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**FROM HUMAN RIGHTS ASPIRATIONS TO
ENFORCEABLE OBLIGATIONS BY NON-
STATE ACTORS IN THE DIGITAL AGE: THE
CASE OF INTERNET GOVERNANCE AND
ICANN**

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From Human Rights Aspirations to Enforceable Obligations by Non-State Actors in the Digital Age: The Case of Internet Governance and ICANN

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As the global policymaking capacity and influence of non-state actors in the digital age is rapidly increasing, the protection of fundamental human rights by private actors becomes one of the most pressing issues in global governance. This Article combines business & human rights and digital constitutionalist discourses, and uses the changing institutional context of Internet governance and the Internet Corporation for Assigned Names and Numbers ('ICANN') as a case study to argue that economic incentives fundamentally act against the voluntary protection of human rights by informal actors in the digital age. I further contend that the global policymaking role and increasing regulatory power of informal actors such as ICANN necessitates a reframing of their legal duties by subjecting them to directly binding human rights obligations in international law. I argue that such reframing is particularly important in the digital age for three reasons. First, it is needed to rectify an imbalance between hard legal commercial obligations and soft human rights law. This imbalance is well reflected in ICANN's policies. Second, binding obligations would ensure that individuals whose human rights have been affected can access an effective remedy. This is not envisaged under the new ICANN bylaw on human rights precisely because of the fuzziness around the nature of ICANN's obligations to respect internationally

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recognized human rights in its policies. Finally, I suggest that because private actors such as ICANN are themselves engaged in the balancing exercise around such rights, an explicit recognition of their human rights obligations is crucial for the future development of access to justice in the digital age.

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I. INTRODUCTION

The Internet has a human rights problem. This problem, best characterized as a human rights vacuum, occurs because a sizeable portion of the Internet's infrastructure—both material and virtual—is owned and coordinated not by public actors, whose behavior and policies are traditionally bound by human rights law, but by private actors. Various private companies and quasi-governmental bodies control aspects of Internet infrastructure and are able to enforce public and private legal regimes globally via that infrastructure. They therefore exercise enormous influence over the global Internet governance regime.¹ However, the human rights obligations of private actors in the digital era remain rather fuzzy, floating among numerous soft law pronouncements and multistakeholder initiatives.² This fuzziness, coupled with the growing power and influence of private actors over public affairs, such as information, voting, and democracy, is increasingly perceived as one the most pressing human right issues of the digital age.³ The extent to which private actors should be responsible for the promotion and protection of fundamental rights online thus has recently become

¹ For a broad picture of the Internet governance regime, see Joseph S. Nye, Jr., *The Regime Complex for Managing Cyber Activities*, CIGI PAPER SERIES BY THE GLOBAL COMMISSION ON INTERNET GOVERNANCE (2014).

² For soft law pronouncements, see, e.g., U.N. Hum. Rts. Council, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect, and Remedy” Framework, U.N. Doc. A/HRC/17/31 (2011), www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [hereinafter “UN Guiding Principles”]; *OECD Guidelines for Multinational Enterprises*, <http://mneguidelines.oecd.org/text>. For multistakeholder 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 multistakeholder initiatives, see, e.g., GLOBAL NETWORK INITIATIVE (GNI), www.globalnetworkinitiative.org; RANKING DIGITAL RIGHTS, www.rankingdigitalrights.org.

³ David Kaye, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression to the 35th Session of the Human Rights Council, U.N. Doc. A/HRC/35/22 (2017); Joseph Cannataci, *The Right to Privacy in the Digital Age*, Presentation at the Internet Governance Forum, João Pessoa, Brazil (2015).

a hotly debated topic among governments, academics, and civil society.⁴

The debate has attracted conflicting narratives. On one hand, some scholars argue that voluntary human rights responsibilities by Internet actors might be more appropriate than hard legal obligations.⁵ On the other hand, proposals for more sweeping international digital constitutionalist efforts have emerged from the 2018 Cambridge Analytica scandal, as well as from increasing evidence of the capacity of Internet platforms to influence democratic elections and affect fundamental rights more broadly.⁶ Traditionally, constitutionalist analyses and the human rights doctrine have focused on the exercise and limits of power by nation-states,⁷ but more recent attempts aim to confront the practices of private companies and quasi-governmental policymaking bodies.⁸

⁴ 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. Further examples include the United Nations Internet Governance Dynamic Coalition on Platform Responsibility (DCPR), which was recently formed and is a multistakeholder 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).

⁵ See, e.g., 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).

⁶ "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). See also Nicolas Suzor, *The Role of the Rule of Law in Virtual Communities*, 25 BERKELEY TECH. L.J. 1817, 1833-34 (2010).

⁷ See, e.g., John Knox, *Horizontal Human Rights Law*, 102 AM. J. INT'L L. 1 (2008).

⁸ For latest overview of digital constitutionalist efforts, see Kinfé Michael Yilma, *Digital Privacy and Virtues of Multilateral Digital Constitutionalism—Preliminary Thoughts*, 25 INT'L J.L. & INFO. TECH. 115 (2017).

