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**HUMAN RIGHTS RHETORIC IN GLOBAL  
INTERNET GOVERNANCE: NEW ICANN  
BYLAW ON HUMAN RIGHTS**

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## HUMAN RIGHTS RHETORIC IN GLOBAL INTERNET GOVERNANCE: NEW ICANN BYLAW ON HUMAN RIGHTS

Monika Zalnieriute\*

### ABSTRACT

*As part of a significant institutional reform in global governance of the Internet, ICANN – an internationally organised multi-stakeholder body that secures the operation of the Domain Name System (DNS) globally – has recently included a Core Value of ‘respect for internationally recognised human rights’ in its Bylaws. Since the DNS is integral for navigating and browsing the Internet, policies governing its operation have enormous human rights implications at the global level. After more than three years of multi-stakeholder deliberations over the appropriate Framework of Interpretation (FOI) for the new*

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*Core Value, ICANN Board has finally approved it in November 2019, taking one crucial step forward towards the implementation of its newly pronounced human rights aspirations. This article critically examines ICANN's latest human rights rhetoric and argues that the new aspirations in the Bylaws are drafted in a way that they carry little, if any, legal weight. I will further show that the new aspirations in the Bylaws are much weaker than the quasi-constitutional, self-imposed commitments in ICANN's founding documents – the Articles of Incorporation. ICANN has proved to be reluctant to comply with those self-imposed commitments in the past; and I argue that it is, therefore, unlikely to convert its novel human rights rhetoric into practice. This raises questions about the extent of its commitment to human rights values, and whether the new Core Value amounts to little more than a veneer intended to bolster ICANN's public image and confidence in light of the ongoing institutional reforms in Internet Governance.*

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## 1. INTRODUCTION

Numerous political and economic battles with wide-ranging human rights implications – such as transnational governmental surveillance and censorship, Internet shutdowns or blackouts during political uprisings, and economic concerns around copyright and trademarks – are being fought by governments and private actors behind the scenes of Internet Governance by manipulating critical Internet infrastructure.<sup>1</sup> One of the core Internet Governance institutions, the Internet Corporation for Assigned Names and Numbers (‘ICANN’), which coordinates the Domain Name System (‘DNS’) globally, has recently embraced new aspirations for human rights as part of its efforts to enhance its legitimacy and accountability under the ongoing institutional reform, known as the IANA transition.<sup>2</sup> ICANN’s

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<sup>1</sup> On co-optation of critical internet resources for political and economic purposes, see generally DeNardis, Laura, *Hidden levers of Internet control: An infrastructure-based theory of Internet governance*, INFORMATION, COMMUNICATION & SOCIETY 15.5 (2012): 720-738; Bradshaw, Samantha, and Laura DeNardis, *The politicization of the Internet’s Domain Name System: Implications for Internet security, universality, and freedom*, NEW MEDIA & SOCIETY (2016), Vol 20(1), pp. 332 -250.

<sup>2</sup> It is beyond the scope of this article to discuss the IANA transition in detail (IANA – Internet Assigned Numbers Authority), for a brief overview, see Raustiala, Kal, *Governing the Internet* (July 26, 2016). 110 AJIL 491 (2016). See also Snyder, Joel, Konstantinos Komaitis, and Andrei Robachevsky, *The History of IANA: An Extended Timeline with Citations and Commentary*, INTERNET SOCIETY 2017, available at <https://www.yumpu.com/en/document/view/56851186/the-history-of-iana-an-extended-timeline-with-citations-and-commentary/12>. For a latest overview of ICANN’s efforts to enhance its legitimacy and accountability, see Hans Morten Haugen, *The crucial and contested global public good:*

newly adopted Core Value of ‘respecting internationally recognized human rights’ in its revised Bylaws<sup>3</sup> is soon to come into effect, after more than three years of multi-stakeholder deliberations over the appropriate Framework of Interpretation (hereinafter the ‘FOI’).<sup>4</sup> ICANN Board has finally approved the FOI in November 2019, taking one crucial step forward towards the implementation of its newly pronounced aspirations.<sup>5</sup>

This development is significant because of the global scope of the human rights implications stemming from ICANN’s policy-making, as the DNS - which ICANN oversees - represents one of the very few centralised points of control over the Internet,

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*principles and goals in global internet governance*, INTERNET POLICY REVIEW, 9(1). (2020) DOI: 10.14763/2020.1.1447.

<sup>3</sup> Article 1.2.b(vii) of the ICANN Bylaws, as amended on the 1<sup>st</sup> of October 2016, <https://www.icann.org/resources/pages/governance/bylaws-en>, visited 24 January 2020 (hereinafter ‘HR Bylaw’), which reads: ‘Subject to the limitations set forth in Section 27.2, within the scope of its Mission and other Core Values, respecting internationally recognized human rights as required by applicable law. This 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. This Core Value does not obligate ICANN to enforce its human rights obligations, or the human rights obligations of other parties, against other parties.’

<sup>4</sup> ICANN CROSS-COMMUNITY WORKING GROUP ON ACCOUNTABILITY (“CCWG-ACCOUNTABILITY”), PROPOSED FRAMEWORK OF INTERPRETATION AND CONSIDERATION CONCERNING ICANN’S HUMAN RIGHTS BYLAW (2017), <https://perma.cc/L29U-P3ZP> (hereinafter ‘FOI’). The Framework was developed by a sub-team working under the ‘Accountability package’ Work Stream 2, and approved by all supporting organizations and Governmental Advisory Committee in October 2018 in ICANN meeting in Barcelona. For adoption of the framework (as part of CCWG-Accountability’s Work Stream 2 Final Report) by the ICANN Board, see *Approved Board Resolutions*, ICANN (Nov. 7, 2019), <https://perma.cc/GQ7L-TZ3H>.

<sup>5</sup> ICANN Board approved the FOI, as part of CCWG-Accountability’s Work Stream 2 Final Report, see *Approved Board Resolutions*, ICANN (Nov. 7, 2019), <https://perma.cc/GQ7L-TZ3H>.

which is otherwise a decentralised ‘network of networks.’<sup>6</sup> DNS matches Internet protocol (IP) addresses (think numerical labels, like 172.16.254.1) to human friendly, easy to remember domain names such as, for example, *google.com* or *amnesty.org*. The economic and cultural importance of DNS is well illustrated by recent disputes between the Brazilian and Peruvian governments and the U.S. e-commerce company Amazon, Inc., over the *.amazon* top-level domain name.<sup>7</sup> Both governments and private actors have used DNS for enforcing their interests globally. For instance, in 1998, ICANN developed an international legal framework for resolving disputes between trademark owners and domain name holders, known as the Uniform Dispute Resolution Policy (UDRP).<sup>8</sup> Despite its informal roots at ICANN, the

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<sup>6</sup> Article 3 of the ICANN Articles of Incorporation stipulates that ICANN’s mission is: “(i) [C]oordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol (“IP”) address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system (“DNS”), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv).” Additionally, the ICANN Strategic Plan of 2004-2006 states: “The mission of The Internet Corporation for Assigned Names and Numbers (‘ICANN’) is to coordinate, at the overall level, the global Internet’s systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems.” ‘Network of networks’ is a widespread reference to the Internet, see, e.g., OXFORD DICTIONARY OF ENGLISH LANGUAGE, ‘Internet’, <http://www.oed.com/view/Entry/248411?rskey=EcsKli&result=1#eid>, visited 31/01/2020.

<sup>7</sup> See Kieren McCarthy, *Jeff Bezos Finally Gets .Amazon After DNS Overlord ICANN Runs out of Excuses to Delay Decision Any Further*, THE REGISTER, <https://perma.cc/2NQE-U4XL> (last visited Dec. 11, 2019); see also Patricia Vargas-Leon & Andreas Kuehn, *The Battle for Critical Internet Resources: South America vs. Amazon. com, Inc., 7 L., ST., & TELECOMM. REV.* 37 (2015).

<sup>8</sup> *Uniform Domain Name Dispute Resolution Policy*, ICANN, <https://www.icann.org/resources/pages/help/dndr/udrp-en>.

UDRP secures economic interests of the trademark owners through a mandatory binding policy on domain name registrants.<sup>9</sup> Recent scholarship also argued that ICANN is creeping into online content regulation undermining free speech in advocating for copyright protection.<sup>10</sup> ICANN has also created the WHOIS policy, mandating the collection of personal information from anyone in the world wishing to register a domain name.<sup>11</sup> Transnational private regulatory regimes, like the UDRP and WHOIS, touch upon important public policy issues, such Internet censorship, data protection and privacy, surveillance, or intellectual property. ICANN's aspirations for human rights and its relationship with human rights law thus become significant.

