
NIELS TEN OEVER:

Hello, everyone, and I wish you all a great evening, morning, or afternoon, depending on where you are. Welcome to the Cross-Community Working Group on Enhancing Accountability Work Stream 2 Human Rights Subgroup meeting on February 7, 19:00 UTC.

I see that I have made a gross mistake in the numbering of the meetings because we are already at the 19th meeting. My [stats] could be 18 because normally I start counting with zero, but 13 is definitely wrong so sorry about that.

But that means we have quite a history together behind us, and it also shows in our work. We've done quite a lot, and we are making quite some progress as well. That is something that we will be discussing on our call today because our loyal Drafting Team, which in the meantime is still growing with Anne and David McAuley, really did some solid work this week which we will be discussing.

But let's not get ahead of ourselves. Let's start off with "administrivia." We have apologies from Anne. Would the people who are on the audio bridge but who are not in the Adobe room please let themselves be known so that the ICANN staff can do a roll call from the Adobe room for the archives and the logs. Nothing there. So does anyone have an update to their Statement of Interest? Also not. Does anyone have a comment or a suggestion for the agenda, or can we go ahead as proposed and as can be seen here on the slides? I see no hands. I see no queue. So let's dive into it.

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.

Where we were was that we've co-developed the Framework of Interpretation which we together sent to the CCWG Plenary after which we asked the Plenary how to go forward. We got a response from that from the co-Chairs, and that created quite some discussion within our group. This week the Drafting Team has been going forward to see what we can do with the Considerations document, especially since in Annex 12 it seems to be mentioned that the considerations should be part of the Framework of Interpretation.

We have a public comment scheduled for the Framework of Interpretation, but it hasn't been released or announced. So are we going forward with the public comment as announced, or are we asking to hold on with the public comments for a sec until we galvanize everything in one document?

Well, what we've seen this week in the Drafting Team is that the document we've been previously working on and made the guidelines and a procedures document could be probably reworked into a Considerations document, which means that we could send everything for public comment at once which would create as little confusion among people as possible.

I would like to hear some thoughts and opinions about what we're going to communicate to our colleagues in the CCWG Plenary tomorrow as a proposal on how we're going to go forward. I see Kavouss' hand is up. Kavouss, please come in.

KAVOUSS ARASTEH:

Thank you, Chair. If I remember correctly, we have at least discussed and I hope that we have decided to give this task to the small group to have a look to see whether there is anything to be added to what we have done from the Annex 12. If I consider or listen correctly what you said, Annex 12 talked about consideration. Consideration does not mean decisions. We consider, and then we see what we can do. Therefore, I suggest that if you have established that as a group or if you have given that to somebody, ask them whether there is anything to do on that.

Secondly, I don't think that we are going to create jobs for us. Some people are putting their finger on every word and trying to push for additional work, Chairman. Dear friends, we are very, very busy. We don't have such time and we don't want to go to that perfection. I'll take somebody – I don't want to name them – says that not making perfection the enemy of good. So what is the result of that investigation or the result of that study to see whether there is anything to be added or there is nothing to be added. So we discuss that and we decide accordingly. Thank you.

NIELS TEN OEVER:

Thank you very much, Kavouss. Indeed, the Drafting Team had a look and I think the conclusion was that they indeed found something is to be added and this is something that could be reworked in a document which could be part of the Framework of Interpretation which could then be submitted at once for review. So the suggestion of the Drafting Team – if I summarize it correctly because, Drafting Team, please feel free to add a bit on this as well because I do not want to claim to speak

for other people or I have done the work that others actually have done – is that there is progress on the Considerations document.

The Considerations document should be part of the Framework of Interpretation that we should submit as public comment. So this proposal is to ask tomorrow at the Plenary that we rechecked our Framework of Interpretation. We ask them to give a bit more time so we come up with a Considerations document and we submit it all at once for public comment.

I see a member of the Drafting Team has something to add. That's great. Tatiana, please come in.

TATIANA TROPINA:

Thank you, Niels. I think you summed it up pretty well. I think what we can add here is that the co-Chairs' response to our request asked us to confirm that we are finished under the Annex 12. We cannot say that we are finished under the Annex 12, and this is why we decided to consider further bullet points and write a single doc as Annex 12 requires us to do. So we can always refer to both Annex 12 and their response to us for the decision we have taken here. Thanks.