Building on these efforts, in this Article I focus on safeguards against the abuse of private power in the changing institutional context of Internet policy and governance. In particular, I examine the human rights vacuum and the necessity for binding obligations in the digital age by focusing on one of the core Internet governance institutions—the Internet Corporation for Assigned Names and Numbers (ICANN)—which coordinates a critical Internet infrastructure: the global Domain Name System (DNS).⁹ Few have investigated ICANN’s problematic relationship with human rights law, despite the wide-ranging human rights implications of ICANN’s policymaking and the co-option of the DNS by governments and private actors to enforce private or public law (or particular policies and legal rights of certain groups).¹⁰ On issues ranging from governmental surveillance to censorship, and from Internet blackouts during political uprisings¹¹ to economic concerns around copyrights

⁹ 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.”

¹⁰ See Laura DeNardis, *Hidden Levers of Internet Control: An Infrastructure-Based Theory of Internet Governance*, 15 INFO., COMM. & SOC’Y 720, (2012); see also Samantha Bradshaw & Laura DeNardis, *The Politicization of the Internet’s Domain Name System: Implications for Internet Security, Universality, and Freedom*, 20 NEW MEDIA & SOC’Y 332, 340 (2016).

¹¹ For an example of Internet blackouts during the Arab Spring, see Alexandra Dunn, *Unplugging a Nation: State Media Strategy During Egypt’s January 25 Uprising*, FLETCHER F. WORLD AFFS. (May 15, 2011), <http://www.fletcherforum.org/home/2016/9/23/unplugging-a-nation-state-media-strategy-during-egypts-january-25-uprising>.

and trademarks,¹² the DNS and ICANN have been at the center of numerous political and economic battles, with serious human rights implications.¹³

Nonetheless, both the mainstream digital rights discourse as well as the business and human rights movement have tended to overlook ICANN.¹⁴ Some have even mistaken it for the equivalent of a private arbitral institution in Internet governance.¹⁵ Digital constitutionalist efforts have instead focused largely on human rights implications stemming from the rising power of Internet platforms.¹⁶ This focus is unfortunate given that ICANN represents one of the very few centralized points of control on the Internet, a “decentralized network of networks,” whose policies have global human rights implications. Moreover, ICANN has recently announced new aspirations for human rights as part of its ongoing institutional

¹² 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).

¹³ DeNardis, *supra* note 10; Bradshaw & DeNardis, *supra* note 10; LAURA DENARDIS, *THE GLOBAL WAR FOR INTERNET GOVERNANCE* (2014).

¹⁴ Digital rights discourse largely focuses on freedom of expression and privacy responsibilities of Internet platforms. *See, e.g.*, Edoardo Celeste, *Terms Of Service And Bills Of Rights: New Mechanisms Of Constitutionalisation In The Social Media Environment?* INT’L REV. L., COMPUTERS & TECH. 1 (2018); Rikke Frank Jørgensen, *Framing Human Rights: Exploring Storytelling Within Internet Companies*, 21 INFO., COMM. & SOC’Y 340 (2017); MacKinnon, *supra* note 5. For civil society and corporate initiatives on digital rights, see, e.g., GLOBAL NETWORK INITIATIVE (GNI), www.globalnetworkinitiative.org; RANKING DIGITAL RIGHTS, www.rankingdigitalrights.org. Business and human rights literature just recently started paying attention to the “governance gaps” in regulation of Internet, but has been limited to Internet platforms and information intermediaries. *See, e.g.*, George *supra* note 5. Few scholars outside of Internet Governance field have heard of ICANN, let alone scrutinized its policies or human rights obligations.

¹⁵ Anna Beckers & Mark Kawakami, *Domestic Enforcement of Private Regulation Is (Not) the Answer: Making and Questioning the Case of Corporate Social Responsibility Codes*, 24 IND. J. GLOBAL LEGAL STUD. 1, 4 (2017).

¹⁶ *See, e.g.*, Nicolas Suzor, *Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms*, SOC. MEDIA & SOC’Y 1, 4 (2018); Terrell McSweeney, *FTC 2.0: Keeping Pace with Online Platforms*, 32 BERKELEY TECH. L.J. 1027 (2017); BELL & ZINGALES, *supra* note 4. For an overview, see Nicolas Suzor, Tess Van Geelen & Sarah Myers West, *Evaluating the Legitimacy of Platform Governance: A Review of Research and a Shared Research Agenda*, 80 INT’L COMM. GAZETTE 385, 385 (2017).

reforms, known as the “IANA transition” (IANA standing for Internet Assigned Numbers Authority). ICANN’s activities (including IANA) have been supervised by the U.S. government, specifically the National Telecommunications and Information Administration, which has occurred under a contract with the U.S. Department of Commerce. Because of growing international tensions after the 2013 Edward Snowden revelations about extraterritorial surveillance by the U.S. government, in 2016 the U.S. decided to cease its supervision of ICANN.¹⁷ The ongoing transition of ICANN’s accountability from the U.S. government to a global multistakeholder community could be seen as the climax of a long history of controversy over U.S. government control and supervision over DNS administration.¹⁸ While it is beyond the scope of this Article to discuss the IANA transition in detail,¹⁹ it is notable that as part of that transition’s “accountability package,” ICANN adopted a bylaw stipulating a “Core Value” of “respecting internationally recognized human rights as required by applicable law” within its scope of mission.²⁰ In this context,

¹⁷ See Juliana Gruenwald, *NTIA Finds IANA Stewardship Transition Proposal Meets Criteria to Complete Privatization*, NAT’L TELECOMMS. & INFO. ADMIN. (June 9, 2016), <http://www.ntia.doc.gov/press-release/2016/iana-stewardship-transition-proposal-meets-criteria-complete-privatization>. ICANN’s activities (including IANA) have been previously supervised by the U.S. 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, visited 20/09/2018.