This relationship, as I will explain, is complicated not least because ICANN is not a state actor or intergovernmental body, it is organized as multi-stakeholder body, and registered as a private organization in California, USA. The role of non-state actors in protection of human rights in the digital era remain unclear: numerous soft law pronouncements and multi-stakeholder initiatives exist,<sup>12</sup> but efforts to establish legally

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<sup>9</sup> For more on the UDRP, see Monika Zalnieriute, *Reinvigorating Human Rights in Internet Governance: The UDRP Procedure Through the Lens of International Human Rights Principles*, 21 COLUMBIA JOURNAL OF LAW AND THE ARTS, (2020), 101; Monika Zalnieriute, *Beyond the Governance Gap in International Domain Name Law: Bringing the UDRP in Line with Internationally Recognized Human Rights*, 56 STANFORD J. INT'L L. (forthcoming 2020).

<sup>10</sup> Annemarie Bridy, *Notice and Takedown in the Domain Name System: ICANN's Ambivalent Drift into Online Content Regulation*, 74 WASH. & LEE L. REV. 1345 (2017).

<sup>11</sup> See ICANN website on WHOIS, <https://whois.icann.org/en>. For more on WHOIS, see GARTH O. BRUEN, WHOIS RUNNING THE INTERNET: PROTOCOL, POLICY, AND PRIVACY (2015); Milton Mueller & Mawaki Chango, *Disrupting Global Governance: The Internet WHOIS Service, ICANN, and Privacy*, 5 J. INFO. TECH. & POL. 303 (2008).

<sup>12</sup> For soft law pronouncements, see, e.g., U.N. Hum. Rts. Council, Guiding Principles on Business and Human Rights: Implementing the United Nations

binding obligations for private actors on international level have not materialized into a treaty since the early discussion in the 1970.<sup>13</sup> Ever increasing power of non-states actors over economic, social and political affairs, and regularly resurfacing scandals about misuse of our data, voter manipulation led many governments, academics, and civil society to reconsider the regulation and human rights duties of private actors.<sup>14</sup>

These discussions have attracted conflicting opinions: some argue that voluntary commitments to human rights by private

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“Protect, Respect, and Remedy” Framework, U.N. Doc. A/HRC/17/31 (2011),

[www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf) [hereinafter “UN Guiding Principles”]; *OECD Guidelines for Multinational Enterprises*, <http://mneguidelines.oecd.org/text>. For multi-stakeholder initiatives, see, e.g., U.N. Global Compact, <https://www.unglobalcompact.org>. Internet governance has not been an exception to the soft law and voluntary initiatives trend, with numerous voluntary multi-stakeholder initiatives, see, e.g., Global Network Initiative (GNI), [www.globalnetworkinitiative.org](http://www.globalnetworkinitiative.org); Ranking Digital Rights, [www.rankingdigitalrights.org](http://www.rankingdigitalrights.org).

<sup>13</sup> Earliest attempts started with the Commission on Transnational Corporations and the United Nations Centre on Transnational Corporations (UNCTNC) were established in 1974; the U.N., *Draft Code on Transnational Corporations* in UNCTC, TRANSNATIONAL CORPORATIONS, SERVICES AND THE URUGUAY ROUND, Annex IV at 231, was presented in 1990. For history of the controversy of the issue at the U.N., see KHALIL HAMDANI & LORAIN RUFFING, UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS: CORPORATE CONDUCT AND THE PUBLIC INTEREST (2015).

<sup>14</sup> See, e.g., European Commission Press Release IP/18/1746, Tackling Disinformation Online: Expert Group Advocates for More Transparency Among Online Platforms (Mar. 11, 2018), [http://europa.eu/rapid/press-release\\_IP-18-1746\\_en.htm](http://europa.eu/rapid/press-release_IP-18-1746_en.htm). Further examples include the United Nations Internet Governance Dynamic Coalition on Platform Responsibility (DCPR), which was formed and is a multi-stakeholder group fostering a cooperative analysis of online platforms’ responsibility to respect human rights, see the outcome document by LUCA BELLI & NICOLO ZINGALES, PLATFORM REGULATIONS: HOW PLATFORMS ARE REGULATED, AND HOW REGULATE US? UNITED NATIONS INTERNET GOVERNANCE FORUM (2017).

Internet actors suffice,<sup>15</sup> while others are unconvinced in light of the information about the complicity of private actors in mass-surveillance and voter manipulation programmes, as revealed by Edward Snowden revelations and the more recent Cambridge Analytica scandal.<sup>16</sup> Constitutional lawyers and the human rights advocates have traditionally focused on the limits of power by nation-states, and not private organizations.<sup>17</sup> A strand of scholarship and activists, these days known as ‘business and human rights’ movement, started confronting non-states actors for their impact on exercise of human rights.<sup>18</sup> Because business a human rights movement paid most of its attention to the global production chains, modern slavery, trafficking and exploitation,<sup>19</sup> a distinct, yet related movement on ‘digital rights’ have emerged, which focus on the substantial policy and de facto standard setting power by private actors in the information policy, such as Internet platforms and informal Internet policy-making bodies. Such movement has long

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<sup>15</sup> See, e.g., NICOLAS SUZOR, *LAWLESS: THE SECRET RULES THAT GOVERN OUR DIGITAL LIVES*. CAMBRIDGE UNIVERSITY PRESS (2019); Erika George, *Corporate Social Responsibility and Social Media Corporations: Incorporating Human Rights Through Rankings, Self-Regulation and Shareholder Resolutions*, 28 DUKE J. COMP. & INT’L L. 521, 538 (2018); REBECCA MACKINNON, *CONSENT OF THE NETWORKED: THE WORLD-WIDE STRUGGLE FOR INTERNET FREEDOM* (2012). But cf. Ian Brown, *Internet Self-Regulation and Fundamental Rights*, 1 INDEX ON CENSORSHIP 98 (2010).

<sup>16</sup> On Cambridge Analytica, see original source, Cadwalladr, Carole, and Emma Graham-Harrison. *Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach*, THE GUARDIAN 17 (2018): 22.

<sup>17</sup> See, e.g., John Knox, *Horizontal Human Rights Law*, 102 AM. J. INT’L L. 1 (2008).

<sup>18</sup> For an overview of the movement and research agenda, see Surya, D. E. V. A., et al. *Business and Human Rights Scholarship: Past Trends and Future Directions*, BUSINESS AND HUMAN RIGHTS JOURNAL 4.2 (2019): 201-21; Wettstein, Florian, et al, *International business and human rights: A research agenda*, JOURNAL OF WORLD BUSINESS 54.1 (2019): 54-65.

<sup>19</sup> Justine Nolan and Martijn Boersma, *Addressing Modern Slavery* (UNSW Press 2019).is a good example of these latest efforts.

tradition, and is known as ‘digital constitutionalism’.<sup>20</sup> Despite ICANN’s enormous power and policy-making capacity with global implications, its problematic relationship with human rights has been often overlooked by digital constitutionalists (let alone business and human rights scholars) who are often preoccupied with the role of Internet platforms such as Facebook or Google.<sup>21</sup>

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<sup>20</sup> “Digital Constitutionalism” is defined as the “constellation of initiatives that have sought to articulate a set of political rights, governance norms, and limitations on the exercise of power on the Internet.” See Lex Gill, Dennis Redeker & Urs Gasser, Berkman Klein Ctr. for Internet & Soc’y, *Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights* at 2 (2015). For an overview of digital constitutionalist efforts, see Kinfe Michael Yilma, *Digital Privacy and Virtues of Multilateral Digital Constitutionalism—Preliminary Thoughts*, 25 INT’L J.L. & INFO. TECH. 115 (2017).

<sup>21</sup> For exceptions, see Monika Zalnieriute, *From Human Rights Aspirations to Enforceable Obligations by Non-State Actors in the Digital Age: The Case of Internet Governance and ICANN*, 21 YALE J. L. & TECH. 278–335 (2019); Monika Zalnieriute, *Reinvigorating Human Rights in Internet Governance: The UDRP Procedure Through the Lens of International Human Rights Principles*, 21 COLUMBIA JOURNAL OF LAW AND THE ARTS, (2020), 101. Digital rights discourse largely focuses on freedom of expression and privacy responsibilities of Internet Platforms (see, e.g., Suzor, Nicolas (2018) *Digital constitutionalism: Using the rule of law to evaluate the legitimacy of governance by platforms*, SOCIAL MEDIA + SOCIETY, 4(3), pp. 1-11; Luca Belli, Nicolo Zingales (eds), PLATFORM REGULATIONS: HOW PLATFORMS ARE REGULATED, AND HOW REGULATE US? (United Nations Internet Governance Forum, December 2017, Geneva). For civil society and corporate initiatives on digital rights, see, e.g., GLOBAL NETWORK INITIATIVE (GNI) [www.globalnetworkinitiative.org](http://www.globalnetworkinitiative.org); RANKING DIGITAL RIGHTS [www.rankingdigitalrights.org](http://www.rankingdigitalrights.org). Business and human rights literature just recently started paying attention to the ‘governance gaps’ in regulation of the Internet, but has been limited to Internet platforms and information intermediaries, see, e.g., – George, Erika, *Corporate Social Responsibility and Social Media Corporations: Incorporating Human Rights Through Rankings, Self-Regulation and Shareholder Resolutions*, DUKE J. COMP. & INT’L L. 28 (2017): 521.