NIELS TEN OEVER:

Exactly. Very, very well put. Much better than I did, Tatiana. Thanks much. I see Avri is yes [to respects to] a single doc. Matthew also agrees. Kavouss agrees. So I think there is no one who is against this approach. Greg is plus one. Cheryl says if it is what the Design Team is proposing, then yes. Excellent.

Then tomorrow, I already asked for a slot in the Plenary. Then we will ask the Plenary if we can go forward like this. I think the Drafting Team is also committed to continue drafting the Considerations document, and we can then discuss that within our group here. But I hope that also does not need to take too many meetings, but let's see where that goes.

That means that we have concluded Point 2 of our Agenda. That's true because there's no queue. Then I would like to go to the next part and have a bit of a look of the overview of the Considerations document that the Drafting Team has been working on this week so that the whole group gets informed on the discussions that are taking place and the work and the direction it's taking – so a bit of a temperature check with our group.

I would like to ask ICANN staff, could you please pull up the Word doc. Those who prefer can also use the Google Docs link here. [This week] again shows that there is no such thing as an ideal tool, but we keep on working with the powers that we have.

Then I would like to ask the members of the Drafting Team to take us through. So who of the Drafting Team will volunteer before I will “voluntell” people? Tatiana? Tatiana's hand is up. Please come in.

TATIANA TROPINA:

Hi. I can start, and then I'm “voluntelling” Greg. But I see Kavouss' hand is up. Might as well give him the floor before I walk through the first part of the document. I'm sorry. I'm not the Chair, but I think that if

there is any question and I have not started working through the document, yes, maybe we better take the question. Thanks.

NIELS TEN OEVER: Of course. Please come in, Kavouss.

KAVOUSS ARASTEH: Yes, my comment is that if there is a need to add something to Preamble and any part, first you put the idea that whether it should be added or not. If we decide it is to be added, then you go to the text whether it requires any edit or any amendment or not – so in two steps. Step one: should we add it to the Preamble for instance, the first part? If the answer is yes, then go to the text to see whether we agree with the text or we have some edits. This is the course of action that I suggest. Thank you.

NIELS TEN OEVER: Thank you very much for that suggestion Kavouss. But just to be sure that we're talking here about a new document. So not the Framework of Interpretation. This is a separate document. So we're just seeing what text we have, what could we put where. That is something to be discussed. Tatiana is offering to explain.

I see Paul McGrady does not want to be tardy. I Googled "tardy," and that means delaying or delayed beyond the right or expected time. So, Paul, feel free to give a reason for tardiness. I see Kavouss' hand is up. Again, Kavouss, please come in. I hear no Paul, and I also do not hear Kavouss.

KAVOUSS ARASTEH: Can you hear me, please?

NIELS TEN OEVER: Oh, I hear you now, Kavouss.

KAVOUSS ARASTEH: I said that I don't think that we should have two separate documents. One Framework of Interpretation for human rights related to the content of Annex 6 and the other framework for the Annex 12. We should have one single. If there is anything to be added, to be added to the paragraph of the Preamble, and we would have one single document. Where we have decided that we should have two documents?

Look at these people commenting on that. People have not [inaudible]. They've been totally misled if you have two separate documents which [do not] have any relation. So please kindly consider that? We are not in favor of having two separate documents. One document with inclusion of anything under Preamble of that and anything under Interpretation. I have no problem to separate them in the text of a single document saying that interpretation relating to what is in this part of the Bylaw and interpretation relating to that part of the Bylaw but not having two separate documents of Framework of Interpretation. I am not comfortable with that – two separate documents. Single document, maybe separate sections. Thank you.

NIELS TEN OEVER: Kavouss, I think that's exactly what the Drafting Team is trying to do. But to be sure, let me give the floor to Tatiana. Tatiana, please come in.

TATIANA TROPINA: Hi, everyone. Well, Kavouss made just absolutely a valid comment which we also absolutely agree with as a Drafting Team. The reason why we're having these additional documents on the screen I will explain. Before we return to the CCWG Accountability Plenary and ask for Chairs to provide us with an advice, we thought we would have two documents. One of them was the Framework of Interpretation, and the second one was addressing the bullet points. So we started working on bullet points, but we didn't discuss them with the group. It was a very rough brainstorming at that moment.

On the call which we had as a small Drafting Team to further develop this document, we decided that we are stuck with the mission of this group itself. So that's where we go to the CCWG Accountability Plenary. So there would be one single document. This document is just a working version of addressing the bullet points. But of course, at least I know that Greg and Matthew, we discussed that this should be only one document and we have to come up with one document only once we consider all other issues.

