conduct and decisions are based generally on commercial law and economic considerations. In contrast to this commercial and economic orientation, ICANN is a global governance body, responsible for particular Internet functions, through development of responsible Internet policy. Although it is not in the business of regulating Internet content, its policies and the conduct and decisions of registries and registrars can profoundly affect multiple stakeholder groups, including individuals, businesses, organisations, and governments. Policy development takes place through a unique multistakeholder, bottom-up decision-making model, setting ICANN apart from typical business enterprises.

ICANN depends on, and benefits from, the input of an extensive community of volunteers, organised into many distinct groups and sub-structures. These include the Government Advisory Committee, whose membership consists of governments and international organisations; other Advisory Committees; Supporting Organisations; standing committees; working groups, review teams and task forces. This global community, supporting the Board and permanent members of staff, reflects the diversity of the Internet itself, and makes ICANN's organisational and governance structure wholly unique.

ICANN's IANA transition, scheduled to take place in September 2016, has prompted discussion on furthering the accountability and transparency of ICANN, and global debates exploded following the first application round of the new gTLDs in 2012, against the backdrop of the creation of the UNGPs in 2011. There is a vibrant and diverse discourse within the multiple governance bodies of ICANN about the overall remit, values, principles, and practices of ICANN. Emerging from this discourse is the question of the relationship between ICANN activities and human rights.

Article 4 of ICANN's Articles of Incorporation commits ICANN to "carrying out its activities in conformity with relevant principles of international law and applicable international conventions and

local law."[1] Whether the "relevant principles of international law and applicable international conventions" include international human rights instruments has yet to be explicitly stated. At the time of writing, the Cross Community Working Group on Enhancing ICANN Accountability[2] is exploring how ICANN's bylaws might be amended to specifically reflect human rights principles.

There are parallel, on-going discussions on the best way to develop and implement policies relating to ICANN and human rights. To assist this process, a Cross Community Working Party on ICANN's Corporate and Social Responsibility to Respect Human Rights (CCWP-HR) was established in 2015, with a particular focus on ICANN's responsibility to respect human rights. In addition, another stream of inquiry relates to ICANN's overall CSR, its scope, and the necessary actions stemming from to this responsibility, such CSR reporting.

ICANN's responsibility to respect human rights has been explored in several reports:

- A report published by the Council of Europe in 2014[3] focused on the meaning of ICANN's global public interest responsibilities from an international human rights perspective. The report suggested that ICANN's mission of serving the global public interest is vague, providing neither clear guidance nor constraint on ICANN's action, and that in addition to the right to freedom of expression and privacy and personal data collection, Internet governance should be mindful of objectives of common interest, such as pluralism, and cultural and linguistic diversity, as well as respect for special needs of vulnerable groups. It pointed out that ICANN's current standards on "sensitive" applied-for new gTLDs do not fully comply with the right to freedom of expression.
- Two subsequent papers by ARTICLE 19 in 2015 focused on *ICANN's human rights responsibilities from a global perspective. The first report dated February 2015, ICANN's Corporate Responsibility to Respect Human Rights*,[4] highlighted ICANN's impact on human rights, such as freedom of expression and privacy, and introduced the UN Guiding Principles on Business and Human Rights (UNGPs), explaining their relation to ICANN. The second report, dated June 2015,[5] following the establishment of the CCWP-HR, further explored how ICANN could implement the UNGPs. The report's main recommendation is that ICANN should demonstrate a commitment to respect human rights in all of its practices.

2. About this Paper

This report builds on the previous work of CCWP-HR, ARTICLE19, and others. Based on the discussions organised by the CCWP-HR, as well as its charter,[6] the working party aims to propose concrete instruments for ICANN to demonstrate its commitment to human rights. Specifically, the CCWP-HR has been working toward the following outputs:

- Requirements, description, and template for Human Rights Impact Assessment which could be used in the Policy Development Process; and
- Requirements, description, and template for ICANN to realize its commitments to human rights as a part of a broader approach to CSR strategy and reporting, including a standard for Transparency Reporting for Law Enforcement Agency requests.

While these two outputs are distinct, it is clear that they are closely related and mutually reinforcing, and should be a beneficial input to the debate on whether, and how, the human rights responsibilities of ICANN should be expressed and implemented.

Recognising the human rights debate in the broader context of the IANA transition in September 2016 and beyond, this paper presents several different options with respect to the two proposed outputs, and, where possible, recommendations and possible next steps for further discussion during ICANN54 in Dublin in October 2015.

3. Building a Common Understanding

Given ICANN's remit, the complex organisational and governance structure of ICANN, together with the multiple simultaneous inquiries into the various dimensions of ICANN's governance and accountability, it will be useful for this paper to try to answer some key questions around the relevance of human rights to ICANN, the relationship between human rights and CSR, the scope of rights that may be at risk, and how best to proceed.

3.1. Do the UN Guiding Principles on Business and Human Rights apply to ICANN?

The UNGPs, established in 2011, quickly transformed the way in which business enterprises understand and act on their corporate responsibility toward human rights, distinct from the state's legal obligations to protect human rights under international human rights instruments. Of the three pillars of the UNGPs – the government duty to protect, the corporate responsibility to respect, and remedy – the second pillar on corporate responsibility to respect human rights enumerates what business enterprises must do in order to "know and show" that they are addressing this responsibility.[7]

More specifically, business enterprises should have policies and processes in place, including a human rights policy and a process of human rights due diligence. This due diligence helps business enterprises identify, prevent, mitigate, and account for how they address their adverse human rights impacts. As part of this process, a business enterprise should look at human rights impacts that it may "cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships" (Principle 17). The three levels of involvement in adverse human rights impacts have the following consequences:

- Where a business enterprise causes an adverse human rights impact, it should take the necessary steps to cease and further prevent the impact.
- Where a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution, and use its leverage to mitigate any remaining impact to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm.
- Where a business enterprise has not contributed to an adverse human rights impact, but that impact is nevertheless directly linked to its operations, products or services by its business relationship with another entity, the situation is more complex. Among the factors that will enter into the determination of the appropriate action in such situations are: the enterprise's leverage over the entity concerned; how crucial the relationship is to the enterprise; the severity of the abuse; and whether terminating the relationship with the entity itself would have adverse human rights consequences (Commentary to Principle 19).