This article contributes to the business and human rights, and digital constitutionalist scholarship by examining ICANN's aspirations for human rights in its updated Bylaws and the legal obligations ICANN has to uphold them. It is not my purpose to scrutinise specific ICANN policies from a human rights perspective here – many of them seem to conflict with internationally recognized human rights norms, and other scholarship has detailed them.<sup>22</sup> Instead, this article zooms in to the new human rights aspirations by ICANN, and, by critically examining their wording in the context of international human rights law, aims to assess their (legal) credibility. I argue that the new ICANN Core Value on human rights, as well as the accompanying Framework of Interpretation, are formulated using tenuous and legally fuzzy language and serves to illustrate the wider disconnect between human rights rhetoric and practice by private actors. While ICANN has recently added the human rights Core Value to its updated Bylaws, it has proved to be unwilling to implement and enforce the self-imposed, quasi-constitutional commitments in its Articles of Incorporation during the 20 years of its existence.<sup>23</sup> This raises questions about whether the new human rights Core Value amounts to little more

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<sup>22</sup> For a general overview of how human rights interact with and may be undermined by ICANN policies, see Monika Zalnieriute and Schneider Thomas, *ICANN's procedures and policies in the light of human rights, fundamental freedoms and democratic values*, COUNCIL OF EUROPE DGI (2014) 12. For a detailed analysis, how the UDRP (which is one of the main of ICANN's policies) impacts on the international human rights norms, see Monika Zalnieriute, *Reinvigorating Human Rights in Internet Governance: The UDRP Procedure Through the Lens of International Human Rights Principles*, 21 COLUMBIA JOURNAL OF LAW AND THE ARTS, (2020), 101; See Monika Zalnieriute, *Beyond the Governance Gap in International Domain Name Law: Bringing the UDRP in Line with Internationally Recognized Human Rights*, 56 STANFORD J. INT'L L. (forthcoming 2020).

<sup>23</sup> Articles of Incorporation for Internet Corporation for Assigned Names and Numbers, ICANN (9 August, 2016), <https://www.icann.org/resources/pages/governance/articles-en>, visited 03/02/2020.

than a veneer intended to strengthen public confidence in ICANN and bolster its public image in light of the ongoing IANA transition institutional reforms in Internet Governance.

## 2. ICANN AND HUMAN RIGHTS

ICANN is a private actor, managing a critical Internet resource, the DNS, which matches computer addresses to human-friendly domain names. Because the DNS is integral for navigating the Internet, human rights implications of the DNS are important for their enormous scope and global reach. The wide implications of DNS and the cultural, strategic and economic importance of domain names is illustrated by substantial litigation,<sup>24</sup> legislative action,<sup>25</sup> and scholarly and civil society debate<sup>26</sup> over the domain names. And also by recent disputes between the Brazilian and Peruvian governments and the U.S. e-commerce

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24. For famous examples of litigation in the US, see, e.g., *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1319 (9th Cir. 1998); *Shields v. Zuccarini*, 254 F.3d 476, 481 (3d Cir. 2001).

25. For example, in the USA, the U.S. Congress amended the *Lanham Act* to include the Anti-Cybersquatting Consumer Protection Act in 1999, which created a cause of action in federal courts for bad faith registration of a domain name containing a protected trademark. See 15 U.S.C. § 1125 (2012).

26. For examples of the civil society debate surrounding domain-name disputes, see the work of IP-Justice and the Noncommercial Users Constituency within ICANN. See IP JUSTICE, <https://perma.cc/6W5B-M59Y> (last visited Nov. 26, 2019); NONCOMMERCIAL USERS CONSTITUENCY, <https://perma.cc/YN9J-BVN3> (last visited Nov. 26, 2019), scholarly debate started with early literature on ICANN and its policies, see, e.g., A. Michael Froomkin, *ICANN's "Uniform Dispute Resolution Policy"—Causes and (Partial) Cures*, 67 BROOKLYN L. REV. 605, 651–78 (2002); DAVID LINDSAY, *INTERNATIONAL DOMAIN NAME LAW: ICANN AND THE UDRP* (2007); KONSTANTINOS KOMAITIS, *THE CURRENT STATE OF DOMAIN NAME REGULATION: DOMAIN NAMES AS SECOND-CLASS CITIZENS IN A MARK-DOMINATED WORLD* (2010).

company Amazon, Inc., over the *.amazon* top-level domain name show that coordination of the DNS ongoing institutional reforms of ICANN therefore entails important implications for many areas of international law and Internet governance.<sup>27</sup>

ICANN was established in 1998 when it was registered in California as an independent, private non-profit corporation to manage the coordination of the DNS under the supervision of the US Government.<sup>28</sup> Despite ICANN's formal status of a private corporation, it is widely viewed as having an important global public dimension as the body responsible for the 'governance of an intrinsically international resource of immense importance to global communications and economies.'<sup>29</sup> Since its inception, ICANN has been operating in accordance with a 'multistakeholder' model of Internet Governance, which relies on public participation and

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27. See Kieren McCarthy, *Jeff Bezos Finally Gets .Amazon After DNS Overlord ICANN Runs out of Excuses to Delay Decision Any Further*, THE REGISTER, <https://perma.cc/2NQE-U4XL> (last visited Dec. 11, 2019); see also Patricia Vargas-Leon & Andreas Kuehn, *The Battle for Critical Internet Resources: South America vs. Amazon. com, Inc.*, 7 L., ST., & TELECOMM. REV. 37 (2015).

<sup>28</sup> For a detailed history of ICANN, see MUELLER, MILTON RULING THE ROOT (MIT press 2002). For special US role, see Cogburn, D. L., Mueller, M., McKnight, L., Klein, H., & Mathiason, J. (2005). *The US role in global internet governance*, IEEE COMMUNICATIONS MAGAZINE, 43(12), 12-14.

<sup>29</sup> *ICM Registry v ICANN, Declaration of 19 February 2010*, available at <https://www.icann.org/en/system/files/files/-panel-declaration-19feb10-en.pdf>, para. 58, citing J. Goldsmith Expert Report, paras. 15-16. *ICM Registry v ICANN* 2010, para. 140. The declaration is the outcome of the Independent Review Proceedings filed in accordance with Article IV, section 3 of the ICANN Bylaws, all relevant submissions and arbitration declaration are available at <https://www.icann.org/resources/pages/icm-v-icann-2012-02-25-en>, visited 20/03/2019.

engagement of policy advisory groups, that range from governments to business and civil society organisations.<sup>30</sup>

Following the Snowden revelations in 2013, and the increasing distrust of the US government by important geopolitical players, such as China and Russia, but also its allies in the EU and Latin America, in 2016 the US government decided to cease its supervision of ICANN.<sup>31</sup> The ongoing transition of ICANN's accountability from the US government to a 'global multistakeholder community' could be seen as the climax of a long history of controversy over US government control and supervision over DNS administration.<sup>32</sup> As part of these institutional reforms, ICANN has updated its Bylaws with a new 'Core Value' of 'respecting internationally recognized human rights as required by applicable law' within its scope of mission.<sup>33</sup> In particular, Section 1.2.(b)(viii) of *Bylaws for Internet Corporation for Assigned Names and Numbers*, adopted on 27 May 2016, reads:

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<sup>30</sup> Epstein, Dmitry, and Brandie M. Nonnecke, *Multistakeholderism in Praxis: The Case of the Regional and National Internet Governance Forum (IGF) Initiatives*, POLICY & INTERNET 8.2 (2016): 148-173; Hofmann, Jeanette, *Multi-stakeholderism in Internet governance: putting a fiction into practice*, JOURNAL OF CYBER POLICY 1.1 (2016): 29-49.

