
JOHANNESBURG – GAC Human Rights and International Law Working Group Session

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MARK CARVELL:

Yes, thank you, Chair. Mark Carvell, one of the co-chairs of the Human Rights and International Law Working Group. We'll just get together in a minute or so and then we'll start promptly as we're running late.

Okay. I think we'll start. First of all to introduce your co-chairs. On my left is Milagros Castanon from Peru. And then just making himself comfortable with a cup of coffee and so on, Jorge Cancio, Switzerland. And myself, Mark Carvell, UK. We're the three co-chairs of this working group.

For those who are new, the objectives are set out in the terms of reference for the HRIL Working Group, Human Rights and International Law Working Group, are to consider any appropriate steps that ICANN could take to help ensure that its coordination of the domain name system is managed in a manner which respects human rights and relevant international law, and to cooperate with ICANN's advisory committees, supporting organizations and communities. And we specify in particular the cross-community work party on ICANN's

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corporate and social responsibility to respect human rights. And we have the chair of that work party with us here today, Niels ten Oever, I'll introduce him here in a minute. And thirdly, our objectives state we should participate in applicable ICANN work streams, policies, and studies to promote a shared understanding of human rights and international law. And of course there's a lot going on in that record under the Cross-Community Working Group on accountability. There's a human rights subgroup. And that has gone out to public comment on a Framework of Interpretation for the core value that is in the bylaws now on respect -- in ICANN's bylaws on respecting human rights. And we'll come on to that in a second with the help of Niels ten Oever, the chair of the subgroup dealing with that under the CCWG.

The agenda for this session is on the screen. It was included in the detailed GAC agenda, so I hope it's familiar to you. And we haven't got much time today, and especially as we're starting a bit late. So the principle issue for us to look at is -- is, indeed, the work of the human rights subgroup under the CCWG, and its drafting of a Framework of Interpretation for the -- and related considerations in respect of the core value on respecting human rights. And that's the first item.

We'll also touch on interaction that the co-chairs have had with the U.N. working group on -- on guiding principles on business

and human rights. We'll touch on that briefly, and then do a bit of a forward look. So that's the agenda for today's session.

So without further ado, unless my co-chairs want to add any comments -- no? At this stage? No? We're very democratic, so...

Okay; right. I think, then, I'll hand over to Niels ten Oever -- appreciate very much your finding time to join us here today -- to update us on the process for developing the Framework of Interpretation, which, as I mentioned earlier, has gone out to public comment. And amongst the respondees, the governments of Brazil, Switzerland, and the UK provided responses to that consultation which finished on the 16th of June, round about then.

So we've gone through a key step. So I really look now to Niels to update us on how things stand, what the -- the work ahead for the subgroup following the public consultation. And then perhaps also sort of outline the process beyond the subgroup at the time of Abu Dhabi meeting, and so on, so that we get a clear sense of timeline here.

So, Niels, many thanks. Over to you.

And I think we'll have the Framework of Interpretation on the screen, if Gulden can help out on that. Maybe it's coming up. Thank you.

NIELS TEN OEVER:

Honorable representatives, working group chairs, thank you very much for inviting me and welcoming me again to speak here in GAC Working Group on Human Rights and International Law.

I'm the rapporteur for the subgroup on human rights in the Cross-Community Working Group on enhancing ICANN accountability.

As you all know, during Work Stream 1 we were able to reach consensus on the core value on human rights that has been added to ICANN's bylaws. There was one provision, though, in these bylaws that the core values in the bylaws would only be activated once a Framework of Interpretation was developed in Work Stream 2. And we've been working hard, together with some of you present here, on exactly that topic.

On that, we also managed, in a fashion as we do here, to reach consensus on that Framework of Interpretation, and that has been up for public comments from May 5 up to June 16th.

We have received 11 comments; namely, from SSAC, At Large, the IPC, the NCSG, the business constituency, the registries, ISOC Venezuela, and individual comment by Shiva Konvar (phonetic)

next to the comments from Switzerland, Brazil, and the United Kingdom.

So the way forward for the subgroup is to await the staff summary of the comments, and then seek to recon- -- analyze and reconcile the comments with the Framework of Interpretation. Since we have representatives from Brazil, UK, and Switzerland here, it might be beneficial to ask them to elaborate a bit on their comments on the Framework of Interpretation from which we can all benefit.

