
COPENHAGEN – GAC Human Rights and International Law Working Group presentation to GAC Plenary
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CHAIR SCHNEIDER: So we are ten minutes ahead of schedule. This is unbelievable, so I suggest that we go on immediately to the next reporting back of the next working group, and then have maybe a more-than-15 minutes coffee break or use the time for discussion.

So let me give the floor to one of the co-chairs or two of the co-chairs, actually, who are here for the Working Group on Human Rights and International Law.

Jorge and Mark, please go ahead.

MARK CARVELL: Yes, thank you, Thomas. This is the report of the activities of the Human Rights and International Law Working Group, HRILWG. I'm one of the co-chairs, and with me is Jorge Cancio from Switzerland who is another co-chair. And I don't know if Milagros is in the room, is the third co-chair, Milagros Castanon from Peru.

The working group met on Saturday. It seems a long time ago. And we had an hour-long session. We had two substantive agenda at the meeting. The first was an update on the

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Framework of Interpretation for ICANN's human rights bylaw. And if you recall, there was the bylaw change recently whereby a human rights core value was added to ICANN's bylaws, which basically said that within the scope of ICANN's mission and other core values, ICANN will respect internationally recognized human rights as recognized -- as required by applicable law. And it also made clear that the core value does not create and shall not be interpreted to create any obligation on ICANN outside its mission or beyond obligations found in applicable law. So at the -- the core value does not obligate ICANN to enforce human rights obligations or the human rights obligations of other parties. So that's essentially the core value.

And the framework -- And this -- this core value would not be coming into effect until a Framework of Interpretation was drawn up. So the process for drawing that up is led by a Cross-Community Working Group Work Stream 2 subgroup on human rights, the rapporteur for us is Niels ten Oever who joined us for the human rights and International Law Working Group to provide us with an update.

Essentially he reported that the Framework of Interpretation had been written. It was ready to go out to consultation, but the work was continuing on a document known as considerations document. This addresses the considerations listed in Annex 12 of the accountability final report and covered issues like which

specific human rights conventions or other instruments should be used by ICANN in interpreting and implementing the human rights bylaw, the policies and frameworks, if any, that ICANN needs to develop or enhance in order to fulfill its commitment to respect human rights. Thirdly, consistent with ICANN's existing processes and protocols, consider how these new frameworks should be discussed and drafted to ensure broad multistakeholder involvement in the process. And consider how the interpretation and implementation of the bylaw will interact with existing and future ICANN policies and procedures. And finally, I think -- yes, finally, consider what effect, if any, the bylaw will have on ICANN's consideration of advice given by us in the GAC.

So this -- At that stage on Saturday morning, the subgroup was working on that text. And subsequent to our meeting when Niels ten Oever updated us, I believe this considerations document is near completion as I understand the state of play at the moment.

On this agenda item, it was very informative. It was important for the working group to keep up to speed with progress of the accountability Work Stream 2 subgroup, and it was a very useful exchange. I don't know if -- Jorge, did you want to add any comment on how that particular discussion went? The one with Niels. Any reflections from you to help our colleagues?

JORGE CANCIO:

Hello. Good afternoon. Thank you, Mark.

Well, actually, just to complement what Mark rightly summarized, that the subgroup of the CCWG still hasn't adopted the considerations, the comment which is attached to the Framework of Interpretation. Nonetheless, the so-called drafting team, which is a subsection of the subgroup, has been making progress here in Copenhagen. And now this -- the document agreed by the drafting team has to go to the subgroup on human rights of the CCWG Accountability, have two readings as is usual there, and then it would go to public comment, including public comment by any interested party.

In Hyderabad we had agreed that we would ask the working group try to prepare a GAC input to the public consultation on the draft FOI, which was then planned for February. So I guess that conclusion remains valid, although we have still to wait for the public comment to start because, as we said, as Mark explained, then there was some delay in order -- which was caused by the need to finalize the work properly.

But I guess that's -- as soon as the public comment is out, we will try to gather that input by the GAC through the working group.