<sup>31</sup> See press release by the NTIA, 'NTIA Finds IANA Stewardship Transition Proposal Meets Criteria to Complete Privatization,' <http://www.ntia.doc.gov/press-release/2016/iana-stewardship-transition-proposal-meets-criteria-complete-privatization>, visited 30/01/2020. ICANN's activities (including IANA) have been previously supervised by the US government under the U.S. Department of Commerce, Award/Contract, No. SA1301 -12-CN-0035, October 1, 2012, [https://www.ntia.doc.gov/files/ntia/publications/sf\\_26\\_pg\\_1-2-final\\_award\\_and\\_sacs.pdf](https://www.ntia.doc.gov/files/ntia/publications/sf_26_pg_1-2-final_award_and_sacs.pdf), visited 20/01/2020.

<sup>32</sup> Raustiala, *Governing the Internet*, *supra* n 2.

<sup>33</sup> Section 1.2.(b)(viii) of BYLAWS FOR INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS at 5, <https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf>, accessed 31 January 2020.

“In performing its Mission, the following "Core Values" should also guide the decisions and actions of ICANN:

<.....>

(viii) “Subject to the limitations set forth in Section 27.2, within the scope of its Mission and other Core Values, respecting internationally recognized human rights as required by applicable law. This 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. This Core Value does not obligate ICANN to enforce its human rights obligations, or the human rights obligations of other parties, against other parties.”<sup>34</sup>

Such and addition to ICANN’s Bylaw is important, and, one could say, long overdue because, despite ICANN’s insistence that public policy issues are not relevant to, what it says, is a narrow mission of merely overseeing the technical functioning of the DNS,<sup>35</sup> many of ICANN’s policies touch upon important public policy issues, such Internet censorship, surveillance and intellectual property. In turn, ICANN’s policies may affect the exercise and enjoyment of human rights on global level.

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<sup>34</sup> BYLAWS FOR INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS at 5, <https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf>, accessed 31 January 2020.

<sup>35</sup> ICANN Articles of Incorporation, *supra* note 23, Article 3, <http://www.icann.org/general/articles.htm>, state that its mission ‘is to coordinate, at the overall level, the global Internet’s systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems.’

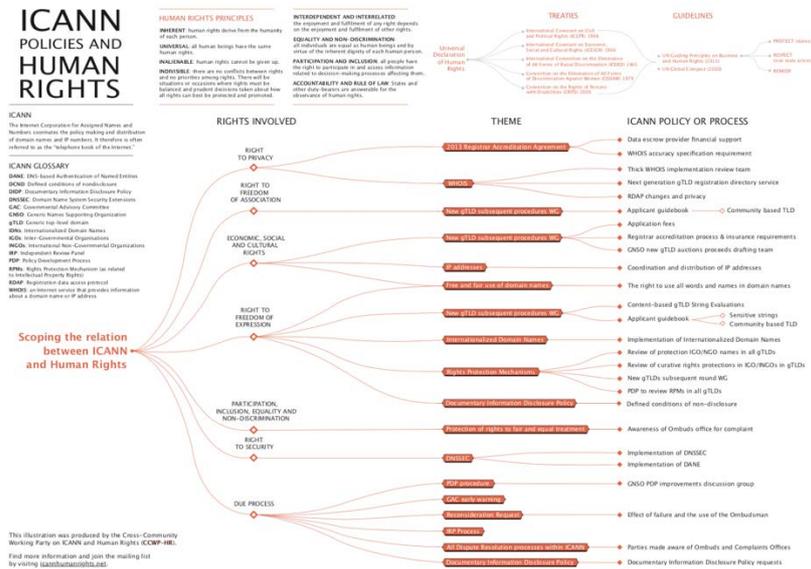


Figure 1: An overview of the relation between human rights, and ICANN’s policies in ICANN, prepared by the CCWP HR.

The inclusion of the human rights Core Value in the updated ICANN Bylaws is thus a great achievement for human rights advocates. However, its actual merit and credibility is open to question given the uncertainty over the scope of human rights obligations, if any, that international human rights law imposes on non-state actors, such as ICANN.

The relationship between private actors and international human rights law has been a subject of intense political and scholarly debate for over four decades, since the first attempts to develop a code of conduct, which included human rights obligations, for multinational corporations in the 1970s.<sup>36</sup> Given the persistence

<sup>36</sup> The Commission on Transnational Corporations and the United Nations Centre on Transnational Corporations (UNCTNC) were established in 1974; the UN ‘Draft Code on Transnational Corporations’ in UNCTC, Transnational Corporations, Services and the Uruguay Round, Annex IV, p. 231 was presented in the 1990. For history of the controversy of the issue at the UN, see Khalil Hamdani and Loraine Ruffing, UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS: CORPORATE CONDUCT AND THE PUBLIC INTEREST (London: Routledge, 2015).

and complexity of the debate, the ICANN community developed a FOI setting out how the new Core Value should be understood, interpreted and, ultimately, manifested in ICANN's policies and procedures. After more than two years of work, the FOI was approved in October 2018 by ICANN supporting organizations and Governmental Advisory Committee ("GAC"); and has been finally approved by the ICANN Board in November 2019.

Following Board's approval, Further Recommendations for a FOI, published as part of the Implementation Assessment Report, provide some guidance on the process of implementation which, according to ICANN, 'will take more than 12 months.'<sup>37</sup> This process will aim to establish procedures for balancing the core value of respecting human rights with other Core Values. The Implementation Report also suggests that all policy development processes, reviews, and recommendations developed by ICANN community will have to show that policies and recommendations sent to the ICANN Board have factored in human rights considerations, as outlined under the FOI.<sup>38</sup>

In the following sections I will analyze which 'internationally recognized human rights' the 'applicable law' might require ICANN to 'respect' in its new role as an independent body, accountable to a global multistakeholder community. I will do so by juxtaposing the text of the Bylaw and the FOI against the analysis of the relationship between international human rights

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<sup>37</sup> ICANN BOARD OF DIRECTORS SUBMISSION NO. 2019.11.07.1b, CONVENING OF THE ROOT SERVER SYSTEM GOVERNANCE WORKING GROUP <https://www.icann.org/en/system/files/bm/briefing-materials-1-1-1-redacted-07nov19-en.pdf>, visited 31 January 2020.

<sup>38</sup> AKRITI BOPANNA AND EPHRAIM PERCY KENYANITO, ICANN TAKES ONE STEP FORWARD IN ITS HUMAN RIGHTS AND ACCOUNTABILITY COMMITMENTS, Article 19, 16 December 2019, <https://www.article19.org/resources/blog-icann-takes-one-step-forward-in-its-human-rights-and-accountability-commitments/>, accessed 31 January 2020.

law and private actors as well as the examination of ICANN's earlier self-imposed commitments in its founding documents – the Articles of Incorporation.<sup>39</sup>

### 3. ICANNS RHETORIC AND ASPIRATIONS

As part of the IANA transition and ICANN moving away from the control of the US government, ICANN has updated its Bylaws in 2016. The updated Bylaws now include the statement that Core Value of '*respecting internationally recognized human rights as required by applicable law*' should guide the decisions and actions of ICANN in performing its mission. In this section, I deconstruct the meaning of the human rights Core Value by scrutinizing each legal concept in detail.

#### a. 'Internationally Recognized Human Rights'

The first question to ask is what is meant by the phrase 'internationally recognized human rights' that ICANN has committed to respecting under its updated Bylaws? The FOI, developed by the ICANN community and finally approved by the Board in November 2019, explains that there are many 'internationally recognized human rights' which might be relevant for a global policy-making body like ICANN under the new Core Value. The FOI states that these might include those spelled out in the Universal Declaration of Human Rights ('UDHR'), the International Covenant on Civil and Political Rights ('ICCPR'), and other significant human rights treaties.<sup>40</sup>

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<sup>39</sup> Articles of Incorporation for Internet Corporation for Assigned Names and Numbers, ICANN (9 August, 2016), <https://www.icann.org/resources/pages/governance/articles-en>, visited 03/02/2020.

<sup>40</sup> The FOI, *supra* note 4, pp. 4-5 states: 'There are a range of international human-rights declarations and covenants that could be relevant

However, the FOI explicitly acknowledges that this list is non-exhaustive ('Including, but not limited to...'); and does not elaborate *where* does the human right in question have to be 'recognized' for it to fall under the 'Core Value'.

From a legal perspective, it becomes crucial whether, beyond these listed treaty instruments, there exists a customary, or some other general, international law of human rights? If it does, then the human rights under the 'Core Value' could be 'internationally recognized' in some other sources of international law, such as customary international law or general principles of international law.

Indeed, the majority of international law and human rights scholars today take the view that international human rights obligations may, and actually do, also derive from customary international law.<sup>41</sup> Further uncertainty thus arises whether and how ICANN's 'Core Value' is meant to change alongside the development of international human rights law, and especially the development of customary international law, which changes over time.<sup>42</sup> It is not clear whether the word 'recognised' was used deliberately to convey that ICANN's commitments are not

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to ICANN's Human Rights Core Value.' And add the non-exhaustive list of human rights instruments in the footnote.

