

Transmission letter to the CCWG-Accountability-WS2 for the final report by the Human Rights subgroup 27 September 2017

The Cross Community Working Group on Enhancing ICANN's Accountability - Human Rights Subgroup would like to sincerely thank those who have taken the time and effort to submit public comments to the Framework of Interpretation and Considerations document during the Public Comment Period [0].

The Subgroup has analyzed and discussed the comments at great length and came to the following conclusions:

The mandate of the group does not include suggesting any changes to the ICANN Bylaws; this includes the Bylaw on Human Rights. As such, any comments that would require changing the Bylaws cannot be accepted. This is the case for comments recommending changes in the hierarchy of Core Values as outlined in the Bylaw or for comments pertaining to the use of the term "applicable law" which is part of ICANN's Human Rights Bylaw.

The Subgroup recognizes that the documents mentioned in the footnotes are not necessarily an exhaustive list of human rights documents, and therefore the text has been changed from 'including:' to 'including, but not limited to:' for purposes of clarity.

Finally, no new references to any instrument in general or the UN Guiding Principles for Business and Human Rights in particular have been added. The conclusion of the Subgroup is that the current proposed wording is a careful balance between the different opinions held in the ICANN community, particularly considering the remit of ICANN's Mission.

The HR Subgroup has developed a document which lists a response to each of the major comments submitted to the public consultation and is including it in this email for reference by the CCWG-Accountability-WS2. This will be published on the public consultation web site as part of the standard process.

As such, the HR Subgroup is submitting its final recommendations for an HR FoI to the CCWG-Accountability-WS2 for approval. Given the submissions made in the public comment process and the minimal changes that have been made to the document to address these, the HR sub-group does not believe it is necessary that this version be posted for a further round of public comment.

[0] <https://www.icann.org/public-comments/foi-hr-2017-05-05-en>

Minority view on Human Rights Final Report 27 September 2017

This dissenting opinion is based on serious concerns about the Sub-Group's treatment of the substantial comments and proposals submitted during the public comment period by the Governments of Brazil, Switzerland and the United Kingdom (who are all active members of the GAC's Human Rights and International Law Working Group). Their expectation was that a properly balanced result would reflect some if not all of the positions and proposals made in their responses. The governments are dismayed to note, however, that there are no changes of any significance to the draft FOI and Considerations documents that addresses any of the substantial issues which they raised.

In particular, the three Governments were in full agreement that the FOI text should make stronger reference to the UN Guiding Principles as the most relevant voluntary international standard. However, the Subgroup did not undertake an inclusive effort to determine if a compromise text could be formulated that would accommodate this position of the three governments.

This dissenting opinion is supported by Jorge Cancio (Switzerland) and Kavouss Arasteh (Iran), members of this Subgroup, and the representatives of the Governments of Brazil and UK who are observers on this Subgroup, and the representative of the Government of Peru.”

Proposed Framework of Interpretation and Considerations concerning ICANN's Human Rights Bylaw

Prepared by the CCWG's Human Rights Sub Group

Prelude:

With ICANN's most recent bylaw change a Human Rights Core Value¹ was added to ICANN's bylaws. In order for this bylaw to come into effect, a Framework of Interpretation should be 'approved for submission to the Board by the CCWG-Accountability as a consensus recommendation in Work Stream 2', as outlined in section 27.2 of ICANN's bylaws².

The first part of this document is the proposed Framework of Interpretation for the ICANN Bylaw on Human Rights. The second part of this document addresses the "considerations" listed in paragraph 24 of Annex 12 of the CCWG Accountability Final Report.

This document was produced by the Cross Community Working Group on Enhancing ICANN's Accountability Sub Group on Human Rights (CCWG SG HR) for discussion in the Cross Community Working Group on Enhancing ICANN's accountability (CCWG) plenary. This is a full consensus document produced by the CCWG SG HR.

¹ (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.

² "Section 27.2. HUMAN RIGHTS (a) The Core Value set forth in Section 1.2(b)(viii) shall have no force or effect unless and until a framework of interpretation for human rights ("FOI-HR") is (i) approved for submission to the Board by the CCWG-Accountability as a consensus recommendation in Work Stream 2, with the CCWG Chartering Organizations having the role described in the CCWG-Accountability Charter, and (ii) approved by the Board, in each case, using the same process and criteria as for Work Stream 1 Recommendations. (b) No person or entity shall be entitled to invoke the reconsideration process provided in Section 4.2, or the independent review process provided in Section 4.3, based solely on the inclusion of the Core Value set forth in Section 1.2(b)(viii) (i) until after the FOI-HR contemplated by Section 27.2(a) is in place or (ii) for actions of ICANN or the Board that occurred prior to the effectiveness of the FOI-HR.

