
NIELS TEN OEVER:

Thanks so much ICANN staff, and thank you all participants and observers for the cross community working group on enhancing ICANN accountability work stream two human rights subgroup. This is meeting 13 on December 2 19:000 UTC.

We will be going through a full agenda, multi [inaudible] of a [inaudible] reading of the work that was prepared by the drafting team. And has been improved according to the discussion we had last week. And let's first start off with administrative.

Will anyone who is on the audio bridge and is not on the Adobe room make themselves known, so that staff can take a roll call from the Adobe room for the archives?

Thank you very much. And I have no absentees. Does anyone have an update to their statement of interest that they would like to notify us about?

No? then I can continue to the relatively sad notice, no, it's a genuinely sad notice that reached me this week, that I've shared with you on the list, that Nigel Roberts, unfortunately, could not make the time commitment anymore to function as co-rapporteur of this subgroup. I would like to really thank Nigel for all of his work that he has done for this subgroup.

It's sad, but I think we can try to continue with joint efforts, make it to our finish line. And our next milestone, not yet the finish line, is only 10 working weeks ahead of us, and that is the ICANN meeting in

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Copenhagen, and we should have, according to our planning sense, shared something with the cross community working group to discuss, and perhaps we could even already help us start a public consultation on that text.

So, the early we get text to the CCWG, the more [inaudible] to all finished milestones. So [inaudible] would be great. So, those were the administrative from my end. Anyone has anything to add on the administrative, or would like to add, change, or suggest something for the agenda that would not be able to address under any other business?

LEON SANCHEZ:

Niels, this is Leon. Just to note that I'm on the phone bridge. I'm not in the Adobe Connect room, but I am available on audio. Thanks.

NIELS TEN OEVER:

Thanks Leon. Great to hear that you're also here. Good to have that support as well. Great. So, I think that leaves us for the administrative, and other administrative?

Yeah, I see that we indeed are meeting on Friday 19:00 UTC. This is not a new practice, this is only for once, because we could not get our normal Tuesday 19:00 UTC slot. After this, I hope everything will go back to normal, and we will be back in our normal rhythm. So, let's continue to the real meat of the work, and please allow me to ask you that if you're not speaking, that you please mute your phone.

Select, continue with an analysis of the discussion of the process of the drafting team working on a proposal for the framework of interpretation. We have completely finished our first meeting of all parts. We've done the second reading of the first, of the first parts. So, that leaves B up to G up to discussion parts for the second parts for the framework of interpretation.

That is our work for today. And, ICANN staff, would you be so kind to either pull up the PDF or the DocX of the document? And for the people who would like to follow me making notes, I can also invite you to the Google Doc that is, I just pasted a link for in the chat.

So now, let's all go to B, within the scope of other core values. We had done a second reading of this, but there were some, there was a disagreement on some text, and the drafting team has worked on that. So, I would like to offer the drafting team to take us through this, and hope to achieve consensus on the second reading of this part.

Who of the drafting team can I invite to take us through this?

Tatiana, you've been volunteered by Greg.

TATIANA TROPINA:

Hello. Tatiana Tropina speaking for the record. I think that isn't very nice of Greg, because it was Greg and Jorge who drove us to compromise. So, as far as we stand, we are starting again with the core values, right?

NIELS TEN OEVER: Exactly.

TATIANA TROPINA: Because that's where we had problems. So, I'm going to read aloud the ICANN bylaw language and then the proposed commentary, and I want to thank again, Greg and Jorge for changing the text and finding the solution, which will be good for everyone in the drafting team. Let's see whether it would be good for the group as well.

So the ICANN bylaw language recommended on, is within the scope of other core values. The proposed commentary of framework interpretation text. It is important to stress that the human rights bylaw is a core value and not a commitment. A quotation, the commitments reflect ICANN's fundamental [compact?]. There is a global internet community and are intended to apply consistently and comprehensively to ICANN's activities.

Bylaw section 1.2C, 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 interpretative rules in the bylaws. The [inaudible] bylaw. The specific way in which core values are to be 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 [inaudible] fidelity to all core values to maintain 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 most serve a policy developed through the

bottom up multistakeholder process, or otherwise best serve ICANN's mission. This was a quotation from bylaw section 1.2C.