<sup>41</sup> See, e.g., D'Amato, Anthony, Human rights as part of customary international law: a plea for change of paradigms, *GA. J. INT'L & COMP. L.* 25 (1995): 47. Lillich, Richard B., The growing importance of customary international human rights law, *GA. J. INT'L & COMP. L.* 25 (1995): 1; Meron, Theodor, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* (Oxford: Clarendon Press, 1989); Simma, Bruno, and Philip Alston, *The sources of human rights law: custom, jus cogens, and general principles*, *AUST. YBIL* 12 (1988): 82.

<sup>42</sup> D'amato, Anthony A., and Richard Anderson Falk. *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* (Ithaca, NY: Cornell University Press, 1971), on soft norms development in international law, see further Chinkin, Christine M. "The challenge of soft law: development and change in international law." *INT. & COMP. L. QUART.* 38.4 (1989): 850-866.

static and will evolve as international law evolves; or it was simply deployed to convey vagueness. It is arguably impossible to list precisely the rights that ICANN has committed to ‘respecting’. This vagueness in turn feasibly contributes to the chasm between ICANN’s rhetoric and practice of human rights, as it is really hard to translate vague statements into practice.

b. ‘Applicable Law’

Even if it were clear which rights ICANN has committed to ‘respecting’, a further crucial question is whether the ‘applicable law’ referred to in the Core Value requires ICANN to respect internationally recognized human rights? The adopted FOI states:

‘ICANN will respect human rights, as required by applicable law (see below on applicable law).’<sup>43</sup>

“Applicable law” refers to the body of law that binds ICANN at any given time, in any given circumstance and in any relevant jurisdiction. It consists of statutes, rules, regulations, etcetera, as well as judicial opinions, where appropriate. It is a dynamic concept inasmuch as laws, regulations, etcetera, change over time.

This limitation requires an analysis to determine whether any human right that is proposed as a guide or limitation to ICANN activities or policy is “required by applicable law”. If it is, then abiding by the Core Value should include

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<sup>43</sup> FOI, *supra* note 4, p. 4.

avoiding a violation of that Human Right. If the human right is not required by applicable law, then it does not raise issues under the Core Value. However, ICANN may still give this human right consideration, even though it is under no guidance to do so pursuant to the Core Values.’<sup>44</sup>

*b.1. International law*

The most obvious starting point for the ‘applicable law’ under the Bylaw is arguably the human rights law, and international human rights law in particular, given ICANN’s global status and worldwide implications of its policies. However, as I have explained in more detail in my earlier work,<sup>45</sup> international human rights law – at least as it currently stands<sup>46</sup> – is generally understood among the international community and political institutions to be legally binding only on States, and not on private, non-state actors.<sup>47</sup> By the same

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<sup>44</sup> *Ibid.*

<sup>45</sup> See Monika Zalnieriute, *From Human Rights Aspirations to Enforceable Obligations by Non-State Actors in the Digital Age: The Case of Internet Governance and ICANN*, 21 YALE J. L. & TECH. 278–335 (2019).

<sup>46</sup> Recently, the efforts to extend international human rights law to private actors have been revived at the UN level; on the latest developments and progress on the UN Treaty on Business and Human Rights, [business-humanrights.org/en/binding-treaty](https://business-humanrights.org/en/binding-treaty), visited 18/01/2020. See further Surya Deva and David Bilchitz (eds.), *BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS: CONTEXT AND CONTOURS* (Cambridge: Cambridge University Press, 2017).

<sup>47</sup> See, e.g., International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], *available at* <http://www2.ohchr.org/english/law/ccpr.htm> (“Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to ...”); see also, e.g., International Covenant on Economic, Social, and Cultural Rights art. 2, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR], *available at*

token, international law beyond human rights is also interpreted in very state-centric mode, and understood by the international community as being created by and for nation states.<sup>48</sup> Therefore, with the exception of principles of international criminal law,<sup>49</sup> under current global political state-centric structures, principles of international law are not thought to directly apply to private informal actors, such as ICANN. Similarly, dominant conceptions of international law imply that *no* international conventions should be directly applied to ICANN because it is a general principle of international law that international conventions only apply to the signatory states who ratified them.<sup>50</sup>

This is not to say that international law is incapable of or should not tackle corporate behaviour – profit or non-profit, like ICANN. To the contrary, private actors have been involved in international affairs from the early days of development of modern international law. As examples of British and Dutch East India Companies demonstrate, private actors made treaties with

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<http://www2.ohchr.org/english/law/cescr.htm> (“Each State Party to the present Covenant undertakes to take steps.”).

<sup>48</sup> See Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, (OUP, 5th ed. 1998), pp. 57–58.

<sup>49</sup> International criminal law is concerned only with the prosecution of ‘the most serious crimes of concern to the international community as a whole’, specifically genocide, crimes against humanity, war crimes and the crime of aggression’ see Rome Statute of the International Criminal Court (entered into force 1 July 2002), 2187 UNTS 90, preamble, Articles 5-8. Generally on international criminal law and private actors, see Darcy, S. (2016). *The Potential Role of Criminal Law in a Business and Human Rights Treaty*, in Deva and Bilchitz (eds), *BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS*, n 46.

<sup>50</sup> This is a well-developed principle of international law, codified in the *Vienna Convention on the Law of Treaties*, Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, p. 331, available at [http://legal.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).

sovereign powers, had militaries and colonized continents.<sup>51</sup> However, the liberal internationalism which became dominant political ideology after the Second World War, favoured and promoted state-centric conceptions of international law, along human rights frameworks, and left the private power unhindered.

Therefore, human rights law is, at least currently, as interpreted along state-centred conceptions, is incapable of providing satisfactory remedies for human rights violations by corporate and other non-state bodies.<sup>52</sup> Informal actors, such as transnational corporations or bodies like ICANN, are thus excluded from *direct* responsibility under international human rights law, and are only encouraged to *respect* human rights under the UN Guiding Principles on business and human rights.<sup>53</sup> These principles were laid out and unanimously endorsed by the UN Human Rights Council (HRC) in 2011 as an acceptable ‘compromise’ after a strong and continued

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<sup>51</sup> Philip J Stern, ‘English East India Company-State and The Modern Corporation’, *The Oxford Handbook of the Corporation* (Oxford University Press 2019); Paul Frentrop, ‘The Dutch East India Company’, *The Oxford Handbook of the Corporation* (Oxford University Press 2019) <<https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780198737063.001.0001/oxfordhb-9780198737063-e-2>> accessed 21 November 2019.

<sup>52</sup> Stephens, Beth. Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations, *YALE J. INT’L L.* 27 (2002): 1; in relation to remedies and the proposed binding UN Treaty on Business and Human Rights, see Erika George and Lisa Laplante, Access to Remedy: Treaty Talks and the Terms of a New Accountability Accord’ in Deva and Bilchitz (eds), *BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS*, n 46.

<sup>53</sup> The United Nations Human Rights Council, (2011) *GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS “PROTECT, RESPECT, AND REMEDY” FRAMEWORK*, A/HRC/17/31 [www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

pushback against binding obligations from multinational corporations have been frustrated since the 1970.<sup>54</sup>

It seems therefore that the ‘applicable law’ under ICANN’s human rights Core Value does not cover international law, at least in its current state-centric conceptions.

### *b.2. Domestic law*

If no international law, including human rights law, is considered to be directly applicable to ICANN, then it follows that ‘applicable law’ may only be national or supranational local law (eg, in the case of the EU, it could be directly binding EU law). The critical question here becomes whether the national or local law in question requires private bodies to respect internationally recognised human rights. The answer to this question partially depends on the national context and whether the countries in question have ratified international human rights instruments and apply certain norms to private actors. However, whatever the jurisdiction, the *applicability* of domestic human rights law to ICANN in those jurisdictions, remains uncertain and limited, again, because of its status as a private organisation.<sup>55</sup> Thus, even if a particular country has ratified the human rights conventions, domestic human rights legislation

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<sup>54</sup> For discussions of these issues in depth, see Deva and Bilchitz (eds.), *BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS*, n 46.

<sup>55</sup> E.g., International or European human rights law would seem not to generally apply to ICANN, see Zalnieriute and Schneider, *ICANN’s procedures and policies in the light of human rights*, above. However, EU data protection law, and the new General Data Protection Regulation does apply to the WHOIS database operated by ICANN, particularly the parts of the database compiled and managed by the European Regional Internet Registry RIPE NCC which is headquartered in Amsterdam. See also Article 29 Data Protection Working Party, *Opinion 2/2003 on the application of the data protection principles to the Whois directories*, WP 76 10972/03.

most often applies only vertically (to *public* bodies). Such legislation is rarely applicable and enforceable horizontally (to private actors).