MARK CARVELL:

Yes. Thanks.

And just to round off, I think for the purposes of the Copenhagen GAC communique, we should note with appreciation the work undertaken by the Cross-Community Working Group on human rights and welcome the opportunity to comment, provide comments on the -- on the Framework of Interpretation and the related considerations document.

So I think it will be a simple statement to that effect.

So perhaps on that agenda item, I should stop now and see if there are any questions anybody has on that.

Yeah, Iran, please. Yes, thank you.

IRAN:

Thank you. I think the drafting team has been presenting. We have received a message from Niels that they have almost finished the draft. They submit it for the working group, or whatever is called, and then after that, they will be sent, after two reading, to the CCWG. And once it is approved by CCWG, will go to public comments.

So, the process is as follows. Public comment, anyone could comment on that, GAC individual, but I don't think that GAC as an entity is invited to make any comment on that. Once the

recommendation is approved after all public comments, like Work Stream 1 -- the Work Stream 1, the recommendation will be sent to the chartering organization. So at that time, GAC in toto have the opportunity to make any comment.

At this stage, GAC as an entity or AC is not required to make any interpretations apart from the GAC members and any other individual.

One thing that I want to mention, we need not to have a parallel operation, and we need to cross-reference this issue which is under consideration, no matter were you to appreciate that, no problem. But the process is like this.

So think stage, GAC does not have any input on that until goes to the CCWG and finalized by CCWG ready for public comment. And after that, GAC members may comment if they wish, once everything is finalized totally and then goes to chartering organizations like GAC.

So we should be quite clear and not mix-up the situation.

Thank you.

MARK CARVELL:

Thank you. Thank you, Iran. Yes, okay, that's an appreciated clarification of the steps for us as a committee in its entirety

when we would be required to comment. But for the interim period, there's obviously the opportunity of individual GAC representatives to comment.

But, Thomas, yes, you wanted to come in on that?

CHAIR SCHNEIDER: Thank you. Well, I think just an additional clarification. Of course Iran is right when things are required, but it is not forbidden to communicate when it is not an obligation. So it's up to the GAC to decide at which point in time it would wish to communicate as a whole. Just that is not forbidden. It's up to the GAC to decide.

MARK CARVELL: Jorge, yes.

JORGE CANCIO: Thank you. Yes, as Thomas said, one thing is when we are required and the other thing is when we wish to make an input. And I guess there is no change in the situation, and that would also motivate the change in what we agreed in the communique of Hyderabad where we agreed in the language of the communique that we would, as a working -- as a working group, prepare a GAC input to the public consultation on the draft FOI

planned for next February. The only change is that it will be in late March probably.

Thank you.

MARK CARVELL:

Okay. Thanks, Jorge.

Did anybody else wish to comment or ask a question?

I don't see any hand. Okay.

So I'll proceed to go on to cover the next item of business of the Human Rights and International Law Working Group, which was an overview of the Council of Europe's report on applications for community-based new gTLDs. And here the purpose of the discussion in the working group was to consider the importance of the -- an effective regime for considering community-based new gTLD applications in the context of opportunities and challenges from a human rights perspective. So we weren't looking at the individual recommendations, which you recall we later did in full GAC plenary. For the purposes of the working group, we wanted a bit of perspective on the human rights aspects.

And for this discussion, we had the author, who was here in Copenhagen, Eve Salomon, to introduce and discuss this aspect,

this crucial context of why the work was done, in order to sort of help ground the committee's consideration of the recommendations at a later stage.

Eve has now left Copenhagen, but with us here at the top table we have Elvana Thaci from the Information Society department - - sometimes I say directorate by mistake -- department at the Council of Europe. So perhaps I'll invite Elvana to recount this particular discussion and invite questions and comments.

So Elvana. Thank you.

ELVANA THACI:

Thank you, Mark. And thank you to the GAC once more for having invited the Council of Europe to present this report to you.

The report was released before the ICANN 57 in Hyderabad, and it was presented in -- at this meeting of the GAC.