Right now, I'm sure that it would be better to work on this document with the bullet points and then integrate those two documents together because there might be some cross-references. So this is the introduction to this document. If we think about Preamble, I'm not even sure that it should be here or be here like this because there should be a

new Preamble once we have the integrated document which would explain that this is a Framework of Interpretation which is drafted in compliance with the Annex 12, includes a little interpretation of the Bylaw and consideration required by the Annex 12. So I wouldn't touch the [inaudible] related to Preamble yet because we will draft it finally when we have the final integrated document.

The next point I'm going to cover is to consider what the Annex 12 asks us is to "Consider which specific human rights conventions or other instruments, if any, should be used by ICANN in interpreting and implementing the Human Rights Bylaw."

Matthew Shears and David McAuley have the opinion that this issue was addressed in the Framework of Interpretation. I personally wasn't sure because we were addressing the issue of internationally recognized human rights. So we have to expand this. If we are to say that there are no human rights conventions or other instruments applicable to ICANN, we have to be clear about this and address it from this angle. I also see a comment from Greg that it's not clear how this has been addressed in the Framework of Interpretation. To sum up on this point, I think that there are no considerations in those bullet points that were properly considered by us when we were drafting the actual interpretation of the Bylaw.

I'll stop here, and I think that someone else can volunteer for the next point. Thank you.

NIELS TEN OEVER:

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

KAVOUSS ARASTEH: Yes, if in view of colleagues' this has been addressed, I agree with Tatiana that they should cross-reference where it has been addressed. So we could not say it has been addressed. If it has been addressed, we should mention where it has been addressed at least by a cross-reference: "See Paragraph X/Y/Z" or "See paragraph above" or "See paragraph below." Thank you.

NIELS TEN OEVER: Thank you very much, Kavouss. I think that's exactly the tenor of that point in the document, which I will ask Greg who magically at the same point put up his hand to elaborate on. Greg, please come in and take us at a high level through the document.

GREG SHATAN: Thanks. Before we get to the next row though, I have a comment on this "Consider which specific human rights conventions..." If we look back at the actual FOI in the row that is entitled "Internationally Recognized Human Rights," what we say is "There are a range of international human rights declarations and covenants that could be relevant to ICANN's human rights core value." Then there's a footnote that's dropped that has about different instruments, kind of the usual suspects, if you will, although a relatively broad list. Then we say, "However, none of these instruments has a direct application to ICANN because they only create obligations for states."

So it seems to me that our answer to the consideration is that we've said that none of these should be used by ICANN. At least that's an interpretation of what's in the FOI. If that's not everyone's consistent interpretation, then we're seriously not being clear. If people think that it could be interpreted differently even if everyone here agrees with me because we've been working together for a while, then we should also be clear.

But what's actually in the FOI doesn't specifically – I mean, it almost says specifically, "We're not going to." None of them are directly applicable, it says that, but does it say, "We're not going to make reference to them at all or use them"? It doesn't really say that. I don't know that's what we intended to say, that they shouldn't be used, shouldn't be referenced. We did say that they don't apply. So I think there's still a disconnection here, and I think we need to be crystal clear because this is one of the key questions we have to answer. Whatever our answer is, it needs to be clear what that answer is. Thanks. That's all I have to say about that. I see Tatiana has her hand up, so I'll [inaudible] before I go back to the document.

NIELS TEN OEVER:

There's a bit of an audio going. Ah, that's much better. Tatiana, please come in and I'll also add myself to the queue.

TATIANA TROPINA:

I'm afraid to speak because of this noise. I agree with Greg because as long as we have what we have now and it's not clear, we will always have the questions like the one from Avri. If international instruments

are not applicable directly to ICANN, it means that there are no human rights, which is basically not true. We were trying to explain this, but I think that this explanation has to be expanded. How international instruments are not used directly because they have no direct applicability, but how ICANN is going to consider human rights in Applicable Law and human rights in general in the process of policy making and thought.

This, of course, goes the direction of implementation, but we have at least just to give these directions to clarify this issue. So, yes, we didn't consider this, and this needs much more work to be done.

NIELS TEN OEVER:

I think the last sentence of Tatiana makes it very clear because I think the problem is that the question in the considerations talks about "should be used by ICANN in interpreting and implementing." I think what we say in the FOI that is my interpretation, and therefore it is important we provide more text because apparently it's open for multiple interpretation where we did not intend it to be. We can look at these documents for guidance and understanding, but they are not necessarily directly meant for ICANN because states are parties to these covenants and ICANN is not.