¹⁸ Kal Raustiala, *Governing the Internet*, 110 AM. J. INT’L L. 491 (2016).

¹⁹ For an overview of the IANA transition, see Kal Raustiala, *An Internet Whole and Free: Why Washington Was Right to Give up Control*, FOREIGN AFFS. 96, 140 (2017); Kal Raustiala, *supra* note 18; JOEL SNYDER, KONSTANTINOS KOMAITIS & ANDREI ROBACHEVSKY, *THE HISTORY OF IANA: AN EXTENDED TIMELINE WITH CITATIONS AND COMMENTARY* (2017), <https://www.yumpu.com/en/document/view/56851186/the-history-of-iana-an-extended-timeline-with-citations-and-commentary/12>. For a critique of IANA transition, see Richard Hill, *Internet Governance, Multi-Stakeholder Models, and the IANA Transition: Shining Example or Dark Side?* 1 J. CYBER POL’Y 176 (2016).

²⁰ Section 1.2.(b)(viii) of the *Bylaws for Internet Corporation for Assigned Names and Numbers*, A California Nonprofit Public-Benefit Corporation, adopted by ICANN Board on 27 May 2016, read: “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*

important questions arise as to what kind of ethical and legal obligations ICANN may have to address human rights. What is the applicable law, and which internationally recognized human rights does that applicable law respect? To answer these questions, the ICANN community has developed a framework of interpretation (FOI) for how the aforementioned “Core Value” should be understood, interpreted, and ultimately manifested in ICANN’s policies and procedures; this framework is awaiting final approval by the ICANN Board.²¹

This Article does not scrutinize specific ICANN policies from a human rights perspective; it has been noted elsewhere that many of these policies seem to be in conflict with various human rights norms.²² Concerns include data privacy issues in the WHOIS policy,²³ due process and limits on freedom of expression in

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.” BYLAWS FOR INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS at 5, <https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf> (emphasis added).

²¹ The ICANN Cross Community Working Group on Enhancing ICANN’s Accountability (CCWG-Accountability) has developed a draft Framework of Interpretation for ICANN’s Human Rights Bylaw, which will only come into effect once the Framework of Interpretation is approved for submission to the Board by the CCWG-Accountability as a consensus recommendation in Work Stream 2, as outlined in Section 27.2 of ICANN’s bylaws: “Section 27.2. Human Rights. (a) The Core Value set forth in Section 1.2(b)(viii) shall have no force or effect unless and until a framework of interpretation for human rights (“FOI-HR”) is (i) approved for submission to the Board by the CCWG-Accountability as a consensus recommendation in Work Stream 2, with the CCWG Chartering Organizations having the role described in the CCWG-Accountability Charter, and (ii) approved by the Board, in each case, using the same process and criteria as for Work Stream 1 Recommendations. (b) No person or entity shall be entitled to invoke the reconsideration process provided in Section 4.2, or the independent review process provided in Section 4.3, based solely on the inclusion of the Core Value set forth in Section 1.2(b)(viii) (i) until after the FOI-HR contemplated by Section 27.2(a) is in place or (ii) for actions of ICANN or the Board that occurred prior to the effectiveness of the FOI-HR.”

²² For a general overview of how human rights interact with ICANN policies, see Monika Zalnieriute & Thomas Schneider, *ICANN’s Procedures and Policies in the Light of Human Rights, Fundamental Freedoms and Democratic Values* (2014) (report prepared for the Council of Europe DGI).

²³ See *infra* note 54. On data privacy issues in WHOIS, see in particular, Stephanie E. Perrin, *The Struggle for WHOIS Privacy: Understanding the Standoff Between ICANN and the World’s Data Protection Authorities* PhD

protecting trademark rights under the Uniform Dispute Resolution Policy (UDRP),²⁴ as well as excessive personal data retention requirements contained in the ICANN Registrar Accreditation Agreements.²⁵ Instead, by scrutinizing ICANN's changing institutional commitments and its relationship with soft approaches to human rights protection, this Article illuminates the human rights vacuum that results when the commercial obligations of private actors are codified either in binding contracts or in international hard law, while human rights obligations of private actors are "secured" via soft law. Hard law is generally understood as obligations that are binding on the parties and can be enforced by the courts, while soft law refers to instruments, such as declarations or principles, which lack a binding nature. I suggest that the human rights vacuum appears to exist wherever hard law commercial obligations collide with soft law human rights pronouncements in Internet governance in the international context.

