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RECORDED VOICE: This meeting is now being recorded.

NIELS TEN OEVER: Thank you very much ICANN staff, and welcome everyone to this fifth meeting of the cross community working group on enhancing ICANN's accountability work stream two, the human rights design team, on September 20th at 19:00 UTC.

I would like to welcome you all. I also would like to welcome you on behalf of my co-chair, Nigel Roberts. We have an agenda. I would like to ask if other people have suggestions to add points to the agenda?

RECORDED VOICE: The host has left the meeting to speak with meeting support, and will rejoin soon.

NIELS TEN OEVER: I see no hands raised, so I think the agenda should be okay. Then I would like to ask the staff to do the roll call according to Adobe Connect, and ask everyone, anyone who is on the audio bridge and not on Adobe Connect, to make themselves known.

There is someone whose number ends in 0700. Who is that?

UNKNOWN SPEAKER: I think that's you.

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*Note: The following is the output resulting from transcribing an audio file into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.*

NIELS TEN OEVER: No, that's not me. Oh, maybe it is my... No, it's somebody else who isn't muted.

Okay, but that person is not in the roll call. And I would like to ask everyone who is not speaking to please mute their mic. Does anyone have changes to their statements of interest to announce?

No? So, that leaves us to the following agenda points. We are continuing work on the analysis of the [Rugby] principles, and their relevance for ICANN. And to go through that in a structured manner, I would like to propose that we simply... We already agreed that we would go through them one by one.

There has been some work done by the drafting team of volunteers, and because of the attention that has been tucked away this week because of the ICANN transition status being discussed in the UN Congress. I think not too much has happened, but I would like to first give the opportunity to the people in the drafting team, whether they have any specific remarks?

I forgot to mention that I have three notices of absentees, [inaudible], Tatiana [inaudible], and [inaudible] could not make it to this meeting. So that means that several people from the drafting team are also not present. But luckily, Greg Shatan who is in the drafting present, is present and is in the queue. So Greg, please come in.

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GREG SHATAN:

Thank you Niels. Greg Shatan for the record. As Niels indicated, unfortunately I would say limited work done. I think many of us are experiencing the sensation of being pulled in too many different directions at once, and not satisfying any of them. But nonetheless, we did take some time to discuss amongst ourselves in the emails, the how to go through this analysis.

And I think the general... While there is a range of opinions, as there always is, I would say that we seem to be reasonable support for the assumption that the [Rugby] principles, or that any [Rugby] principle is out unless it's in, and it's not in any wholesale fashion, but would need to be analyzed and determined to which ones and to what extent it comports with ICANN's mission, and with various other core values and the overall balancing process.

So I think that is, that makes this more of an editorial task, [inaudible] judgment pass, as opposed to just a kind of issue of, you know, are we adopting any principle per se? And so, I think that we may... Perhaps that wasn't clear enough because I see Jorge disagreeing with something that seems to agree with what... The next statement is consistent to what I say.

To analyze each principle, and see whether they are in or out, or to what degree. Yes. So, but we're not adopting them and then trying to... They're neither in or out until we decide one thing or the other. And they're not in, to any particular degree, if we just decide to what degree. So hopefully that's consistent with the overall understanding. And what I call kind of the Paul [Tome?] concern, kind of continues to echo, which is, if you go to the next slide, we can see especially in the

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second part in the second sentence, to address adverse human rights impacts with which they are involved.

Now is this the, I think this may not actually be the one that raises the great concern, I think it's one of the next ones when they're basically supposed to use their influence with their party, and the issue of ICANN using influence is definitely a double edged sword, and one that we will have to look at.

I think, you know, this one here may be more straightforward, but you know, nonetheless, we need to examine and think about. So I'll stop talking at this point. Thanks.

NIELS TEN OEVER:

Thank you very much Greg for that overview of discussion of the talk last week. And I think, indeed, several concerns have been brought up. And I think that it's very good that we discuss them, but let's discuss them, try to, as concrete as possible with concrete text, so we see what we are worrying about, what we can agree about, and then what we can put into a draft framework of interpretation, because our work is to come up with a framework of interpretation, not a framework of implementation.

