

ARTICLE¹⁹

**Issue report for the Cross
Community Working Party
on ICANN's Corporate and
Social Responsibility to
Respect Human Rights:**
Practical recommendations
for ICANN

June 2015

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Executive Summary

Since the ICANN 52 meeting in London in June 2014, there have been active cross-community discussions about human rights and ICANN. The continuing dialogue suggests a growing need to provide some structure.

This report focuses on the Internet Corporation for Assigned Names and Numbers (ICANN)'s corporate social responsibility (CSR) to respect human rights. It applies the UN Guiding Principles on Business and Human Rights (Guiding Principles) to the specific context of ICANN. Recognising the special nature and complexity of ICANN's multi-stakeholder governance structure, it aims to help ICANN 'translate' respect for human rights and put it into practice in its own policies and procedures. The report offers practical recommendations and examples, in accordance with the terms of reference of the NCSG-Cross Community Working Party on ICANN's Corporate and Social Responsibility to Respect Human Rights (see Annex).

The report's main recommendation is that ICANN should demonstrate a commitment to respect human rights in all of its practices. In our view, a rigorously implemented policy on respect for human rights is fundamental to ensuring that ICANN's international, multi-stakeholder, bottom-up operating model remains effective. The mechanisms through which ICANN can achieve respect for human rights should be built into every level of its organisation and mandate beginning with its by-laws. Using ICANN's usual policy-development process, the Board should now adopt a Human Rights Framework and Principles. Those commitments should, furthermore, be integrated into ICANN's Strategic and Operational Plan. Improving respect for human rights should also be an ongoing priority in ICANN's regular organisational reviews.

This work builds upon and continues the dialogue about ICANN's human rights responsibilities which was initiated by two recent reports: the Council of Europe report published in June 2014, and the ARTICLE 19 report published in February 2015. Whereas the Council of Europe report explored governments' duty to protect human rights, the ARTICLE 19 report, ICANN's Corporate Responsibility to Respect Human Rights, introduced a new dimension to the debate by highlighting corporations' duty to respect human rights, based on the Guiding Principles. This report aims to develop that earlier work, using those principles as the basis for

a number of specific steps which ICANN should take to incorporate Corporate Social Responsibility for Human Rights (CSR-HR) principles into its procedures. It also builds on the Interpretative Guide developed by the Office of the UN High Commissioner for Human Rights, as well as the EU Commission's ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights. The report highlights, in particular, the key policies and procedures ICANN should adopt in order to demonstrate its commitment to respect human rights.

Recommendations

Taking note of ICANN's multi-stakeholder governance structure, as well as its existing policies and mechanisms with relevance to human rights, and its mission to operate in the interest of the whole internet community, this report recommends that ICANN should build respect for human rights into every level of its organisation and mandate by:

- Reviewing its Bylaws to ensure they reflect human rights principles;
- Setting out in its Human Rights Framework and Principles how human rights principles will be applied to core business procedures and operations;
- Approving the revision of its by-laws and its Human Rights Framework and Principles;
- Integrating these principles into its Strategic and Operational Plan;
- Ensuring that respect for human rights is an ongoing priority for its regular organisational reviews.

The implementation of the Guiding Principles is a continuous process of learning and improvement with three core elements: 1) commitment to, and embedding of, the human rights policy; 2) due diligence in following that policy; and 3) remediation procedures for addressing policy violations.

1. In order to demonstrate its commitment to human rights and bring these principles into the mainstream, ICANN should:

- Open a public consultation process for the development of a human rights policy;
- Adopt a policy on human rights;
- Set up an internal human rights team;
- Undertake regular, (bi)annual, external reviews of its work and policies;
- Align existing policies and procedures with established human rights principles.

2. In order to comply with due diligence, ICANN should:

- Produce an externally-audited annual report on human rights issues and their implications for ICANN policies and procedures;
- Commission external, (bi)annual reports on human rights with clear recommendations.

3. In order to provide for remediation, ICANN should:

- Increase the capacity and resources of the Office of the ICANN Ombudsman in accordance with Article IV, Section 4 of ICANN's Bylaws. This office could then deal with remediation procedures and complaints in cases involving human rights and human rights violations, and provide assistance on human rights issues to ICANN's staff and community.