Grounded in a business and human rights discourse, the Article argues that economic incentives either act against or are insufficient for the voluntary protection of human rights in the

Thesis, (June 2018) (unpublished PhD dissertation, University of Toronto) (available at <https://tspace.library.utoronto.ca/handle/1807/89738>).

²⁴ See, e.g., Milton L. Mueller, *Rough Justice: A Statistical Assessment of ICANN's Uniform Dispute Resolution Policy* (2001) 17(3) THE INFORMATION SOCIETY 153; A. Michael Froomkin, *ICANN's 'Uniform Dispute Resolution Policy'—Causes and (Partial) Cures*, 67 BROOKLYN L. REV. 605 (2002); 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 *INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE* (Peter K. Yu ed., 2007); JACQUELINE LIPTON, *INTERNET DOMAIN NAMES, TRADEMARKS AND FREE SPEECH* (2010); KONSTANTINOS KOMAITIS, *THE CURRENT STATE OF DOMAIN NAME REGULATION: DOMAIN NAMES AS SECOND CLASS CITIZENS IN A MARK-DOMINATED WORLD* (2010); Monika Zalnieriute, *Beyond the Governance Gap in International Domain Name Law: Bringing the UDRP in Line with Internationally Recognized Human Rights*, 20 STAN. J. INT'L L. (forthcoming Feb. 2020); Monika Zalnieriute, *Reinvigorating Human Rights in Internet Governance: The UDRP Procedure Through the Lens of International Human Rights Principles*, 43 COLUM. J.L. & ARTS. (forthcoming Jan. 2020).

²⁵ ZALNIERIUTE & SCHNEIDER, *supra* note 22.

digital age by private actors under the prevalent principle of corporate and social responsibility (CSR).²⁶ I argue that market forces have not been favorable for human rights protection within ICANN in particular, not least because ICANN is not a traditional corporation—it is a non-profit corporation, which has no direct customers in the traditional sense, nor does it really compete with any other organization for market share in the assigned names and numbers of the Internet. While some scholars have suggested that domestic private law could be used to better enforce this responsibility,²⁷ in this Article, I focus on the role that international law can play in these efforts. Indeed, domestic law and domestic courts could and do play a role in the enforcement of human rights obligations of private actors, especially in areas of labor standards, anti-discrimination and data protection law.²⁸ However, given the global nature of ICANN policymaking, as well as its recent breakaway from formal oversight by the U.S. government and move toward accountability to a “global stakeholder community,”²⁹ it has become less appealing to use domestic law as an instrument to further the development of global regulatory process in Internet governance. Other scholars have suggested that self-imposed commitments could also be enforced using foreign investment treaties³⁰ or international trade agreements.³¹ This Article

²⁶ On the relationship between the corporate and social responsibility (CSR) and business and human rights (BHR) movements and discourses, see Florian Wettstein, *CSR and the Debate on Business and Human Rights: Bridging the Great Divide*, 22 BUS. ETHICS Q. 739 (2012); Anita Ramasastry, *Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability*, 14 J. HUMAN RTS. 237 (2015).

²⁷ See, e.g., Beckers & Kawakami, *supra* note 15; Jan M. Smits, *Enforcing Corporate Social Responsibility Codes Under Private Law, or: On the Disciplining Power of Legal Doctrine*, 24 IND. J. GLOBAL LEGAL STUD. 99 (2017); Gunther Teubner, *Corporate Codes in the Varieties of Capitalism: How Their Enforcement Depends Upon the Difference Between Production Regimes*, 24 IND. J. GLOBAL LEGAL STUD. 81 (2017).

²⁸ See Anna Beckers, *Legalization Under the Premises of Globalization: Why and Where to Enforce Corporate Social Responsibility Codes*, 24 IND. J. GLOBAL LEGAL STUD. 15 (2017).

²⁹ See Raustiala, *supra* note 18; Hill *supra* note 19.

³⁰ See, e.g., Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 INT’L & COMP. L.Q. 573 (2011); Ying Zhu, *Corporate Social Responsibility and International Investment Law: Tension and Reconciliation*, 1 NORDIC J. COM. L. 30 (2017).

³¹ Stephen Joseph Powell, *Coal and Gold, Hard and Cold: Using Trade Agreements to Resolve Human Rights Violations in the Caribbean Colombia*

supplements the search for international law solutions by looking to international human rights law. I argue that the increasing significance of private actors in Internet governance necessitates a reframing of their legal duties by introducing international human rights obligations that are directly binding upon them.

The remainder of this Article is structured as follows. Part II discusses the complex relation between human rights law and ICANN's unique quasi-governmental organizational structure. Part III looks into ICANN's new aspirations for human rights and critically examines their legal value. In Part IV then I argue that the lack of profit consideration limits the potential impact of ICANN's voluntary commitments and its obligations as part of corporate social responsibility (as envisaged by the business management literature). I further suggest that it is precisely the unique quasi-governmental organizational structure of ICANN that necessitates the recognition of stronger human rights obligations that would apply to it, rather than a vague and unenforceable "responsibility" to respect human rights. Finally, in Part V, I advance a normative argument addressing why directly binding human rights obligations for private actors are crucial for the future development of ICANN, Internet governance, and access to justice in the digital age.

