

## **Comment of Brett D. Schaefer and Paul Rosenzweig of The Heritage Foundation on the Human Rights Commitment in the Cross Community Working Group on Enhancing ICANN Accountability 2nd Draft Report (Work Stream 1)**

This submission is the second comment of Brett Schaefer and Paul Rosenzweig of The Heritage Foundation (“Heritage”).<sup>1</sup> Heritage is a research and educational institution – a “think tank” – focused on U.S. domestic and international public policy and is a member of the Non-Commercial User Community of the GNSO. This comment addresses potential problems arising from the CCWG-Accountability call for an ICANN commitment to human rights to be included in its bylaws.<sup>2</sup>

There are two examples of commitment formulation provided in the draft:

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

As stated in the draft, “The group has achieved consensus on including a human rights related Commitment in ICANN’s Bylaws within its defined Mission. However no particular wording currently proposed achieved consensus. Reiterating its commitment to articulate concrete proposals as part of its mandate, the CCWG-Accountability is calling for comments on this approach and the underlying requirements.”<sup>3</sup>

In response to this request, if the CCWG-Accountability proceeds to support inclusion of a commitment to human rights in the bylaws, we strongly urge it to endorse a narrowly defined commitment to specific human rights consistent with NTIA criteria and likely to be directly affected by ICANN through its operations and policies (example 1) rather than a broad commitment to “internationally recognized fundamental human rights” (example 2).<sup>4</sup>

We base this recommendation out of concern that a broad commitment to “internationally recognized fundamental human rights” would, even if circumscribed by the caveat that the commitment be within the mission and operations of ICANN, be an invitation for various civil society groups, ICANN constituencies, and governments to petition the organization to commit to and involve itself in human rights activities not directly related to its mission.

“Internationally recognized human rights” is a very broad, imprecisely defined term. What does internationally recognized mean? Does it mean the rights enumerated in the Universal Declaration of Human Rights (UDHR)? Does it extend to the U.N. International Covenant on Civil and Political Rights

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<sup>1</sup> Our first comment addressed the problematic possibility that the Governmental Advisory Committee (GAC) could be granted voting privileges as part of the new Sole Member while retaining its current privileged status as an advisory committee that can oblige the Board to “try, in good faith” to find a mutually acceptable solution in the case of disagreement about GAC advice. “Comment of Brett D. Schaefer and Paul Rosenzweig of The Heritage Foundation on the Cross Community Working Group on Enhancing ICANN Accountability 2nd Draft Report (Work Stream 1),” August 20, 2015, <http://forum.icann.org/lists/comments-ccwg-accountability-03aug15/msg00005.html>.

<sup>2</sup> CCWG-Accountability 2nd Draft Proposal on Work Stream 1 Recommendations, §3, ¶¶ 144-52, August 3, 2015, <https://www.icann.org/en/system/files/files/ccwg-draft-2-proposal-work-stream-1-recs-03aug15-en.pdf>.

<sup>3</sup> *Id.* ¶152.

<sup>4</sup> *Id.* ¶151.

(ICCPR) and the U.N. International Covenant on Economic, Social and Cultural Rights (ICESCR)? Does it extend further to include the “core” human rights treaties identified by the Office of the High Commissioner for Human Rights (OHCHR)? Does it include the general comments and recommendations of the treaty bodies? What about other human rights not included in those documents but supported by some governments and human rights advocates and/or endorsed by bodies like the U.N. Human Rights Council?

Not every government has ratified even the core human rights treaties and far fewer actually observe and abide by the rights enumerated in them. Even the narrower category of “fundamental” human rights<sup>5</sup> is denied in part or entirely by a number of governments around the world. So what threshold must be crossed for a right to be considered internationally recognized? If it is universal observance, then even the human rights most central to ICANN’s mission – freedom of assembly, freedom of expression, freedom of religion, property rights, the right to privacy, and the right to due process – will fall short.