Finally, the report recognises that embedding respect for human rights within ICANN's policies and procedures is a complex process, requiring continuous commitment and resources. We understand that ICANN may not always be in control of all the circumstances within which it operates, and that these circumstances may change rapidly. Implementation of the Guiding Principles is, therefore, a continuous process of learning and improvement. We also acknowledge that this responsibility is one in which the Governmental Advisory Committee (GAC), from whom ICANN receives the input of governments, has a keen interest and significant responsibility, and that an ongoing collaboration with the GAC is therefore strongly advisable.

Introduction

‘ One of the greatest ironies of this period in history is that, just as technology remakes our world, the need to maintain the human dimension of our work, and a company’s sense of its social responsibility, is growing at an equally rapid pace. Harmonizing economic growth with the protection of human rights is one of the greatest challenges we face today.’

Mary Robinson, former United Nations High Commissioner for Human Rights

The Internet Corporation for Assigned Names and Numbers (ICANN) is a unique non-profit multi-stakeholder body, responsible for the technical management of internet domain names and addresses. It operates at a global level and creates 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. Domain names and top level domains may include expressive and communicative elements (e.g. .gay, .sucks, .islam), so ICANN’s policies are directly relevant to the rights to freedom of expression and freedom of association. The relationship between ICANN and the domain name registrars is governed by the 2013 Registrar Accreditation Agreement (RAA), whose data retention and disclosure provisions are relevant to the right to privacy and data protection. Thus, ICANN’s policies and procedures, implemented through its contractual arrangements, may substantially interfere with people’s ability to enjoy the range of internationally recognised human rights set out in the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

As discussed in our earlier report, ICANN – as a non-profit corporation, and not being a state - is not required to protect human rights under international law . Nonetheless, Article 4 of the ICANN Articles of Incorporation states that ICANN is bound to operate “for the benefit of the internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law”.

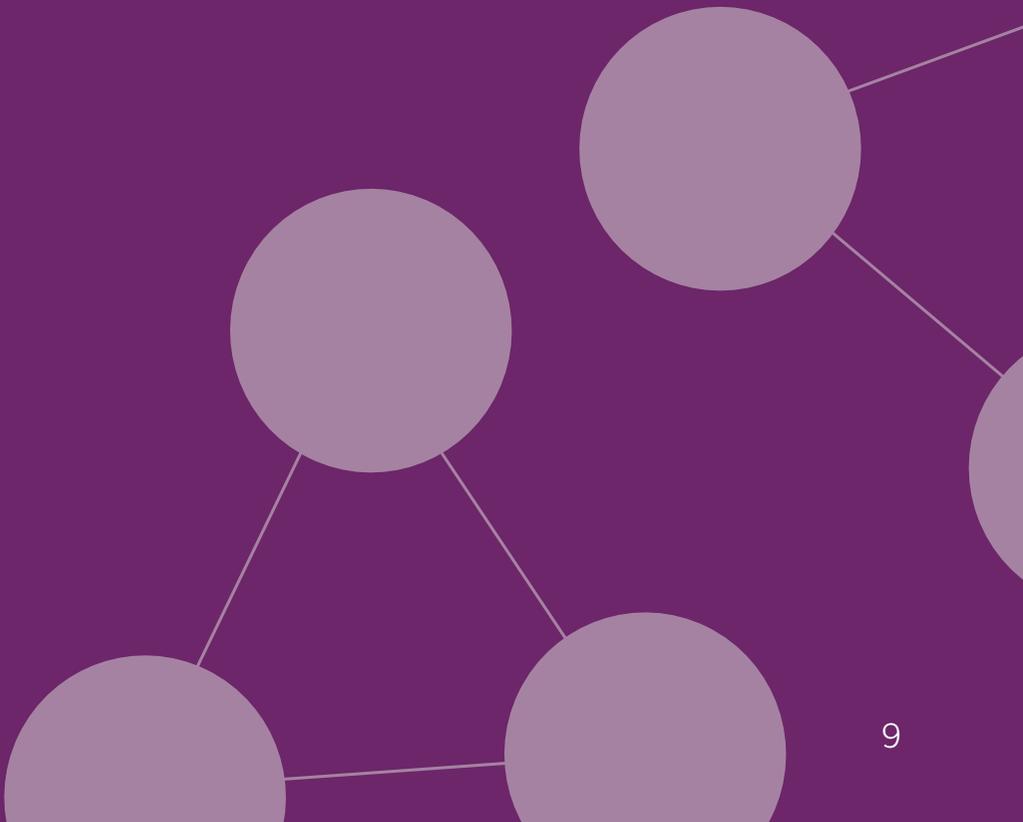
Unlike many corporations, ICANN is not a purely economic organ seeking profit but a private body, a non-profit corporation with a mandate to “operate for the benefit