The foregoing analysis of "causing", "contributing to", or "directly linked through business relationships to" adverse human rights impacts is one of the challenges facing business enterprises

under the UNGPs. They usually debate and delineate the different levels and areas of responsibilities with the help of experts and using a corporate human rights impact assessment or similar methodology.

The principles under pillar two are specifically designed to work in the context of a "business enterprise". They are silent about the responsibilities of non-profit enterprises, and other actors and organisations that provide business services and facilitate business activities – these include business associations, chambers of commerce, stock exchanges, non-profit organisations, some educational bodies, bar associations, and accounting bodies. However, considering the influential positions that these organisations occupy in the world of business, some of these actors are proactively taking up the UNGPs, and analysing the implications of their operations in light of the UNGPs. For example, bar associations, including the American Bar Association and the International Bar Association, have endorsed the UNGPs, and some stock exchange organisations are actively investigating the role of the UNGPs in their operations.

Since ICANN is legally a non-profit corporation, some may argue that technically it is not a business enterprise within the meaning of the UNGPs; on the other hand, as stated above, ICANN has characteristics of a business, and its activities profoundly influence for-profit business enterprises in terms of direct economic impacts, as well as indirect impacts through influencing Internet content. ICANN has business relationships with registries and registrars, and these direct linkages can result in human rights impacts down the chain of actions of these actors. The UNGPs undoubtedly apply to most, if not all, of these actors in the chain; in addition, the key actors in the Information and Communication Technology (ICT) sector, and beyond, apply the UNGPs when it comes to assessing human rights impacts and reporting (see Section 4 and 5).

Thus, if we were to give a purposive interpretation to the UNGPs, entities such as ICANN, whose functions can have human rights impacts in a business environment, should also be covered by the UNGPs. Moreover, the UNGPs are supported by governments, businesses, and civil society organisations globally, and are a credible starting point for ICANN's internal stakeholders to begin to understand the scope of its corporate responsibility to respect human rights. Finally, as a framework, the UNGPs are adaptable to the organisation's structure and requirements and do not prescribe a *one size fits all* solution.

The two ARTICLE 19 publications referenced above began a discussion about the applicability of the UNGPs to ICANN; the CCWP-HR should build on such discussions to further its understanding of human rights impacts of ICANN activities. To ensure that this discussion does not get too far ahead of the on-going overall governance debates elsewhere in ICANN, this community is of the view that ICANN should take measured, incremental steps, promoting adequate internal debate and consensus building, and piloting of approaches, ultimately leading to an organisation-wide recognition of ICANN's human rights responsibility over a longer timeframe.

3.2 What is the relationship between Corporate Social Responsibility (CSR) and the UNGPs?

Broadly speaking, CSR is a type of self-regulation by business. CSR programs may be integrated into the business or run in parallel with the business, and can take many forms, including charity, activities to benefit communities, and efforts to address environmental and social issues usually unregulated by law. It can address human rights but does not do so exclusively. The corporate responsibility to respect human rights under the UNGPs is separate from CSR. The UNGPs explain that "[b]usiness enterprises may undertake other commitments or activities to support and promote human rights, which may contribute to the enjoyment of rights. This does not, however, offset a failure to respect human rights throughout their operations" (Commentary to Principles 11). This means that any charitable contributions and proactive programs of a corporation cannot substitute for efforts to prevent or mitigate against negative human rights impacts which might result from the operations of that corporation.

Another understanding of CSR, used by the European Union among others,[8] is focused on the corporate responsibility to understand and address a business' impact on society, to avoid adverse impact, and maximise any benefit for business, such as improving risk management. Such a definition *can* include the corporate responsibility to respect human rights as outlined in the UNGPs. As is evident from the diverse CSR programs and reporting of European companies however, CSR usually includes many other environmental and social elements as well as corporate promotion.

Most businesses in all regions and sectors today have some notion of CSR within their activities which they can articulate. It is possible for them to embrace respect for human rights, using CSR culture as a base, particularly if there is a strong responsibility or compliance orientation in that CSR culture.

In the case of entities without any CSR policy, strategy or programs, and without human rights policy or process, they must make a strategic decision about an entry point and prioritization. While it should be a goal for ICANN to implement a full CSR strategy, given its operations which are policy – and service-oriented (where adverse human rights impacts may appear abstract, diffused or unpredictable) rather than extraction- or production-based (where many adverse human rights impacts are more tangible and predictable), it may take time to arrive at a full consensus on the scope of its CSR strategy.

Meanwhile, according to the Council of Europe report,[9] there are pressing human rights issues which must be resolved within ICANN, particularly in relation to the gTLDs, WHOIS and the Registrar Accreditation Agreement (RAA). Therefore, this paper proposes a *step-by-step* implementation of CSR, with an immediate focus on human rights policy and procedure, and the development of a fuller CSR strategy over time. ICANN's reporting could take a similar path, starting with reporting on its human rights activities, and gradually expanding into the realm of transparency reporting, as well as more complete CSR reporting.