I will continue with the text or suggestion [inaudible]. The human rights bylaw needs to be balanced against other core values, in the case where not all core values can be further assert to maintain this. Furthermore, this interpretative rule will acknowledge that there might be flexibility in applying the core values, based on quotation many factors, that are a clue in any given situation.

This also makes clear in the core values section of the bylaw, which states that the core values are intended to guide ICANN in its decisions and actions. The bylaws also stress that the core values have to respect quotation, ICANN will act in a manner that complies with and reflects ICANN's commitments and respects ICANN's core values, as stipulated in the bylaws section 1.2.

Finally, the [inaudible] in the treatment of the different core values. They are guiding elements that need, as appropriate, to be taken in 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 the balancing test must not cause ICANN to violate any commitment, as commitments are binding. The other core values as set forth in annex two of this document. So, [inaudible] which, of course, some trouble is in the paragraph which starts, as finally there are no [statement?] hierarchy in the treatment of the different core values.

So, this was this sentence which was rephrased by us. Thanks a lot. I will finish here. Thanks.

NIELS TEN OEVER:

Thanks so much for that presentation of this part B of the bylaw. I think what people will see, there is one mistake I made. I missed on opening bracket before finally. That's a mistake from my side, so please that blame on me. I'm sorry for the un-clarity there.

So, the biggest change that was made here was exactly that sentence where there is the open brackets, so finally, there is no extending hierarchy in the different core values. They are a guiding element that need as appropriate to be taken into account.

So, that was a compromise, it was found in the drafting team. And I would like to invite comments to that.

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

Kavouss?

KAVOUSS ARASTEH:

Hello. Can you hear me?

NIELS TEN OEVER:

Yes, we can hear you now, Kavouss. Please come in.

KAVOUSS ARASTEH: Yeah. [Inaudible]... ...for five minutes. Just [inaudible] we can say that. [Inaudible], I see some edits which is almost [inaudible]...

So I put some [inaudible] amendment, which makes it more clear. One party against other party, or one party against other parties. [Inaudible]...

NIELS TEN OEVER: Thank you very much Kavouss. So, for me, your audio quality is not so good. And secondly, I think you might be commenting in another part of the text. Currently, we're discussing the part that comments on, within the scope of other core values.

So, I think David McAuley's hand is up. David, please come in.

DAVID MCAULEY: Thank you Niels. It's David McAuley for the transcript. I apologize if I miss something, but I'm not exactly certain that I understand what the compromise was. So, I'd ask a member of the drafting team if you could just explain, briefly, what the competing statements were, and what the compromise is. I just think I missed that. Thank you.

NIELS TEN OEVER: No problem, David. I think Tatiana and Greg's hands are up, so I'll leave it to them to explain. Tatiana, please come in.

TATIANA TROPINA:

Thanks. Tatiana Tropina speaking for the record. I will start, and maybe Greg can continue. I remember that, in the beginning, we had the proposed text, that there is no legal hierarchy in the treatment of the different core values. And we thought that, Greg and I thought that might be misleading, because there is no predetermined of standing hierarchy.

And Jorge was insisting that inserting the word legal and referring to legal hierarchy would follow the principle of legal certainty. So, this was the disagreement, and I will ask Greg to follow on the compromise itself. Thanks.

GREG SHATAN:

Thanks. It's Greg. And I think that, basically, we were looking for what we felt was a way to characterize hierarchy. So it would be a little more explanatory, but to get the concept clear, and avoid, you know, potential for misinterpretation, and after trying out a number of alternatives, some of which were several words, and other, the word standing seem to best capture the, what the...

The fact that there is no standing hierarchy can be captured in that phrasing. So, that's what we have. There were any number of interim things batted around, but this seemed to be the best. And one that, within the drafting team, we all agreed on.

NIELS TEN OEVER:

Indeed. Thank you very much for explaining that, Greg. David, I hope it is more clear for you now. Is that the case?

DAVID MCAULEY: Yes it is. Thank you, Niels.

