**Prelude:**

This is the working document of CCWG WS2 Design Team for ICANN Human Rights Bylaw Frame of Interpretation**. Please use ‘suggest’ mode at all times**

**Relevant documents:**

 [Design Team Wiki](https://community.icann.org/display/WEIA/Human%2BRights)

 [Background paper](https://docs.google.com/document/d/1wPU-ACb-320q4K-ScAsAwVVNYiHxlOfuNgrSKb67OYw/edit)

 [Concerns out potential negative or unintended impacts of HR bylaw](https://docs.google.com/document/d/1KcKGRJjuhKEzCh2AZ8PPR_MofOQFBN8CMuJqTG_h9h4/edit)

 [Analysis of Ruggie Principles for ICANN](https://docs.google.com/document/d/10XMIVosuEfgmXwr7SQjeNLKI8r_hdONrJNV2ih72V80/edit)

 [Summary of what was agreed & discussed during WS1 on Human Rights](https://docs.google.com/document/d/1rwpw9aSAqboRO2_rNkjMVJPOmYwmdr5B1_M_aNMoZb4/edit)

 [CCWG report](https://community.icann.org/pages/viewpage.action?pageId=58723827)

 [Annex 6](https://community.icann.org/download/attachments/58723827/Annex%2006%20-%20FINAL-Revised.pdf?version=1&modificationDate=1456255586000&api=v2)

 [Annex 12](https://community.icann.org/download/attachments/58723827/Annex%2012%20-%20FINAL-Revised.pdf?version=1&modificationDate=1456255865000&api=v2)

**Text of the new Bylaws Core Value as adopted in May:**

(viii) Subject to the limitations set forth in Section 27.2, within the scope of its Mission and other Core Values, respecting internationally recognized human rights as required by applicable law. This Core Value does not create, and shall not be interpreted to create, any obligation on ICANN outside its Mission, or beyond obligations found in applicable law. This Core Value does not obligate ICANN to enforce its human rights obligations, or the human rights obligations of other parties, against other parties.

Text of Section 27.2. as adopted:

"Section 27.2. HUMAN RIGHTS (a) The Core Value set forth in Section 1.2(b)(viii) shall have no force or effect unless and until a framework of interpretation for human rights (“FOI-HR”) is (i) approved for submission to the Board by the CCWG-Accountability as a consensus recommendation in Work Stream 2, with the CCWG Chartering Organizations having the role described in the CCWG-Accountability Charter, and (ii) approved by the Board, in each case, using the same process and criteria as for Work Stream 1 Recommendations. (b) No person or entity shall be entitled to invoke the reconsideration process provided in Section 4.2, or the independent review process provided in

Section 4.3, based solely on the inclusion of the Core Value set forth in Section 1.2(b)(viii) (i) until after the FOI-HR contemplated by Section 27.2(a) is in place or (ii) for actions of ICANN or the Board that occurred prior to the effectiveness of the FOI-HR.

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| **ICANN Bylaw Language** | **Proposed Commentary** | **Working/discussion**  | **Agreed text**  |
|  ‘within the scope of its Mission’  |  The bylaws, including the human rights provision, will be interpreted within the scope of ICANN’s Mission.  | Jorge: → GreenThe Mission is the core boundary for any HR commitment. No obligation may arise out of the HR core value that is beyond the narrow technical Mission defined in the Bylaws.This idea is stressed when the Bylaws states: “This Core Value does not create ... any obligation on ICANN… outside its Mission”.Matthew:Quote the exact mission here we don’t need to do more than that for the FoI: “The mission of the Internet Corporation for Assigned Names and Numbers (“ICANN”) is to ensure the stable and secure operation of the Internet’s unique identifier systems as describedin this Section 1.1(a)(the “Mission”).”Etc.Agree that for now we can just quote the mission and see further whether we require any further interpretation in connection with the bylaw (may be when it comes to drawing the lines what can/can not be done)I agree that we should just quote the Mission here as follows:* (a) The mission of the Internet Corporation for Assigned Names and Numbers (“ICANN”) is to ensure the stable and secure operation of the Internet’s unique identifier systems as described in this Section 1.1(a) (the “Mission”). Specifically, ICANN:(i) Coordinates the allocation and assignment of names in the root zone of the Domain Name System (“DNS”) and coordinates the development and implementation of policies concerning the registration of second-level domain names in generic top-level domains (“gTLDs”). In this role, ICANN’s scope is to coordinate the development and implementation of policies:
* For which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, security and/or stability of the DNS including, with respect to gTLD registrars and registries, policies in the areas described in Annex G-1 and Annex G-2; and
* That are developed through a bottom-up consensus-based multistakeholder process and designed to ensure the stable and secure operation of the Internet’s unique names systems.