3.3 How should ICANN Prioritise?

All organisations struggle with prioritisation and sequencing of different human rights related initiatives. Where to start, what to prioritise, and how to move to implementation is a recurrent question asked by those tasked with initiating a robust human rights program. A textbook approach is illustrated in the ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights (the ICT Sector Guide).[10] Applying the steps in the ICT Sector Guide would mean that ICANN should start with:

i. A top level human rights statement (e.g. principles, policy, bylaws, core values);

ii. A roadmap for implementation – this may include an organisational-level human rights impact assessment (at the ICANN overall operational level);

iii. Identification of specific potential human rights issues (which may include potential human rights impacts that can be expected by the creation/application of ICANN policies);

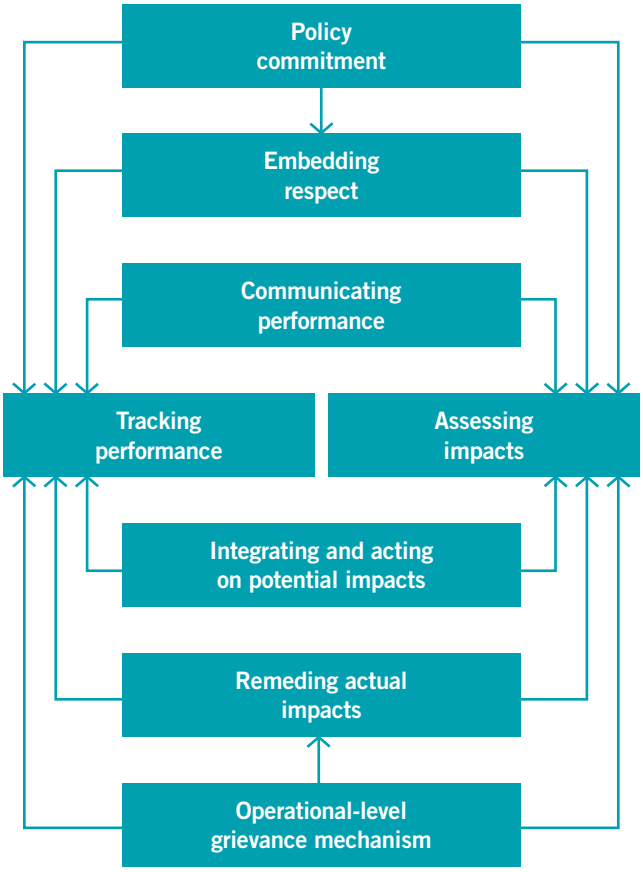
iv. A plan for mitigation and remediation of issues (including addressing grievances);

v. Communication around these issues; and

vi. Reporting publically on progress periodically.

Following this sequence will enable policy, procedures, and practices to be internally consistent and coherent. This process can be illustrated by the flow diagram below:

Key elements of the Corporate Responsiblity to Respect



Source: ICT Sector Guide

However, many organisations allow approaches to human rights issues to develop more organically and not necessarily in strict sequence. Taking advantage of the human rights issues that capture staff and stakeholders' attention most, and creating appropriate processes and tools to address them, can eventually drive the development of an effective overall organisational position on human rights. Once such a position is formed, it can, in turn, require fine-tuning of processes and tools. This report proposes that ICANN consider taking the following steps over a period:

Step 1

- Create a human rights review process
- Review existing policy development process itself for human rights impacts and consider areas of improvement
- Apply the human rights review process on a pilot bsis for ICANN's policy development process

Step 2

- Taking into account the results of the pilot, formaise the human rights review process for ICANN's policy devlopment process
- With this input, conside a human rights policy statement in the context of policy development process

Step 3

- Consider carrying out an organisational level human rights impact assessmen for the entire ICANN operations, in collaboration with external experts
- Consider an organisation-wide human rights policy statement, integrating the human rights policy for policy development process

Step 4

- Consider a CSP strategy
- Consider a CSR reporting

3.4. Which human rights should ICANN focus on?

The UNGPs clearly establish that business enterprises should respect all internationally recognised human rights. This means, as a minimum, "those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work" (Principle 12). Of course, "in practice, some human rights may be at greater risk than others. . . and therefore will be the focus of heightened attention. However situations may change, so all human rights should be subject of periodic review" (Commentary to Principles 12).

Assuming that ICANN will follow the approach suggested in the UNGPs, it should have a clear sense of the rights which are at greatest risk. ARTICLE 19's June 2015 paper on ICANN's corporate responsibility to respect human rights examines freedom of expression, the right to privacy, data protection principles in detail, in the context of ICANN's operations.

This approach is similar to the approach taken by companies that offer online services and communications: for them, it is generally understood that the most prevalent human rights issues are freedom of expression and privacy. For example, Yahoo! states that the company's Business & Human Rights Program was created to coordinate and lead its efforts to protect and promote free expression and privacy.[11]

Likewise, the Ranking Digital Rights project plans to use 31 indicators focused on disclosure of policies and practices of ICT companies that affect users' freedom of expression and privacy.[12] The ICT

Sector Guide mentions the right to privacy (which includes government requests to ICT companies), freedom of expression, and labour issues (as all companies have employees), as well as business relationships (in the case of ICT companies, relationships with suppliers are a material point of inquiry in human rights *due diligence*, but this should not be the case with ICANN). In addition, the Global Network Initiative's Principles mention freedom of expression and privacy.[13]

Other experts suggest that a broader list of human rights issues should be considered in the context of Internet governance. As mentioned, the Council of Europe report identified the rights to freedom of expression, freedom of association, and freedom of religion, and the principles of equality and non-discrimination as being at risk in connection with decisions on gTLDs. It also noted that data protection and privacy must be considered in reference to WHOIS and RAAs. In general, the Council of Europe would like ICANN to promote pluralism, and cultural and linguistic diversity, as well as respect for special needs of vulnerable groups. The Panel on Global Internet Cooperation and Governance Mechanisms, convened by the World Economic Forum and ICANN, suggests that the Internet governance ecosystem should respect human rights and shared values, culture, and linguistic diversity, among others.[14] Annex A presents a more detailed analysis of the relevant human rights at risk in relation to key ICANN operations, as identified by members of the CCWP-HR.