ICANN Bylaw Language	Framework of Interpretation
'within the scope of its Mission'	<p>ICANN's Mission is set forth in Section 1.1 of the ICANN Bylaws (see Annex 1):</p> <p>The Mission establishes the boundaries of ICANN's Core Value to respect human rights. Due to the broad scope of human rights, attention to this limitation is necessary to ensure that ICANN will not step outside of its defined scope and mission. In this regard, any interpretation of the application of the Human Rights Core Value - provided in the Framework of Interpretation - must be checked against ICANN's Mission to ensure compliance with the general limitations provided in this part of the Bylaw.</p>
'within the scope of other Core Values'	<p>It is important to stress that the Human Rights Bylaw is a Core Value and not a Commitment. <i>“The Commitments reflect ICANN’s fundamental compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN’s activities.”</i> (Bylaws, Section 1.2(c))</p> <p>In contrast, Core Values are not necessarily intended to apply consistently and comprehensively to ICANN’s activities. Rather, the Core Values are subject to the following interpretive rules in the Bylaws:</p> <p><i>“[...] 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.”</i></p>

	<p>Bylaws, Section 1.2(c).</p> <p>The Human Rights bylaw needs to be balanced against other Core Values in the case where not all Core Values can be fully adhered to simultaneously. Furthermore, this interpretive rule recognises that there must be flexibility in applying the Core Values, based on “many factors” that occur in “any given situation.” This is also made clear in the Core Values section of the Bylaws, which states that the Core Values are intended to “guide” ICANN in its “decisions and actions.”</p> <p>The Bylaws also prominently stress that the Core Values have to be “respected” (“ICANN will act in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values” as stipulated in Bylaws, Section 1.2).</p> <p>Finally, there is no standing hierarchy in the treatment of the different Core Values; they are guiding elements that need, as appropriate, to be taken into account. The balance must be determined on a case by case basis, on the basis of proportionality, without automatically favoring any particular Core Value. The result of a balancing-test must not cause ICANN to violate any Commitment, as Commitments are binding.</p> <p>The other Core Values are set forth in Annex two of this document.</p>
‘respecting’	<p>ICANN will respect human rights, as required by applicable law (see below on applicable law). In order to do so, ICANN should avoid violating human rights, and take human rights into account in developing its policies as well as in its decision-making processes.</p>
‘internationally recognized	<p>There are a range of international human-rights declarations and</p>

human rights'	<p>covenants that could be relevant to ICANN's Human Rights Core Value.³ However, none of these instruments has a direct application to ICANN, because they only create obligations for States. By committing to one or more of these international instruments, nation states are expected to embed human rights in their national legislation.</p> <p>The reference to "internationally recognized human rights" in the bylaw should not be read in isolation; rather it must be considered together with, and limited by, the reference "as required by applicable law." As a consequence, under the Human Rights Core Value, international human rights instruments are not directly applicable to ICANN beyond what is provided for in applicable law. Rather, only those human rights that are "required by applicable law" will be relevant to ICANN.</p> <p>Furthermore, depending on the jurisdiction in which ICANN operates, the law applicable to its operations may vary and thus the human rights applicable to ICANN's operations will vary as well.</p> <p>Nevertheless, ICANN understands that internationally recognised human rights, including those expressed in the Universal Declaration of Human Rights, can guide its decisions and actions.</p>
'as required by applicable law'	<p>"Applicable law" refers to the body of law that binds ICANN at any given time, in any given circumstance and in any relevant jurisdiction. It consists of statutes, rules, regulations, etcetera, as well as judicial opinions, where appropriate. It is a dynamic concept inasmuch as laws, regulations, etcetera, change over time.</p>

³ Including, but not limited to:

- [Universal Declaration of Human Rights](#)
- [International Covenant on Civil and Political Rights](#)
- [International Covenant on Economic, Social and Cultural Rights](#)
- [International Convention on Elimination of All Forms of Racial Discrimination](#)
- [Convention on the Elimination of all Forms of Discrimination Against Women](#)
- [Convention on the Rights of Persons with Disabilities](#)
- [UN Declaration on the Rights of Indigenous Peoples](#)
- ILO's [Declaration on Fundamental Principles and Rights at Work](#) (applicable to ICANN's employees and workers)

	<p>Applicable law can have disparate impacts on ICANN around the globe: for example, if ICANN employs personnel in different jurisdictions then it must observe the appropriate labour laws in those various locales. Applicable law is thus a large body of law that eludes our ability to catalogue, but it is ascertainable in the context of a specific question or issue.</p> <p>This limitation requires an analysis to determine whether any human right that is proposed as a guide or limitation to ICANN activities or policy is “required by applicable law”. If it is, then abiding by the Core Value should include avoiding a violation of that Human Right. If the human right is not required by applicable law, then it does not raise issues under the Core Value. However, ICANN may still give this human right consideration, even though it is under no guidance to do so pursuant to the Core Values.</p>
<p>‘This Core Value does not create, and shall not be interpreted to create, any obligation on ICANN outside its Mission or beyond obligations found in applicable law’</p>	<p>This sentence restates the basic concept that the Human Rights Core Value cannot create or be used to create any obligations that go beyond the limits of ICANN’s Mission or applicable law.</p>
<p>‘This Core Value does not obligate ICANN to enforce its human rights obligations or the human rights obligations of other parties, against other parties’</p>	<p>This part of the bylaw draws the clear line between “respect” for human rights as a Core Value and any attempt to extend the Bylaw into requiring ICANN to enforce the human rights obligations of ICANN or any other party against other parties.</p>

<p>Considerations Language (from Annex 12 CCWG report, paragraph 24)</p>	<p>Considerations by the Human Rights Subgroup</p>
	<p>The following part of the document addresses the “considerations” listed in paragraph 24 of Annex 12 of the CCWG Accountability Final Report.</p>
<p>Consider which specific Human Rights conventions or other instruments, if any, should be used by ICANN in interpreting and implementing the Human Rights Bylaw.</p>	<p>ICANN, as a non-state private entity, is not a party to any Human Rights declaration, convention or instrument. However, ICANN the community and the organization could refer to any of the widely adopted Human Rights declarations, conventions and other instruments⁴ while taking human rights into account in its policies and operations. It should be noted that the bylaw was not written with one specific Human Rights declaration, convention or other instrument in mind.</p> <p>With regards to the UN Guiding Principles for Business and Human Rights, no consensus was reached as to their suitability for interpreting the Core Value. However with regard to the implementation of the Core Value certain aspects of the UN Guiding Principles for Business and Human Rights could be considered as a useful guide in the process of applying the Human Rights Core Value. There are certain Guiding Principles that may not be suitable for ICANN and others that might be</p>

⁴ Including, but not limited to:

- [Universal Declaration of Human Rights](#)
- [International Covenant on Civil and Political Rights](#)
- [International Covenant on Economic, Social and Cultural Rights](#)
- [International Convention on Elimination of All Forms of Racial Discrimination](#)
- [Convention on the Elimination of all Forms of Discrimination Against Women](#)
- [Convention on the Rights of Persons with Disabilities](#)
- [UN Declaration on the Rights of Indigenous Peoples](#)
- ILO’s [Declaration on Fundamental Principles and Rights at Work](#) (applicable to ICANN’s employees and workers)

