HUMAN RIGHTS SUBGROUP
Tuesday, August 08, 2017 - 19:00 to 20:00

>> MR. TEN OEVER: Hello, everyone.  It is 1900 UTC on the dot.  I can start.  If you would be so kind to start the recording.

Thank you very much.  I can start and welcome everyone to the Cross Community Working Group on enhancing ICANN accountability WorkStream 2 Human Rights Subgroup, meeting 31 on August 8 at 1900 UTC.

I can start, would you please be some kind to take the roll call from the Adobe Connect room and could everyone who is on the audio bridge and not in the Adobe Connect room please make themselves known so we can include them in the roll call.

If none, then we can register that we got apologies from bass tea Anne goes links.  And we did not get any other apologies as far as I can remember.

Does anyone have an update to their statement of interest?

I see no hands, no comments, no interjections.  So, let's go to the agenda barbing.

Has anyone got a comment on the proposed agenda points, or would like to change, propose a change in order?  Or would like to propose that we don't discuss these points altogether?

No?  Okay.  Then we will continue.

So, in addition to what we did last week, which was going through all the comments. And in review of last week's changes, we have concluded then that we would add but not limited to, two footnotes that outlined the number of instruments.

Is everyone still okay with that?

Seems so. Everyone seems in consent as last week. It seems nothing has changed when it comes to that point, but it does seem that there was quite some discussion on the next part, and that was the proposed text for the last parts of the, of the paragraph on and let me pull up the Google doc so we can all spend some time there together, because I think we will need to do some drafting and some work on that.

So, here is the Google doc; is the link to the Google doc. And those changes were at the last part of the question, consider how the interpretation and implementation of this bylaws would interact with existing policies and procedures of ICANN. And I was then to prop toes a new draft text, which I have done.

Can we go back to the previous document in the screen? Sorry. I should have known.

And there, I pop posed the following language which seems to have caused some raise in blood pressure, which was of course never my intention. So I am greatly happen to discuss that. I see Bernie's hand is up. Please come in.

>> Yes Niels. I just noted that you were speaking a little fast in the previous section. As you remember, we're trying to caption. Thank you.

>> MR. TEN OEVER: Sorry. My apologies to the captioner. I got excited.

So, what I proposed was in that last paragraph that we needed to redraft, because during last week's session, we found out that the language that was in the consideration was a bit off, so I've been redrafting that and I would suggest this. And I think we have some other proposals on the list and I hope we can achieve consensus on that now.

Let me read what I proposed. When examining in trainings ICANN the organization could consider using a framework like the UNGPs as well as specific instruments such as HRIAs to assess it's impact on Human Rights and offer remediation. However it is up to ICANN organization to decide the most appropriate framework and extremity to do this. The result of ICANN organizational assist should be reflected in ICANN annual reporting.

Initially this proposal came up when discussing the comment, a comment by one of the governments, and then (indiscernible) said that we could suggest that I can, our organization could consider using that.

Kavouss, please come in, could you say what you have in the chat or you have no microphone, or I can read it out also becomes a long Niels monologue.

>> Hi Niels, can you hear me well?

>> MR. TEN OEVER: We can hear you very well. Great to hear you.

>> Okay. Yeah. Thank you. So, I basically think that there is a bit of misunderstanding. I think that the language was proposed because so many comments pointed out to Ruggie. And without, it seems to me, without the understanding that we are talking about a policy making implications, and not implications for the ICANN organization. And I think that the language

we have already in the framework of interpretation, it is consensus language, it does refer to Ruggie. It was a kind of, you know, suitable for all of us.

So additional language was proposed I believe, and correct me if I'm wrong, to make a clearer distinction between policy making and community consideration like ICANN community and ICANN organization, which might consider to commit to Ruggie principles. But this decision would be up to ICANN. It's not up to us. It's not for us to make the decision in the framework of interpretation.

And if I grabbed the microphone anyway, I would like also to say that this sentence about interpretation. I believe probably I over looked it on the last call and I believe that I wasn't alone who actually missed this point. I think that again, it is a bit out of date of this group to propose something like this, because it goes to the direction of implementation and not interpretation. And also is quite how to say, vague; what it means. We don't know. We really don't know. And unless we're going to explain this which will take a point of time and as you say blood pressure, be better to strike it out and leave it to ICANN organization to decide how they actually going to adopt this framework or which principle they're going to commit to. Whether they're going to offer implementation or not, or what have you. So, yeah, I have finished here. Thank you very much.

