

## Comments by the Federative Republic of Brazil

on the draft *Proposed Framework of Interpretation and Considerations concerning ICANN's Human Rights Bylaw* (hereafter "the draft Proposed Framework")

Brazil endorses the comments made by the Federal Office of Communications, Switzerland on the draft Proposed Framework, dated 15 June 2017, and supports the amendments to the draft that the Swiss Federal Office of Communications suggested.

In addition, Brazil would like to share the following comments on the draft Proposed Framework:

- **On page 3, the first sentence of the third paragraph reads: "*Finally, there is no standing hierarchy in the treatment of the different Core Values*".**

Brazil notes that the above statement does not appear anywhere in the Bylaws in such a peremptory form. Brazil considers that the Bylaws leave the question of hierarchy between different Core Values open for further consideration according to specific circumstances, and that it does not necessarily follow that there will be no hierarchy in their treatment under specific circumstances.

Bylaws, Section 1.2(c), provides 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". It is possible that these factors, among which is the substance of the Core Value in question, require the Human Rights Core Value to lie higher up in the hierarchy than other Core values. It is worth noting that public international law establishes a hierarchy of norms pursuant to the content (or value) of the different norms, and that human rights obligations often prevail over conflicting rules to the extent they are often at the top of that hierarchy.

As a suggestion of amendment, Brazil proposes redrafting the first sentence of the third paragraph on page 4 as follows:

*"Finally, there may be a hierarchy in the treatment of the different Core Values, according to the values they embody and the importance the multi-stakeholder community attaches to these values."*

- On page 4, the first two sentences of the fifth paragraph read: ***““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.”***

Brazil suggests substituting the word “binds” with “applies to”.

Brazil understands that a law that is "binding" on someone can be read more restrictively than a law that "applies to" someone. Brazil understands that the expression "applicable law", which is Bylaw language, may encompass "soft-law", international legal standards, etc., which may not be binding, but be applicable nonetheless.

Brazil also suggests including, before the word “etcetera”, express reference to “*customary international rules and principles*”.

Brazil understands that customary international law is particularly relevant in the field of human rights law applicable to non-state actors, notably businesses. They are particularly relevant because non-state actors, though generally not party to human rights treaties, may still be subject to international legal norms by virtue of custom, notably as custom continues to evolve to apply to non-state actors.

- On page 6, the first full sentence at the top of the page reads: ***“However, ICANN the community and the organization could refer to any of the widely adopted Human Rights declarations, conventions and other instruments while taking human rights into account in its policies and operations.”***

Brazil suggests redrafting the above sentence as follows: *“However, businesses can be subject to international customary law rules and principles as they evolve in the field of human rights. Further, ICANN the community and the organization should refer to any of the widely adopted Human Rights declarations, conventions and other instruments while taking human rights into account in its policies and operations.”*

See comments above.

16 June 2017