II. WHAT'S SO SPECIAL ABOUT ICANN AND HUMAN RIGHTS?

A. A *Private Multistakeholder Body*

ICANN is a private actor: an American non-profit corporation which manages a critical Internet resource known as the Domain Name System (DNS). The DNS matches Internet Protocol addresses (e.g., 97.74.104.218) to human-friendly domain

Mineral Extraction Industry, 10 INTERCULTURAL HUM. RTS. L. REV. 55 (2015), Rafael Peels et al., Corporate Social Responsibility (CSR) in International Trade and Investment Agreements: Implications for States, Businesses and Workers, presentation at INT. LABOUR CONFERENCE (2016).

names, such as *www.icann.org*. Because the DNS is integral to the way in which we navigate the Internet, decisions surrounding the DNS have human rights implications with enormous scope and global reach. 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 U.S. Government.³² However, because the DNS is a global system, ICANN exercises public functions and enacts policy with global effect well beyond U.S. borders.³³

ICANN's activities operate in two dimensions: the actual corporation that implements the policies and procedures to run the DNS, as well as the so-called "multistakeholder community," which helps develop those policies. Since the very beginning, ICANN has been operating in accordance with a "multistakeholder" model of Internet Governance, which relies on public participation and the engagement of policy advisory groups that range from governments to business and civil society groups. Multistakeholderism is a principle of state and non-state actors deliberating and ultimately making policy decisions "as equals,"³⁴ a very prominent idea in Internet governance.³⁵ Relying on this principle, ICANN thus stimulates bottom-up policy development, and its thrice-yearly meetings in different parts of the world are open to any member of the global public regardless of their knowledge of Internet governance issues.³⁶

³² For a detailed history of ICANN, see MILTON MUELLER, *RULING THE ROOT* (2010). For the special U.S. role, see Derrick L. Cogburn et al., *The U.S. Role in Global Internet Governance*, 43 IEEE COMM. MAG. 12, 12-14 (2005).

³³ See *About ICANN*, <https://www.icann.org/resources/pages/welcome-2012-02-25-en>; *Articles of Incorporation for Internet Corporation for Assigned Names and Numbers*, ICANN (9 August, 2016), <https://www.icann.org/resources/pages/governance/articles-en>. On the blurred lines between the public and private nature of ICANN and its relationship with the governments, see Jonathan Weinburg, *Governments, Privatization and "Privatization": ICANN and the GAC*, 18 MICH. TELECOMM. & TECH. L. REV. 189 (2011).

³⁴ Dmitry Epstein & Brandie M. Nonnecke, *Multistakeholderism in Praxis: The Case of the Regional and National Internet Governance Forum (IGF) Initiatives*, 8 POL'Y & INTERNET 148 (2016).

³⁵ See Jeanette Hofmann, *Multi-Stakeholderism in Internet Governance: Putting a Fiction into Practice*, 1 J. CYBER POL'Y 29, 38 (2016).

³⁶ For example, the ICANN website states: "ICANN meetings are all about participation, collaboration, and finding solutions to the small—and large—problems that the Internet constantly faces. As a meeting attendee you could be from almost any profession and from any corner of the planet. ICANN is

ICANN's version of multistakeholderism has been criticized for, in effect, simply creating conditions for industry dominance despite its claims to equal participation among governments, civil society, and business.³⁷ The richest and most powerful companies, such as Amazon or GoDaddy, have significant financial resources and capacity to ensure that their business interests are reflected in ICANN's policies, whereas civil society is sometimes entirely excluded from negotiations or policy development processes.

B. ICANN—Quasi-Governmental International Organization?

Despite ICANN's formal status as a private corporation, a widely shared view is that it has an undeniably important global public dimension for the "governance of an intrinsically international resource of immense importance to global communications and economies."³⁸ For example, the U.S. Congressional Research Service has recently acknowledged that, "ICANN is by definition an international organization . . . because cyberspace and the Internet transcend national boundaries and because the successful functioning of the DNS relies on participating entities worldwide."³⁹

set up to allow everyone affected by its work—and that is pretty much everyone—to have a say in its processes. To ensure that the organization stays flexible and changes to meet the needs and demands of a rapidly changing Internet, not only do the SOs, ACs, and the Board go through regular reviews, but ICANN also maintains a strong culture of general public participation. Typical attendees include government representatives, business managers, IT managers and consultants, DNS industry managers and experts, intellectual property managers, academics, and others invested in the continuing stable, secure and resilient operation of the Internet. End users are also well represented. If you prefer to participate remotely, there are a wide range of mechanisms that make that possible." *About, ICANN*, <https://meetings.icann.org/en/about>.

³⁷ See LEE A. BYGRAVE, *INTERNET GOVERNANCE BY CONTRACT* (2015); Mark Raymond & Laura DeNardis, *Multistakeholderism: Anatomy of an Inchoate Global Institution*, 7 *INT'L THEORY* 572 (2015).

³⁸ *ICM Registry v ICANN* (2010) at ¶ 140. *ICM Registry v ICANN* (2010) at ¶ 58, citing J. Goldsmith Expert Report at ¶ 15-16.