Some human rights laws are applicable horizontally in certain jurisdictions. For example, the EU data protection law, and the new General Data Protection Regulation ('GDPR')<sup>56</sup> does apply to ICANN, as it would be considered a data controller, at least jointly with the Registrars and Registries, who manage domain names databases. For example, the policy for WHOIS database is set by ICANN, and EU data protection law applies, particularly the parts of the WHOIS database compiled and managed by the European Regional Internet Registry RIPE NCC which is headquartered in Amsterdam.<sup>57</sup> Similarly, ICANN is bound by the newly adopted California Consumer Privacy Act ('CCPA'),<sup>58</sup> the most comprehensive and stringent privacy bill in the United States. The CCPA becomes effective on 1 January 2020<sup>59</sup> although the California Attorney-General cannot pursue enforcement actions until 1 July 2020.<sup>60</sup>

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<sup>56</sup> General Data Protection Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ 2016 L 119/1 ('GDPR').

<sup>57</sup> See also Article 29 Data Protection Working Party, Opinion 2/2003 on the application of the data protection principles to the Whois directories, WP 76 10972/03.

<sup>58</sup> See Assembly Bill No. 375, CHAPTER 55, An act to add Title 1.81.5 (commencing with Section 1798.100) to Part 4 of Division 3 of the Civil Code, relating to privacy, available [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201720180AB375](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB375), accessed 03/02/2020.

<sup>59</sup> Cal Civ Code § 1798.198(a).

<sup>60</sup> John Stephens, *California Consumer Privacy Act* (2 July 2019) American Bar Association <[https://www.americanbar.org/groups/business\\_law/publications/committee\\_newsletters/bcl/2019/201902/fa\\_9/](https://www.americanbar.org/groups/business_law/publications/committee_newsletters/bcl/2019/201902/fa_9/)> (Accessed 23 October 2019).

Beyond personal data protection and information privacy laws, human rights standards are also often domestically applied horizontally in anti-discrimination laws and certain labour standards (which are more relevant for ICANN as an employer rather than policy-making body) or the gross human rights abuses that may also often be covered under criminal law.<sup>61</sup>

However, beyond these limited exceptions, state-centric conceptions of domestic human rights law do not generally ‘require’ ICANN to respect internationally recognised human rights. Thus, from a legal perspective, the ‘applicable law’ qualification in the Core Value significantly weakens the self-imposed constraint in the new Core Value, reducing its utility and use to very little, if anything, in practice.

c. No Obligation to ‘Enforce’

Finally, irrespective of the considerations referred to above about the state-centric nature of international law and limited applicability of human rights law, it is important to note that the human rights Bylaw further states:

‘This Core Value does not obligate ICANN to enforce its human rights obligations, or the human rights obligations of other parties, against other parties.’<sup>62</sup>

While this qualification is arguably of a negating nature, it is hard to grasp what exactly the drafters intended to convey with

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<sup>61</sup> On more of horizontal application for human rights, see, Knox, John H, *Horizontal human rights law*, *AJIL* (2008): 1-47; Leczykiewicz, Dorota, *Horizontal application of the Charter of Fundamental Rights*, (2013) *EUROPEAN LAW REVIEW* ISSUE 4.

<sup>62</sup> See ICANN’s Human Rights Core Value Bylaws, *supra* note 33.

this limitation. On the one hand, the statement could be understood as an explicit acknowledgement that ICANN does not commit to *enforce* human rights obligations (both those of ICANN and of others) ‘against other parties’. However, ICANN does not have any *enforcement* powers to start with - it is not a regulator of any kind, and lack any *inversitgave* or regulatory powers to be able to enforce any policies in the first place. This makes the use of term ‘enforce’ rather dubious. On the other hand, the statement could be read as a green pass for non-compliance with human rights ‘Core Value’ in its own policy-development processes. In such case, it would seem that even if ICANN actually had certain human rights obligations by virtue of the ‘applicable law’ in question imposing them on private actors (eg, data protection obligations required by the EU or Californian law), the self-imposed ‘Core Value’ should still not be interpreted as obligating it to ‘enforce’ – or comply with - its human rights obligations.

This would be an unfortunate outcome, given that the strongest impact of the ‘Core Value’ has always been expected to be on the policy-development processes (and ICANN itself has made this expectation public).<sup>63</sup> Such interpretation would imply that ICANN reserves itself a right not to act whenever its policy-development processes in fact do disregard human rights, even if they are required by applicable law. The earlier mentioned Implementation Assessment Report, published following Board’s approval of the FOI in November 2019, suggests that all policy development processes, reviews, and recommendations developed by ICANN community will have to show that policies

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<sup>63</sup> See ICANN, *Proposed Considerations concerning ICANN’s Human Rights Core Value in the newly adopted ICANN Bylaws*, Impact Assessment Evaluation, August 2017, p. 3, available at <https://gac.icann.org/reports/public/ccwg%20-%20ws2%20impact%20assessment%20-%20human%20rights%20foi%20-%20august%202017.pdf>, visited 22/03/2018.

and recommendations sent to the ICANN Board have factored in human rights considerations, as outlined under the FOI.<sup>64</sup> However, even then the Board and the community could still refuse to comply with the Core Value, as long as it would be ‘factored’ in the process. Under both interpretations, the pronouncement that ICANN has no obligation to ‘enforce’ its ‘obligations’ leaves one wondering about the meaning and implications of such qualification, and brings further obscurity to the ‘Core Value.’

d. Tenuous Promise in the new Core Value

The preceding legal analysis of the new ICANN’s Bylaw, as interpreted under the FOI, demonstrates that both the Bylaw and the FOI are drafted in a manner that enables ICANN to downgrade or entirely escape its human rights responsibilities. The adopted FOI further opens the door to legal interpretations that are antithetical to respect for universal human rights norms by emphasising that human rights were included in the Bylaws simply as a ‘Core Value’, rather than as a ‘Commitment’.<sup>65</sup> Seen in this light, the human rights Bylaw does not seem as promising as initially conceived by the human rights groups which lobbied ICANN to include the human rights language in the Bylaws. These nuances in wording did not cause great

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<sup>64</sup> AKRITI BOPANNA AND EPHRAIM PERCY KENYANITO, ICANN TAKES ONE STEP FORWARD IN ITS HUMAN RIGHTS AND ACCOUNTABILITY COMMITMENTS, Article 19, 16 December 2019, <https://www.article19.org/resources/blog-icann-takes-one-step-forward-in-its-human-rights-and-accountability-commitments/>, accessed 31 January 2020.

<sup>65</sup> ‘There is a different section of the Bylaws that sets forth ICANN’s ‘Commitments’ (section 1.2(a)). The Core Values (such as the Human Rights Core Value) are distinguished from the Commitments’ see the FOI, *supra* note 4, p. 3.

concern to human rights advocates (at least initially) who often used the terms ‘values’ and ‘commitments’ interchangeably.<sup>66</sup>

However, in legal interpretation language and exact terms matter. By relying on this type of vague and nebulous language, ICANN is not unique in trying to water down the legal value of its aspirations and/or commitments. For example, the OECD guidelines on transnational corporations also are argued to entail likewise ‘flexible’ language for compliance with international norms and domestic law, that could be interpreted to reduce human rights responsibilities of private actors to virtually nothing.<sup>67</sup> In the following section of this article, I will argue, that the tenuous interpretation of the new Core Value in the approved FOI is much narrower than ICANN’s self-imposed requirements in its founding document, the Articles of Incorporation.<sup>68</sup>

#### 4. SELF-IMPOSED COMMITMENTS IN ICANN’S ARTICLES OF INCORPORATION

Despite the obscurity over applicability of international legal norms, including human rights, to private actors, many such

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<sup>66</sup> For the interchangeable use of language, see Article 19, ‘ICANN Board agrees to human rights commitment,’ <https://www.article19.org/resources/icann-board-agrees-to-human-rights-commitment/>, visited 22/03/2020. See also AKRITI BOPANNA AND EPHRAIM PERCY KENYANITO, ICANN TAKES ONE STEP FORWARD IN ITS HUMAN RIGHTS AND ACCOUNTABILITY COMMITMENTS, Article 19, 16 December 2019, <https://www.article19.org/resources/blog-icann-takes-one-step-forward-in-its-human-rights-and-accountability-commitments/>, accessed 31 January 2020, suggesting ICANN has adopted human rights commitments.