We're trying to say three things at the same time, and probably it would make sense to try to get these things apart and say them one-by-one. That might be helpful. But I think it might help that we make it clearer and come up with new text because I think that way we get much more constructive discussion out of this.

But I see there is a queue forming for Greg, Tatiana, and Paul. Greg, please come in.

GREG SHATAN:

Just briefly to amplify what I was saying in the chat, no direct application is what our conclusion is. What this question is asking is, what should be used? No direct application and no use are not the same thing. If we just say “asked and answered, considered and addressed,” that becomes a rational interpretation of the two questions laid side-by-side. But that’s to my mind not a correct interpretation.

It’s also, to pick Avri’s words, a terribly pessimistic or [crabbed] narrow interpretation. Clearly, ICANN is not going to just make up human rights or come up with its own list from scratch. That’s not what we intended. The fact that these have no direct application to ICANN, while true, doesn’t end the answer to the question. Answering this question correctly and clearly should resolve that. Thanks.

NIELS TEN OEVER:

Thank you very much, Greg. I see Paul is next in line. Paul, please come in.

PAUL MCGRADY:

Thank you. I just typed in the chat something that I think does maybe a little bit better of what I’m thinking here than what I’ll be able to say. The bottom line is these international documents are not binding on ICANN, but I believe we would find them instructive in the obligations to respect human rights. They need to be read in conjunction with

Applicable Law, which means the law of any jurisdiction where ICANN has the appropriate nexus to where it has to obey their law and then balanced with the need for predictability in implementation of policy.

In other words, what we don't want to do is get four or five years down the road on some sort of implementation and then have an "aha moment" where everything on a particular policy and the implementation work that's all done by the community is subject to a surprise reversal.

So I think we're trying to capture "not binding but instructive read in relationship to specific obligations under Applicable Law and balanced with an eye toward predictability." I think that captures what we've all been saying for weeks. Apologies if I've gotten it wrong, but I'd like to throw that out as something to think about. Thanks.

NIELS TEN OEVER:

Thank you very much, Paul. I see Kavouss and David are next in line. Kavouss, please come in.

KAVOUSS ARASTEH:

Yes, I think that the explanation given by Greg I think may be a need to look at what we have done on the initial document. Saying that does not have direct implications, it means that this has indirect implications. So by that, you have not made any good interpretations just saying it does not have direct implications because it might have indirect and then how this indirect implication should be implemented. So perhaps we should review what you have done at the first instance with respect

to the initial document that you have prepared. Look at that one to see to what extent we could improve that to not have any doubt.

With respect to the [mandate or nonmandated], that is a different issue. We are not talking about [mandated or nonmandated]. We are talking about having any implication or not. It says “does not have direct,” it could be interpreted as it has indirect. If it is indirect, than how can ICANN interpret that indirect implication? Thank you.

NIELS TEN OEVER:

Thank you very much, Kavouss. Then there is David McAuley. With David I would like to close the queue on this because I think the Drafting Team then has gotten a lot of ideas from the group and then could perhaps present us next week with some language for us to discuss. David, please come in.

DAVID MCAULEY:

Thank you, Niels. I hope not to repeat Kavouss, but I’m having some phone issues so I didn’t quite hear all of that. But I take your point, Niels, that you mentioned that we do need new language and maybe a hybrid would help us. What I’m speaking about when I say hybrid is a reference to a foundational document that we all can agree. I think [Uniform] Declaration of Human Rights might be such a document to say that ICANN should consider that but also some general language that recognizes that the Bylaw is written without reference to specific documents and it recognizes that the body of internationally recognized human rights will probably grow. It’s not a static thing. That’s probably true with Applicable Law too.

So rather than list things that drive a stake in the ground as of a certain date in 2017, we might want to just make a reference to a foundational document and then say that we recognize that the body of internationally recognized human rights will grow and, accordingly, ICANN should look to additional documents as appropriate or something like that. So I would suggest hybrid language if it makes sense. Thanks, Niels.

NIELS TEN OEVER:

Thanks, David. I'm so happy you will help us craft that language during this week. I'm really looking forward to that.

So, having discussed that role and being halfway into our call, I'd like to go back to a member of the Drafting Team to take us through other discussions and points within the document – very similar to this discussion – so the group has an idea of what we're talking and thinking about, where are the [eight] points, and what we already agreed on.

Greg, will I go back to you? Matt, will we continue to you? Who will take up the baton?