If internationally recognized means the rights endorsed by the United Nations, it would involve and encompass far more than the human rights that might be directly impacted through improper coordination of the allocation of the three sets of unique identifiers of the Internet or inappropriate policy development related to those functions. There are over three dozen rights recognized in the UDHR, ICCPR, and the ICESCR. The OHCHR identifies over 50 human rights issues.<sup>6</sup> New rights – the so-called third generation human rights like the right to development and the right to peace – are being promulgated and seriously considered even if they currently lack the acceptance of more-established human rights.<sup>7</sup>

In short, there is no clear delineation of where internationally recognized human rights start or end. Indeed, it is a fundamental tenant in the United Nations and among the majority of human rights advocates that human rights are all interrelated, interdependent and indivisible. If the CCWG-Accountability endorses a broad commitment to human rights, it is likely that the human rights community will interpret this as a commitment by ICANN to all human rights even if they are not thought by the CCWG-Accountability to be within the mission and operation of the organization.

We believe that this perspective will lead civil society, which has repeatedly urged ICANN to use revenues from its gTLD sales to finance a diverse set of charitable and development priorities, to demand that ICANN take affirmative action to realize human rights commitments beyond what much of the multi-stakeholder community likely anticipate or would consider reasonable.

The caveat in the examples that the human rights commitment would be within the mission and operation of ICANN, in our opinion, would not be a sufficient limitation to restrict such efforts. The restriction could be sufficient in regard to human rights obviously outside of ICANN’s area of responsibility, such as the right to life, the right to food or the right to a healthy environment. But the

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<sup>5</sup> Generally, freedom to peaceably assemble, freedom of association, freedom of expression, freedom of religion, freedom of thought, freedom of movement, right to due process of law, right to liberty, and the right to self-determination.

<sup>6</sup> Office of the High Commissioner for Human Rights, “List of Human Rights Issues,” <http://www.ohchr.org/EN/Issues/Pages/ListofIssues.aspx>.

<sup>7</sup> The first generation is civil and political rights like freedom of expression and the right to due process. The second generation is economic, social and cultural rights like the right to education and the right to housing.

CCWG proposed revised text of ICANN’s mission statement and core values, while much improved, would nonetheless provide windows for those so inclined to assert that ICANN has a bylaw commitment to support, facilitate or advance human rights more closely linked to ICANN’s mission even if not currently envisioned by the CCWG-Accountability to be within ICANN’s mission or operations.

For instance, the revised bylaw text as recommended by the CCWG-Accountability states,

“In performing its Mission, ICANN must operate in a manner consistent with its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions, and applicable local law and through open and transparent processes that enable competition and open entry in Internet related markets.”<sup>8</sup>

And

“In performing its Mission, the following core values should also guide the decisions and actions of ICANN:....

2. 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....

5. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest as identified through the bottom-up, multistakeholder policy development process.”<sup>9</sup>

Armed with a broad commitment to human rights in the bylaws, it is easy to articulate an argument that ICANN has an obligation under various human rights conventions and in service to the public interest (also poorly defined and under debate within ICANN and its constituencies) to, for instance, use the proceeds from gTLD sales to expand the diversity of the Internet community by financing expanded broadband and connectivity in developing countries consistent with the right to development or to prioritize domain name purchases for under-represented ethnicities or genders or to enforce content restrictions to prohibit hate speech.

Regardless of whether these missions are well-intentioned, they should be outside of the ICANN remit. Efforts to press ICANN to act on human rights commitments tangential to its mission may be successfully resisted despite the potential loopholes. But with the current reform process underway, prudence should lead the CCWG-Accountability to pre-emptively minimize this possibility through tighter language in the mission statement, core values, and, if it is to include any commitment to human rights within the bylaws, to specifically enumerate human rights in a manner that is consistent with the NTIA criteria and directly related to ICANN’s core purpose and operations to avoid mission creep.

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<sup>8</sup> CCWG, “Mission, Commitments, & Core Values: Comparison of Current Bylaws to 2<sup>nd</sup> Draft Proposal,” <https://community.icann.org/pages/viewpage.action?pageId=53783460&preview=/53783460/56133563/Annotated%20Mission%20Commitments%20%26%20Core%20Values%20Current%20v%20Proposed%2027%20August.pdf>.

<sup>9</sup> CCWG, “Mission, Commitments, & Core Values: Comparison of Current Bylaws to 2<sup>nd</sup> Draft Proposal,” <https://community.icann.org/pages/viewpage.action?pageId=53783460&preview=/53783460/56133563/Annotated%20Mission%20Commitments%20%26%20Core%20Values%20Current%20v%20Proposed%2027%20August.pdf>.

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