So our way forward is to reconcile these comments, and once that's done, we hope to officially end our work and then wait until the other subgroups in the CCWG are also done with their work. And then subsequently there will be a public comment period on the interrelation of the recommendations of the different parts of the CCWG.

It seems that the subgroup on human rights is expected to be one of the earlier subgroups to finish their work. So while we have that -- that forum, that cross-community space, we might as well look into whether we can develop some best practices on how the -- how the different SOs and ACs could integrate the -- the core values in their work as is outlined in the Framework for Interpretation. So it will be up to every SO and AC to comply with the bylaw. But we might in a -- a cross-community fashion

be able to come up with a streamlined framework that the different SOs and ACs could subsequently consider.

So you are still very much invited to join the subgroup for both the analysis and perhaps the follow-up work that we will develop there. I'll stop here for now and see whether there are any questions or comments or whether perhaps Brazil, the U.K., and/or Switzerland would like to elaborate on their comments to the Framework of Interpretation.

MARK CARVELL:

Thank you, Niels. I wonder if you could just pick out the key elements of the draft Framework of Interpretation. I mean, it's on the screen and we can scroll through it quickly. Just especially for the benefit of newcomers. Would you be able to quickly run through the key elements? Not the entirety of the document, I hasten to add. Are you happy to do that? Just to get us all on the same page, if you like. And we note what you say about, you know, much further down the track, the GAC, as one of the ACs, will have to undertake a process to review the impact of the Framework of Interpretation on the GAC's own working methods, and that indeed will be an opportunity for this working group to assist the GAC in doing that. And I also endorse your message to GAC representatives to engage with the subgroup's work between now and Abu Dhabi in terms of

undertaking the incorporation or review of the comments received in the public comment period into finalizing the document. I think that's a message that all of the three co-chairs would endorse, that here's an opportunity for governments to contribute to finalizing the Framework of Interpretation. So look out for the working group page on the Web site. If you're not already a member, seek to join it, and then you can participate in its virtual meetings, teleconferences. You have to give a statement of interest. It's very straightforward process to join. If -- yeah, Milagros, do you want to say something?

MILAGROS CASTANON: Perhaps I could comment on the three comments that have been done to the Framework. And I prefer to do it in Spanish, if I may.

I have read all the contributions from Brazil, Switzerland, and the U.K., and I regret that Peru has not made a contribution on time. Because of reasons outside my control, I isn't able to have that input from Peru.

What I would like to highlight from the three contributions we received is that in the three cases there is a common thread. If I'm not mistaken, that common thread is the fact that there is a seemingly lack of clear mention to the link that should exist

between this issue of human rights and what we developed in the context of the United Nations. In some cases, there is a suggestion to explicitly mention certain conventions and international legal instruments. In other cases, suggestions refer to a more general broader reference to the entire legal framework pertaining to human rights used in the United Nations. Personally, I believe that the second option could be the most appropriate way of approaching this issue. Because I believe that in the first place, when you start linking instruments, you may fall into the trap of overlooking one instrument inadvertently and on the contrary, when you make reference to a corpus of legal instruments relating to human rights and the United Nations, you are taking a more holistic approach to this issue and at the same time that also reflects this idea of evolution incorporated in international law and specifically in human rights. Evolution that needs to -- this kind of evolution needs to be taken into account in ICANN and in all fora where we work on the basis of international law. International law is not just a set of static laws. It is a dynamic corpus of laws. And this is something that we need to take into account here. At the same time, there was a reference made to a phrase that had to do with applicable law. This is what we see in the ICANN bylaws. I received an explanation earlier this morning and there is a specific target or recipient for such phrase. In this case, we are talking about the countries with an international

convention or an international law is not automatically incorporated into its own national legal system. In the case of Peru, and in many other countries, when Peru adheres to an international convention, that legal instrument becomes a national regulation and a national law and it is of a higher order than the national law. So when we speak about applicable law or applicable rules, we are referring to those countries where this is not the case. I believe that we should also make that kind of differentiation when we rephrase this paradox. Thank you.