of the internet community as a whole.” The Council of Europe’s Committee of Ministers stressed in a Declaration adopted on 3 June 2015 that “ICANN, as a private non-profit corporation should respect international human rights law, notably the UN Resolution 17/4 on Human Rights and Transnational Corporations and other Business Enterprises, and welcomes its commitment to operate in conformity with relevant principles of international law.” In our view, ICANN’s mandate to “operate for the benefit of the internet community as a whole” includes an responsibility to respect internationally recognised human rights.

This report makes practical recommendations for ICANN about how it should implement its CSR policy so that it respects human rights, conducting human rights assessments, and exploring where human rights mechanisms could be included in ICANN’s policies and processes. It also aims to advance cross-community debates on ICANN and human rights within the ICANN community, which may result in tangible policy changes and reforms as proposed by the community. In particular, we recommend that ICANN draws upon the guidelines developed here when implementing CSR into specific human rights policies.

This report is divided into two parts: Section 1 sets out and explains the concept of CSR and introduces general, as well as internet-specific, CSR frameworks. Section 2 explores how human rights policies could be developed in practice within ICANN policy processes. It sets out a number of steps that should be considered so as to implement CSR principles, and concludes by making a number of practical recommendations for ICANN.

1. The Corporate Social Responsibility to protect Human Rights



1. The Corporate Social Responsibility to protect Human Rights

Human rights are basic norms which secure the dignity and equality of all human beings without discrimination. They include a range of internationally recognised human rights under the UDHR, the ICCPR and the ICESCR. These documents set out a range of rights, including the rights to freedom of expression and privacy and the right to a fair trial and due process.

1.1 Corporate social responsibility

Whilst states are the organs traditionally bearing responsibility for human rights (i.e. states are responsible for respecting, protecting and fulfilling human rights), in the last decade, various private bodies have worked to understand and address the human rights impact of their activities. They have done so by recognising their social responsibility to respect human rights. Corporate social responsibility is generally understood and defined as the responsibility of private companies to make decisions and pursue policies that are in line with the objectives and values of society. The acceptance and fulfillment of responsibilities by private bodies is mainly determined by ethical considerations, as well as the desire to maintain good relations and a positive public image. Some classical CSR pioneers claim that “social responsibility begins where the law ends. A firm is not being socially responsible if it merely complies with the minimum requirements of the law, because this is what any good citizen would do.”

The concept of CSR, including respect for human rights, is used increasingly as a benchmark to measure the overall performance of organisations. Many companies have therefore embraced CSR to boost their reputation and maintain a high level of stakeholder trust.

1.2 Global CSR initiatives

The importance of CSR at international level was first recognised in 2007 during the United Nations Global Compact (UN Global Compact) summit. The UN Global Compact is a strategic policy initiative for businesses committed to CSR. With over 12,000 corporate and other participants from over 145 countries, it is the largest CSR initiative in the world.

The UN Guiding Principles, known as the ‘Protect, Respect, and Remedy’ framework, were unanimously adopted by the United Nations Human Rights Council in June 2011. These principles were developed over a period of six years by Professor John Ruggie after extensive consultation with the public, private, and non-governmental sectors in every continent, and have gained broad support and acceptance. Several important international CSR standards, adopted later, such as the 2011 OECD Guidelines for Multinational Enterprises and the ISO 26000 Standard for social responsibility draw directly on the Guiding Principles. There is, therefore, a significant degree of consistency in the standards of behaviour expected from companies such as ICANN.

1.3 Industry-specific corporate social responsibility initiatives

Civil society, governments and private sector companies have also been working for some time to adapt the Guiding Principles for industry-specific needs. This has led to the adoption of industry-specific standards against which companies can measure their activities and chart their progress.