It is clear from the foregoing analysis that the rights most relevant to ICANN's policy development process, and possibly other operational aspects, are freedom of expression and privacy. It is also clear that members of the CCWP-HR recognize that other rights come into play (see Annex A), and as additional issues in ICANN policy development emerge, it is possible that rights not included in Annex A may become relevant. This report suggests that ICANN's human rights inquiry into the policy development process should consistently focus on the two core rights mentioned above, but supplemented by the list (Annex A) of rights relevant to the area of existing policy, the policy being developed, or to other relevant areas of ICANN operations. Regardless, it is paramount that these relevant rights are identified only as indicative of the rights at risk, and that they are subjected to comprehensive and iterative consultation with the global Internet community for verification or modification.

The decision about which rights should be addressed by ICANN will affect the scope and complexity of its eventual human rights impacts assessment, as well as its reporting on matters related to its responsibility to respect human rights.

4. Working towards a Human Rights Impact Assessment Template for the Policy Development Process

4.1 Suitability of HRIAs

Human Rights Impact Assessment (HRIA) is a tool used in the process of human rights due diligence to systematically catalogue an organisation's human rights risks, and the impacts of its activities on stakeholders and society, so that appropriate avoidance, mitigation or compensatory measures can be taken by the organisation. Although public sector agencies use HRIAs in connection with proposed laws and regulations, such usage seems to be overshadowed by private sector use, which became more prevalent after the UNGPs came to effect in 2011.

Although several HRIA frameworks and templates are publicly available, they aim to inform a corporate entity of its human rights "footprint" and are undertaken as a part of an enterprise risk management process, or before the entity enters into a new activity. There is no such template specifically for a policy development process of an organisation. The closest analogy may be regulatory impact analyses (RIAs) by regulatory agencies[15] which focus on the costs and benefits of a proposed regulation (similar to the consideration of what is "useful or harmful" mentioned in the Council of Europe report)[16]. While conceptually useful, the methodology for such RIAs is complex, and is not practical to try to adapt it to the current situation at ICANN. ICANN needs a new tool that has elements of HRIAs, but is adapted to the specific policy development scenario. Some aspects of existing HRIA models may be useful to note here.

Generally, the more commonly used templates for corporate purposes are:

- Danish Institute for Human Rights Compliance Assessment Tool;[17]
- NomoGaia's Human Rights Impact Assessment tool;[18]
- International Finance Corporation (IFC) Human Rights Impact Assessment and Management tool;[19]

The first two take a 360° approach, in order to have an organisation review their own human rights impacts systematically, with several hundred questions to be answered. The IFC tool is more adaptable: for example, it enables companies to carry out either a freestanding HRIA or assessment in connection with other environmental or social impact assessment process. All of these instruments offer a review opportunity of all or specific corporate activities against multiple international human rights instruments, often with the assistance of outside experts, producing large quantities of information.

These are a significant undertaking, so it makes sense to do so only in cases where significant economic and human rights issues intersect.[20]

To use a specific industry example, Yahoo! states that it undertakes an HRIA when one of following circumstances is present:

- Entry into new markets;
- Launch of new products or services that may impact users' rights to privacy or free expression;
- Review and revision of internal procedures for responding to government demands for user data or content restrictions in existing markets;

- Data storage decisions;
- Review of the free expression and privacy-related policies, procedures and activities of potential partners, investments, suppliers and other third parties.[21]

The second circumstance – launch of new products – may be the most analogous to ICANN's policy development. Unfortunately, Yahoo! does not publish its HRIAs, but the framework follows the Global Network Initiative Implementation Guidelines, of which Yahoo! is a founding member.[22]

Oxfam's Community-based Human Rights Impact Assessment offers an alternative path to corporately-driven processes, allowing affected stakeholders and communities to drive a process of information gathering and participation, framed by their own understanding of human rights. This approach may be particularly useful for when ICANN engages with those whose rights may be affected by a proposed policy.

The available HRIA models are instructive in two ways. First, there is a distinction between a top-down, desk-study approach to impacts assessment, and a bottom-up, participatory approach to identifying human rights risks from a rights holder perspective. Second, the HRIAs focus on the potential negative human rights impacts, in the context of the national environment, by placing a specific emphasis on those who are vulnerable or marginalised, in order to ensure that their views are reflected.

4.2 How does a human rights review process work?

This report recommends that a streamlined human rights review process be applied as part of ICANN's policy development process, in order to eliminate potential human rights risks, to be verified or adjusted by a process of consultation. The outcome of this process should feed into the overall decision by ICANN on the proposed (or existing) policy. Annex B describes the ten review steps in the human rights review process. This process could be carried out at the outset of a policy development process, and in conjunction with the creation of the issues paper.

This review process would have several benefits:

- The review process is a far more streamlined process than HRIAs, and would take less time to complete, as well as requiring significantly fewer financial and human resources; and
- It is a relatively simple process which can be completed by non-human rights experts (by ICANN staff and/or members of the CCWP-HR, any consultants, and with a community review).

Furthermore, it is far more appropriate for ICANN to spend time and resources on a comprehensive global consultation on the policy than on HRIAs. The initial rights at risk identified through a process of desk study, however rigorous, may not be identical to those perceived or experienced as abused by affected rights holders. Thus, the top-down process of human rights review must be supplemented by a bottom-up process of consultation with potentially affected stakeholders and rights holders in order to verify or modify the rights at risk and to identify the types of impacts or harm.