But arguably we need to understand a bit about what an implementation would look like to come up with a framework of interpretation because it is what influence the implementation. So it is a careful balancing act, and an act in trying to understand how this fits on ICANN. So I think the general concerns are clear, and I would like to try to make work a bit more detailed and precise so that we get to text

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that we can, sort of that we can really get on paper, what we mean and move constructively forward.

I see Tijani's hand is up. Tijani, please come in.

TIJANI BEN JEMAA:

Thank you very much Niels. The first thing I want... The first question I want to ask is, is ICANN a business enterprise? I don't think so. It is a not-for-profit corporation. So does it apply to ICANN? Does this principle apply to ICANN? Thank you.

NIELS TEN OEVER:

So we're going now into the discussion of the first one. So we, and are starting with point two. So I suggest now, we start with the discussion of the first [Rugby] principle for businesses, as it is depicted here. And Greg and Tijani already made two comments about it. And I see Kavouss is already in the queue as well as Avri. Kavouss, please come in.

KAVOUSS ARASTEH:

Yes, good time everybody. While I agree with Tijani that we should clearly mention whether ICANN is a part, or is considered to be of the business enterprises, perhaps if we could reverse that, maybe we say that business enterprises, including or including ICANN, put ICANN different make it clear [inaudible]. But my question is not this.

My question is that, the first, the second part, and should address. The word address is different from undertaking any action. I can address my interest to you, but I do not undertake... Sorry, I can address my

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obligation, but I could not undertake to render the obligation. So I have difficulty with the word adjust. This is one.

And the second difficulty with the risk of people, in particular American colleagues, they argue with me about the use of the word should. I have been trained, for years and years, that should is an optional word. It is not an obligation. It is not a mandate. I [inaudible] use need to be, or need, or we should use shall. Because should is, in particular in this very important issue, could be interpreted as optional.

And in the bylaw, we have several areas that we talked about shall, not should. There are some other area, so I leave it to the colleagues to argue which party is correct, but I am not very much happy with the should. However, my main problem, a part from Tijani's question which is right, is to address.

We asked the enterprises business to address the issue. Okay, we address the issue, but we should respect the issues. We should undertake to do some action, but not address only. Thank you.

NIELS TEN OEVER:

Thank you very much Kavouss. I see Avri and Jorge are in the queue, and is see Paul and Brad are making points in the chat. If Paul and Brad, if any one of you would like to get in the queue and also put your point on speaking, so we could have a discussion about it.

But I would like to continue now to Avri. Avri, please come in.

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AVRI DORIA:

Thank you. This is Avri speaking. I want to comment on this. I think it is exceptionally applicable to ICANN. First of all, in terms of business, we are a non-profit business. We are a registered corporation, you know, and basically it's, there are contracts, there are contracts that involve money. It is subject to business accounting rules, and also [inaudible] that.

So I wouldn't want to quibble over the word. Obviously, if we were writing this sentence, we might use a different word there. We might qualify it, but as an expression there, I believe we fall into that.

The word address is interesting. I actually think that from an English speaking perspective, address does cover all of the issues that Kavouss was bringing up. There is respect in the first line, address means talk about, it means recognize, it means figure out if we want to do something about.

In terms of the word should, it has an optional element to it, as Kavouss says, but that is a very limited option. It's not the say as may. It is much stronger than may, which is the full optional. The meaning of should, in common usage, means that it's not quite must, because there would be occasions where it might not be applicable, but that you know, you really should do it, unless you've got a good reason not to, and you need to be able to elucidate that reason.

You may not be able to address it because it involves too much private information, or it's being addressed by a court, or it's being done somewhere else. So it's not an absolute, but it is a contingent obligation. So in terms of this being applicable to us, I think it is

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completely applicable to us. And just, you know, think that it may be definitional in terms of what all of the words mean in some cases. Thank you.

NIELS TEN OEVER: Thank you very much Avri. And I would like to remind everyone that we do not need to do wordsmithing here. We will not copy this part [inaudible], but let's see what we will find. We have already said in the bylaw that ICANN will respect internationally recognized human rights. The word business enterprises, we can leave that out entirely.