>> MR. TEN OEVER: Thank you very much, Tatiana.

I think if we, I'm happy to drop and offer remediation. I don't think that changes much. I think it makes our lives easier. So I can do that in the Google doc, but in the meantime let's also listen to David McAuley. And David let's listen. David, please come in.

>> Niels.  Thank you.  It's David McAuley for the record, I felt I ought to put my hand up and explain, because I had made an entry on the list just a few, I don't know an hour or so ago, maybe two hours.  And I'm largely along the lines that Tatiana is, but I want to acknowledge the comments of Brazil, Switzerland and especially the U K.  I know Mark is on the call with us today.  And acknowledge the good work and the passion that they have with this, with respect to this.

I just wanted to state that I too was concerned with language about remediation.  And when I read, you know as I look at the Ruby principles and I'll just use 13 B as an example.  13 B requires that a business seek to prevent or mitigate adverse Human Rights impacts that are directly linked to their operations or services by their business relationships.  That term is very broad, I think.  Even if they've not contributed to them.  And the word remediation to me sort of smacked of the concept of enforcement and I remember that in the core value, we don't site this language very often, at least I don't, but I would like to read part of the core value as it says this core value of I cap does not obligate ICANN to enforce it's Human Rights obligation or the Human Rights obligations of other parties against other parties.

And I think the reason for that is that the DNS is a peculiar animal.  And what would be considered part of ICANN's business relationships would be registrants all over the world.  I mean business relationships is a broad term, it's not something about privity of contract or direct contract relationships.

And so, I thought that the language was of concern.  And then on the list, I also suggested a change in the next sentence, where, excuse me, where I suggested that that would better read,

however it is up to ICANN the organization to decide whether and how, that is the most appropriate framework and instrument. And it should be plural, instruments plural, to do this.

So, I'll answer Anne's question on the list as yes, it should be in the plural.

And simply say that those are my thoughts and I acknowledge and admire the comments from the others, but I disagree in this respect and that's what I'll say. Thank you Niels.

>> MR. TEN OEVER: Thank you very much, David.

I would like to ask one, one clarification question. Do you think ICANN organization could also live up to itself, to the commitment without any framework of instrument, because that is what is your sentence seems to imply and I want to understand if I understood that correctly.

>> Thank you, Niels. It's David McAuley again. In my opinion, I can, could choose to live up to these obligations, yes, if it's within its discretion and it's a matter of choice, as oppose Todd a framework of interpretation that an IRP panel will look at as legislative history to the by law and impose on ICANN involuntarily.

So I would say yes, I could even see adding language like ICANN could consider voluntary remediation. But again, to me, the lynch pin here is that those would be something that ICANN would voluntarily undertake. Thanks Niels.

>> MR. TEN OEVER: Thanks so much. But would you say, so, in the last change, last proposed change to the last sentence, you said, did you say, ICANN organization to decide when were and if it would use an appropriate framework. And my question is, this is really an open

question, because I'm not a lawyer. Can people live up to such a commitment without a framework or an instrument to assess it itself, or is that just my primitive brain?

>> Hi, it's David again, Niels. I think that they can. I think the ICANN board could choose to undertake such an assessment. They could undertake to do Human Rights impact assessments.

I think absent the dictates or the persuasive elements of Ruby, they could go everything under Ruby as they choose. Maybe I'm misunderstanding the question, but I'm not sure, I'm not to me, that's the answer that strikes me as appropriate. Maybe I'm misunderstanding what you're asking.

>> MR. TEN OEVER: Okay. Make my question is not clear. I think if the you're going to undertake an HRIA, you're using that instrument. And I think it is language you suggested, you said ICANN can also choose not to adopt any framework or any instrument to live up to, to its commitments of Human Rights. And it seems like they would need something; or we can leave it up to

>> I need to think about that, Niels. Let me ponder it for awhile, while you take other comments.

>> MR. TEN OEVER: Yes, Greg, please come in. I've been holding on to the mic too long. Greg, please come in.