The human rights review process should produce a list of issues, together with suggestions for experts to be consulted, and a global consultation plan, taking care to include those who may be vulnerable or marginalised, and those not be easily engaged through online modes of consultation. The consultation plan should run in parallel with the overall ICANN process of policy development, and the human rights issues identified and verified should be presented alongside other issues identified through the usual process for identification of issues. The proposed review process should be piloted with several policy initiatives, preferably those with relatively clear-cut human rights impacts.

If it has not already been carried out, a human rights review of ICANN's policy development process itself may be beneficial. While the process appears to already contain various due process checkpoints, it may nonetheless be helpful for ICANN to understand areas of improvement. For example, it may be worthwhile to consider the following points:

- Whether the overall policy development process, and its purpose, is clear, transparent, and understandable to all stakeholders;
- Whether appropriate information is publicly available throughout the process of developing a particular policy;
- Whether the consultation methodology meets human rights principles, such as inclusion, participation, engagement, and transparency;
- Whether decisions are explained in a clear, transparent manner, understandable to all stakeholders; and
- Whether there are any mechanisms for redress which are human rights compatible.

Over time, an improved policy development process, made compatible with human rights principles, combined with the experience gained in applying such a process, could lead to ICANN's formation of a human rights policy statement on its policy development process.

This paper recommends that human rights debates and decisions by ICANN board, management, and the global Internet community, take place within the overall policy debate and decision framework, and not separately. This approach ensures that human rights risks are considered as an integral part of the ICANN organisational values, and human rights risks are managed as part of the overall ICANN enterprise risk management. Human rights decisions in the ICANN policy contexts are likely to involve weighing of different rights, and eventually a judgment – akin to a balancing act. ICANN's human rights deliberation process should not be detached from the realities and modalities of ICANN operations; instead, it should be enriched by the active and inclusive participation of the global Internet community. To ensure accountability, both interim and final decisions should be explained in a transparent manner. Human rights reporting is one way to enable ICANN to account to its global community about decisions made, and the rationale and process leading to them.

5. Corporate Social Responsibility (CSR) Reporting: Human Rights

A CSR report is commonly used by businesses to demonstrate how they are fulfilling their social and environmental responsibility toward their stakeholders. Different companies may call them by different names, such as sustainability reports[23] or citizenship reports.[24] While these reports are produced largely on a voluntary basis, recent regulatory changes are making human rights reporting mandatory for large companies in Europe,[25] and around specific themes and activities.[26]

Human rights are increasingly included in CSR reports. Even where companies are not required to report formally on their non-financial performance, reporting on human rights performance carries benefits: strengthening relationships with key stakeholders, and enhancing trust in the company's operations.

As outlined above, this paper recommends that ICANN take an incremental approach to implementing a CSR strategy and report: beginning with a human rights review. While it is possible to report on incremental progress in a human rights review, as well as the potential adverse human rights impacts of its policy development process, it would help the reporting process as well as the audience of such reports, if ICANN had an 'anchoring place' or focus, which often is a human rights policy for many companies.

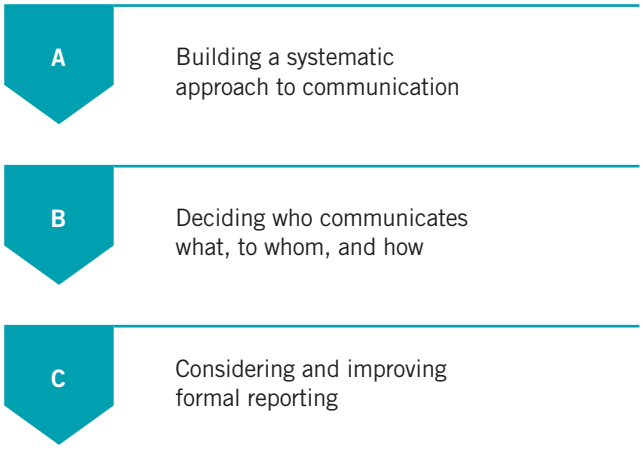
Accountability and transparency are a core part of human rights due diligence. Communicating externally about how business enterprises address their human rights impact is one of the steps recommended by the UNGPs. It is by "knowing and showing" respect for human rights in practice that companies build trust in their performance, demonstrate their reliability as partners, and gain a substantial "social license to operate" (the activities of business remaining legitimate in the eyes of society). Reporting is part of being accountable for how business is done, not least to those who may be impacted by their operations.

Communicating on human rights is first and foremost about accountability. For ICANN, communicating externally is important to ensure that its aims are being fulfilled, and that the ICANN community is informed about how this is being implemented. This can include communicating both on on-going responses to existing issues, and on efforts to improve prevention of negative human rights impacts.

External communication should be fit for purpose and can take many different forms: in-person meetings, online dialogues, consultation with affected stakeholders and formal public reports. Due to ICANN's size and structure, its global audience, and many meetings and online discussions already taking place, a written report may be the best option.

5.1 Starting Point

Part 3, Section V of the ICT Sector Guide on "Communicating Performance" suggests the following steps:



These steps provide a useful checklist, assuming that ICANN goes down the route of formal reporting. There are two questions to be considered in developing a human rights report – one of format and one of content.

5.2 Format

Formal reporting on human rights performance can be part of either a stand-alone annual CSR report or integrated into the annual report. Listed companies usually start with a stand-alone CSR report because they have very specific legal requirements and deadlines on the financial reporting side in the annual report and are reluctant to be delayed by deadlines on the CSR side.

The benefit of an integrated report, combining financial and non-financial reporting, is that it sends a signal, internally and externally, that an organisation identifies and addresses financial and non-financial issues and risks on an equal footing and in a holistic manner. This is considered by many to be a more advanced form of reporting. For ease of production, ICANN could start with a stand-alone human rights report, to which a transparency-reporting component can be added over time, with a view to developing a full stand-alone CSR report in the future. It can then consider the benefits and costs of producing an integrated report.