MATTHEW SHEARS:

I'm happy to be the next sacrificial lamb here to read through this. Next item, I think, was one of the most discussed, and not necessarily... And it's still, I think, very much in a state of flux. The consideration is to consider the policies and frameworks, if any, that ICANN needs to develop and enhance in order to fulfill its commitment to respect human rights.

We have a couple of different alternative texts. The first one, sent to the subgroup on human rights of the CCWG suggests that “while operationalizing the human rights Bylaw, ICANN should prioritize areas of focus, such as its operations, existing policies and procedures, and/or new policies consistent with its mission.”

Before going any further, I would note David McAuley's comment at the bottom or in the middle of the next page. David says, "I don't see any obligation to operationalize the HR Bylaw either in section 1.2B8 or section 27.2 of the Bylaws."

So, in essence, the very concept of this first sentence is being called into question by David – as well as myself, to be honest. I think we're looking at policies and frameworks, and that's not necessarily the same thing as operationalizing.

Then we go on, "The subgroup believes that ICANN's commitment to respect human rights and to take human rights into consideration in its operations and policies in a foregoing manner should be consistent with the human rights core value of the Bylaws. This could involve the use of human are rights impact assessments of how ICANN's operations could impact human rights."

Here we've now introduced the idea of a human rights impact assessment. I'm not sure if that's a policy or a framework, or how that relates to what we have here. Another overall difficulty with this paragraph – no matter how you phrase it, in the alternative or any other – is to make sure that we kind of distinguish between ICANN the corporation and what its staff and executives might do and decide, and

what ICANN the community does in the development of policies, say, in the GNSO or the ccNSO or even the ASOs.

They're really two different considerations. And there's maybe even a third consideration, which is ICANN's internal policy – say, human relations, employee policies and the like. So this, to my mind, does need a bit of real thinking through. We're just, as I say, really just working through issues.

I see a queue, so I'll shut up and let the queue speak. Paul first, I guess.

PAUL MCGRADY:

Thanks. Greg raises a really interesting question, and it's not one that I think we spent a lot of time talking about so far – at least I don't think so – which is, is the framework of interpretation meant to be something that the Board keeps on the shelf that it looks at when a new policy hits its desk and decides whether or not the policy passes muster. Or is it something they keep on the shelf for when a dispute flares up between competing interests? Or, is it really – as this operationalizing language suggests – something that is supposed to go down into the operations of ICANN?

Again, Greg is always hard to read. I never know if he's straw manning to get us all thinking or if he has a position on that. And I admit that I have, up to this point, not given that a lot of thought. But I think it's a really important question. What is this at the end of the day? Is it a backstop or is it something much more pervasive? Thanks.

NIELS TEN OEVER: Thank you very much, Paul. I see Kavouss next in line. After that, Tijani. Kavouss, please come in.

KAVOUSS ARASTEH: Yes. I don't agree with those people who think that we don't need to do anything. I don't want to name anybody. I think the two alternatives are good. Perhaps alternative two – which is, in my computer, in red – is more neutral and better worded by using the verb “could” rather than using the “should” in the first alternative.

So, I think we need to have some explanations. And in my personal view, the option two or alternative written in red or whatever color, starting with policies and frameworks, is a good alternative. But I'm not in favor of being silent. Thank you.

NIELS TEN OEVER: Thank you very much, Kavouss. Tijani, please come in.

TIJANI BEN JEMAA: Thank you very much. I was frightened by what Greg just said when he made difference between ICANN the corporation, staff, and Board and ICANN the community. Shall we make a framework for each?

And with the new ICANN, community is part of the corporation since it is the sole designator. So, I'm really frightened by having two frameworks, one for the community and the other for the staff and the Board. Thank you.

NIELS TEN OEVER: Thank you, Tijani. Let me try to give a quick response. The difference between ICANN the corporation is that it has actual operations. And the community does policymaking. So, there are different processes maybe needed for that. But, I see Greg is next in line and he's probably much better equipped to answer that. Greg, please come in.

GREG SHATAN: Thanks, Niels. You're doing a great job, but I'll just expand on that. First of all, we don't want two frameworks and I don't think anybody was suggesting that. But we do need, when we're using the noun ICANN, to think about what we're referring to. And just as we the community are not going to be involved in necessarily the day-to-day of employee policy setting, ICANN the corporation is not going to be involved in the day-to-day of consensus policy setting or gTLD or ccTLD policy setting.