So we need to see what is... Does this work from the ICANN context? So that's how I would like to encourage you to look at it. I see Jorge Cancio is in the que. Jorge, please come in.

JORGE CANCIO: Hello, good evening. Do you hear me okay?

NIELS TEN OEVER: Yes, very fine, thank you.

JORGE CANCIO: Hello. Thank you very much. This is Jorge Cancio for the record. I think Avri really said a lot of things that I would have said, myself. I am [inaudible] of the opinion that here we are dealing with an organization that if it is, we can connect to some things, it would be more to business enterprises, and I think that we would really benefit from guidance, or

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advice, or ideas from [inaudible], both of [inaudible] himself, Mister [inaudible], who, if I'm not mistaken, was going to be contacted by this working group at some point of time.

And by the way, a part from Mister [inaudible], the originator of these principles, we should be aware that there is a working group on international races, that these were the implementation of these guiding principles, so their opinion could also be very useful for shedding some light on some of the concepts of the principles.

Having said that, this principle, I think that, and speaking as a lawyer, it seems that there is very much of an in-built flexibility in this principle, and especially if we consider also the part of should address [inaudible] already gives us a leeway on how we would implement that. And also on what means adverse human rights impact.

So, apart from the guidance or the opinion we may get from those who are specialized in the implementation of these principles on an international level, I think we should be mindful that there is a lot of flexibility there. And apart from this, I guess that also the fact that we are talking about a core value, which has been confirmed by ICANN Legal. It's an element that first part of a balancing test in the course of decision making by ICANN, should also make us aware or raise the awareness that we are talking about elements that are not a binding obligation, or on a strict commitment.

It must be complied with to the letter, our elements of guidance of decisions to be taken by ICANN. Hope this helps. Thank you.

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NIELS TEN OEVER: Thank you very much Jorge. I'll also take that on my list, international working group on the implementation of the guiding principles. I see David McAuley is also in the queue. David, please come in.

DAVID MCAULEY: Thank you Niels. David McAuley here for the record. I appreciate Niels, your comment earlier that this is a framework of interpretation, not a framework of implementation. And I would to add to that, neither is it a framework of expansion. And I think that we have to recognize that what we're interpreting is a very narrow bylaw, where ICANN has agreed to respect internationally recognized human rights, as required, that's an important word, as required by applicable law.

The concept of applicable law is in the bylaw, it's there, and we have to deal with it. And in that context, I would say, to me at least, the words should address are extraordinarily broad. I think I listened to Avri and I understand her point, but I think the word address simply invites a very broad definition and application.

In fact, if I read it correctly, Nigel said in the chat that address means to deal with, asking ICANN to deal with adverse human rights impacts where they might exist. I think it's extraordinarily beyond the remit of what the bylaw says in section 1.2B8. So that's my comment. Thank you very much.

NIELS TEN OEVER: Thank you very much for that comment, David. I see Paul McGrady in on the queue. Paul, please come in.

PAUL MCGRADY:

Thank you. Paul McGrady for the record. So I think that we're doing exactly what we're not supposed to do by jumping forward to these [Rugby] principles. The bylaw itself mentions applicable law, and on the last call, and in the chat, I've been advocating for the idea that we would get what applicable laws already apply to ICANN.

And I put it into the chat again at the beginning of the call and was invited to come on and make a verbal statement so that it could be discussed. So it appears that we're going out and we're looking for all kinds of principles and all kinds of fixes, but yet we've not done what we have to do, which is look at what the applicable law is.

And so, I again suggest, and it looks like it's going to be ignored, but I'm [inaudible], hey, why don't we look at applicable law? There are lots of laws at the state and local level, and that deal with human rights issues that would necessary apply to ICANN because it is a California corporation that employs people in California.

And so I would say let's, again, go out, get some advice, if we need to. If we don't think we can do the work ourselves. Figure out what human rights rules and regulations already apply to ICANN, and then in the event that we think there are some human rights principles that should apply to ICANN that don't already apply to ICANN by way of applicable law, then we can have a discussion about whether or not these [Rugby] principles are the way to patch that, knit the quilt.