MARK CARVELL:

Thank you, Milagros. Well, we'll turn now to Niels to run through briefly the key elements of the draft framework, and possibly those two points about a holistic approach to referencing international law came up in the subgroup discussions and also the one about applicable law, if -- possibly. So maybe you want to pick up on Milagros' comments. But anyway, if you would like to just quickly run through the key elements of the draft, that would be very helpful, I think. Thank you.

NIELS TEN OEVER:

Thank you very much, co-chair. I'll quickly go through the Framework of Interpretation and the considerations document. The Framework of Interpretation takes little parts from the -- from the core value and adds an explanation on how they

should be interpreted. So it starts off with explaining that the human rights core value should not -- will not expand ICANN's scope or mission and that it needs to be balanced with other core values that ICANN has. Furthermore, when ICANN respects human rights, it should do so within its own mandate and not act as an -- as an entity that goes out to protect and enforce human rights since that is the obligation of states and not of non-states actors.

MARK CARVELL: Niels, do you want to refer to specific parts of the --

NIELS TEN OEVER: Oh, I'm scrolling through, I'm going down.

MARK CARVELL: You are? Okay.

NIELS TEN OEVER: I'm very sorry. I don't have scroll control.

MARK CARVELL: Maybe we could ask Gulden to go to the next page.

NIELS TEN OEVER:

Yes, next page, please. And I'm actually already two pages further. Sorry. Then subsequently, we refer to internationally recognized human rights and this might be hinting to one of the comments the representative of Peru made. We there refer to -- but not exclude, but not limit ourselves to, the Universal Declaration of Human Rights, the International Government on Civil and Political Rights, the International Government on Economic, Social, and Cultural Rights, the International Convention of Elimination of all Forms of Racial Discrimination, the Convention of Elimination of All Forms of Discrimination Against Women, the Convention of the Rights of Persons with Disabilities, the U.N. Declaration of the Rights of Indigenous People, and ILO's Declaration of Fundamental Principles and Rights at Work. However, it is also noted that none of these instruments has a direct application to ICANN because they only create obligations for states, but as was said, states are expected to embed human rights in international legislations, which ICANN's subsequently needs to comply by, but these standards could inform ICANN to understand what the standards should be.

When it comes to applicable law, we've had quite some discussion about that, and we came to the conclusion applicable law refers to the body of law that binds ICANN at any

given time in any given circumstance and in any relevant jurisdiction.

So there is no inclusion of exclusion or -- of specific countries and what they have done with the ratification of instruments. That differentiation is not made in the Framework of Interpretation or the considerations document.

So furthermore, the Framework of Interpretation restates that the core value shall not be interpreted to create an obligation for ICANN to go outside of its mission or beyond obligations found in applicable law and it does not obligate ICANN to enforce human rights obligations or human rights obligations of other parties against other parties. In the considerations document that follows, there is a reference to the U.N. guiding principles for business in human rights which do take account non-state actors. And even though we did not achieve consensus on it, it should be -- these should be used for the interpretation of the bylaw, it is said that they could help us guide or inform the process of implementation, and that is another international instrument that we're looking to inform us in the process that lies ahead of us.

The considerations document continues to say that the different SOs and ACs will need to develop their own processes to comply with the -- with the core value on human rights and that these

supporting organizations and advisory committees could consider defining and incorporating human rights impact assessments in their respective policy development process and the ways they devise their advice. And, of course, that human rights impact assessments should not consider human rights in isolation -- in isolation since human rights are universal, indivisible, interdependent, and interrelated. And I think that was the overview of the best of these two documents.

MARK CARVELL:

Great. Thank you very much, Niels. Perhaps at this point I can invite questions with regard to the draft, and indeed the process as described by Niels. I see Germany wanting the floor.

GERMANY:

Yes, thank you for the presentation. Excuse my ignorance. You cited quite a lot of resolutions and documents from the U.N. on human rights. I wonder whether also the -- the text of the right to privacy in the digital age is cited in these papers and reflected because as -- as I understand, it's an important part of the discussions within the U.N. and part of the human rights framework. Thank you.