So, I think every time we use the word ICANN, we have to ask ourselves, what are we talking about – and be clear, because I don't think it's a one size fits all type of thing. And the more you read it, try to think about how this would actually be operationalized, so to speak. The more – at least to my mind – you realize that you can't just say “ICANN” and expect that it has a universal meaning each time.

I don't think that anybody was saying that we should do nothing, but I do think we need to think about where the job of this subgroup stops and where the job of other groups might start. Our job here is when the other groups start their work, that they clearly and consistently interpret the Bylaw.

So, as is noted a little bit later on, the GNSO sets gTLD policy. It's not up to this group or a cross-community group to set gTLD policy relating to human rights, though I think everybody on this call could participate in a GNSO working group that dealt with that.

But we do need to make sure that if and when – and I expect it will be when, not if – GNSO were to face that question, they face that question with as much clarity about what the Bylaw means as possible. Thanks.

NIELS TEN OEVER:

Thank you very much, Greg, for outlining that there is a border to what we can and should do here. And let's not try to [bar] the ocean, or at least let's not try to do that in our subgroup.

I see Tatiana is next in line. Tatiana, please come in.

TATIANA TROPINA:

Hi. I would like to make maybe a strange comment. When there was discussion whether the Ruggie principles are applicable to ICANN, one of the main arguments why we decided that they were not applicable to ICANN was that the human rights core value was primarily designed not to serve only ICANN operation. But we were concerned when we were drafting these Bylaws, and in the accountability Work Stream 1 about the implications of human rights for ICANN consensus policymaking.

And this way, although I don't believe that we have to in any way operationalize these bylaws or propose [anything the] community should and should not do in taking this core value into account on how the policy should be developed this way. I believe that we have to

address the issue of the ICANN community and consensus policymaking, and we have to say that this core value actually extends to this.

No matter what kind of framework this community will come up with to implement this Bylaw, implementation phase to operationalize it and whatever, it would be very strange if we would be talking about ICA:NN operations only because it would be absolutely off focus. And then the question is, of course, why ICANN is not committed to Ruggie principles if it's only about operation? Thanks.

NIELS TEN OEVER:

Thank you very much, Tatiana. Andrew, next in line. Please come in.

ANDREW MACK:

Yes, thank you. I guess I was going to try to build off of what Tatiana said, I think, a little bit. It strikes me that there are – we use ICANN so informally to refer to the ICANN community or to an aspect of the ICANN community and to ICANN as the organization.

And based on the conversation I'm hearing now, it sounds like we kind of need slightly different rules for all of them, and that we want to write the rules for ICANN the organization fairly narrowly. But we have to have some sort of rules of engagement for the broader community, given the role that the volunteers play.

So, I just wanted to highlight that because it does strike me that we want to have some sort of acknowledgement of the need to engage ICANN the community more broadly without rules that are too restrictive.

NIELS TEN OEVER: Thank you very much, Andrew. So, yes, let's not do too narrow things. We should still be able to move.

Kavouss, please come in.

KAVOUSS ARASTEH: Yes. I am surprised by the new notion that we try to say "ICANN community"/"ICANN organization". Are we getting into another description or definition – what is ICANN community; what is ICANN organization?

We are not talking about ICANN community. We know what the community is. It was described or defined previously during the Work Stream 1, but I don't want to get at this stage to have a distinction between these two and think that human rights is applied by ICANN community and not by ICANN organization.

There is no such a distinction. We are talking about ICANN all through the Bylaw and we never, in the Bylaw, have ICANN community and ICANN organization as a separate entity or a separate organ or a separate arrangement. I don't understand this new issue brought by Greg.

So, I am not in agreement with this distinction between the two. Either we say ICANN or ICANN community, but we don't say ICANN organization or ICANN community versus each other. I don't understand. And that gives rise to a lot of difficulty, and we're getting

more work and we're creating more [inaudible]. Please, kindly distinguish a...

Secretariat, put this (my comment) into the output that I am not in agreement with such distinction and precise definition. ICANN and ICANN community are the same, and we don't have a distinction between ICANN community versus ICANN organization. This is a new [error] and confusing and misleading everybody. Thank you.

NIELS TEN OEVER:

Thank you very much, Kavouss. I think what's meant here is to separate the day-to-day operations from the policymaking process and not necessarily separating entities. But it's clear we need some more clarity in this work.

We have 15 minutes left and the idea here is to create a bit of a more overview of the document and not go into detail. This is not yet a detailed text. We're not there yet. This is just a direction in which we're thinking, but all your comments are definitely helping the Drafting Team thinking of our focus. That's really good.