Or if there is some other way to patch it. But dumping [inaudible] to go pick up the patch, when we've not even identified where the quilt is,

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and if it has a hole to be patched, seems to me a completely out of order in terms of how we should be handling this thing. And also then, jumping [inaudible] to come in and tell us about his particular patch for a quilt we've not identified and a hole we have not found yet to be patched, seems to me even anything [inaudible] at this stage.

So anyway, there it is for the record. Hope we can get back to the important business of finding out what human rights principles apply to ICANN under applicable law. Thanks.

NIELS TEN OEVER:

Thank you very much for that Paul. Greg is in the queue. Greg, please come in.

GREG SHATAN:

Thanks. Greg Shatan again for the record. So many things to reply to, I wish I had five heads. In any case, as David points out, we are bounded by applicable law. That may not be the way, you know, that human rights in the abstract might work in an abstract organization, which is, but it's the way our bylaws work, which is perhaps another reason that we are further away from [Rugby] than one might think.

I originally raised my hand back when, to talk to the business enterprise issue, which I think is more or less of a red herring, actually, in one sense, which is that ICANN is clearly a business enterprise, even if it is a non-profit. A non-profit is a form of business enterprise, it just doesn't distribute profits to shareholders.

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But it does act in many ways like a business enterprise, it's a bit different. But the real difference is, and my question will be, is ICANN merely a business enterprise? And my answer to that is absolutely not. None of us would be here, having this conversation if ICANN was merely a business enterprise.

ICANN is an internet policy development community, attached to a business enterprise. And if we were to deal with ICANN solely as a business enterprise, we might not even be dealing with the policy development aspects of it. Clearly, that's not the intent, but at the same time, to the extent that ICANN's remit and its method of action, and even what ICANN is, beyond those people who draw a paycheck from it, and the organization from which they draw a paycheck, that's not a business enterprise.

And when we are looking at how to apply our bylaw, I think we're almost on clean ground, or in a green field with that regard. So I think that underpins the fact that we could look at [Rugby] with a skeptical eye, because it's precisely the areas where ICANN does not function as a business enterprise where I think some of the more thorny issues could arise.

Secondly, with regard... We need to... And as David did, you know, go back to what the bylaw says. And it actually doesn't say we will respect human rights. The [inaudible] language says, in performing its mission, the following core values should also guide the decisions and actions of ICANN. And then we go down to the number eight that says, subject to limitations set forth in section 27.2, which is the dormancy provision.

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Within the scope of its mission and other core values, respecting internationally recognized human rights as required by applicable law. So, ICANN's responsibilities as in its bylaws to respect international human rights don't go beyond those required by applicable law. But we're not going into soft law here, or non-law, in regard to interpreting this bylaw.

Put aside the scope of mission and core values issues for the moment, not that they're unworthy of discussion, but rather it's a whole separate vector. I think it's, as we look at this language, at all, you know, we should look at not just the [Rugby] language, but also the commentary that's in the guidelines to try and get some sense of what the words meant.

And in terms of address, the commentary states, addressing adverse human rights impact requires taking adequate measures for their prevention, mitigation, and where appropriate, remediation. So, if one were to adopt this principle, and adopt this commentary, then that's what would be meant by address in this case.

So, we need to look at these carefully, and whether this is something that we intend when we say ICANN will respect human rights. And also understand that any of us, prevention, mitigation, or mediation is only for those within applicable law. So, this is not a simple exercise, but at the same time, it's a careful one.

And I think what we need to do is to figure out whether, essentially the whole [Rugby] exercise really gives us a whole lot in terms of trying to figure out what the bylaw is, and we should all, you know, keep looking

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at that bylaw and make sure we understand kind of how its bounded before we seek to put kind of, you know, wrap a [Rugby] around it, so to speak. Because it is not quite a [Rugby] principle in of itself. Thank you.

NIELS TEN OEVER: Thank you very much Greg. Kavouss is next in line. Kavouss please...

KAVOUSS ARASTEH: Yes, do you hear me please?

NIELS TEN OEVER: Yes, we hear you.