NIELS TEN OEVER: We have not added resolutions from the human rights council or other instruments from the -- from the U.N. except for those that were mentioned, but it's definitely a useful input. Even though I'm not sure whether we could still add that to the document at this moment, but if you would participate in the subgroup, I would definitely invite you to make that point there.

MARK CARVELL: Okay. I see Iran. Is anybody else wanting the floor, by the way? Nope? No queue. Okay. Please, Iran. Yes, thank you.

IRAN: Thank you. As Niels mentioned, we have discussed all of these issues at length, hours and hours and hours, and that was the best we could include in the output. However, as Niels mentioned, all this comment will be considered and we try to see whether we could add something if we have agreement of the group. If not, we cannot do anything. That is that. This is a very -- among the very difficult part of this Work Stream 2. The first one was jurisdiction and the second one was the Framework of Interpretation of human rights. So these are very, very critical and sensitive issues. Nevertheless, comments are respected and we will take into consideration in the subgroup whether and to what extent we could take that into account. Thank you.

MARK CARVELL:

Thank you, Iran. Did you want to comment, Niels, or -- no. Okay. Thank you. Just so you know, I'm sure you are probably well aware, all 11 public comments are accessible on the ICANN Web site. You just go to -- do a search on ICANN public comments. You then get all the consultations, including those that are finished, and then you can link into comments received. It's under comments forum, I think. And then you'll be able to open up all the comments.

Niels suggested quickly summarizing the three governments' comments. I'll just say very briefly that we very much supported the direction taken by the subgroup in formulating the draft. This is very key to ICANN's position as the global coordinate for the Domain Name System and complements the work of the GAC in terms of public interest issues relating to human rights and fairness and opportunities and so on. So we made that point in our response to the public comments period, and then we really focused on applicability of the second pillar of the U.N. guiding principles for business and human rights, which is if you're familiar with those principles, they set out what our corporate responsibilities, and, of course, the -- the first pillar was state responsibilities in respect to business and human rights. The second pillar is about corporate responsibilities. And we see a direct read across to ICANN as essentially a private

sector-led organization. Multistakeholder, unique in its character and so on, but the U.K. is firmly of the view that there is direct relevance within the guiding principles of the U.N. to the work of ICANN. So if you go to the U.K. comment, you'll see that argument set out in more detail. And with the added aspiration that ICANN become a sort of -- a beacon for applicability of the U.N. guiding principles more widely.

Switzerland, would you like to -- Jorge, would you like to comment on the Swiss response? And maybe Brazil may wish to do so? Yeah, thank you. We'll follow on with Brazil, first. Jorge. Yes. Thank you.

JORGE CANCIO:

Thank you so much, Mark, and hello, everybody, again. I see that our chair is very vigilant with the time and as we only have five minutes left for the session, I would refer to the comments we circulated to the working group on human rights and international law. Basically the bottom line of the comment is that we would very much appreciate a strong alignment with the U.N. guiding principles for business and human rights, although, of course, we appreciate a lot the -- the extensive work and all the efforts of the subgroup where we also take part in it. So I think perhaps Brazil wants to enter in.

BRAZIL:

Thank you, Chair. Thank you, Niels, for, I think, putting some effort to come out with this result, which is non-negligible.

Brazil basically shared a couple of the concerns expressed by Switzerland in its commentary, and the concerns were that perhaps the framework, as it appears, might not so much foster protection of human rights but hinder in some aspects. But the bottom line I think of Brazil's comment is pretty much in line with the description made by the representative of Peru. And the suggestions that we made, suggested amendments eventually, to be taken into account. I'm not sure whether there's time for that, to perhaps mitigate some of the concerns we have expressed. And I think the main concern is -- in the amendments intended to address this concern is to ensure that the Framework of Interpretation will not eventually freeze the content of the core value as it might be applicable to ICANN businesses. Particularly in this area where it's national (indiscernible) in constant evolution. Thank you.

MARK CARVELL:

Thank you, Brazil. I don't know in Niels wants to comment ahead of the subgroup reviewing all of the comments on that. Did you want to saying at this point?

NIELS TEN OEVER: I'd like to thank again all the representatives who have submitted comments but also the representatives that might still have other ideas on how we can make this better. And I would wholeheartedly invite you again to take part in the work because that might potentially improve the mileage of your -- of your comment. And then we could really ensure that we really understand what you mean with it. So the -- they're only once a week, one hour, and it will be really great to -- to have you all there.