I'd like to close the queue on this point, and then we can go through other parts of the document so we can have a bit of a feel of the whole document before the end of this call in 15 minutes.

Andrew, please, come in. Andrew's hand is gone.

Greg, please come in.

GREG SHATAN:

Just to briefly respond and then move on for the moment. I'm sure I'll be back again. For example of what I'm trying to point out – if we look at this first sentence, “ICANN should prioritize areas of focus such as its operations, existing policies and/or new policies.” Who will be doing this prioritizing?

Are we talking about the ICANN strategic plan? Are we talking about new policies being prioritized by the GNSO or the ccNSO? Just saying that ICANN generally should do all these things just doesn't seem to me to be clear enough.

So, we need to think about who the actor is when we're saying this should happen. But, I don't want to belabor this point or this row. So, if we want, we can go on to the next row and just come back to this one later.

NIELS TEN OEVER:

Yes. Before we continue, I think that we have more discussion here, partly also because we're looking at a more granular level of operationalization of the Bylaw. I think we need to be really careful here that we're not overstepping the mandate of our subgroup.

So, we should be considering what things could be done potentially at a high level, but we are not here to define what the exact processes should be; how it should be done. We can give recommendations.

So, whereas on earlier points [when it's] more about the interpretation of our Sol, we might be more strict than looking forward because it's

not us who are actually doing this and we've not been mandating to do that. So, I hope that this frames this a bit.

And then I'd like to give it back to Greg to take us through other parts of the document in the remaining 12 minutes. Greg, please, go ahead.

GREG SHATAN:

Thanks, Niels. I think that's a very important point. And as David points out, these two rows are kind of two sides of the same coin. This row is asking what policies and frameworks ICANN would need to develop or improve to fulfill its commitment to respect human rights. And the next row asks us to consider how these new frameworks, or policies and frameworks, should be discussed and drafted – consistent with ICANN's existing processes and protocols.

[And I] want to make sure we have broad multistakeholder involvement, kind of going back to a point we've been discussing, too, about where the multistakeholders are involved.

So, there's a very general statement – a method for developing any new policies or frameworks may be needed to fulfill ICANN's commitment to human rights will be dictated by the type of policy and how ICANN develops those policies.

That's a very generic statement, but it's made, I think, fairly clear by the following paragraphs which, to sum them up, says, "gTLD policy is done by the GNSO, PDP, ccNSO." Same with regard to ccTLDs, and the ASO, while it doesn't have quite the same formal process, would also consider the same.

And lastly that – and here we get back to which ICANN we're talking about – Operations, employee-related, vendor-related policies should be developed by ICANN operations and management, taking human rights into account as dictated in the Bylaw. But you should also consider multistakeholder involvement.”

And, frankly, I think that language has been watered down. I think I had “strongly consider” or something more there. So, to answer the question of do we want no involvement in ICANN operational internal policy setting, the answer is absolutely not. So, I think “consider” here is a weak waffle word.

Not to get too far down into the weeds on this particular row, but I think this points out, also, kind of the border between our work and the work of those that will come after us and be guided by our work.

Then there's a whole bunch of commentary that's still left in the margin here that you're all free to read. But, actually, I think what's happened actually is this whole – this is actually the Cheshire cat's smile here over on the right because this was a comment about a suggestion. That suggestion has actually been removed, but the comment hasn't. So, I think that we probably can more or less ignore the comments in the margin.

So, I don't think there's anything to say about this row before we move on to the next one.

NIELS TEN OEVER:

Perfect. Please do so.

GREG SHATAN:

Yes. Consider how the interpretation and implementation of this Bylaw will interact with existing and future ICANN policies and procedures. Another kind of version of the same question, in a sense – and I think we do say that the interpretation of the Bylaw should be driven by the framework of interpretation. That seems to be the whole reason we're doing this.

The implementation of the Bylaw interacting with existing and future ICANN policies and procedures is also a second question. So, we go through this, and there's some suggestions as we get into implementation – human rights impact assessments, human rights risk assessment, preliminary issue report, including a policy impact assessment.

So, there's a variety of ideas here. Whether this is what we should be doing here is something I think we need to discuss. We're supposed to get down into the level of concrete implementation in this group and suggest that each group that actually does policy should adopt these, or whether we leave those things to the next level.

So, I think right now, we're kind of getting into the business that the support organizations are supposed to be into. That's my personal feeling about this section; but, obviously, reasonable people can differ and we'll need to discuss those.