³⁹ Lennard G. Kruger, Cong. Research Serv., *RL Internet Domain Names: Background and Policy Issues* (Mar. 6, 2015), <http://www.fas.org/sfp/crs/misc/97-868.pdf>.

Scholars and commentators debate how ICANN should best be described. As ICANN was established through a domestic act based on California law, it remains formally excluded from the list of “classic” international organizations.⁴⁰ Yet given the global relevance and “international character” of the public good it manages, some commentators characterize ICANN as “a new type of international non-governmental organization” (NGO).⁴¹ Others see the involvement of governmental actors in ICANN as an impediment to defining it as an NGO.⁴² While ICANN officially adheres to its private non-governmental status, changes to its organizational structure and composition have led to an increasing involvement of states in its activities over time.⁴³ For example, there are currently 154 governments sitting as members and 36 international organizations sitting as observers in ICANN’s Governmental Advisory Committee.⁴⁴ This enormous governmental component has caused other prominent international legal theorists to describe ICANN as a “hybrid intergovernmental-private administration.”⁴⁵ It is also difficult to classify ICANN as a “public-private partnership” because such a model requires a partnership between private and public bodies, rather than a private entity providing participation for both state and non-state actors, as ICANN does.⁴⁶ Irrespective of

⁴⁰ This is also confirmed by the International Law Commission (ILC), see ILC, *Draft Articles on International Responsibility of International Organizations*, (2011) YEARBOOK OF THE INTERNATIONAL LAW COMMISSION Vol. II Part Two.

⁴¹ See Erich Schweighofer, *Role and Perspectives of ICANN*, in INTERNET GOVERNANCE AND THE INFORMATION SOCIETY: GLOBAL PERSPECTIVES AND EUROPEAN DIMENSIONS 83 (Wolfgang Benedek, Veronika Bauer & Matthias C. Kettemann eds., 2008).

⁴² Gianpaolo Maria Ruotolo, *Fragments of Fragments. The Domain Name System Regulation: Global Law or Informalization of the International Legal Order?*, 33 COMPUTER L. & SEC. REV. 159, 167 (2017).

⁴³ *Id.*, at 166.

⁴⁴ See the website of the Governmental Advisory Committee of ICANN at <https://gac.icann.org>.

⁴⁵ Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 65 LAW & CONTEMP. PROBS. 15, 22 (2005) describes ICANN as a “hybrid intergovernmental-private administration” which was “established as a non-governmental body, but which has come to include government representatives who have gained considerable powers, often via service on ICANN’s Governmental Advisory Committee, since the 2002 reforms.”

⁴⁶ Ruotolo, *supra* note 42, at 167.

the preference for a particular label or definition, ICANN is clearly a semi-formal international organization.⁴⁷

C. Global Human Rights Implications of ICANN Policies

Enforcing private or public law via access to critical portions of the Internet's technical infrastructure, such as the DNS, is nothing new. Governments and private actors have known for a long time that control over the DNS can be very useful for enforcing particular policies or legal rights of certain groups on the Internet, and thus, globally.⁴⁸ Despite ICANN's insistence that public policy issues are not relevant to its mission of merely overseeing the functioning of the DNS,⁴⁹ many of its policies clearly fall under global lawmaking.

For example, in 1998, ICANN adopted the Uniform Dispute Resolution Policy (UDRP), which is an international legal framework for resolving disputes between trademark owners and domain name holders.⁵⁰ The UDRP is applied in many countries throughout the world and allows trademark holders with domain names in several countries to adjudicate issues at the same time in one process.⁵¹ It was the first ever Consensus Policy developed by ICANN to be binding on its accredited Registrars, and as a form of mandatory administrative procedure, it is currently the only global, non-judicial dispute resolution policy for trademark-related disputes.⁵² In developing the policy,

⁴⁷ The 'mobile' and 'variable' nature of international organizations has been recognized by legal scholars, who agree that international organizations "have shifted their focus systematically away from international institutions, toward broader forms of international institutionalized behaviour." Friedrich Kratochwil & John Gerard Ruggie, *International Organization: A State of the Art on an Art of the State*, 40 INT'L ORG. 753, 754 (1986).

⁴⁸ See DeNardis, *supra* note 10; Bradshaw & DeNardis, *supra* note 10.

⁴⁹ See *supra* note 9.

⁵⁰ *Uniform Domain Name Dispute Resolution Policy*, ICANN, <https://www.icann.org/resources/pages/help/dndr/udrp-en>.

⁵¹ An exhaustive list of countries is available at WIPO, *Domain Name Dispute Resolution Service for Country Code Top-Level Domains (ccTLDs)*, WIPO, <http://www.wipo.int/amc/en/domains/cctld/> (visited 29/04/2019).

⁵² Consensus Policies are binding on gTLD Registry Operators and ICANN-accredited Registrars, through the agreements each signs with ICANN. Consensus Policies are developed through a formal Policy Development Process within the GNSO.

ICANN exerted regulatory authority over all domain name registrants whose domain names include generic top-level domains, such as .com or .org, throughout the world.⁵³ The popularity of these top-level domain names worldwide extends ICANN's authority well beyond domain name registrants in the United States.