	<p>applicable, depending on the circumstances. However, it is beyond the scope of this document to provide a detailed analysis of the Guiding Principles and their application, or not, in particular situations.</p> <p>In any case, a conflict between any Guiding Principle and an ICANN Bylaw provision or Article of Incorporation must be resolved in favor of the Bylaw or Article. The use of the Guiding Principles as potential guidance has to be carefully considered by each SO and AC as well as ICANN the organization.</p>
<p>The policies and frameworks, if any, that ICANN needs to develop or enhance in order to fulfill its commitment [sic] to respect Human Rights</p>	<p>In order to put the Human Rights Core Value into practice, ICANN the community as well as the organization will need to consider how to reflect this Core Value in their policy and operational processes. Each SO and AC should take the Core Value into consideration in its policy development or advisory role. It is up to each SO and AC, and ICANN the organisation, to develop their own policies and frameworks to fulfill this Core Value. In doing so, the SOs and ACs, as well as ICANN the organization, should also take into account the requirement to balance the Core Values.</p> <p>The subgroup notes that the word “commitment” used in this sentence is not quite appropriate in the context of interpreting the Human Rights Core Value. There is a different section of the Bylaws that sets forth ICANN’s “Commitments” (Section 1.2(a)). The Core Values (such as the Human Rights Core Value) are distinguished from the Commitments. The Bylaws state that “In performing its Mission, ICANN will act in a manner that ... respects ICANN's Core Values” (Section 1.2; emphasis added) that ““Core Values” should also guide the decisions and actions of ICANN” (Section 1.2(b), emphasis added), and notes that “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.” (Section 1.2(c), emphasis added). Section 1.2(c) goes on to note “perfect fidelity to all Core Values simultaneously” may not always be possible, and that “where one Core Value must be balanced with another ... the result ... must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN's Mission.”</p> <p>As such, it would be more accurate to say that ICANN the organization</p>

	<p>and the community have an “obligation to respect and be guided by the Human Rights Core Value, as balanced with other Core Values where appropriate.”</p> <p>A particular Human Right should not be considered in isolation since Human Rights are universal, indivisible, interdependent, and interrelated.</p>
<p>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.</p>	<p>The development of any new policies or frameworks that may be needed to apply the Human Rights Core Value will be dictated by the type of policy and how ICANN the organization and the community develop those policies.</p> <p>For example, “developing and recommending to the Board substantive policies relating to generic top-level domains” (Bylaws, 11.1) is the responsibility of the GNSO and any new or revised policies or frameworks, including any changes to the GNSO Policy Development Process, should be developed by the GNSO using that organization’s policy and processes. The GNSO’s Policy Development Processes provide for multistakeholder involvement in Working Groups developing these policies, and for public comment on any recommendations.</p> <p>Similarly, “developing and recommending to the Board global policies related to country code top-level domains” (Bylaws, Section 10.1(a)) is the responsibility of the country code Names Supporting Organization (ccNSO). Any new or revised policies or frameworks, including any changes to the ccNSO Policy Development Process, should be developed by the ccNSO using that organization’s policy and processes.</p> <p>The review and development of recommendations on Internet Protocol (IP) address policy is the responsibility of the Address Supporting Organization. The ASO does not have a similar formal PDP to the ccNSO and the GNSO. Nonetheless, ASO should also consider how to apply the Human Rights Core Value.</p> <p>When developing corporate or operational policies, and executing its operations, ICANN the organization should take the Human Rights Core Value into account. In order to do so ICANN the organization should propose a framework to the community, which should include multistakeholder involvement in its development, and regular review.</p>

<p>Consider how the interpretation and implementation of this Bylaw will interact with existing and future ICANN policies and procedures.</p>	<p>The interpretation of the Human Rights Core Value should be driven by the Framework of Interpretation. It is expected that the Core Value will be taken into account when future ICANN policies and procedures are developed, and interpreted in accordance with the Framework of Interpretation.</p> <p>Supporting Organizations could consider defining and incorporating Human Rights Impact Assessments (HRIAs) in their respective policy development processes. HRIAs should not consider particular Human Rights in isolation since they are universal, indivisible, interdependent, and interrelated. Given the interrelated nature of Core Values, the Supporting Organizations could also consider other Core Values, as part of the balancing required by the Bylaws.</p> <p>Advisory Committees could also consider similar measures defining and incorporating HRIAs in their respective processes.</p> <p>When examining its operations, ICANN the organization could consider instruments such as HRIAs to assess its impact on Human Rights. However, this is up to ICANN the organization to develop and implement. The results of such HRIAs should be reflected in ICANN's annual reporting.</p>
<p>Consider what effect, if any, this Bylaw will have on ICANN's consideration of advice given by the Governmental Advisory Committee (GAC)</p>	<p>ICANN's Mission, Commitments and Core Values, including the Human Rights Core Value, should be taken into account by the SOs and ACs, and ICANN the organization when considering policy matters.</p> <p>The Board will need to take into account ICANN's Mission, Commitments and Core Values, including the Human Rights Core Value, in considering all matters before the Board, which also includes advice given by the GAC.</p>

ANNEX 1.