As noted here, at the end we say, "In order to implement these policy changes, an appropriate mechanism should be established." It's suggested here – and I'm not sure I buy into it – that a CCWG on human

rights would establish proposals for the supporting organizations to implement in their respective policy development processes. So, we'll need to consider whether that makes sense.

Lastly, we say, "ICANN should consider ensuring it does not violate human rights in its operations. Again, "consider" is a terrible waffle word. We ourselves are trying to consider, but at the end of our considerations, we're supposed to actually say something – and might consider instruments such as an HRIA. But it's up to ICANN the corporation to decide and implement.

So, we're still stuck in that question of which ICANN, and where and what the multi-stakeholder voice is.

The last question we have is, "Consider what effect, if any, this bylaw will have on ICANN's consideration of advice given by the GAC." And the basic statement is, "There is no change to the status of GAC advice or how GAC advice will be considered solely due to this Bylaw. The Board will need to take into account ICANN's mission and core values" – and the commitments; we should add that – "including the human rights core value in considering advice given by the GAC" – which, presumably, is what they've always done – "and ask, how is no change accurate? Won't this Bylaw affect GAC public policy advice?"

What I say to [Ann] is that this question is focused on how the ICANN Board will consider the GAC advice and not how the GAC will formulate its advice. And I believe that staying away from talking about how GAC formulates its advice was a very conscious decision in the drafting of this last consideration.

Jorge remarks that “GAC advice is an input into the ICANN policy development or decision-making process. The GAC discusses primarily public policy implications. Each member with its own background strives for consensus, but it is ICANN who makes the legal decision that it is measurable against its Bylaws, including the HR core values.”

I'm not sure if that's intended as a comment or as something that should go into text, and we need to think about whether that makes sense. And it seems to imply that the GAC doesn't need to consider the mission commitments and core values in making its advice, but that seems inconsistent with other thinking that I've heard. So, maybe this is an ambiguity that needs to be resolved.

I think that takes us to the end of the document at the high level, except for this last blank page which reflects so many possibilities.

I'll stop talking. And Kavouss has his hand up.

NIELS TEN OEVER:

Thank you very much, Greg, for this overview. We have four minutes left. We've had an overview of where we are. We have great considerations from our group with which the subgroup can work, and I'm very curious what Kavouss will give us to work with for the [inaudible].

Kavouss, please come in.

KAVOUSS ARASTEH:

Thank you very much, Niels. I don't think that we can say that we have reviewed the whole document. We were on point three, and I have a comment on point three. And, unfortunately, we have not taken that comment into account.

Put my disagreement – Kavouss Arasteh disagrees that the point three has been fully discussed, debated, and so on and so forth. I don't agree with either of the three interpretations they have made. They want to exempt GNSO from anything and they want to involve GAC in everything and so on and so forth. I [don't] understand this distinction.

Once again, there is a discrimination between the two things, so we have to come back to point three at our next meeting.

I don't agree with anything and I don't agree that the people continue to have, again, this discrimination between GAC and GNSO. GNSO now is considered to be totally an irrelevant group. It does not obey. It does not agree with anything, doing its own thing. And it's totally independent.

It is another ICANN, and I don't agree. Once you have come to the GAC, you put everything on the GAC. GAC advice should be [screened] by the Board whether it corresponds with the human rights. What are the measures that ICANN should take into account to see whether the GAC advice is respecting human rights or not? I don't understand this interpretation.

So, I totally disagree with these three last interpretations as to the point three. We only discussed point two, and I request [that] the colleagues

do not make any distinction between the groups. Be totally neutral.
Thank you.

NIELS TEN OEVER:

Thank you very much, Kavouss. And on that note, we have had a quick, high overview with no agreement – but just an overview which gives input for the Drafting Team to work. And next week we'll go through the whole document again.

I'm greatly looking forward to that. Thank you all very much for your participation, for your activity on the list, and for being here at the 19th meeting. And we go for a 20th next week. I hope to see some of you at the plenary tomorrow where we'll explain our position. [I promise then] to go with a bigger and better document. [We'll] include considerations.

Have a great week, and I'm looking forward to working with you all on the list. Drafting Team, I'm looking forward to seeing you all on our little list. Let's see what we can do for next week. Thank you all, and have a great evening. Bye, all.

CHERYL LANGDON-ORR:

Thank you, everyone. Bye.

[END OF TRANSCRIPTION]