<sup>67</sup> See Blitt, Robert C., *Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance*, TEX. INT’L LJ 48 (2012): 33 at p. 55.

<sup>68</sup> ICANN, Articles of Incorporation for Internet Corporation for Assigned Names and Numbers, *supra* note 23.

actors do themselves declare that they will operate in conformity with them as part of their self-imposed procedural principles. Self-imposed commitments are particularly common when private actors perform regulatory and policy-making functions.<sup>69</sup> ICANN is not a special case, and, lacking an external source of legal authority and legitimacy,<sup>70</sup> it has voluntarily undertaken to operate according to quasi-constitutional principles and values.

The most apparent endeavour of ICANN to impose quasi-constitutional limits on its power could be found in Article 4 of its Articles of Incorporation, which states that ICANN shall operate

‘for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law’.<sup>71</sup>

Here an important question is what those ‘relevant principles of international law’ and ‘applicable international conventions’ might be. The argument that ICANN, as a private party, is not bound by the principles of international law was advocated by ICANN itself in the international arbitration proceedings

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<sup>69</sup> Barnes, Javier, *Three generations of administrative procedures*, in Ross-Ackermann, S., and Lindseth, P.L. (eds), *COMPARATIVE ADMINISTRATIVE LAW*, (Edward Elgar 2017), at p. 306.

<sup>70</sup> On legitimacy and ICANN, see Lindsay, David, *What do the .XXX disputes tell us about Internet governance? ICANN’s legitimacy deficit in context*, *TELECOMMUNICATIONS JOURNAL OF AUSTRALIA*, Volume 63, Number 3, 2013, 33.4-33.5.

<sup>71</sup> Articles of Incorporation for Internet Corporation for Assigned Names and Numbers, ICANN (9 August, 2016), <https://www.icann.org/resources/pages/governance/articles-en>, visited 03/02/2020.

between ICM registry and ICANN over the controversial .xxx string.<sup>72</sup>

a. Choice to be Bound by Principles of International Law

The .xxx proceedings, initiated over a decade ago, concerned the allocation of the .xxx top level domain name. In particular, throughout the 2000s, ICANN has been reluctant to approve the top level domain name .xxx for pornography sites based on “moral” concerns expressed by the George W. Bush Administration.<sup>73</sup> The registry, which had applied for the .xxx domain, eventually initiated independent review proceedings against ICANN claiming that ICANN was under obligation to act in accordance with the principle of good faith, as required by its Articles of Incorporation and Californian law.<sup>74</sup> In response, ICANN argued that, as a private actors, it was not bound by international law, and general principles of international law, despite its declarations in the Articles of Incorporation.

The applicability of general principles of international law to ICANN and interpretation of Article 4 was not determinative in the .xxx case proceedings, as the majority of the panel considered that the general principle of good faith (which was subject of the dispute) was not only found in international law

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<sup>72</sup> See *ICM Registry v ICANN, Declaration of 19 February 2010*, available at <https://www.icann.org/en/system/files/files/-panel-declaration-19feb10-en.pdf>

<sup>73</sup> On the .xxx case, see Paul J. Cambria, Jr., *ICANN, the .Xxx Debate, and Antitrust: The Adult Internet Industry’s Next Challenge*. 23 *STANFORD L. & POL’Y REV.* 101 (2012), Jacqueline Lipton & Mary Wong, *Trademarks and Freedom of Expression in ICANN’s New gTLD Process*, 38 *MONASH U. L. REV.* 188 (2012).

<sup>74</sup> See *ICM Registry v. ICANN* (Feb. 19, 2010), <https://www.icann.org/en/system/files/files/-panel-declaration-19feb10-en.pdf>. The declaration is the outcome of the Independent Review Proceedings filed in accordance with Article IV, Section 3 of the ICANN Bylaws,

and in general principles that are the source of international law, but also in Californian corporate law, where ICANN was incorporated. However, the majority of the arbitration panel in the .xxx case disagreed with the narrow interpretation proposed by ICANN. The panel held that Article 4 of its Articles of Incorporation required ICANN to act consistently with the ‘*general* principles of international law’ that are recognised as a source of international law under the Statue of the International Court of Justice.<sup>75</sup>

Indeed, such an interpretation is supported by numerous examples in contracts between international actors, and precedent in international tribunals, demonstrate that not only sovereign states but also other bodies can choose to apply principles of international law in determining their rights.<sup>76</sup> This voluntary practice is particularly common when public goods are at stake.<sup>77</sup> The DNS being a public good suggests that ICANN would likely be among the group of non-state actors choosing to voluntarily be bound by certain principles of international law.

b. Explicit Application of the Principles of International Law in ICANN Policies

Indeed, ICANN has also subjected some of its global policies to international law standards in practice. For example, it has explicitly chosen to apply the norms of international law in certain areas; such as the procedure concerning the ‘limited public interest objection’ to the new generic Top-Level Domains

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<sup>75</sup> *ICM Registry v ICANN* 2010, *supra* note 72, para. 140.

<sup>76</sup> *ICM Registry v ICANN*, para. 138. *Cf* however Benvenisti, E., *THE LAW OF GLOBAL GOVERNANCE*, (Hague Academy of International Law, Brill, 2014), p. 58, claiming it is rather unusual for a private informal body to chose to be bound by the standards developed under international law

<sup>77</sup> *ICM Registry v ICANN*, Declaration, para. 58.

(‘gTLD’) applications. In that procedure, ICANN has decided to assess the compatibility of the particular gTLD string against ‘fundamental’ principles of international law and the principles relating to public order and morality under international human rights law in particular.<sup>78</sup> Moreover, ICANN’s Governmental Advisory Committee established a Working Group on Human Rights and International Law, which focuses on aspects of ICANN’s policies and procedures which relate to human rights and relevant international law.<sup>79</sup> Thus, it is clear that ICANN itself has in the past deployed principles and standards of public international law in the development of its policies.

c. Bindingness of Self-Imposed Human Rights Norms

Based on such practice, there is no reason why the requirement to operate in compliance with ‘internationally recognized human rights’ is not similarly included as a requirement under ICANN’s Articles of Incorporation. Indeed, when arguing against direct general applicability of international law to ICANN in the .XXX case, ICANN claimed that it had imposed such a requirement on itself. In particular, ICANN highlighted that it:

‘did not adopt principles of international law indiscriminately, but rather to ensure consistency

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<sup>78</sup> See Adamantia Rachovitsa, *International Law and the Global Public Interest: ICANN’s Independent Objector as a Mechanism of Responsive Global Governance*, in NON-STATE ACTORS AND CHANGING RELATIONS IN INTERNATIONAL LAW (Martinus Nijhoff, 2017), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2929512](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929512)., p. 4. See also E Benvenisti, *The Law of Global Governance* (HAGUE ACADEMY OF INTERNATIONAL LAW, ALL-POCKET, 2014), p. 58.

<sup>79</sup> More information about the working group, as well as its terms of reference, could be found on GAC dedicated space: <https://gac.icann.org/working-group/gac-working-group-on-human-rights-and-international-law>, visited 20/03/2018.

between its policies developed for the world-wide Internet community and well-established substantive international law on matters relevant to various stakeholders in the global Internet community, such as general principles on trademark law and freedom of expression relevant to intellectual property constituencies and governments.’<sup>80</sup>

So, under ICANN’s own proposed interpretation, ‘relevant principles of international law’ in its founding document means those principles that are ‘specifically directed to concerns relating to the Internet, such as freedom of expression or trademark law.’<sup>81</sup>

Interestingly, such an interpretation implies that ICANN would have to engage in some sort of proportionality or balancing analysis to resolve the conflict between, for example, trademark law and other principles of international law, such as freedom of expression, in each policy-making process. Most importantly, however, it reveals that ICANN has envisaged the right to freedom of expression – and potentially other human rights, such as data protection and privacy – to be relevant principles of international law, with which it voluntarily undertook to comply.

#### d. Enforcement Mechanism for Self-Imposed Commitments

The fact that international human rights law and conventions may not apply directly and generally to private actors does not

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<sup>80</sup> *ICM Registry v ICANN*, Declaration, para. 139, quoting ICANN’s Response to Claimant’s Memorial on the Merits, pp. 59-60.