>> Thanks, Greg Shatan for the record. Couple of things. First as an over arching comment, it's clear from the public comments that some felt that we in our consensus did not go far enough with regard to our references to Ruggie.

I think it's also fair to say that there are those who may have felt we went too far, but we're willing to live with the consensus; and therefore did not put in comments.

I think that we will see comments and push back if we move significantly off the consensus that we had the first time around.  So, I think that needs to be taken into account.

Obviously you can't account for comments that were not made.  I think that, I have to go back and look at the IPC comments, for instance I think we indicated that the balance that was struck was acceptable so I think the UP can infer from that, that a change in that balance would not be acceptable.  Certainly if it went in one direction, and maybe in either direction.

More specifically to this language, I think we have to, first off, just from pure language standpoint, we should avoid using the word framework.  Since the framework we're talking about is the framework of interpretation and we need it to refer to other things.  We should avoid that.  I don't think there is any necessity to refer to the guiding principles as a framework.  We could refer to them aspirins or guidelines or something else, but it really muddy's the water to use it again.

I think that, yeah, other than that, I have some issues with moving from, away from the language we had before.  I need to see it compared to the prior language, but I think, you know, this goes back to the point I made last week, which is this a floor, not a ceiling, and nothing in here discourage ICANN or any SOs/ACs from adopting other principles or inference or framework or whatever you want to call them in any way, but the idea here is to leave that will latitude to another level and not impose the CCWGs views in that regard.  Thanks.

>> MR. TEN OEVER: Thank you very much, Greg.

I think what we also see in the chat, that we were very much, I think it's much more a language thing than a difference in opinion, so perhaps we can go a bit through the wordsmithing and see what we could do.  I think David has made an example but let's first go through the list.  I think there is an old hand from Craig.  So, Anne, please come in.

>> Yes, thank you very much Niels.  One comment I have is that I think I would have been extremely helpful to have a red line of the language that is in the existing document.  I found that I it takes quite a bit of time to go back and compare the existing language with the changes.  I'm not even sure that I got that right, but I wanted to try to answer your previous question about what ICANN the organization can do.

And the reason I think that this new language is probably goes too far, and is a matter of substance, is that I don't think that ICANN the organization can adopt a framework as opposed to, let's say, conducting a Human Rights impact assessment, without presenting that framework to the SOs/ACs and reviewing that proposal with them.  And that in and of itself is kind of a top down policy process.  I mean it should be working the other way in a multi stakeholder organization as unique as ICANN policy development and in relation to a framework should come through a PDP, through a bottom up process.

The framework, we've actually referred to framework in the language in the considerations document, and what we said is that when examining its operations, ICANN the organization, let's see, let me scroll up here.

That it should consult with the SOs/ACs.  Let's see, when developing corporate or operational policies and executing its operation, ICANN the organization should take the Human Rights core value into account.  In order to do so ICANN the organization should propose a framework

to the community which should include multi stakeholder involvement in its development and regular review.

So, that language already appears in considerations.  And the language we're talking about here, basically says that, not that it's up to ICANN to propose a framework and to consider what tools and instruments are appropriate and to propose a framework to the community, but rather that it's up to ICANN to develop and implement a framework.

I agree with your comment in the chat that Ruggie is a framework.  I do not agree that ICANN the organization can adopt a framework and adopt Ruggie without putting that idea out to the community and to the SOs/ACs as a policy development process.  Thank you.

>> MR. TEN OEVER: Thanks so much for that Anne.

I think we might go a bit into, I think the blood pressure is quite high.  I think the changes that we propose were quite small, but I see they might have been too big for some, so let's drop the discussion about the framework.  We'll put in in response to reaction to the government.  It was a suggestion made by Tatiana.  Seems like people on the call do not like it now.  That's great. So, that is, let's see what we can do to resolve this.

Kavouss, please come in.

>> Yes.  Good morning.  Hello.  Do you hear me?

>> MR. TEN OEVER: Yes.  We can hear you very well, please come in, Kavouss.

>> Yes. From who has spoken, all again, any changes, the stick to the (indiscernible) language. However under the public comment we have received comments and we need to keep on board to the extent that we could agree.

In another group, (indiscernible) one person upside down totally what was agreed before by the referring to the public comment and see that we have to take that public comment. But here I see quite different.