NIELS TEN OEVER: Excellent. So, my internet connection is lagging a bit, so I do not see if there are any other hands are up. If not, and I don't think there are. Then we can continue to the next part, which is about respecting. So, who on the drafting team can I invite to do the second reading of the [inaudible]?

Please come in.

Can I invite someone from the drafting team? Greg?

GREG SHATAN: This is Greg, I'm happy to move to the next.... Just remind me of which one? I'm sorry. I was in the chat.

NIELS TEN OEVER: Respecting. So, it is [inaudible]...

GREG SHATAN: I get the short one, after giving Tatiana the long one. So, respecting is interpreted, the interpretation reads, 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.

NIELS TEN OEVER: Thank you very much for reading that out Greg. Are there any comments to this text? Are there any hands up? I'm sorry. I cannot see because I'm not in the Adobe room anymore.

TATIANA TROPINA: Niels, Tatiana Tropina speaking. I see Kavouss's hand is up.

NIELS TEN OEVER: Okay, Kavouss, please come in.

TATIANA TROPINA: It's down now. Sorry.

NIELS TEN OEVER: Okay. So, if no hands are up, let me... There are no issues with the text. I think the last time we also didn't have issues with that, so we can continue. So, because this was a short one, I would like to compensate Greg and give most of his longer reading time. So Greg, could you also read out the next one?

GREG SHATAN: Happy to do so. The bylaws text is internationally recognized human rights. The interpretation is, there are a range of international, I think

international should probably be lower case, there are a range of international human rights, declarations, and covenants that could be relevant to ICANN's human rights core value.

However, none of these instruments has a direction application to ICANN, because they only create obligation for states. By committing to one or more of these international instruments, nation states are expected to imbed human rights in their national legislation. The reference to, quote, internationally recognized human rights, quote, in the bylaws, in the bylaw, should not be read in isolation.

Rather, it must be considered together with, amended by, the reference, quote, as required by applicable law, unquote. 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.

NIELS TEN OEVER:

Thank you very much for reading that out, Greg. I am back in the Adobe room, and I do not see any hands. So that means no comments. No comments once, no comments twice.

UNKNOWN SPEAKER:

I had a comment. Yes, just real quickly. Greg, this may be because I'm not a lawyer, but when you say that they're not applicable, what you really mean is that they're not applicable in the legal sense, right?

Because, I mean, I wonder if there is another one we can say that, that didn't, it didn't sound, the [inaudible] doesn't sound right to me, as a non-lawyer. Do you know what I'm saying?

GREG SHATAN: Well, they're not applicable in any sense, not just in a legal sense. Not directly applicable to ICANN. We're talking about the international human rights instrument...

UNKNOWN SPEAKER: We're mentioning them because they are some guideposts to push off on, right? And what we're saying is, they're not something that we're going to use in terms of an enforcing mechanism, but they are... I guess, it's just the term applicable seems a little bit, it seems a little harsher than... For a non-lawyer, for a layman, it sounds like, a little harsher than [inaudible], but I don't know.

GREG SHATAN: I think that is, to my understanding, the sense in which we use. It is fairly, harsh may be the wrong word, definitive, might be the right word. The point of this, and maybe this goes more to the term how applicable law is, it uses that applicable law, you know, provides a limiting factor in the bylaws. And the other point here is that because international human rights instruments are not applicable to ICANN, but they're applicable to states.

And what is applicable to ICANN is applicable law. And applicable law, as states introduce national legislation, reflect human rights

instruments, but without being reflected in applicable law, would not be directly applicable to ICANN.

And you'll see in the last sentence, you know, it's restated in the last, slightly differently, that only those human rights that are required in applicable law would be relevant to ICANN.

UNKNOWN SPEAKER:

Okay. I understand what you're trying to get at, I'm just trying to figure out if there is another way to do it, but maybe not. Thanks for the explanation.

NIELS TEN OEVER:

And I think we should also [inaudible] the framework of interpretation of the bylaw. That does not mean that ICANN may make policy that and a stronger commitment to human rights, but it is really clear, and in essence, quite legal explanation of the responsibilities and the applicability.

So, I think I understand what you're saying, but I also think we should stay relatively legalistic here, because we're really talking about the legal bylaw, and the core values, and how that should be interpreted.