<sup>81</sup> *ICM Registry v ICANN*, Declaration, para. 106.

negate the value of ICANN's self-imposed commitments.<sup>82</sup> Surely, self-imposed commitments are only as valuable as their enforceability. In other words, the state-centred nature of human rights law might be less of an issue if ICANN voluntarily submits to external review of its compliance. It may do this via adjudication, international arbitration or judicial review, for instance. Indeed, ICANN established an independently administered, third party adjudication procedure in 2005 to review decisions of the ICANN board alleged to be inconsistent with ICANN's Articles of Incorporation or Bylaws.<sup>83</sup> ICANN claims that the process for independent review of ICANN's actions 'reinforces its transparency and accountability mechanisms.'<sup>84</sup>

Therefore, I argue that contrary to the interpretation in the adopted FOI, ICANN could be compelled to comply with 'internationally recognized human rights' even if the 'applicable law' in question does not so directly require. ICANN could be compelled to do so via the third party adjudication procedure because it has voluntarily chosen to act in compliance with 'relevant principles of international law' in its Articles of Incorporation, which under ICANN's own understanding do include human rights relevant to the Internet, such as freedom of expression, data protection and privacy, among others.

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<sup>82</sup> See Besmer, Veronica, *The legal character of private codes of conduct: more than just a pseudo-formal gloss on corporate social responsibility*, HASTINGS BUS. LJ 2 (2006): 279.

<sup>83</sup> ICANN, RECONSIDERATION AND INDEPENDENT REVIEW: ICANN BYLAWS ARTICLE IV ACCOUNTABILITY AND REVIEW, <https://www.icann.org/resources/pages/reconsideration-and-independent-review-icann-bylaws-article-iv-accountability-and-review>, visited 03/02/2020. ICANN has designated the International Centre for Dispute Resolution (<https://www.icdr.org/>) to operate the independent review process.

<sup>84</sup> ICANN, RECONSIDERATION AND INDEPENDENT REVIEW, *ibid.*

However, the existence of only one such proceeding during the 20 years of ICANN's existence (the .XXX case, mentioned earlier)<sup>85</sup> raises the question of whether mere availability of such adjudication proceedings is sufficient to ensure that ICANN is accountable to the global multistakeholder community for its compliance with its human rights Core Value. Is the rather theoretical prospect of being held accountable enough, if it not is not implemented in practice?

e. Limited Compliance with the Self-Imposed Commitments

Indeed, the review proceedings have not been initiated beyond the .xxx occasion, despite widely perceived inconsistencies between ICANN's global policies and human rights norms. Various stakeholders and civil society organisations have criticized many ICANN policies, including ICANN's WHOIS policy mandating collection and public disclosure of personal data of all domain name registrants,<sup>86</sup> to due process concerns and limits on freedom of expression to protect trademark rights under the Uniform Dispute Resolution Policy,<sup>87</sup> to excessive

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<sup>85</sup> On the number of independent review proceedings, see ICANN, ANSWERS TO RECURRING QUESTIONS REGARDING THE INDEPENDENT REVIEW PROCESS, <https://www.icann.org/resources/pages/irp-questions-2010-06-19-en>, which clearly states that: 'One request for Independent Review has been initiated in ICANN's history. That request was brought by ICM Registry in June 2008. Documents related to the ICM Registry Independent Review are located at <https://www.icann.org/resources/pages/irp-2012-02-25-en>.'

<sup>86</sup> On data privacy issues in WHOIS, see in particular, Perrin, Stephanie E. THE STRUGGLE FOR WHOIS PRIVACY: UNDERSTANDING THE STANDOFF BETWEEN ICANN AND THE WORLD'S DATA PROTECTION AUTHORITIES (PhD Thesis, University of Toronto) 2018, available at <https://tspace.library.utoronto.ca/handle/1807/89738>.

<sup>87</sup> See, eg, Milton L Mueller, 'Rough Justice: A Statistical Assessment of ICANN's Uniform Dispute Resolution Policy' (2001) 17(3) THE

personal data retention requirements in the ICANN registrar accreditation agreements.<sup>88</sup> In addition to the .xxx controversy and proceedings, ICANN has been involved in a scandal over the .gay top level domain name attracting outcry from human rights activists for failing to respect the freedom of expression and freedom of assembly of the LGBTI community.<sup>89</sup> In May 2019, ICANN finally allocated .gay top level domain name, but not to the community application, endorsed by the International Lesbian, Gay, Bisex, Trans and Intersex Association (ILGA), but rather to a private applicant.<sup>90</sup>

However, neither the outcry from human rights activists, nor dozens of letters to ICANN from the EU data protection

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INFORMATION SOCIETY 153; A Michael Froomkin, *ICANN's "Uniform Dispute Resolution Policy" — Causes and (Partial) Cures* (2002) 67(3) BROOKLYN LAW REVIEW 605; David Lindsay, *INTERNATIONAL DOMAIN NAME LAW: ICANN AND THE UDRP* (Hart Publishing, 2007); Zohar Efroni, *Names as Domains, Names as Marks: Issues Concerning the Interface between Internet Domain Names and Trademark Rights*, in Peter K Yu (ed), *INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE* (Praeger Publishers, 2007); Jacqueline Lipton, *INTERNET DOMAIN NAMES, TRADEMARKS AND FREE SPEECH* (Edward Elgar Publishing, 2010); Konstantinos Komaitis, *THE CURRENT STATE OF DOMAIN NAME REGULATION: DOMAIN NAMES AS SECOND-CLASS CITIZENS IN A MARK-DOMINATED WORLD* (Routledge, 2010).

<sup>88</sup> M Zalnieriute and T Schneider, *ICANN's procedures and policies in the light of human rights, fundamental freedoms and democratic values*, COUNCIL OF EUROPE DGI (2014) 12.

<sup>89</sup> On .gay issues further, see DeNardis, Laura, and Andrea M. Hackl, *Internet control points as LGBT rights mediation*, INFORMATION, COMMUNICATION & SOCIETY 19.6 (2016): 753-770; Zalnieriute, Monika, *The anatomy of neoliberal Internet governance: A queer critical political economy perspective*, in Otto, Dianne (ed) *QUEERING INTERNATIONAL LAW* (Routledge, 2017). 67-88; on gTLDs more generally, see Salomon, Eve and Pijl, Kinanya, *Applications to ICANN for Community-based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective*, COUNCIL OF EUROPE DGI(2016)17.

<sup>90</sup> See <https://www.icann.org/resources/agreement/gay-2019-05-23-en>, .gay Registry Agreement, accessed 03/02/2020.

authorities<sup>91</sup> and various NGOs<sup>92</sup> over violations of data privacy rights in the WHOIS policy and the Registrar Accreditation Agreement of 2013 have convinced ICANN to revise those policies. Therefore, it would seem that the capacity of ICANN's informal multistakeholder structure, and its self-imposed commitments, to hold it to human rights values has been very limited to date. It is hard to see how this long-standing practice would change with the coming into force of the human rights Bylaw which, as argued above, is much weaker than the requirements under ICANN's Articles of Incorporation.

## 5. CONCLUSION

This article critically examined ICANN's new aspirations for human rights and argued that not only do they carry little, if any, legal weight, but they are weaker than the quasi-constitutional, self-imposed requirements already in ICANN's Articles of Incorporation. The analysis of the new aspirations also illustrated that, as far as human rights protection is concerned, this is an instance where there is a significant disconnect between human rights rhetoric and practice. While ICANN has adopted the new Core Value, it has also proved reluctant to comply with its self-imposed human rights commitments in

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<sup>91</sup> See Article 29 Working Party, letter to ICANN of 8<sup>th</sup> January 2014, Ref. Ares (2014)22160, available at [http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2014/20140108\\_letter\\_icann.pdf/](http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2014/20140108_letter_icann.pdf/) (visited 26/04/2019); Article 29 Working Party, letter to ICANN of 11<sup>th</sup> April 2018, available at <https://www.icann.org/en/system/files/correspondence/jelinek-to-marby-11apr18-en.pdf>, visited 10/04/2019.

<sup>92</sup> E.g. Derechos Digitales and the Statewatch pressured ICANN not to adopt its RAA policy; see Derechos Digitales, Letter to ICANN of July 19, 2012, <http://www.derechosdigitales.org/wp-content/uploads/letter-of-concern-ICANN-Derechos-Digitales.pdf/>; Statewatch, 'Want to set up a website? The 'Five Eyes' want your personal data,' <http://www.statewatch.org/analyses/no-234-websites-five-eyes.pdf>.

practice during the 20 years of its existence. The article suggests that this informal global policy-making body is, therefore, unlikely to convert its latest human rights rhetoric into practice. In turn, this raises questions about whether the new Bylaw provisions amount to little more than a masquerade aimed at improving public confidence in the context of an institutional transition – public confidence being particularly important now because ICANN is, in its own words, ‘officially accountable to the global multi-stakeholder community.’<sup>93</sup>

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<sup>93</sup> See ICANN website, *Overview of the IANA Stewardship Transition*, <https://www.icann.org/stewardship-accountability>, visited 03/04/2019.