MARK CARVELL: That hour may vary, depending on where you are and so on. But anyway, yes, it's very important to participate as much as possible. I see Indonesia calling for the floor and then Iran. So we're running out of time. Five minutes. I just want to report very briefly on the contact we've had with U.N. working group, but please, Indonesia, yes. Go ahead.

INDONESIA: Thank you. Just small question. In your -- in your meetings, you also discussed about the and consider discussion on practicals activities in human rights, for example. Personal data. When you use WHOIS lookup, you get the data of the person, and so on, and so on, while now we are talking about possible personal

data should be kept -- you know, should be kept from public, and so on. You know, the kind of things of practicalities.

Thank you.

MARK CARVELL: Thank you. Did you want to react quickly, Niels? Thank you.

NIELS TEN OEVER: At this moment we're looking at interpretation and not so much implementation. So...

MARK CARVELL: Very clear. Thank you.

Iran, please.

IRAN: Yes. Just to add something that Niels mentioned. We in our participation, Iran participation, the GAC member participation, we tried our best to follow what or were at the table from UK and Brazil and Switzerland to put as much as possible guiding principles of the human rights of U.N., but we were not successful because they were over people that didn't like that at all.

So the best thing is, as Niels mentioned, those people actively participate in the group and try to convince others and put some hand to our hands and see whether we can do that. But I have some -- some doubt that you will be successful.

Thank you.

MARK CARVELL:

Thank you, Iran, for underlining that message about engagement. That's very -- Appreciate that very much.

I see no other calls for the floor, so I'll just move quickly on to the second item, which was, indeed, our outreach to the U.N. working group on guiding principles for business and human rights, which was undertaken by the co-chairs. We made contact with Anita Ramasastry, who is a member of the U.N. working group. They had a meeting recently, in Geneva I think it was, and we've had two conversations with her. There is a lot of interest in the working group on what's happening here at ICANN. There was a possibility that they might actually provide a response to the public comment period. They haven't done that, but that doesn't detract from the level of their interest. And we will maintain that contact with Anita, who is underlining what I said earlier about the potential applicability of the second pillar in the U.N. Guiding Principles to ICANN in our -- in our discussions. And we may well see the working group contribute

to the work of the subgroup in developing that argument further.

So we will stay in contact with Anita Ramasastry, and possibly we may be able to involve her in the meeting in Abu Dhabi. We did have an invitation for her to contribute to this session, but she's actually traveling today, wasn't able to do that remotely, either. So that was -- But we will continue to be in contact.

So that's our outreach effort. And Anita realizes that it will be a valuable opportunity for her as a representative working group to engage fully with all members of this working group. So we hope that will be realized, as I say, in Abu Dhabi.

So that's the situation there.

I'll turn to my co-chairs for any final comments in the 30 seconds or so we've got left. Although we did start late, but still. Anyway.

Jorge, did you want to say a few words?

JORGE CANCIO:

Thank you so much, Mark. Just two comments. First is that there is an opportunity to engage with the subgroup and with the CCWG on this very important topic. So there's time on that. And later on, when all the Work Stream 2 recommendations are finished, this will come again to the GAC as one of the chartering

organizations, but only for approval. So if we want to really change things or improve things, now it's the time, still, to engage with the subgroup which is led by -- by Niels.

Thank you.

MARK CARVELL: Yes. Thank you, Jorge. Now is the time.

Milagros, did you want to say anything more?

MILAGROS CASTANON: Bye.

MARK CARVELL: Bye. Adios. Okay. Thank you.

Well, it remains for me to thank very much Niels for joining us today. It's a great privilege to have the chair of the subgroup in charge of such an important work stream in enhancing ICANN's accountability and transparency. It's great to have you here, and we will stay in contact, I'm sure, and look forward to the outcome of the subgroup's deliberations, and we'll all participate in that as much as we can. And I also underline the message again: Get involved.

Thank you very much. We'll finish there. Thank you very much for your attention.

I think I hand the mic now to our chair. Thomas, if you're ready. Yeah? Thanks.

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