Section 1.1 of the ICANN Bylaws (ICANN mission)

(a) The mission of the Internet Corporation for Assigned Names and Numbers (“ICANN”) is to ensure the stable and secure operation of the Internet’s unique identifier systems as described in this Section 1.1(a) (the “Mission”). Specifically, ICANN:

(i) Coordinates the allocation and assignment of names in the root zone of the Domain Name System (“DNS”) and coordinates the development and implementation of policies concerning the registration of second-level domain names in generic top-level domains (“gTLDs”). In this role, ICANN’s scope is to coordinate the development and implementation of policies:

- For which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, security and/or stability of the DNS including, with respect to gTLD registrars and registries, policies in the areas described in Annex G-1 and Annex G-2; and*
- That are developed through a bottom-up consensus-based multistakeholder process and designed to ensure the stable and secure operation of the Internet’s unique names systems.*

The issues, policies, procedures, and principles addressed in Annex G-1 and Annex G-2 with respect to gTLD registrars and registries shall be deemed to be within ICANN’s Mission.

(ii) Facilitates the coordination of the operation and evolution of the DNS root name server system.

(iii) Coordinates the allocation and assignment at the top-most level of Internet Protocol numbers and Autonomous System numbers. In service of its Mission, ICANN (A) provides registration services and open access for global number registries as requested by the Internet Engineering Task Force (“IETF”) and the Regional Internet Registries (“RIRs”) and (B) facilitates the development of global number registry policies by the affected community and other related tasks as agreed with the RIRs.

(iv) Collaborates with other bodies as appropriate to provide registries needed for the functioning of the Internet as specified by Internet protocol standards development organizations. In service of its Mission, ICANN’s scope is to provide registration services

and open access for registries in the public domain requested by Internet protocol development organizations.

(b) ICANN shall not act outside its Mission.

(c) ICANN shall not regulate (i.e., impose rules and restrictions on) services that use the Internet's unique identifiers or the content that such services carry or provide, outside the express scope of Section 1.1(a). For the avoidance of doubt, ICANN does not hold any governmentally authorized regulatory authority.

(d) For the avoidance of doubt and notwithstanding the foregoing:

(i) the foregoing prohibitions are not intended to limit ICANN's authority or ability to adopt or implement policies or procedures that take into account the use of domain names as natural-language identifiers;

(ii) Notwithstanding any provision of the Bylaws to the contrary, the terms and conditions of the documents listed in subsections (A) through (C) below, and ICANN's performance of its obligations or duties thereunder, may not be challenged by any party in any proceeding against, or process involving, ICANN (including a request for reconsideration or an independent review process pursuant to Article 4) on the basis that such terms and conditions conflict with, or are in violation of, ICANN's Mission or otherwise exceed the scope of ICANN's authority or powers pursuant to these Bylaws ("Bylaws") or ICANN's Articles of Incorporation ("Articles of Incorporation"):

(A)

(1) all registry agreements and registrar accreditation agreements between ICANN and registry operators or registrars in force on 1 October 2016 [1], including, in each case, any terms or conditions therein that are not contained in the underlying form of registry agreement and registrar accreditation agreement;

(2) any registry agreement or registrar accreditation agreement not encompassed by (1) above to the extent its terms do not vary materially from the form of registry agreement or registrar accreditation agreement that existed on 1 October 2016;

(B) any renewals of agreements described in subsection (A) pursuant to their terms and

conditions for renewal; and

(C) ICANN's Five-Year Strategic Plan and Five-Year Operating Plan existing on 10 March 2016.

(iii) Section 1.1(d)(ii) does not limit the ability of a party to any agreement described therein to challenge any provision of such agreement on any other basis, including the other party's interpretation of the provision, in any proceeding or process involving ICANN.

(iv) ICANN shall have the ability to negotiate, enter into and enforce agreements, including public interest commitments, with any party in service of its Mission.

ANNEX 2

Other Core Values

(i) To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of, other responsible entities that reflect the interests of affected parties and the roles of bodies internal to ICANN and relevant external expert bodies;

(ii) Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;

(iii) Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment in the DNS market;

(iv) Introducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process;

(v) Operating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN's other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community;

(vi) While remaining rooted in the private sector (including business stakeholders, civil society, the technical community, academia, and end users), recognizing that governments and public authorities are responsible for public policy and duly taking into account the public policy advice of governments and public authorities;

(vii) Striving to achieve a reasonable balance between the interests of different stakeholders, while also avoiding capture;