KAVOUSS ARASTEH: Yeah. I think we should address the issue one by one. If the people believe that others needs to deal with it, why not to put deal with. 50 people believe that [inaudible] what you say, taking necessary measures, or adequate measures, or measures in regard with, why not put that? I am not happy with the word address. This is point one.

Second, are we talking of ICANN, or we are talking of business enterprises, or we are talking of both? So we have to be very clear. If you are talking of ICANN only, why not say ICANN? Here we are talking of business enterprises, why we should not say only business enterprise and not talk about ICANN.

If we're talking about both, we should add very, very clearly that we mean enterprises, business enterprises, and ICANN. So [inaudible]

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three issues. Address should be replaced with some other word. And then business enterprises should be a clear whether we include ICANN or not, and if that is the case, and the address is something that we have to change to either undertake or [inaudible], or respect, or something, but not address.

I am not convinced of the address. [Inaudible] should [inaudible] as a recommendation is optional. I do not agree with the presentation of colleagues that they try to force me that should is better than may. Yes, [inaudible] make, but there are other words you can have. You can have [could?], you can have would, you can have [inaudible], you can have may.

That is not an obligation. Once again, it is not an obligation. I cannot agree with that. Thank you.

NIELS TEN OEVER:

Thank you very much Kavouss. So we've seen an interesting discussion developing with people who have different comments, or people have comment to this specific [Rugby] principle. And there was a discussion about the process that we take in general, the discussion about applicable law.

So we can go ahead and understand and have a discussion about what applicable law is, and I am personally a bit hesitant, because it would, in my understanding, but please correct me if you have another vision of that, that we understand what loss and regulations on different levels that are currently applicable to ICANN can be seen as impacting human rights, and then how they impact ICANN.

And that might be quite an extensive, nothing exercised, I'm not sure if that's needed for the framework of interpretation. But if people have a concrete idea how that is a step forward, I would definitely welcome that as well. So I see there is a queue forming again. Greg, please come in and see if you can wrap [Rugby] around it.

GREG SHATAN:

Thank you Niels, I'll do my best. In my collection of red herrings, I think that should is also a red herring. The question is not whether... And we're not talking about a business enterprise in the abstract, we're clearly talking about one entity, ICANN. We're talking about what ICANN would do when it attempts to respect human rights in the context of the bylaw.

So whether we say should, must, will, may, might, that is actually besides the point. The question is what is ICANN doing when it is trying to respect human rights. Then clearly a business enterprise should respect human rights, but it doesn't. At that point, they're not avoiding infringing on human rights of others, and they're not addressing adverse human rights impact, but when they are in the act of respecting human rights, then they are conceivably, avoiding on infringing on human rights of others and addressing adverse human rights with which they are involved.

So the should is really not necessary. I mean, these are written as principles, and that's perhaps one of the reasons why you have all of this should stuff. But if we think about what the intent is, the intent

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here really is to communicate what it means when you are acting to respect human rights.

And so, [Rugby] at least calls out these two major points, avoid infringing on the human rights of others, and address adverse human rights impacts of which they are involved. Sometimes like bullet points are better than sentences. You can avoid all kinds of parts of language that can end up as red herrings.

So, the question though is whether... A number of the questions is whether it's, whether ICANN should be subjected to, when we say we are respecting human rights, is avoiding infringing on the human rights of others what we mean? Is addressing adverse human rights impacts with which ICANN is involved? Do we mean something else?

And obviously, all of this is bounded by the applicable law, and it's bounded by the fact that this is a guidance in a core value, and it's subject to a balancing act as well. So it all becomes a little bit layered, but at the fundamental layer is deciding whether these two fragments avoid on infringing on human rights of others, and addressing adverse human rights with which they are involved, with addressing, at least arguably meaning what [Rugby] thinks it means, which I put into the chat.

So that's really the core of what we need to discuss on this. One other point, just to chime in on the applicable law. I think given that ICANN's responsibilities are bounded by applicable law, it is critical, I think to have at least an overarching understanding of what that means. Otherwise, it's impossible to interpret the bylaw.