The report examined the community applications and in particular in the light of ICANN processes which address community objections and priority evaluation -- Community Priority Evaluation.

We examined these issues from a human rights perspective; in particular, the rights to freedom of expression and the right to

freedom of association, the principle of nondiscrimination, and due process.

The report also aims to contribute to the GNSO policy development process on community-based applications again from a human rights perspective.

On Saturday, we had a presentation of the conclusions of the report, the main findings of the report, and the recommendations. The overall conclusions of the report point to some weaknesses in the processes mentioned, which I just mentioned, especially community objections, processes, and Community Priority Evaluation where human rights might be affected.

Also, the report highlights that prioritization of communities is not sufficiently developed. The current guidelines in the Applicant Guidebook are not sufficient.

One of the items which was also debated in that session, but later on in the new gTLD session was the understanding of the notion of public interest which appears to be unclear. The types of individuals and groups that are considered to be protected by that notion are not -- are not clearly defined.

Also, the report recommended reassessment of the purpose of community-based application processes so that ICANN

processes, more broadly speaking, are supportive of values of plurality and diversity of -- of content on the Internet.

More specifically with regards to community objections and the process there, the report stresses that due process and quality control are needed to maximize the predictability of ICANN in its decisions. It underlines in particular the need for effective remedies, and in relation to this it says that there are no appeal mechanisms for community -- in the context of community objection procedures.

There is also a need for -- for measures and guidance to increase accountability, to reduce inconsistency, to avoid also impressions of unfairness, and to underline the intended purpose in the process of applications for community-based TLDs. The report also recommends reevaluation of the scoring system and points to the need to lower the bar or develop a new process for assessing community-based applications.

With particular regard to ICANN accountability mechanisms, the report again highlights that there is no effective appeal process to hold ICANN to account with regard to its reconsideration requests, with regard to independent review processes, and so on and so forth.

For the next -- possibly for the next round of applications for gTLDs, the report underlines the need for a revised system of

fair, reasonable, and non-discriminatory incentives on community TLDs so that the community of applicants can be taken on trust in order to deter potential gaming.

In a nutshell these are some of the key conclusions of that report which represented -- and there was a very constructive exchange of views with GAC members on those recommendations. Thank you.

MARK CARVELL:

Thank you, Elvana. So for the purposes of the report in the GAC communique, the report of the Human Rights and International Law Working Group, we will have a simple account of how there was a discussion of why the Council of Europe report is important in the context of opportunities and challenges in the human rights perspective. We will record the fact that we had that discussion in the communique.

At this point, I'll invite questions on that particular activity of the human rights, international law working group, if there are any or comments.

Iran, please. Yes, thank you.

IRAN:

Thank you. Some of the issues raised already in the questions in the new gTLD PDP, for instance, appeals process. It was mentioned that GAC currently there is not. But they mentioned that there is a need to have an appeal, but it doesn't matter. So no problem with the report. No problem.

But the issue is we are interested in this language of the communique, as we have discussed. The discussion was the Council of Europe did not ask support of recommendation because we're not in a position to go. They want that we invite the GNSO working group, or whatever you call them, to consider the matter and take necessary action as appropriate. That was what was discussed. I'm interested in the language of communique. People came to us and said whether we should say "invite" or whether we say "request," have no problem. But either of the two, either inviting or requesting to consider the matter and take necessary action as appropriate. That is the language that we are interested. We have no problem with the very bulky documents. And we're not in the position to go through recommendations one by one and to see which one are applicable, not applicable. That is a very substantive issue to be discussed. But that will be done at the level of the group which now are calling for that. Thank you.

MARK CARVELL:

Thank you, Iran. Obviously, we will come to consideration of the text with regard to reporting on the discussion and GAC plenary of the council. We report tomorrow, is it? For the purposes of this session, we're just looking at the consideration of the report by the Human Rights and International Law Working Group, just to make that distinction clear. Thank you for your comments. And we will take those into account when we formulate the communique text with regard to the consideration by the GAC plenary of the recommendations. Thank you.