I am not suggesting to take on board the key proposals from the public comment, but we have to accommodate that, that some language with qualifications which on the one hand does not, I would say compromise the consensus of this. On the other hand does not disappoint that, the group. (indiscernible) the public comments.

What I would suggest is that we could reuse the ICANN organization may, where applicable and appropriate, comma, and continue to put something. Because this may, is totally option.

And then you say where applicable, it infers that the entity should adapt applicability.

And the second qualification, the appropriateness of that, the (indiscernible) of that. So it's quite (indiscernible). But at least take something which may improve, in my view, the consensus. At least, it would be (indiscernible) that this group protects the public comments. We are not bound to accept it, but (indiscernible) to what extent we could tolerate the language you had in order to maintain its substance of (indiscernible). On the other hand put some latitude on that, which is opening natural, with several qualifications. Namely, if applicable and where appropriate.

So, these are my suggestions, I think I have helped the four people, to keep in mind, but (indiscernible) accept that other people making comments also. They have some concerns. This issue was discussed in depth, at length, and the same (indiscernible) strongly feel that the group did not consider. And I, at the meeting said, because we could not agree on that, try again. And now we have. And now it is up to us to see whether we could tolerate and put some (indiscernible) language in order to take into consideration (indiscernible).

Thank you very much.

>> MR. TEN OEVER: Thank you very much Kavouss.

In the meantime we have a propose organizational from David McAuley, which for the first part, is the text edited there, without an offer remediation the text would be when examining its operations, ICANN organization could consider using a framework like the UNGPs as well as specific instruments such as HRIAs to assess its impacts on Human Rights.

I think Greg said let's not use framework because we're already using a framework, which is a framework of interpretation, so maybe we could use principles. Would that work?

>> No, not the principle nor framework, none of them would work. Thank you. (Kavouss).

>> MR. TEN OEVER: Okay. Kavouss, do you have other language suggestion?

>> Why not without framework. Why do we need to put framework in the framework? What are we doing framework interpretation, in that framework of interpretation. We use another framework. Framework under framework.

You know, speaking on this site, could you put the text, could somebody put the text either on the chat or on the, on the frame that we can see what it is. Because it is difficult to remember all of these things. Thank you.

Could somebody put that on the screen please? Or in chat?

>> MR. TEN OEVER: I have just put it in the chat, Kavouss.

So, and also, let's see. Tatiana says she didn't like principles. Greg didn't like framework. Would you, do people have other solutions for those words?

>> Conflict, could we use conflict instead of framework or principle? (Kavouss).

>> MR. TEN OEVER: Using concepts like UNGPis, yeah. I am suggesting plural. So, using frame works like the UNGPis. Frame works like the UNGPs.

In consultation with the SOs/ACs, but and that would be in, that would mean that we changed the meaning of the whole paragraph, because it has been saying that SO and ACs in ICANN organization should define themselves how they will live up to the commitment. And now we're saying that every one thing should go proposal, but that would change things again.

Kavouss's hand is up. Kavouss please come in.

>> Yes. I think if you use (indiscernible) so, I don't know. I think it maybe some other, framework. I'm looking for some other, (indiscernible) it's somewhat (indiscernible) instead of framework and principle. Something else.

>> MR. TEN OEVER: I think we're currently not saying what ICANN should do. So the sentence is already quite weak. What examining operations, ICANN organization could consider using frameworks like the UNGPis as well as specific instruments such as HRIAs. But it seems in the inclusion of using framework like the UNGPs, we try to make (indiscernible) to the comments, but it seems that we're creating more shit that solutions with insertion of that language. So, shall we go back and remove, using framework like the UNGPs and just go to the text. When examining its operations, ICANN organization could consider specific instruments, such as HRIAs to assess its impact on Human Rights?

So, then we have removed the principles and the frame works and the UNGPs and then we have exactly the language that we had before. The consensus text to what the, to the public comment.

Anne, please come in.

>> Yes. Thank you Niels. I think that you did point out when you commented on my suggestion, and then the core disagreements here which, I think you were saying that that, just takes away from what the, the power that the ICANN organization, what they would be able to do within their own operations.