Similarly, ICANN created the WHOIS policy, which mandates the collection of personal data from anyone in the world wishing to register a domain name.⁵⁴ Programs like the UDRP and WHOIS mean that ICANN has created a transnational private regulatory regime, and that its policies establish genuine global legal norms.⁵⁵ Given that ICANN-created global norms often touch upon important public policy issues, such as Internet censorship, surveillance, or intellectual property, their relationship with both domestic law and fundamental human rights values becomes significant.

The creation of legal norms and private regulatory structures with such extraterritorial effects is an especially problematic phenomenon from a human rights perspective for several reasons. First, the privatized regulatory structures and the imposition of sanctions by private actors, such as the unilateral suspension of services, transfer of domain names, or punitive actions for alleged illegal use potentially raise many human rights concerns. As numerous Internet governance scholars have argued, such private structures and alternative dispute resolution mechanisms may undermine due process rights and freedom of expression, as well as the rights to privacy and freedom of association, equality, and non-discrimination.⁵⁶ ICANN insists

⁵³ See, e.g., Komaitis, *supra* note 24; Zalnieriute, *supra* note 24.

⁵⁴ 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).

⁵⁵ Gunther Teubner & Peter Korth, *Two Kinds of Legal Pluralism: Collision of Transnational Regimes in the Double Fragmentation of World Society*, in REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION 23 (Margaret Young ed., 2010) (“[J]udged against the criterion of the establishment of processes of secondary rule-making, the ICANN policies are genuine legal norms.”).

⁵⁶ See, e.g., Froomkin, *supra* note 24; Zalnieriute, *supra* note 24.

that human rights issues are not relevant to its narrow technical mission,⁵⁷ but many of its policies entail direct human rights implications as described above.

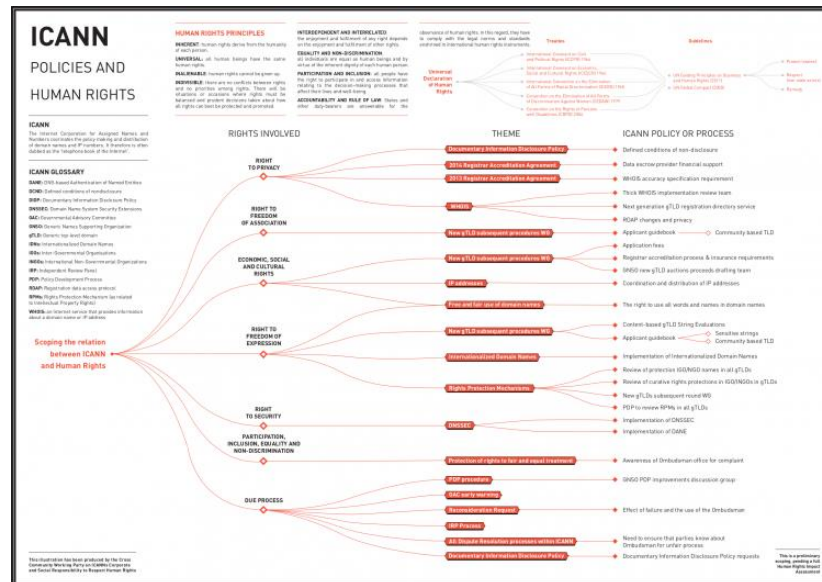


Figure 1.

An overview of the relation between human rights and ICANN’s policies in ICANN, prepared by CCWP HR. The full chart is available at https://community.icann.org/download/attachments/53772653/article19_ICANN_1706_reviewed.pdf.

Indeed, many ICANN policies have attracted criticism and, in some cases, litigation. Civil society campaigns for policy change range from those surrounding data privacy concerns in the WHOIS policy⁵⁸ to due process concerns and concerns about limits on freedom of expression in protecting trademark rights

⁵⁷ For instance, the chair of the ICANN Board and Internet veteran Steve Crocker, who observed during ICANN 51 in Los Angeles that he “did not see any connection between human rights and ICANN.” Transcript of Board with the Non-Commercial Stakeholders, ICANN (Oct. 14, 2014) at 5, <https://archive.icann.org/meetings/losangeles2014/en/schedule/tue-board-ncsg/transcript-board-ncsg-14oct14-en.pdf>.

⁵⁸ See *supra* note 54. On data privacy issues in WHOIS, see Perrin, *supra* note 23.

under the Uniform Dispute Resolution Policy.⁵⁹ Such campaigns have also targeted excessive personal data retention requirements contained in the ICANN Registrar Accreditation Agreements.⁶⁰ Despite proclaiming its independence from the U.S. government, ICANN was also heavily criticized—especially by libertarians—for initially acceding to the demands of the Bush Administration by not approving the top level domain name *.xxx* for pornography sites based on “moral” concerns expressed by the Administration.⁶¹ ICANN was later forced to change its stance, as the registry which had applied for the *.xxx* domain later initiated independent review proceedings against ICANN.⁶² Similarly, ICANN has been involved in a scandal over the *.gay* top level domain name (which is still not allocated), causing an outcry from human rights activists for failing to respect the freedoms of expression and assembly of the LGBT community.⁶³

The compatibility of ICANN policies and human rights law has also been litigated in courts. Most recently, this includes the litigation on the compatibility of the WHOIS system and the EU General Data Protection Regulation (GDPR), which came into force in May 2018 and is directly applicable to private actors.⁶⁴

⁵⁹ See, e.g., Mueller, *supra* note 24; Froomkin, *supra* note 24; JACQUELINE LIPTON, INTERNET DOMAIN NAMES, TRADEMARKS AND FREE SPEECH (2010); KOMAITIS, *supra* note 24; Zalnieriute, *supra* note 24.