The issues, policies, procedures, and principles addressed in Annex G-1 and Annex G-2 with respect to gTLD registrars and registries shall be deemed to be within ICANN’s Mission.(ii) Facilitates the coordination of the operation and evolution of the DNS root name server system.(iii) Coordinates the allocation and assignment at the top-most level of Internet Protocol numbers and Autonomous System numbers. In service of its Mission, ICANN (A) provides registration services and open access for global number registries as requested by the Internet Engineering Task Force (“IETF”) and the Regional Internet Registries (“RIRs”) and (B) facilitates the development of global number registry policies by the affected community and other related tasks as agreed with the RIRs.(iv) Collaborates with other bodies as appropriate to provide registries needed for the functioning of the Internet as specified by Internet protocol standards development organizations. In service of its Mission, ICANN’s scope is to provide registration services and open access for registries in the public domain requested by Internet protocol development organizations.(b) ICANN shall not act outside its Mission.(c) ICANN shall not regulate (i.e., impose rules and restrictions on) services that use the Internet’s unique identifiers or the content that such services carry or provide, outside the express scope of Section 1.1(a). For the avoidance of doubt, ICANN does not hold any governmentally authorized regulatory authority.(d) For the avoidance of doubt and notwithstanding the foregoing:(i) the foregoing prohibitions are not intended to limit ICANN’s authority or ability to adopt or implement policies or procedures that take into account the use of domain names as natural-language identifiers;(ii) Notwithstanding any provision of the Bylaws to the contrary, the terms and conditions of the documents listed in subsections (A) through (C) below, and ICANN’s performance of its obligations or duties thereunder, may not be challenged by any party in any proceeding against, or process involving, ICANN (including a request for reconsideration or an independent review process pursuant to Article 4) on the basis that such terms and conditions conflict with, or are in violation of, ICANN’s Mission or otherwise exceed the scope of ICANN’s authority or powers pursuant to these Bylaws (“Bylaws”) or ICANN’s Articles of Incorporation (“Articles of Incorporation”):(A)(1) all registry agreements and registrar accreditation agreements between ICANN and registry operators or registrars in force on 1 October 2016 [1], including, in each case, any terms or conditions therein that are not contained in the underlying form of registry agreement and registrar accreditation agreement;(2) any registry agreement or registrar accreditation agreement not encompassed by (1) above to the extent its terms do not vary materially from the form of registry agreement or registrar accreditation agreement that existed on 1 October 2016;(B)any renewals of agreements described in subsection (A) pursuant to their terms and conditions for renewal; and(C)ICANN’s Five-Year Strategic Plan and Five-Year Operating Plan existing on 10 March 2016.(iii) Section 1.1(d)(ii) does not limit the ability of a party to any agreement described therein to challenge any provision of such agreement on any other basis, including the other party’s interpretation of the provision, in any proceeding or process involving ICANN.(iv) ICANN shall have the ability to negotiate, enter into and enforce agreements, including public interest commitments, with any party in service of its Mission.  |  |
|  ‘within the scope of other Core Values’  |  The Commitments and Core Values section of the bylaws (Section 1.2 (a) and (b),respectively) has several notable references that echo important human rights concepts: *