There are several CSR reporting frameworks that feature a human rights component. As a first step, ICANN could apply the human rights elements of these CSR reporting frameworks for their own report on human rights:

The UN Guiding Principles Reporting Framework (RAFI)[27]
RAFI is designed to guide companies reporting on their human rights impacts in line with the UNGPs. If ICANN begins its reporting by focusing on human rights, this framework will be the most relevant. RAFI is comprised of 31 questions, but companies just beginning to address human rights issues can meet the minimum threshold of information required by the UNGPs by answering the eight overarching questions and four informational requirements. Over time, the company should work towards answering the remaining supporting questions and improving the quality of their responses to all questions, demonstrating on-going improvement.

Companies across different industries are beginning to use this framework, including Unilever, Ericsson, H&M, Nestle, Newmont, and ABN-AMRO. Unilever was the first company to publish a stand-alone human rights report,[28] and there are several elements of Unilever's approach that ICANN could adopt for its own human rights report:

(i) Milestones: The report begins with a chart outlining how the company has developed its human rights due diligence year on year, from "Laying the Foundations" to "Putting the Processes in Place" to "Strengthening and Developing."

(ii) Policies and Processes: This section outlines the policies relating to human rights that have been developed or are being developed and any stakeholder engagement conducted.

(iii) Embedding Human Rights: In this section, the report outlines the human rights impacts that the company considers most salient in its operations, determined through consultations and review processes e.g. discrimination, fair wages, forced labour.

(iv) Looking Ahead: This section outlines how the company plans to develop and strengthen its human rights due diligence in the coming years.

The Global Reporting Initiative (GRI)[29]
Many companies use the GRI Sustainability Reporting Guidelines for full CSR reports, but there are categories for disclosure on human rights which ICANN could draw on. GRI released the most recent G4 version of the Guidelines in 2013, which also recognises the importance of the UNGPs. The Reporting Principles and Standards Disclosures are divided into categories, such as economic, environmental and social (including human rights), and the aspects of these categories to be reported on. For example, aspects regarding human rights include freedom of association and non-discrimination. There are a series of indicators to report on and companies that follow the Guidelines usually produce an index in their CSR reports, which outline the categories, aspects and indicators. For example, Cisco's 2014 CSR report[30] aligns with the GRI Guidelines, addressing categories and aspects in narrative form throughout the report, with an index of GRI indicators and the company's compliance with them at the end of the report.

While the human rights aspect of the GRI Guidelines does not specifically refer to freedom of expression, this does not prevent companies from reporting on these impacts. For example, Cisco's CSR report has a section on Privacy and Data Security featured as part of the Governance and Ethics pillar of its broader CSR Strategy (see below).

Sustainability Accounting Standards Board (SASB)[31]

The Sustainability Accounting Standards Board (SASB) is an independent, U.S based non-profit organisation. SASB's mission is to help U.S and foreign public companies disclose material, and "decision-useful" information on sustainability to investors. Standards are industry specific, including a "Technology and Communication" category. There are separate standards for, "Electronic Manufacturing Services & Original Design Manufacturing; Software & IT Services; Hardware; Semiconductors; Telecommunications; Internet Media & Services".[32] For example, the Internet and Media Services standards include topics such as freedom of expression, data privacy and data security.[33]

Ranking Digital Rights[34]

The Ranking Digital Rights project will publish its first Corporate Accountability Index in November 2015, where 16 Internet and telecommunications companies will be ranked according to 31 indicators focused on corporate disclosure of policies and practices that affect users' freedom of expression and privacy. While it is not a reporting framework against which companies can be measured, the 31 indicators would be useful for ICANN to review and compare how they might be ranked, which would give an indication of areas ICANN could concentrate on for improvement. In addition, the project's pilot methodology poses questions regarding the company's commitment to respect human rights and regarding transparency, which could be useful in developing a human rights policy, review process, and transparency report.[35]

5.3 Content

Once the format for the report is chosen, what should be included in the CSR report? The GRI reporting indicators might prompt the type of information that should be reported, but the GRI framework does not necessarily provide an overall narrative, and many reporting entities choose to hire editors to create an overarching narrative or themes, in addition to or folding in reporting on specific reporting indicators.

ICANN's already-published annual reports offer an excellent baseline on which the organisation can build its reporting practice, to ultimately cover matters of interest or concern expressed by ICANN's stakeholders.[36] While these have a financial reporting component, given ICANN's not-for-profit characteristics, the reports generally have some interesting content on which a human rights report could build. For example:

- The Affirmation of Purpose, including the mission to ensure accountability, transparency and the interests of global Internet users;[37] and
- The creation of an Accountability and Transparency Review Team report, participation in 2014's NetMundial and the multi-stakeholder approach at the core of ICANN.

Other activities to consider including in a human rights report:

- Updates on the reform of the WHOIS registration system[38] and efforts to include privacy protections for Internet domain name owners, for which there has recently been a public consultation process.[39] Civil society groups such as the Electronic Frontier Foundation have expressed concern about the lack of privacy protections so far;[40] and
- As outlined above, the first report could track ICANN's progress in developing a human rights review process and policy for human rights impacts in a policy development process; these efforts could build a foundation for an organisation-wide human rights policy and a CSR strategy.

5.4 What should the narrative be for ICANN's first human rights report?

There are several considerations:

- Many organisations publish reports with reference to their CSR strategy, policy implementation and compliance.[41] They develop internal key performance indicators to track progress on issue areas over time. To do this, ICANN would need a CSR strategy, which should be acknowledged as one of ICANN's goals.
- When an extraordinary event happens in a particular year, organisations can build a report around the event; ICANN's on-going governance and accountability or human rights work generally could be one of the reporting themes.
- What can be reported may be limited by the availability of data. For this purpose, many reporting organisations start with stocktaking of the available and relevant data that the organisation has already collected or has capacity to collect regularly.
- Stakeholder views are important, and many reporting entities engage with stakeholders specifically in order to identify topics of interest to stakeholders to be included in their CSR reports.