In the case of ICT companies, several internet-specific CSR initiatives have emerged which take into account the complex environment in which these companies operate, including the transformative nature of the internet, its role in promoting free expression, and the need to navigate different national laws across the world.

1.4 Global Network Initiative

Perhaps the most well-known of these efforts is the Global Network Initiative (GNI), a multi-stakeholder coalition of ICT companies, human rights organisations and academia. GNI was launched in 2008 by Google, Microsoft and Yahoo after they came under fire for assisting government surveillance and censorship in China and other countries. Some other large companies, such as Facebook and LinkedIn, have joined since then. GNI has proved to be a worthwhile effort, influencing the policies of many non-member ICT companies. Reviewing GNI's principles and guidelines might be a useful starting point for ICANN to learn about best practice examples and experiences from the major ICT companies that have joined the GNI, many of which are already well represented at ICANN.

1.5 Internet Rights & Principles Coalition

Within the framework of the Internet Governance Forum, the Internet Rights & Principles Coalition was created in 2009 with the mission “to make rights on the Internet and their related duties, specified from the point of view of individual users, a central theme of the internet governance debate held in the IGF context”. In 2010-11 the Internet Rights & Principles Coalition (IRPC) developed its Charter of Human Rights and Principles for the Internet, distilling its 21 clauses into 10 Rights and Principles for the Internet based on international human rights laws and norms.

1.6 Silicon Valley Standard & Ranking Digital Rights

An example of a civil society initiative aimed at engaging with internet companies and strengthening their CSR responsibilities is the Silicon Valley Standard, initiated by Access and adopted in 2011. The Ranking Digital Rights (RDR) project is another important internet-specific CSR initiative, aimed at increasing the private sector's CSR responsibility to respect human rights, and focusing on developing a system to assess, compare, and publicly rank the world's most powerful ICT companies on free expression and privacy criteria. According to RDR, its scope is broader than the Global Network Initiative, in that RDR is able to evaluate ICT companies' policies when they have not yet 'opted in' to any particular CSR framework. RDR has set itself the goal of 'setting out a clear pathway for companies to improve their policies and practices affecting freedom of expression and privacy through concrete, measurable steps' and 'to make it easier for companies to take the recommended actions rather than asking them to come up with the answers on their own.' Since the project is ongoing, RDR will release the results of a full ranking of global internet and telecommunications companies in late 2015.