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  | It is important to stress that the Human Rights Bylaw is a Core Value and not a Commitment. “The Commitments reflect ICANN’s fundamental compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN’s activities.” (Bylaws, Section 1.2(c))In contrast, Core Values [are not intended to apply consistently and comprehensively to ICANN’s activities. Rather, the Core Values] are subject to the following interpretive rules in the Bylaws:“[…] *The specific way in which Core Values are applied, individually and collectively, to any given situation may depend on many factors that cannot be fully anticipated or enumerated. Situations may arise in which perfect fidelity to all Core Values simultaneously is not possible. Accordingly, in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN’s Mission.” Bylaws, Section 1.2(c).*[The Human Rights bylaw must be balanced against other potentially competing Core Values. Furthermore, this interpretive rule recognizes that there must be flexibility in applying the Core Values, based on “may factors” that occur in “any given situation.” This is also made clear in the Core Values section of the Bylaws, which states that the Core Values are intended to “guide” ICANN in its “decisions and actions.” Finally, there is no hierarchy among the Core Values. The balance must be determined on a case by case basis, without automatically favoring any particular Core ValueAs such, a Core Value can never create an absolute commitment on the part of ICANN. It is also implicit that a Core Value cannot cause ICANN to violate any Commitment, as Commitments are absolute.] Agree with mentioning this balancing notion. I do not subscribe to the text in the commentary section and the inferences drawn from them to human rights principlesThe other Core Values are:(i) To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of, other responsible entities that reflect the interests of affected parties and the roles of bodies internal to ICANN and relevant external expert bodies;(ii) Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;(iii) Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment in the DNS market;(iv) Introducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process;(v) Operating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN’s other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community;(vi) While remaining rooted in the private sector (including business stakeholders, civil society, the technical community, academia, and end users), recognizing that governments and public authorities are responsible for public policy and duly taking into account the public policy advice of governments and public authorities;(vii) Striving to achieve a reasonable balance between the interests of different stakeholders, while also avoiding capture; |  |
|  ‘respecting’  |    Unlike the internationally recognized human rights which legally obligate states (see below), the UNGPs do not create new international law obligations or limit or undermine any legal obligations a State may have (UNGPs, General Principles). This also means that the UNGPs do not require enterprises to enforce human rights, which is the legal duty of states.  (Anne A-S) ICANN’s commitment to apply the UNGPs to its operations and policies in the foregoing manner is consistent with the letter and the spirit of the human rights provision of the bylaws as well as with the UNGPs. Unless required by applicable law, all human rights policies shall be developed pursuant to the MultiStakeholder Model bottom-up process and shall be effective upon subsequent adoption by the ICANN Board.   | The Bylaw uses the term “respect” to characterize how ICANN will be “guided” by this Core Value, [and contrasts it with “enforcing” Human Rights, which the Bylaw expressly says that ICANN will not do].“Respecting” human rights may be seen as avoiding violating human rights. [Aside from this, there are no particular actions that necessarily flow from “respecting human rights.]It has been suggested that one possible resource for interpreting the Bylaw is the “UN Guiding Principles on Business and Human Rights” (UNGPs). [However, there should be no presumption that the UNGPs apply to ICANN in any way.] The UNGPs is tailored for “business enterprises.” [ICANN is a sui generis institution and cannot be categorized merely as a business enterprise, though it shares some characteristics with business enterprises.] [The UNGPs also go far beyond interpretation, which is the task for this document. Aspects of the UNGPs that go into implementation or requiring particular activities thus must be disregarded for purposes of the Framework of Interpretation.][Finally, it should be absolutely clear that satisfying or complying with the UNGPs is neither the intention or a requirement of the Bylaws or of this Framework of Interpretation. As such, the Bylaw does not guide ICANN to seek to comply with the UNGPs.] References to the UNGPs are [purely] as one potential resource for interpreting relevant parts of the Bylaw.One possible resource for interpreting the term “respecting” can be found in the UN Guiding Principle (“UNGP”) 11:* “*This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”*