So, if there are no other comments to this part, I'd like to continue to the following parts. I see there are no hands up [CROSSTALK]...

My slow internet connection. Please, Kavouss, please come in.

KAVOUSS ARASTEH: Yes, I'm sorry. I don't know which part you are speaking. [Inaudible] applicable law, I have no problem, but this applicable law shall not interfere with the national registration of any country. Is it clearly mentioned? Number one.

Number two, I have difficulty with other parts against other parties. This is not a proper [CROSSTALK]...

NIELS TEN OEVER: ...arrived at that part of the text yet.

KAVOUSS ARASTEH: Yeah, okay, but international law or applicable law, should not [inaudible] with the national legislation of any country. Is it [inaudible] text? Thank you.

GREG SHATAN: We have a definition of applicable law that's in the next section, or rather I should say, a discussion of applicable law that is in the next section. I realize there is a little bit more to this section that was over onto the next page. So, why don't I go ahead and read those last two sentences in this section?

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. Nevertheless, ICANN understands that internationally recognized human rights, including

those expressed in the universal declaration of human rights, can guide its decisions and actions.

KAVOUSS ARASTEH: [Inaudible] in the [inaudible] national legislation. Is that right or not?

GREG SHATAN: As I read this, it does, we are considering this in reference to national legislation. Because ICANN is an entity that exists under national legislation. That's indeed, a large part of the case. When we get to the discussion of applicable law in the next row, it's probably clearer.

NIELS TEN OEVER: Yeah, that's what I would like to do now, perhaps that will move forward and get more clarity on the applicable law and national legislation part. So Tatiana, can I invite you to read out the part as required by applicable law?

TATIANA TROPINA: Yes, thanks a lot Niels. Tatiana Tropina for the record. Applicable law is first the body of law that binds ICANN at any given time, in any given circumstances, in any [inaudible] jurisdiction. It consists of statutes, rules, regulations, etc. as well as judicial opinions where appropriate. Is [inaudible] on the concept in as much laws, regulations, etc. change over time.

Applicable law can have [inaudible] inputs on ICANN around the globe. For example, if ICANN employs personal in different jurisdictions, then it must observe the applicable label laws in those various locales. Applicable law is [inaudible] a large body of law, that alludes our ability to catalogue, but it is a [inaudible] in the context of specific question or issue.

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 values 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 these human rights consideration even though it is under no guidance to do so pursuant to the core values. Finished.

NIELS TEN OEVER:

Thank you very much Tatiana. No changes here. This is also what we read last time, likely based on the suggestions made by David McAuley, only fine tuned a little bit.

I'm going for comments, questions, and suggestions once. Comments and suggestions twice. No comments and suggestions here. That's great. There are only two more parts to go in our second reading, and they are relatively short. So, let's take our short text specialist again, Greg, would you be so kind to do a second reading of these last two?

GREG SHATAN: Absolutely. This is the case where the bylaw may be longer than the interpretation. This core value does not create, and shall not be interpreted to create any obligation on ICANN outside of its mission, or beyond obligations found in applicable law, the interpretation is as follows.

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.

NIELS TEN OEVER: Thank you very much Greg. Comments or questions to this part?

It's very short, very clear, nothing added, no extra comments. This is going really well.

Then the last part, Greg.

GREG SHATAN: I'll take the last part as well. This core value does not obligate ICANN to enforce its human rights obligations, or the human rights obligations of other parties, against other parties. This part of the bylaw draws a 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 other parties, against other parties.

NIELS TEN OEVER: Thanks Greg. I see Kavouss has a comment on this. Kavouss, please come in.

KAVOUSS ARASTEH: [Inaudible] I think the term other parties, against other party, is not correct. One could say, one party against another party, or one party against other parties. So this is not other to others. Either one to one, or one to other. So, I suggest that we amend that.

One party against, or one party against other parties, yes. Thank you.

NIELS TEN OEVER: Thank you very much Kavouss. Greg, Tatiana, Jorge, would you like to come in? As I remember, we stayed pretty close to the text in the bylaw for this, so I think that's the reason why we have this text here.

GREG SHATAN: I'm happy to jump in. I actually agree with Kavouss here. I think the use of, the repetitive use of other parties, seemingly to refer to two different parties within a particular instance, I think is somewhat confusing, even though it is almost directly following the text of the bylaw.

