

Summary: Workstream 1 HR discussions/agreement

Intro note: pre-WP4 discussions

The introduction of the human right bylaw language was discussed as an option in the the second draft report of the CCWG. The second draft report states that “In these discussions, some participants raised the following 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.”¹

The main issues discussed and agreed upon (or not!) at the WP4 during the process of the bylaw drafting:

- **No human rights cherry-picking**
 - WP4 agreed with the argument that human rights are indivisible, interrelated and interdependent. This was reflected in the email correspondence and in a specific report from WP4 to the CCWG. This was adopted by the CCWG and ended up in Annex 6 of the final report:

“The CCWG Accountability also disagreed with any attempt to single out any specific Human Right (such as “freedom of expression”) in the proposed draft Bylaw text on the basis that Human Rights cannot be selectively mentioned, emphasized, or applied since they are universal, indivisible, interdependent, and interrelated”
- **No initial commitment to / no reference to any particular HR instrument in the bylaw**
 - WP4 initiated a poll asking members and participants to vote on including references to particular international instruments (such as UDHR, ICCPR and others) in the Human Rights Bylaw draft. The result of this poll, was no consensus on whether to include any references, and if we did, which reference(s) would be included (e.g., UDHR, ICCPR, ICESCR, other treaties or the Ruggie Principles²). This is one of the points that was forwarded to WS2 to resolve
- **Discussions on “respect” vs. “enforce and protect”**
 - WP4 concluded that ICANN’s commitment to human rights would be one of “respecting” human rights, not “protecting” or “enforcing” human rights. There

¹ <https://www.icann.org/en/system/files/files/ccwg-draft-2-proposal-work-stream-1-recs-03aug15-en.pdf>

² The results of the poll can be found on the WP4 mailing list archives:
<http://mm.icann.org/pipermail/wp4/2015-October/000158.html>

was a broad agreement that ICANN cannot turn into a human rights watchdog and that the obligation of ICANN to respect human rights would be in line with its limited mission. The consensus decision was taken to explicitly state that ICANN does not have any obligation to either enforce or protect human rights. This has been reflected in both CCWG report and in the bylaw language Annex 6 states that :

Further, the CCWG Accountability emphasized that adding a commitment to respect Human Rights to the ICANN Bylaws should not lead to an expansion of ICANN's Mission or scope. While there was general agreement that ICANN should commit to respect Human Rights within the limited scope of its Core Values, any type of external enforcement or regulatory activity would be wholly out of scope.

- **No blind commitment to Ruggie principles**
 - The Ruggie principles have to be carefully assessed with regard to the commitment that ICANN cannot turn into a human rights watchdog. The concept of agreed bylaw language includes the prohibition on enforcement and protection. Moreover, as ICANN has a unique mission, not all of the Ruggie principles that are in general applicable to private companies would be applicable to ICANN, and some principles could even have significant negative consequences..

- **No complete consensus on the implications of Article 4 of Articles of Incorporation vis a vis Human Rights**
 - While Article 4 of the Articles of incorporations provides that ICANN shall carry out its activities in conformity with relevant principles of international law and applicable international conventions, it was agreed that applicability of this provision to the international instruments on human rights would require an additional legal analysis, maybe by external advisors. In general, human rights conventions and other international instruments create obligations for the states only, which, in turn, implement those obligations into their national laws. Thus, there was no agreement whether or not the reference to the principles of international law in Art. 4 creates any obligation for ICANN with regard to respecting human rights.

- **The “dormant” bylaw and the need for the framework of interpretation**
 - Concerns had been raised that the bylaw creates obligations that can have significant consequences. As a result, it was decided that the bylaw shall not enter into force before the Framework of Interpretation is agreed upon and adopted in the same process as CCWG WS1.

Conclusion: the task of the WS2.

Annex 6 of the final report of the CCWG gives the following reasons for the human rights bylaw:

- The proposed draft Bylaw on Human Rights would reaffirm ICANN's existing obligations within its Core Values, and would clarify ICANN's commitment to respect Human Rights.
- The bylaw will not expand ICANN's narrow scope and mission
- A commitment to respect Human Rights should be included in ICANN's Bylaws in order to comply with the NTIA criteria to maintain the openness of the Internet. These criteria include free expression and the free flow of information.

The Annex 12 of the final report the CCWG highlights that the Framework of Interpretation is to be developed "to ensure that adding the proposed Human Rights Bylaw provision into the ICANN Bylaws does not lead to an expansion of ICANN's Mission or scope". The final report (Annex 12) recommends to address the following issues related to the Human Rights Bylaw:

- "Consider which specific Human Rights conventions or other instruments, if any, should be used by ICANN in interpreting and implementing the Human Rights Bylaw.
- Consider the policies and frameworks, if any, that ICANN needs to develop or enhance in order to fulfill its commitment to respect Human Rights.
- Consistent with ICANN's existing processes and protocols, consider how these new frameworks should be discussed and drafted to ensure broad multistakeholder involvement in the process.
- Consider what effect, if any, this Bylaw would have on ICANN's consideration of advice given by the Governmental Advisory Committee (GAC).
- Consider how, if at all, this Bylaw will affect how ICANN's operations are carried out.
- Consider how the interpretation and implementation of this Bylaw will interact with existing and future ICANN policies and procedures".

The Framework of Interpretation for Human Rights has to be developed as a consensus recommendation in Work Stream 2 and to be approved by the ICANN Board using the same process and criteria as for Work Stream 1 recommendations. The Bylaw provision will not enter into force before the FOI-HR is in place.