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That doesn't necessarily mean that we need to create a tome of the applicable laws that implicate human rights concerns, but it does mean that we need to have an overarching understanding of what those are, and we need to see how deep we get into that.

You know, if anybody is actually going to implement this, then it really would be important to understand that so we don't end up violating the bylaw by taking, either taking ICANN out of applicable law into soft law, non-law, or you know, ethical considerations, as laudatory as those may be, or laudable, rather.

On the other hand, it also means that ICANN should respect, it should not under do it either. If there is applicable law that applies, ICANN needs to follow it. So the trick here is to try to color within the lines, within the line and up to the line, and not over the line. Thank you.

NIELS TEN OEVER:

Thank you very much Greg. I think we, with that, have a very good pass of the first [Rugby] principle. And I think we now have quite some inputs on this one, that we can see what parts of this language we could or should use, even write a short analysis about it.

Perhaps this is a good moment to also continue to the following principles, because some of the points that both Brett is mentioning in the chat, and that Greg mentioned as well, about third parties are also covered by later principles. So I suggest that we continue to further principles, and to also discuss them and see what it also answers some of our questions.

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So I suggest continuing to the next one. I see Greg's hand is up. Greg, is that an old hand or is that a new hand?

GREG SHATAN: Old hand.

NIELS TEN OEVER: Okay. Then I see Paul's hand is up. Paul, please come in.

PAUL MCGRADY: So this is Paul McGrady again for the record. Since we're moving on to the next [Rugby] principle, should I just...? Are we not going to discuss the applicable law? I just want to... I mean, I hate going back to the same thing, but I say this and there is no response to it. Is there anybody on the call that thinks we should not look at the applicable law before we look at the [Rugby] principles?

Can we at least have a conversation have about it, rather than just me jumping ahead and nobody responding to it? Thanks.

NIELS TEN OEVER: I see Kavouss would like to respond. Kavouss, please come in.

Kavouss, we cannot hear you.

KAVOUSS ARASTEH: Okay. I have difficulty with reference to international related organizations [inaudible]. This is designed for a particular purpose

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[inaudible]. I don't think that we could refer to that. We should put it in more general terms. It was good for the study that made by [inaudible], but it is not good for our purpose, international [inaudible] organizations, [inaudible] or ISO issue is [specific?] and it should not put it in that very limited context. Thank you.

NIELS TEN OEVER:

Thank you very much Kavouss. I see Greg is in the queue. Greg, please come in.

GREG SHATAN:

Thanks. Greg Shatan once again for the record. To respond to Paul, and just to show that we have a variety of opinions within the IPC, I personally agree with Paul. It's critical to understand that this all bounded by applicable law.

I think that every [Rugby] principle to the extent that we were taking in any of the language at all, has to kind of end implicitly with the language of the bylaw that says that it's as required by applicable law. Kind of like when you get a fortune cookie and you read it out loud in bed at the end.

Accept that makes it funny and this isn't really humorous. So, this is actually a perfect example of where we are cracking against each other, or rather [Rugby] and the bylaw are opposite. So I think that while we don't necessarily need to have an applicable law review before we do this, we have to understand that this every principle, whether it's a [Rugby] principle, or one we make up, or one we take from some other

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list of corporate responsibility or good governance documentation, is limited the way the bylaw is limited.

That doesn't mean ICANN shouldn't, in its own way, do other things. You know, ICANN isn't required to give employees birthday cakes on their birthdays, it's not in the bylaws. I'm not sure if they do it, but if they did it, that would be fine, it's just not required. But in terms of what is required, the requirements go only as far as applicable law does.

So were I not in complete agreement with Paul, I don't think we need to put this effort aside and dig into the question of applicable law. I do think that it has to constantly be there as a, that's wrapped around the [Rugby] principles is the applicable law principle. So we've got a law wrapper around a [Rugby] wrapper, around the bylaw.

And I think we can actually lose a lot of the [Rugby] wrapper because it really, in many ways, doesn't fit. So, I think you have to... We can't get out of this without a strong understanding of what applicable law means. And I think just before this call, and I confess I didn't look at it, I think Karen Mulberry distributed a memo that had been prepared, or maybe Sam Eisner did, that on the issue of applicable law and human rights in the ICANN context, so we should certainly take a look at that, see where that takes us, and whether we do that first or next.