 This can be broken down into two parts: (1) *avoiding* “infringement” of human rights” and (2) *addressing* adverse human rights “impacts”. In looking at this possible resource, we will need to consider separately the applicability of each prong to the Bylaw. Furthermore, the terms “impacts and “involvements” are both ambiguous and potentially broad-ranging. [These may go well beyond the scope of the Bylaw, and thus may need to be limited or set aside if this particular statement is used to interpret the meaning of “respect” in the Bylaw]. [Of course, our task is not to interpret the UNGPs, it is to interpret the Bylaw. As such, emphasis on seeking to understand and interpret any of the UNGPs may not be prudent or appropriate.] “respecting” is further defined in UNGP 13 as:*“(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;**(b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.”**As noted above, with regard to (a), we need to look at each aspect to see if any aspect should be applied to ICANN’s “respecting human rights.” It is possible that Section (a) may be helpful in interpreting ICANN’s “respect” for human rights.**[However, section (b) [will not] be applied to ICANN’s respect for human rights. ICANN has a global mission and cannot be required to decline to do business with entities that may not have the same commitment to human rights, nor is it appropriate to use ICANN’s powers as leverage to force changes in third parity behavoior].*Jorge: Subsection 13 (b) remains relevant as it highlights that “respect” implies also a non-legal obligation with regard to HR impacts directly linked to ICANN's operations. I do not agree with the view that 13 (b) imposes any obligation or "requirement" to decline to do business with any entities. There is neither an obligation to use its powers as leverage to force changes in third party behaviour. The UNGP Interpretative Guide just says the following:...the business enterprise “does not have responsibility for the impact itself: that responsibility lies with the entity that caused or contributed to it. The enterprise therefore does not have to provide remediation (although it may choose to do so to protect its reputation or for other reasons). However, it has a responsibility to use its leverage to encourage the entity that caused or contributed to the impact to prevent or mitigate its recurrence. This may involve working with the entity and/or with others who can help.” (see UNGP interpretative guide, [UNGPIG] p. 18, available at<http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf>). **Comment**: Subsection UNGP 13 (a) refers to the business’ own activities [and is linked to the obligation to “remediate” under UNGP 15 (c) below.] While there may potentially be a “linkage” in the UNGP, that does not mean that Section 15(c) should have any application in interpreting the Bylaw. Furthermore, remediation is a type of implementation, which is beyond our scope. [As note below, Subsection 13(b) applies to third party activities. As previously stated, this goes beyond ICANN’s respect for human rights, and should be read as a limitation of ICANN’s Core Value. In other words, ICANN could choose to take on any of these activities (unless otherwise prohibited), but they are not part of the Core Value. ] The Mission as core boundary, as said above, should in any case act as limit to any specific implementation of this principle.  Under UNGP 15 “respecting” implies that “*Business enterprises should have in place policies and processes appropriate to their size and circumstances, including:**(a) A policy commitment to meet their responsibility to respect human rights;* **Comment**:   *”* **Comment**: [Subsections (a) and (b) seem to be covered by the Bylaw HR commitment and its FoI.][Subsections (c) to (e) would be an issue for further development and implementation by community and staff.]  [Under UNGP 19 additional elements regarding the obligation to respect are spelled out which refer to the integration of the HR commitments into internal processes. This should be addressed in implementation work by the community and staff. Other instrumental principles linked to implementation are UNGP 20 (tracking effectiveness of responses) and 24 (communication and reporting).]Matthew: Some of the above seems to be going way beyond what we need as an understanding of “respecting”. And one dimension we have not looked into is as follows:To quote Ruggie: ““the responsibility of enterprises to respect human rights is reflected at least in part in domestic law or regulations corresponding to international human rights standards.” Which comes back to applicable law. Therefore complying with local laws in jurisdictions in which IANN operate will contribute to respecting human rights. I think we need to be cautious in over broadly defining what “respecting” meansThere are parts of Ruggie that clearly go beyond possible interpretation of the Bylaw. It would be best not to mention these at all. If we do mention them, we will need to categorize them as follows:1. Possible guidance in implementing the Bylaw. These must be within the scope of the interpretation of the Bylaw..
2. Voluntary actions. These could be considered by ICANN, but there is no basis in the Bylaw for favoring these actions.
3. Do not use. These would be inconsistent with the limited guidance of the Bylaw or with ICANN’s mission and commitments, or otherwise inconsistent with ICANN’s role in the DNS ecosystem.