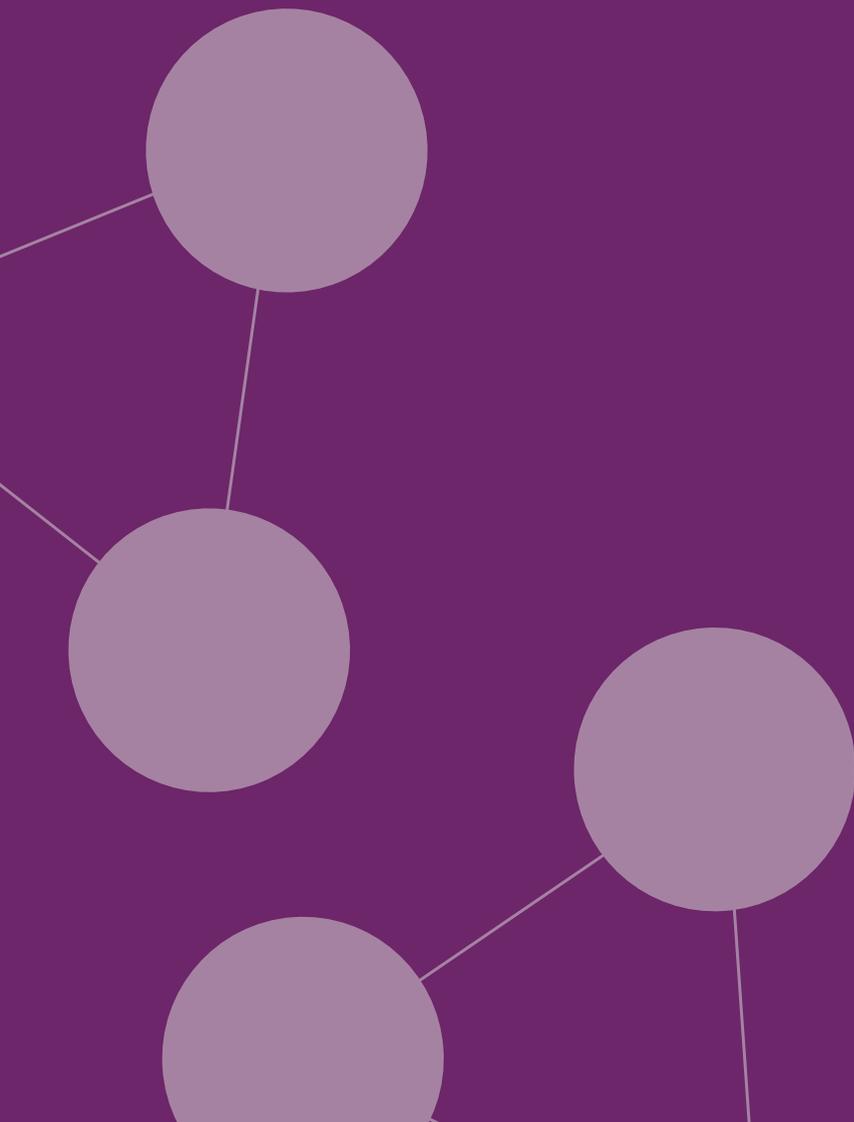
1.7 Relevance for ICANN

All these internet-specific initiatives seek to provide direction and guidance to the ICT industry and its stakeholders about protecting and advancing the enjoyment of human rights globally. These initiatives are particularly relevant for ICANN, taking into account its global responsibility for the technical management of internet domain names and addresses.

By joining initiatives such as the UN Global Compact, ICANN would signal its commitment to human rights within the field of internet governance. ICANN would be responsible for making individual policy decisions on how best to implement the principles and bring them into specific human rights policies and procedures. For instance, ICANN could resist to comply with law enforcement or international trade requests from governments on the grounds that they are in breach of international human rights norms. At the same time, if ICANN is to demonstrate its ability to self-regulate in the area of human rights, it must implement CSR principles effectively.

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2. Integrating Respect for Human Rights into ICANN Policies & Operations



The CSR to respect human rights involves the adoption of appropriate internal policies and structures to ensure that human rights form part of a company's culture, decision making and operations. The purpose of this section is to describe a set of core elements that constitute compliance with CSR principles, and provide ICANN with guidance on how to implement the principles. As the ICT-Sector Guide explains, these core elements are a) a human rights policy commitment and a process for embedding that commitment into ICANN's culture and operations; b) human rights due diligence, which puts that policy into practice, and c) remediation procedures to address any negative impact ICANN has had on human rights.

2.1 A human rights policy commitment

To begin with, the UN Guiding Principles require a human rights policy commitment, which needs to be approved, articulated, and communicated both internally and externally. It will need to be reflected in ICANN's policies, procedures and practices in order to embed respect for human rights within ICANN. According to the ICT-Sector Guide, a human rights policy commitment would include the following core elements:

1. Defining the content of human rights policy commitment
2. Developing the policy commitment
3. Communicating the policy commitment
4. Aligning internally with the policy commitment
5. Applying the commitment to business relationships.

Within ICANN, the development of a draft human rights policy would need to involve key representatives of various constituencies in order to garner strong community support. For instance, the existing cross-community working group of volunteers could be developed into a policy development process or task force which could elaborate the draft policy. The Board could then initiate a community consultation process on the contents of the human rights policy, which, once adopted, would be communicated to all stakeholders.

After adoption, existing policies would need to be aligned with the human rights policy. ICANN has various processes and procedures already in existence that incorporate aspects of human rights, even if they are not expressed in human rights language, and these should be consistent with human rights policy. For ICANN, this would include, for instance, the RAA, WHOIS data collection, retention and disclosure requirements, and the Uniform Domain-Name Dispute-Resolution Policy (UDRP).

In order to ensure that the human rights policy is properly implemented, a dedicated human rights team should be established under the direction of a senior member of staff, which should include active participation by senior management (or even member(s) of the ICANN Board). The team could also be based on existing internal ICANN structures, such as the Accountability and Transparency Review Team, whose mandate could be extended if, after consultation, it was deemed suitable by the ICANN community and the Board. The alternative would be to create a new structure after consulting with the community.