There is a distinction that has to be made between ICANN's own hiring and what they can obligate registries to do, and I think Greg has pointed that out in the chat. I'm not sure how we can describe that distinction, but I do note that if we leave this language substantially as it is, it conflicts with the other language that says that ICANN the organization should not adopt a framework without multi stakeholder involvement.

And that's because the by law limits the obligation to applicable law.  So anything that goes beyond applicable law is a matter of policy.  So, when it's policy, they need to involve the SOs/ACs.  So I think there is an actual substantive difference there.

So, if we're talking about ICANN the organization implementing Ruggie, it depends on the reach of Ruggie, how far it reaches.  It can't reach to the registries, without being developed through consensus policy, because the registries can only be obligated by, contractually, by consensus policy development.

So, we either need to distinguish between internal operating framework or else we need to say that if they are proposing a, an organization wide framework that they have to consult with the SOs/ACs.  Thank you.

>> MR. TEN OEVER: Thanks, Anne.  I thought this was only considering ICANN's impact.  So, when examining its operations, so in the process of analyzing, ICANN organization could consider using framework like the UNGPs to understand its impact, sorry the measurement.  So I do not think the current language would, would conflict.

Kavouss, hand is up.  Please come in.

>> Yes.  I think I perhaps wasn't clear.  I suggest that ICANN organization may consider (indiscernible) appropriate and continue.  I do not (indiscernible) as Tatiana says, we could not replace, could with may.  Why?  What is the reason?  What is the law that does not allow us to do that?  And why is Tatiana so against the proposal made by me?

I suggest that ICANN, the organization, may consider, appropriate, (indiscernible) thank you.

>> MR. TEN OEVER: Thank you all.

It is up to ICANN to develop and implement, I think we might be talking about different parts of the text, Anne.

Greg has his hand up. Greg, please come in.

>> Thanks. I'll still trying to think of another word to use instead of frameworks that might please everyone. I don't have one.

And I guess, one question I have is whether, what exactly we're talking about when we're talking about ICANN assessing its impact on Human Rights. The impact of what? Of ICANN, of everything ICANN the organization does, or it's only its operations as a, you know, typical business, you know, buying goods and services? I think that there is, you know, the language is a little sloppy, or unclear. And I guess the impact on Human Rights.

We're trying to get at Human Rights impact assessment here sideways, it seems. We're trying to encourage ICANN or some are trying to take this language, try to encourage ICANN to run a Human Rights impact assessment. I'm just not sure, you know, how prescriptive we want this to be. And I'm not sure that's what, just I have real trouble with the language to assess its impact on Human Rights. It just, it seems to be poorly phrased and very vague, ambiguous, to be interpreted so many different ways.

And again, I go back to the, ICANN the organization, in its relationships with contracted parties and also with the CCTLDs or by and large not under contract, but I think the ability to, or the issues that arise are even more, should be of even more concern to CCTLBs in that regard.

So, I think what we have originally left a lot of latitude for ICANN. I would like to try to find some way to take into account the comments that were made. Of course we need to take into account all the comments that were made, not just the ones that were requested changes here.

So, again, I'm trying to, in the background, find the language to compare to what we're changing to. I don't have that. So it's still a little hard to talk to the changes in that regard. I apologize for that. Thank you.

>> MR. TEN OEVER: I have the feeling that we're, that the comments are expanding, even beyond the language and the consensus we had before the public comments, so I'm a bit surprised. And I find it hard to describe the way to go forward; which might be because I didn't provide a red line.

So, I propose we hold the discussion and I ask a drafting team to come up with the text. Are there people who would like to volunteer for a drafting team?

I see, Anne's hand is up. Anne?

>> Yes. Thank you, Niels. I am sorry that there is a surprise about the change in the language. I do think it kind of goes back to perhaps this issue of the combination of framework with the words to offer remediation, because you were saying that you thought that this language really only went to the whole question of impact and assessing an impact. And I think there are several of us who are reading it as developing a framework that results in action that results in even possibly remediation.

And so, if we're talking about tools that assess impact, that's one thing. If we're actually talking about, and I think there was agreement that HRIA is a tool, or the organization could use.

If we're talking about something that is going to be adopted as a policy such as Ruggie principles that are definitely going to apply to all the operations of ICANN, that's probably why you're hearing so much push bag on   push back on that.

Which one are we talking about?  Impact assessments or frameworks for policy for ICANN the organization?