I continue to propose that we not devote our resources to an analysis of Ruggie, and instead devote our time to interpreting the Bylaw itself. |  |
|  ‘internationally recognized human rights’  |  The internationally recognized human rights that are relevant to ICANN are: * [Universal Declaration of Human Rights](http://www.un.org/en/universal-declaration-human-rights/)
* [International Covenant on Civil and Political Rights](http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx)
* [International Covenant on Economic, Social and Cultural Rights](http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx)
* [International Convention on Elimination of All Forms of Racial Discrimination](http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx)
* [Convention on the Elimination of all Forms of Discrimination Against Women](http://www.un.org/womenwatch/daw/cedaw/)
* [Convention on the Rights of Persons with Disabilities](http://www.un.org/disabilities/convention/conventionfull.shtml)
* [UN Declaration on the Rights of Indigenous Peoples](http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx)
* ILO’s [Declaration on Fundamental Principles and Rights at Work](http://www.ilo.org/declaration/lang--en/index.htm) (applicable to ICANN’s employees and workers)

These rights are contained in human rights instruments that bind states, and not private actors. Nonetheless, ICANN can refer to them as international benchmarks in its operations and strive to respect them, without being legally bound by them. ICANN’s human due diligence can be carried against these rights in order to ascertain whether ICANN’s operations or policies create an outcome that is not consistent with these rights. \*Note that UNDRIP is technically a declaration adopted by the UN General Assembly and not a legally binding treaty.  | [Under UNGP 12 *“internationally recognized human rights”* is *“understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.”]*[Under UNGP 18 a HR risk assessment should be produced, which would help in identifying what HR are more relevant for ICANN, without excluding other HR (i.e., “no cherry-picking”). This should be addressed in implementation work by the community and staff.][UNGP 24 sets some criteria on prioritization of reactions to HR impacts. Also something to be considered in implementation.]I do not mind the conventions/international instruments to be listed here, once it is mentioned that they are binding only for states and can serve only as a source of interpretations as to what human rights are and which human rights we are referring to (without cherry picking, as you might remember).  |  |
|  ‘as required by applicable law’  |  As already mentioned, the UNGPs are grounded in recognition of enterprise responsibility to comply with all applicable laws. This is a universal principle that applies to all individuals and organs of society. To the extent any applicable law reflects internationally recognized human rights (such as applicable law on freedoms of assembly, association, ideas and expression, labor, nondiscrimination, privacy, protection of minors and vulnerable people, etc.), and they are applicable to ICANN directly (as opposed to ICANN’s business partners), these legally bind ICANN. | Applicable law should be understood at least to refer to the law from jurisdictions where ICANN does business consistent with what is established in the corresponding agreements, contracts etc and consistent with rules of international private law.NOTE: David MaCauley intended to provide thoughts. ICANN Legal could be asked as well, as the mention of “applicable law” is used in a variety of existing agreements and provisions.Here is David’s text from his e-mail: “My understanding of the concept of applicable law refers to that body of law that binds ICANN at any given time and in any given circumstance. It could consist of statutes, rules, regulations and the like, as well as decisional orders/rulings of courts having appropriate jurisdiction, that take effect through the power of a legitimate governmental entity. It is a changeable concept inasmuch as laws, regulations, etc. change over time. It can be fairly long-lasting, such as California corporate-governance rules impacting ICANN, or it can be fairly short-term in effect: if ICANN chooses to organize a meeting of its board, staff and community in Hyderabad then the board, staff, and community must observe Indian travel regulations affecting visitors. Applicable law can work disparate impacts on ICANN around the globe: for example, if ICANN employs personnel in Singapore, Turkey, Uruguay, Belgium, etc. then it must observe appropriate (and potentially conflicting) personnel laws in those various places.  Applicable law is thus be a large body of law that eludes our ability to catalogue, but it is ascertainable in the context of a specific question or issue.”  |  |