Several areas were identified during the research for this report which could be included in the CSR report in order to increase transparency and accountability. For example, ICANN is reportedly receiving an increasing number of requests from law enforcement agencies, which are taking an increasing interest in the DNS system, especially in people registering certain domains that could be facilitating criminal behaviour, such as the online exchange of child abuse images. It appears there has been co-operation between law enforcement and ICANN,[42] but the extent of this is unclear to the community. In particular, it is unclear which law enforcement agencies are making the requests, who within ICANN is receiving the requests, how many requests ICANN are receiving, and how ICANN is responding to such requests.

Since ICANN will increasingly receive requests from law enforcement agencies, it is important to be as transparent as possible about this in order to ensure accountability for decisions to comply or not. How to systematically record these requests and report on them, for the sake of transparency, is an issue that ICT companies are grappling with globally.

6. Transparency Reporting

Transparency enables governments and companies to demonstrate that they are upholding key human rights principles of accountability and transparency, and enables other stakeholders to hold governments and companies accountable to such principles.[43] A key development in company transparency in the ICT Sector has been the annual or bi-annual release, by some companies, of information relating to Government requests for content takedown received by companies, or requests for user data.[44] Publishing information on Government requests, and company responses, increases awareness among users of the scale and scope of Government requests, and increases transparency around corporate responses.

The ICANN board has already approved an annual transparency report recommended by the Accountability and Transparency Review Team (ATRT).[45] A first step would be determining which elements need to be included in such a review, based on the ATRT's report. Several elements were suggested in the ATRT report which might be used as a starting point:

"c. Statistical reporting to include at least the following elements:

i. Requests of the Documentary Information Disclosure Policy (DIDP) process and the disposition of requests.

ii. Percentage of redacted-to-unredacted Board briefing materials released to the general public.

iii. Number and nature of issues that the Board determined should be treated confidentially.

iv. Other ICANN usage of redaction and other methods to not disclose information to the community and statistics on reasons given for usage of such methods.

d. A section on employee "Anonymous Hotline" and/or other whistleblowing activity, to include metrics on:

i. Reports submitted.

ii. Reports verified as containing issues requiring action.

iii. Reports that resulted in change to ICANN practices."[46]

Transparency reporting is still in its infancy in the ICT sector, but it is developing year by year, moving towards the inclusion of more relevant information. Google published the first transparency report in 2010, following its withdrawal of operations from China.[47] Initially, ICT companies were slow to follow suit. The Snowden disclosures in 2013 arguably triggered the development of transparency reporting as an industry standard format of accountability, as companies tried to restore trust in their services. At the time of writing, 58 ICT companies worldwide are producing transparency reports.[48] Although there are similarities across company transparency reports such as purpose, type of data, and reporting periods, there is no standardised method of publishing the information, and thus each company's transparency report differs depending on the nature of the company's operations. This means ICANN has some flexibility when developing the purpose and format of their own transparency reports.

The initial approach of developing a transparency report for ICANN should start with establishing which ICANN staff member holds responsibility for collecting corporate data, and what kind of information is being collected. A starting point could be to find out what data is already being collected, and identify gaps in that information. Then a data collection system needs to be put in place, for example local registrars reporting back annually on the requests they have received.

In addition, there needs to be a process in place by which law enforcement or government agencies make requests to ICANN, such as a designated person in law enforcement submitting a request in writing to a designated person in ICANN, which can then be recorded, collated, aggregated if necessary, and made ready for publication. Some guidance on this can be found in the Global Network Initiative (GNI) Implementation Guidelines.[49]

This report outlines below some key factors commonly reported in current transparency reporting, noting that most companies now use some combination of these factors:

Number of requests: The early days of transparency reporting consisted of the number of requests companies received from governments, listed by country. The numbers generally included requests to remove content or hand over user data, and how many requests companies complied with. While the publication of such data is important to help lift the veil of secrecy around ICT companies' relationships with governments, the publication of Microsoft's first transparency report in 2013 in particular prompted stakeholders to publicly ask how transparency reports made up of spreadsheets, tables and graphs can be usefully interpreted.[50]

Depending on the company and the services offered, the statistics could imply different situations. For example, one request could relate to one mobile phone account connected to one person; alternatively, one request could relate to five different email accounts connected to one person, making comparison between company's transparency reports and interpreting the numbers in a meaningful way difficult. In addition, some numbers were not reported at all, such as National Security Letters (NSLs) in the U.S. Following the Snowden disclosures, Internet companies began pushing back against the government, with the aim of allowing more disclosure of NSLs; disclosure was initially granted only if the number of NSLs were reported in bands of 1,000, starting with 0-999.

As more companies publish reports, there has been an effort to give the statistics, which remain an important starting point, more context, and to build a more accurate picture as to the nature of requests that companies are receiving.

Case Studies/Context: Early transparency reports provided numbers on how many requests were turned down by companies, but with little or no explanation. While this may have been necessary for legal reasons in some cases, the reasoning behind rejections of requests is an important part of a company's accountability. Google's transparency reports for government removal requests started to include a section on 'Explore Requests'[51] in which context on the nature of particular requests and whether/why they did/did not comply is provided. In many cases, it is revealed that a government request did not comply with the country's own laws.