But of course, if the text of the bylaw were absolutely clear and then we wouldn't be doing a framework of interpretation. So, I think that to say, to enforce the human rights obligations of one party against other parties, would be, or of a party against other parties, would be clearer. And it seems also clear that the party that's being referred to in that

particular instance, is not ICANN, which actually leads to another problem with this interpretation, as I read it, which is that the core value, or this last sentence, talks about not obligating ICANN to enforce its human rights obligations, as well as talking about not obligating ICANN to enforce the human rights obligations of another party.

So, I think we need to... We kind of lost that piece of the, of this sentence. So we might want to say something like requiring ICANN to enforce the human rights obligations of ICANN, or another party against other parties. So, maybe that we're using another party. That, at least, I think captures both sides.

To enforce the human rights obligations of ICANN, or any other party against other parties. [CROSSTALK] human rights obligation of ICANN or any party against other parties.

NIELS TEN OEVER:

[Inaudible] in the Google Doc and putting text in there. I see Kavouss's hand is up. First, I would like to make it really clear to everyone what we have. David McAuley agrees with Greg. Hands are going down.

Does this mean we agree on the text? This part of the bylaw draws a clear line between respect for....

RECORDED VOICE:

...is not...

NIELS TEN OEVER:

...I think technically what our next step is. There are... There is one other part of the work that we haven't done yet. And that is come up with the other questions that were asked of this subgroup, beyond coming up with framework of interpretation. And these were questions about recommendations for policies and procedures for the implementation of the human rights bylaw.

So, the drafting team has already made some first steps in coming up with drafting that. That is not a very long document. I can put the link here. I would personally prefer that we first finish that part of the work, and that we send it [inaudible] to the CCWG plenary for discussion. An alternative would be that we first now sent the framework of interpretation, and sent the recommendations after.

A plus for this would be that the plenary would have more time to discuss, because we will probably be one of the first subgroups to have put something in, and the closer we get to Copenhagen, the more likely it would be that other people are also handing things in. So, we might get more attention from the plenary.

I'd like to get a bit of a sense of a feel from the group what we would like to do. Would we like to forward this framework of interpretation for discussion, or shall we first spend one week, two weeks, three weeks on refining the procedure recommendations and then send it all at once?

I'd like everybody's comments on that.

Cheryl, please come in.

CHERYL LANGDON-ORR: Thank you. Cheryl for the record. I was [inaudible] typing, and I thought, why am I bothering typing? I'll just put my hand up. I think it would be a very good thing to send this part of our work on for the plenary consideration and discussion over what would be a couple of weeks of break, not just for the first [inaudible] advantage, which I think you wisely pointed out, but also because I think a very important highlight for the CCWG as a whole, but benchmark for all of the sub-teams as well.

So, a little competition and encouragement might go a long way.
Thanks.

NIELS TEN OEVER: That's great. So Cheryl is opting for sending the FOI already to the CCWG. So, maybe we should come up with some green marks and red crosses. So, let's... Please put on a green mark if you think we should forward the framework of interpretation, as we have it now, to the plenary.

And then send the other questions we are supposed to answer later on. So please send a green click, and a red click if you think that we should wait until we have a consolidated [inaudible] once.

I see a sea of green.

NIELS TEN OEVER: Leon, please come in.

LEON SANCHEZ:

Thank you very much Neils. Just to add my congratulations to the subgroup, and my acknowledgement that you have achieved a major milestone not only for this subgroup, but for the CCWG At-Large as a plenary, and that I'm very happy that you have reached this document. And of course, I will be happy to support it when times comes in our plenary.

So, thank you very much for this very valuable work that you have all done. And congratulations again.

NIELS TEN OEVER:

Thank you very much, Leon. And on that happy note, I will close today's call. I am looking forward to seeing some of you in Guadalajara, and definitely looking forward to seeing all of you on the list, and on the call next week too. Also [inaudible] last steps of our work.

Thank you very much for a constructive discussion and for the great volunteering from everyone. Thank you all. Enjoy your day. Bye.

[END OF TRANSCRIPTION]