|  ‘This Core Value does not create, and shall not be interpreted to create, any obligation on ICANN outside its Mission’  |  As stated above, application of the human rights Core Value does not create any legal obligation of ICANN outside its Mission. It is assumed that it is implicit in ICANN’s Mission that it will operate within the bounds of applicable laws; furthermore, it is also assumed that ICANN has the discretion to voluntarily make commitments to respect human rights and to carry out human rights due diligence.   | See above on Mission as core boundary.I think we need more specific guidance on this sentence, given that it is only a three sentence Bylaw |  |
|  ‘or beyond obligations found in applicable law’  |  The application of the UNGPs to ICANN’s operations and policies does not create legal obligation beyond those found in laws applicable to ICANN. | See above on applicable law.Agree.Again, I think we should explore more specific guidance, rather than a mere cross-reference. |  |
|  ‘This Core Value does not obligate ICANN to enforce its human rights obligations’ [against other parties]  |  The Core Values do not create any new legally enforceable rights or duties of ICANN and ICANN will not be legally obligated to enforce human rights obligations against other parties. While UNGP Principle 13(b) refers to adverse human rights impacts that are directly linked to ICANN’s operations, products or services by its business relationships, and suggests that termination of the relationship is an option, ICANN must also take into account “credible assessments of potential adverse human rights impacts of terminating such business relationships” (commentary to Principle 19). On the assumption that the negative human rights impacts of termination outweigh the benefits, ICANN can consider remaining in the business relationship, consistent with its Mission, and seek to implement one or more actions, such as engagement, capacity building, exercising its leverage outside the business relationships, etc., with respect to its business relationships.  | See above on Mission as core boundary and the proper interpretation to give to the concept of “respecting” HR, especially as regards third parties (see above on UNGP 13 (b)). As noted above, UNGP 13(b) shall not be used to interpret ICANN’s “respect for human rights.” Furthermore, 13(b) is contrary to the Bylaws text and ICANN’s role in the DNS. Thus, 13(b) should be read as a statement of actions that ICANN should not take -- not merely as a statement of actions that ICANN is not required to take. I don’t see 13b as being in scope as actions under 13b would be contrary to the intent of the bylaw text.Just a comment: I believe this is one of the keys for the interpretation of the bylaws, especially with regard to the line between respect and enforcement, because in my opinion some of the Ruggie - which have been extensively mentioned in the first project of this document - rather border with enforcement than respect. This is also connected to the boundaries of the ICANN’s mission. So I believe we have two limitations while interpreting the bylaw: the mission limitation and the prohibition on enforcement, and this is the “matrix” that any interpretation shall be checked against. On 13 (b) as said above: the business enterprise “*does not have responsibility for the impact itself: that responsibility lies with the entity that caused or contributed to it. The enterprise therefore does not have to provide remediation (although it may choose to do so to protect its reputation or for other reasons). However, it has a responsibility to use its leverage to encourage the entity that caused or contributed to the impact to prevent or mitigate its recurrence. This may involve working with the entity and/or with others who can help.*” (see UNGP interpretative guide, [UNGPIG] p. 18, available at<http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf>).  |  |
|  ‘or the human rights obligations of other parties, against other parties’  |  See immediately above.  | See above on Mission as core boundary and the proper interpretation to give to the concept of “respecting” HR, especially as regards third parties (see above on UNGP 13 (b)) |  |