It is an important part of our work. Thank you.

NIELS TEN OEVER:

Thank you very much Greg. So with all of those wrappings, I think that might lead to quite a nice human rights sandwich, and that seems to be

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a way forward. I see that there are multiple people in the queue. I see Nigel and Kavouss. Nigel, please come in.

NIGEL ROBERTS:

Okay, I'll try and be very quick. I just want to highlight that when people talk about the US Constitution, and state law, and so on, imposing human rights obligations, they don't. I kind of like people to read the link I put in the chat. Civil and criminal law regulates the conduct of ICANN in California. Applicable law does not impose any obligation to respect human rights on ICANN, unless it voluntarily adopts them.

Give you an example. If you were a state actor, let's say you were an agency of the British government or something, you'd be legally required to balance the right between free expression and the right to privacy, for example, both of which are human rights.

ICANN has absolutely no obligation to do that. For example, it could decide that the UDRP gives complete right to property owners over free expression, and it would have no obligation, in human rights law, to take the free expression into account. We need to bring in applicable law in a way which says, ICANN is a non-state actor, but because it exercises significant power, it should follow human rights principles, and it voluntarily adopts, and you can base this on [Rugby] if you like, because that's what [Rugby] is designed to do, but it doesn't have to be.

But the whole point of applicable law is that there is no applicable law that imposes a single human rights obligation on ICANN, which is why it's so important that we get this right and voluntarily adopt the human

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rights obligations, which are relevant. And I think there is about four of them. I listed them in the chat, but there may even be others.

NIELS TEN OEVER: Thank you very much Nigel. I think Kavouss's hand is up, or is it an old hand Kavouss?

KAVOUSS ARASTEH: Yes. Still I have difficulty because we concentrate on the business enterprise. If we are only dealing with business enterprise, this [inaudible], because under the ILO [inaudible] there are three parties, states, business enterprise, and workers. And this paragraph address or deals with the relations between the business enterprise and workers. And that is good.

But if we by implication include ICANN, I don't think that that's valid. Because we are not addressing that ICANN state human rights at work. That means we're dealing, addressing the issue within the ICANN [inaudible] or whatever, and the ICANN employees.

We have to be very clear what we mean by enterprise, business enterprise. If it includes ICANN, then it maybe, if it does not include ICANN, this part does not apply. Thank you.

NIELS TEN OEVER: Thank you very much Kavouss. And I think we can also see here that the text here is quite similar to the different treaties that we have listed out in the background paper, and that we also put in the draft framework of

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interpretation. So we also see convergence here. So I think that now we see what list of principles and treaties there are, and this is a discussion of Greg and Paul, we also understand that functions within applicable laws, we need to understand how they are translated within that applicable law.

So that could help us understand this [Rugby] principle. So within the 10 minutes we have left. I will still try to point to the last point, and I know this is a big Paul [Tume?] point, and I would just like to get people's idea about the extent where we could apply human rights.

And I know that we cannot finish this discussion about third parties and the relations ICANN has, but I would try to gauge opinions so we can perhaps work this week to draft a bit more text to see how it could be applicable to ICANN. So are there people who would like to respond to this fourth [Rugby] principle? Greg, please come in.

GREG SHATAN:

Thanks. Actually going to respond briefly to Nigel first. I looked briefly at the article that he linked to, the [Ronan?] article, and I think there may be a, somewhat of a language usage here. The article begins with the first sentence, which I think points out the whole problem, the linguistic problem.

International human rights law imposes obligations on states. Well, if that's what we mean by human rights law, then Nigel is right. Laws that impose obligations on states do not directly impose obligations on anybody else but states.

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But that's not what we're talking about. We're talking about the fact that human rights are in fact carried out and obligations to follow numerous human rights are in fact embodied in the laws that non-state actors have to follow, they differ by country or by region, if you're in the EU and not Brexit-ing. But they are...