The human rights team would coordinate and lead the implementation of the CSR principles. In addition, it would provide training for those ICANN staff (e.g. those in audit compliance or legal departments) and community members who are most likely to face human rights challenges.

Finally, human rights commitments would need to be reflected in ICANN's business relationships with third parties. In practice, this could be achieved by including human rights provisions in ICANN's contractual agreements.

2.2 Human rights due diligence

As explained in the ICT-Sector Guide, human rights due diligence is an ongoing process through which companies 'know' and 'show' that they are respecting human rights in practice. Human rights due diligence requires companies to understand how risks relating to human rights can change over time and how they should respond. For ICANN, this would mean looking at both the external and internal factors that may give rise to human rights risks, as well as the resources needed to help address them. Due diligence requirements, for example, might include ICANN documenting governments' demands on issues that might affect human rights, and potentially seeking external advice where relevant. To comply with this requirement, a sufficiently senior member of ICANN's staff should be made responsible for overseeing and documenting those demands in which human rights are implicated (e.g. access to personal data, taking down sites exercising free speech or political dissidence, allegations of criminal activity). The dedicated staff member should be empowered to give the relevant supervisory authorities (such as the national data protection authorities) access to this documentation. Furthermore, this individual should have access to independent advice within the ICANN ecosystem, for instance from the Ombudsman and/or a human rights advisory committee.

2.2.1 Reviews of compliance documentation

Human rights due diligence also requires the establishment of detailed procedures in order to ensure the consistent implementation of human rights policies and to document compliance with these policies. In particular, the Board should order regular internal reviews (every six to 12 months) and less frequent external reviews (every 12 to 24 months) of ICANN's human rights compliance.

2.2.2 Human rights impact assessments

Human rights due diligence also requires human rights impact assessments. In the case of ICANN, these should be carried out regularly to identify the policies and/or decisions that may have a negative or positive impact on human rights. The scope and level of detail of such assessments may be different depending on the purpose of the assessment concerned. These different purposes could include, for example, measuring the impact of an existing procedure or the likely impact on human rights of a new policy. In other words, ICANN would have a certain flexibility as to the scope and detail of human rights assessments. Nonetheless, ICANN should:

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- Prioritise the use of human rights impact assessments for policy and procedural areas that are identified by the convened human rights team as presenting the greatest risks to human rights, such as WHOIS or the UDRP. The most problematic areas should be identified following regular reviews by the human rights team of the impact of ICANN's operations on human rights.
 - Regularly update human rights impact assessments, according to material changes in both: a) human rights laws (e.g. current revision of the European data protection rules), as well as b) ICANN's policies (e.g. current proposed revision of WHOIS).
 - Draw upon resources from civil society, government bodies, international organisations, the CCWP and its materials developed, in particular, as part of this multi-stakeholder process.
 - Integrate the findings of the human rights assessments into ICANN's processes.
 - Communicate these findings, along with the way in which the human rights impacts are assessed.

2.2.3 Human rights risk mitigation strategies

Finally, in response to human rights impact assessments, ICANN should develop appropriate risk mitigation strategies by developing new policies and procedures, or by reviewing existing policies and procedures such as the WHOIS database. In practice, ICANN might wish to revise the internal procedures it uses when responding to government demands for user data or content restrictions in specific countries. Equally, ICANN should consider reviewing the way in which community applications and/or country requests concerning new gTLDs (e.g. .islam; .xxx) are assessed, particularly in circumstances where the rights to freedom of expression and privacy are not strongly protected in the requesting country.

2.3 Remediation for human rights impacts/implications

The final core element of the implementation of the Guiding Principles involves the creation of remedies for use when practices that are inconsistent with CSR principles are identified, including meaningful steps to ensure that such inconsistencies do not recur.

2.3.1 Role of the Office of the Ombudsman

Within ICANN, a remediation mechanism could be integrated as part of the role of the Ombudsman. In our view, the Ombudsman would be particularly well-placed to deal with internal matters, such as inter-constituency disagreements over the human rights impact of new policy proposals or the anonymous reporting of suspected violations of its human rights policy. At the same time, given the size and the complex multi-constituency system of ICANN, the Office of the Ombudsman should be given sufficient resources and be properly staffed so that it is able to deal with such human rights complaints.