Are there any other questions about the working group's consideration before I move on to the final reporting item, which are due now, which is that we had hoped to include in the working groups session a linkup with a representative of the U.N. working group on business and human rights, Anita Ramasastry, to discuss the applicability to ICANN of the U.N. guiding principles on business and human rights, what are commonly known as the Ruggie principles. Due to time and logistics, we weren't able to do that, to incorporate that link up where we would -- had hoped for Anita Ramasastry to provide an information exchange for the benefit of the whole working group. But we weren't able to do that.

However, later in the day we did manage to make a call to Anita, which Jorge and I participated in, along with Niels ten Oever from the subgroup and also members of the drafting group we

talked about earlier of the subgroup, two or three members. So it was a very small group. It wasn't a full working group session.

And the relevance here is to the considerations document, because the subgroup had been talking and discussing whether the Ruggie principles could be of use for the interpretation of the core value. And there were differences of opinion amongst members of the CCWG subgroup on human rights about that issue. We, as the working group, had planned to help inform the dialogue by creating this opportunity to have an input from a member of the U.N. working group.

However, as I say, we were able to do that, but outside the main meeting of the working group. It was a very useful first start of an exchange. The considerations document that the drafting group has been working on will have text about the Ruggie principles. So this exchange, actually, was very useful and timely for that purpose, but very much a first exchange. And we were able to take soundings from Anita on other stakeholder entities which had either adopted the Ruggie principles -- I think FIFA was named as one of those -- or are being considered. And a couple other entities are undertaking review of the Ruggie principles to see that.

So there was some opportunity to see how other international organizations with -- some with government participation, are

likewise looking at how the Ruggie principles could, actually, be a useful tool and source of advice for informing policy development to ensure that it is consistent with human rights, international human rights and commitments. So it was a useful first contact. And I think there will be a follow-up by the subgroup as a result of that. And I think we will, as a working group, look to consider how we might have further exchanges. We haven't taken a decision on that yet. We'll do that in consultation with members of the working group.

So I think it was a very useful first contact. Again, maybe Jorge wants to add a comment on the Ruggie principles.

JORGE CANCIO:

Thank you, Mark. Not so much on the Ruggie principles because that could go beyond the frame of this discussion.

But, as I understood it, Niels ten Oever, the rapporteur of the subgroup on human rights of the CCWG, will report back also to that subgroup on this first contact we have facilitated and will seek the opinion of that subgroup on the convenience or on the possibility of further contact with the U.N. working group.

MARK CARVELL:

Okay. Thanks, Jorge.

I think that pretty much wraps it up in terms of our current recent activities here in Copenhagen. But I invite any final comments or questions at this point, if anybody has -- Iran, please. Yes, thank you.

IRAN:

Yeah. I wish you good luck. Because currently it takes a few days, few hours to say there is no consensus to the applicability, suitability for interpretations of core values to using the guiding principles of business and human rights.

And I mentioned that there might be something and then at the end said that it should be balanced with the core value. And core value has priority. But I wish you good luck, if you can convince things. But I am not very optimistic that you can convince them, because we have discussed this principle one by one for hours and hours and hours. And then it was finally rejected. Thank you. I was in favor, but it was rejected by others. Thank you.

MARK CARVELL:

Yes. Thank you, Iran. These are very much exploratory consultations that we have initiated through facilitating the call from the working group. And inviting members of the subgroup

to join that. So it's very exploratory. It's not a matter of taking any position on the applicability of the Ruggie principles.

It's useful to know, from the perspective of a member of the U.N. working group, how, if not in their entirety, elements of the Ruggie principles could serve as a useful tool. I think you used that word "tool" as a sort of -- in terms of lack of resource. But we'll see. It's very exploratory, as I say, at this stage. Thank you. Unless there are any other comments, questions, suggestions? I'll hand back to Thomas. Thank you.

CHAIR SCHNEIDER:

Thank you. If there are no other comments or questions, I think we hand it over to the coffee break.

[Coffee break]