Legal frameworks: Telecommunications operators have struggled to produce transparency reports, as they were often prevented by law or the terms of their license from disclosing the number of requests they received from law enforcement agencies in certain countries. In 2013, Vodafone developed a transparency report that focused less on the numbers and more on laws governing censorship and surveillance in 29 countries they operated in. The report presented information including:

- Situations where disclosure is unlawful under the laws of that country;
- Where there is no lawful provision and/or such interception technology has not been activated and therefore Vodafone does not receive requests;
- Where the law on disclosure is unclear and Vodafone is awaiting guidance;
- Where the law on disclosure is unclear and Vodafone has been unable to obtain further guidance;
- Where authorities have directly told Vodafone that they cannot disclose information, even when the law does not expressly prohibit this; and
- Where it does not need to publish because the government, parliament or a credible independent body such as a regulator, already publishes statistical information for certain types of demands issued to all operators in that country.

Vodafone took a bold step by presenting this information, which highlighted the responsibilities of the government rather than just reporting on the company's own performance. Providing this additional context also highlights areas where disclosure and transparency can be improved. Telenor followed suit using this methodology in their first transparency report in 2015. It is the view of many companies that the onus is on Fovernments to be transparent about the requests they make to companies, and it is Governments themselves who should be producing transparency reports.

Major events: Some companies have chosen, in addition to regular transparency reports, to publish information on requests that fall outside routine law enforcement requests. For example, the Swedish telecommunications operator TeliaSonera publishes information on "major events" such as requests for "mass surveillance" or network shutdowns, although with limited

details. For example, in 2013, TeliaSonera disclosed that the company had been asked to shut down the network, or restrict access to certain websites, in its Eurasia operations 20 times.[52]

Transparency data collection and reporting will take time to develop and implement, but the process can form an important part of developing ICANN's overall human rights policy, and CSR strategy and reporting, as it demonstrates on-going commitment to improve. For example, ICANN's first human rights report could present the development of a request process and data collecting system, and point to a commitment to full reporting in subsequent reports.

7. Conclusion

It is vital that ICANN's approach to fulfilling its responsibilities to respect human rights is understood and accepted by the ICANN community. The fact that human rights discussions are happening at various working groups simultaneously, inside and outside of ICANN, suggests that there is substantial energy to tackle and operationalise human rights in ICANN's activities. There is an opportunity to use this momentum to establish the need for a systematic approach to human rights, including a full human rights impact assessment, and a human rights policy at the ICANN corporate level, as well as a CSR strategy and CSR report.

Through the current assignment, the CCWP-HR welcomes the opportunity to input to the overall debate on and development of ICANN's human rights position and system. This also means that some degree of open-endedness and flexibility should be ensured in the design of the CCWP-HR outputs so that
they are able to fit within the overall human rights policy and governance system of ICANN when they are put in place.

Taking the steps outlined in this section will lead the way to developing a comprehensive CSR strategy and reporting by ICANN in subsequent years.

Annex A

Potential Rights at Risk in relation to various ICANN Operations

Classification of ICANN Operation	Potential Rights at Risk
General ICANN	• Right to access information • Right to access free education (by implication) • Right to participate in cultural life
Sensitive String Review	• Freedom of expression • Freedom of association • Freedom of religion
Auctions	• Due process • Freedom of association • Principle of equality and non-discrimination
TLDs	• Freedom of expression • Freedom of association • Freedom of religion • Principle of non-discrimination • Property rights
Application Guidebook and RAA / WHOIS	• Freedom of expression • Freedom of association • Personal data protection • Right to privacy
Sensitive expression in the Application Guidebook	• Freedom of expression
Trademarks	• Freedom of expression
Community-based TLDs	• Freedom of expression • Freedom of association • Right to access culture • Right to access and impart information • Principle of equality and non-discrimination (including sexual orientation)

Classification of ICANN Operation	Potential Rights at Risk
Protected domains (e.g. doctor/medical)	• Right to health
Restricted/criminal (e.g. child pornography etc)	• Freedom of expression • Rights of the child
UDRP	• Due process • Right to fair trial
Rights concepts that need consideration	• Public interest • Pluralism • Cultural and linguistic diversity • What community means • Due process • Accountability and transparency • Multi-stakeholder (what it really means in this context) • Internet governance (what is ICANN's perspective) / managed in a sustainable and people-centered fashion • An open, inclusive, safe and enabling internet • Equal access (to ICANN) • Minorities and vulnerable communities • Security and stability • Right to development

Source: Comments of CCWP-HR members, Council of Europe, and IHRB

Annex B

Human Rights Review Process

Step 1

Review of stated objectives of the policy

- What are the intended economic and social benefits?
- Who are the beneficiaries?

Step 2

Preliminary identification of rights at risk

- In addition to privacy and freedom of expression, what other rights may be at risk? Consider Annex A

Step 3

Identification of stakeholders and rights holders

- Who are vulnerable or marginalised, whose voices may not be heard?
- Are there country or regional contexts that could magnify human right harms to rights holders?

Step 4

Identification of any relevant national legal requirement

- What legal protection exists/is missing?

Step 5

Identification of potential negative human rights impacts

- How will the rights at risk affect the rights holders?

Step 6

Prevention, migration or compensation

- Are there mitigating circumstances?
- Are there ways to prevent, mitigate or compensative for (in this sequence) such negative impacts? Consider ICANN's capacity to address the negative impacts.

Step 7

Consultation with external expert groups, if difficult or significant human rights issues

- Who has the capacity and experience in this area?
- How should the experts be engaged?

Step 8

Summary of initial findings

- Overall benefits of the proposed policy, rights at risk, potential impacts, prevention or mitigation measures etc.

Step 9

Design and execution of a global consultation process

- In view of the initial findings of potential negative human rights impacts, define both online and offline process to engage stakeholder groups, particularly those who may potentially be affected but are difficult to reach.

Step 10

Confirmation of human rights issues and presentation

- Verify the intitial findings, or modify them to reflect the outcomes of global consultation

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