>> MR. TEN OEVER: I think we were only talking, we were initially only talking about impact assessments.  Then in last session, it was discussed we could add a reference to Ruggie, that might be used.  That seems to have opened now a whole frame of discussion.

So, somehow the opinion of last week's call doesn't translate well into this week's call.  So, I nope that Tatiana, Greg and David, can help us with these two sentences.

Kavouss, please come in.

>> Yes.  I think we can not use the remediation.  I don't think that we are talking of impact in the application or in implementation.   We are talking of policy.   (indiscernible) in interpretation.  It talks about the policy, but not about the implementation.  So I don't think that we could talk about the impact or remediation.  The remediation means that something has happened and we want to remedy that.  Where we are talking that something should not happen.  Or if something happened, this is the policy to address that.

So, I don't think that remediation is a good replacement.  So I suggest if you can not find something quickly, drafting would be good.  If the result of drafting at the next meeting, but not at the next one only.

If not, you can go back to the initial text. So you give one chance, and drafting team tries something, take in account the comments. Subject it to the next meeting. If at the next meeting it is agreed as a replacement. So far so good. If not, you retain the initial sentence as it was drafted. Thank you.

>> MR. TEN OEVER: Thank you very much, Kavouss.

Anne's hand is up. Anne please come in.

>> I'm sorry. It's Anne again. I was just asking for purposes of the drafting team, could they prepare a red line of the changes and forward it to at least to the drafting team members, if not the whole list; actually probably the whole list.

We do need to see what the changes say.

>> MR. TEN OEVER: Maybe we don't even need a red line and the drafting team can simply start from the, could simply start from the text that we had, from the public comment, and see what changes could be made and need to be made there; because it seems I completely failed to resolve and rework the comments from everyone.

So, let's start with a clean will slate and take the text from the public comments, and have the drafting teamwork from there. Would that be okay, drafting team?

And members of the group?

>> That's not okay. That is not okay at all. This is Anne. We need, it's very confusing and hard to analyze when you circulate new text without showing the changes. It's very, very difficult.

>> MR. TEN OEVER: So, I do not necessarily understand that people do not see the changes in the Google doc.

>> I can not see the changes in the Google doc. I went to various different links trying to identify the changes and see the changes in the Google doc, but, yeah, Greg has posted the previously existing language.

But you can see the main differences, and this is Anne again; are that it states that ICANN could consider implementing a framework like the Ruggie principles, and that it's up to ICANN to do that.

It doesn't say anything about, you know, having that framework subject to SOs/ACs review, which that is mentioned in other parts of our consideration document.

So, we need the red line, not only to move forward with it, but also to compare it to other sentences in the considerations document which may be inconsistent with the proposed language.

>> MR. TEN OEVER: Okay. I'll email to the group the text as it was at public comments that we propose to change last week. I will also share the changes that I proposed. And then let's see if the drafting team can come with a third version.

Is that okay?

>> Thank you.

>> MR. TEN OEVER: Kavouss, please come in.

>> Yes. I think the drafting team, whoever they are, need to look at the original text and look at the public comments and to see to what extent they may be able to modify the text.

Initial text in order to the extent feasible and possible to taking into some public comments and bring something back to us at next meeting.

Once again, I insist that if at the next meeting, we could not agree to the proposed changes, we maintain the initial text and we go forward. We can not spend so much time on this issue, I think. This is a very critical issue and we're talking too much on theory. It is not appropriately put our finger on particular words. It seems you can tell how concerned some of those four people who have spoken.

I am looking for some solution, but it seems to some people, they stick with something else, and they go into the depth of the (indiscernible) seeking out so many questions. It should be far more simpler than that one. So, this is (indiscernible) original text, public comment, see if they can agree themselves to put something and bring it to us. And if agreed by us at the next meeting so far so good. But if it's not agreed, the text will be dropped, the public comment will be dropped, and we maintain the initial text. Thank you.

>> MR. TEN OEVER: Sounds good to me.

So, let's do that. I'll share the text on the list directly after this meeting.

I think that leaves it for now for sufficient for this meeting.

Thank you all for participating and for discussion, I'm greatly looking forward to see you all working on the list; and next week on the call.

Bye all.

(End of meeting).