2.3.2 Procedure for resolving human rights policy ‘inconsistency claims’

Alternatively, the ICANN remediation system could be based on a model similar to that of ICANN’s Uniform Dispute Resolution Procedure (UDRP), where different parties are given time and notice, and could respond to the CSR-HR ‘inconsistency claim’. For example, whenever a particular policy might potentially have a negative impact on human rights, a human rights policy ‘inconsistency claim’ could be submitted, detailing how the proposed policy violates – or might potentially violate - human rights norms, and the group responsible for that particular policy would respond to the points raised in the claim.

The most suitable model – both for internal and external remediation - should be chosen following consultations with the community.

Conclusion

A combination of solid governmental support and committed corporate action is needed if human rights are to have lasting protection. ICANN does not operate in a vacuum: not only would ICANN's respect for human rights benefit society as a whole, it would also increase public confidence in ICANN and enhance its public image. Indeed, if ICANN wants to continue enjoying independence from government, it must demonstrate that it is capable of self-governing, and this includes the area of human rights.

It is up to the ICANN community to decide which human rights management system is most suitable for its own governance model. However, whatever steps ICANN takes, it is imperative that these steps should be transparent, and effectively communicated to the various constituencies, communities and the public. It is hoped that this report will be useful in assisting ICANN to take the proactive steps needed to implement its social responsibility to respect human rights.

Annex

Charter for the Cross Community Working Party on ICANNs Corporate and Social Responsibility to Respect Human Rights

Background

This cross community working party (CCWP) seeks to map and understand the issues and potential solutions related to corporate and social responsibilities of the Internet Corporation for Assigned Names and Numbers (ICANN), and this related, but not limited to policies, procedures and operations, it particularly focuses on ICANNs responsibility to respect human rights. It builds on a long term community engagement on this topic, further catalyzed with the publication of the paper 'ICANN's procedures and policies in the light of human rights, fundamental freedoms and democratic values', as commissioned by the Council of Europe, and after sessions held in London, Los Angeles and Singapore. It seeks to improve ICANN's measures to respect human rights in accordance with article 4 of ICANN's articles of incorporation and have established a programme for corporate social responsibility.

Objective

The CCWP on ICANNs Corporate and Social Responsibility to Respect Human Rights would have the purpose to raise awareness, provide information, facilitate dialogue and make suggestions to ICANN the corporation and the ICANN community on ways to better harmonize ICANN's policies and procedures with internationally recognized human rights and corporate social responsibility standards, such as UN Guiding Principles on Business and Human Rights, the UN Global Compact, and the European Commission and International Human Rights and Business guidelines on implementation of the UN Guiding Principles on Business and Human Rights for the ICT Sector. This specifically in the context of the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). The working party will focus on issues related to human rights that are directly impacted by ICANN policy decisions, procedures and operations.

Responsibilities and scope of work

- (i) To continue the process of raising awareness about the interplay between ICANN's policies, procedures and operations and corporate and social responsibility issues, specifically with respect for human rights;
- (ii) To map and collect information from the community about cases as well as current ICANN policies, procedures and operations that present an impact on the respect of human rights in which further guidance on how to harmonize policies and procedures with increased respect of human rights would be necessary;
- (iii) To develop corporate and social responsibility guidelines for the procedures that are in place or that should be created in the policy development process to ensure specifically, but not limited to, the respect for human rights;
- (iv) To provide information, suggestions and recommendations to the chartering organizations and to the broader ICANN community on how ICANN's policies and procedures can be developed and implemented consistent with internationally recognized standards.

This input can inform the policy development processes as defined in the ICANN By-laws.

- (v) To propose procedures and mechanisms with the aim of producing assessments on if and how policies and procedures under development and/or being implemented may impact on human rights.
- (vi) Draft Position Papers and Statements as deemed appropriate.
- (vii) To carry out further discussions about the pertinence and timing for the creation of a cross-community working group on this issue.

The membership of the CCWP on ICANNs Corporate and Social Responsibility to Respect Human Rights is proposed to include members representing the diversity of the ICANN community. The Working Party will serve as a focal point for the CSR discussion, knowledge dissemination and communication about the impact of ICANN's policies and procedures on corporate and social responsibility, specifically related to Human Rights. Its activities will be conducted in an open and fully transparent manner.

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