This carries down, and among the obligations on states is to, where they want to and decide to, to take those human rights laws or principles and bring them down to the level where there are obligations. So, if we were to look at specific human rights principles and map them against the laws that are applicable to ICANN, we would find a high degree of concordance between those two lists.

It wouldn't be perfect, and obviously they would be shaped a little bit differently, but overall there would be concordance for the very reason that, accept in a country which chooses to make it fully legal to violate every human right that one can think of, there are going to be laws that are, on all fours, with the human rights that are set forth in human rights instruments.

But ultimately, it's how those are expressed in the applicable law that needs to guide ICANN's particular respect for human rights. So, Nigel says private business can violate human rights perfectly legally, not if it also violates an applicable law. You're going around in circles here.

I cannot engage in human traffic [inaudible], because I'm a private actor. Those things are against US law. Now maybe if I was in a different language, it would be a different story. But here, I have obligations that track back to and are in accordance with human rights,

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and I have to follow them, ICANN has to follow them, anybody else who is here has to follow them too.

So, that's that point. With regard to this language in front of us, I think the whole section B probably should just be tossed out. That would be my starting point, if we're looking for a starting point, this one. And I think I've taken more than enough time, so I'll stop talking now. Thanks.

NIELS TEN OEVER:

Thank you very much for that comment Greg. I see Kavouss is in the line, and I realize we have a few minutes, and it's a pity because I would like to hear and understand from more people, but we probably need to do that on the list, whether people think we should toss B out completely, or whether we think in some cases it makes sense and in some cases it doesn't.

But I think we'll move that to the list. But who is in the queue? Kavouss, please come in.

KAVOUSS ARASTEH:

Yes, Niels, I [inaudible] that as [inaudible] structure of this part of, or this text [inaudible] is a good [inaudible], because at least we have [worked?] to introduce any words like should, or shall, or could, or [inaudible]. We start avoiding, we start seeking. So I think we use, we need to use [inaudible] structure for the first part of, instead of should do this, and should do that.

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Directly go to the verb and go to the third person of the verb, in order not to be in the trap of should or shall or may or could or something like it. So I just request you kindly to consider whether the structure should be used elsewhere in order to avoid that difficulty.

I have no problem with A, but with B, seek to prevent. Seek from whom? Do we seek from the enterprise to prevent? Business enterprise? Or we ask business enterprise to seek? We seek from whom to prevent. So it is not clear, the problem is that [Rugby] mentioned something for specific purposes, and now all of the sudden it becomes the guiding principle for all of us.

We should look at that one, and see if it is applicable. We take it, if it is not applicable, we don't take it. If it is applicable, we change it, we change it. But we are not bound to take whatever he wrote in 2005, take it here, which may not [be] applicable.

Therefore, I have difficulty with the [inaudible], unless somebody explain me what it means by seek. Who seek from whom? To prevent. And why did they prevent or [inaudible]? Prevent and/or... I don't know. So about the [inaudible], the word seek is quite ubiquitous. To seek from who? Thank you.

NIELS TEN OEVER:

Thank you very much Kavouss. And I understand... I see Andrew is in the queue, and we haven't heard from Andrew, so I definitely want to give Andrew an opportunity to speak. Andrew, please come in.

Andrew?

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Mic could be on mute, Andrew. I thought I heard someone breathing.

So we're... Yes, we hear you now, Andrew, so please keep it short because we're almost at the top of the hour.

Sorry, Andrew, we do not hear you. I hear you typing now, or maybe that might be someone else. We're almost at the top of the hour. Many people need to leave us. I think we will take this discussion and see if we can work a bit on this [inaudible], we can form it a bit to the ICANN example.

Personally, I really appreciate that the constructive discussion, and I think it really got us thinking a bit more concretely, so I hope we can continue with this next week, and see how we can process the things we have discussed already in our thinking and also a bit in writing, so we could discuss that with the drafting team as well.

So I would like to thank you all very much for your attention and for your contributions. I'm looking forward to seeing you all next week on the call, and during the week on the list in working on this. Thank you very much all, and staff you can stop the recording.

**[END OF TRANSCRIPTION]**