⁶⁰ Zalnieriute & Schneider, *supra* note 22.

⁶¹ 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).

⁶² 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.

⁶³ On *.gay* issues, see Monika Zalnieriute, *Digital Rights of LGBTI Communities: A Roadmap for Dual Human Rights Framework*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND DIGITAL TECHNOLOGY (Ben Wagner et al. eds. 2019); Laura DeNardis & Andrea M. Hackl, *Internet Control Points as LGBT Rights Mediation*, 19 INFO., COMM. & SOC’Y 753 (2016); Monika Zalnieriute, *The Anatomy of Neoliberal Internet Governance: A Queer Critical Political Economy Perspective*, in QUEERING INTERNATIONAL LAW 67 (Dianne Otto ed. 2017).

⁶⁴ Regulation (EU) 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

In particular, in 2018, ICANN lodged three appeals in German courts which refused to force an ICANN-accredited registrar, EPAG Domainservices GmbH, to continue collecting data despite EPAG's concerns that doing so would violate GDPR.⁶⁵ The courts have so far stood firm in rejecting ICANN's requests for an injunction to enforce the WHOIS data collection requirements on the EPAG registrar, on the grounds that the variety of data collected and stored under WHOIS was unnecessary to fulfill ICANN's specified objectives of combating criminal or otherwise punishable infringements or tackling security problems. Most recently, following a complaint by a Danish IT worker, who acted as a proxy for multiple domain name registrants in the course of his work, Denmark's Data Inspectorate ruled on March 28, 2019 that the publication of proxies' personal contact information by the domain names administrator is unnecessary and violates GDPR data minimization principles.⁶⁶

D. Uncertainty Over Applicability of Human Rights Law and Jurisdiction

When private (or quasi-private) actors create legal norms that have extraterritorial effects, such bodies are often able to escape

repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L119/1.

⁶⁵ On May 25, 2018, ICANN filed a motion for preliminary injunction against the accredited Registrar EPAG Domainservices GmbH. Motion from Jakob Guhn to Langericht Bonn (May 25, 2018), <https://www.icann.org/de/system/files/files/litigation-icann-v-epag-request-prelim-injunction-redacted-25may18-de.pdf>. On 30 May 2018, the Regional Court of Bonn (the *Landgericht Bonn*) has issued its preliminary decision on the case (Landgericht Bonn, Court Order, 30 May 2018, 19W32/18 (10 O 171/18) <https://www.icann.org/de/system/files/files/litigation-icann-v-epag-request-court-order-prelim-injunction-redacted-30may18-de.pdf>), which has been further confirmed by the Appellate Court of Cologne (the *Oberlandesgericht Köln*) on September 3, 2018 (Oberlandesgericht Köln, Court Order, Sept. 3, 2018, 19W32/18 (10 O 171/18), <https://www.icann.org/de/system/files/files/litigation-icann-v-epag-order-higher-regional-court-icann-plea-remonstrance-redacted-03sep18-de.pdf>).

⁶⁶ Bronte Cullum, *Danish WHOIS Registrar Breaching GDPR*, GLOBAL DATA REV. (Apr. 8, 2019), <https://globaldatareview.com/article/1190008/danish-whois-registrar-breaching-gdpr>.

the limits imposed by national constitutions and domestic human rights legislation. They are able to do so because they are not directly bound by public and administrative law safeguards on the exercise of public power.⁶⁷ ICANN is a very good example of this regulatory gap: despite its unique public-private hybrid quasi-governmental nature, its public mission, and its policymaking role with global reach, it is unclear whether the human rights law of any jurisdiction imposes any limits on its activities, beyond a few limited cases of labor standards, anti-discrimination law, and data protection law.

In the United States, where ICANN is headquartered, it operates in accordance with the U.S. corporate law system rather than a more traditional public law regime.⁶⁸ As a private non-profit corporation registered in California, ICANN is not constitutionally bound by the U.S. Bill of Rights and has also largely escaped human rights regulations and antitrust liability in the U.S.⁶⁹

Beyond the United States, ICANN has clearly established “operations” in other countries from a jurisdictional perspective. It has regional offices in Brussels, Istanbul, Montevideo, and Singapore.⁷⁰ However, ICANN’s contractual agreements lack choice-of-law clauses, and controversies over the so-called “jurisdictional issue” remain unresolved.⁷¹ Whatever the jurisdiction however, the direct applicability of human rights law

⁶⁷ See generally ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006).

⁶⁸ On ICANN’s quasi-governmental status, see Kingsbury et al., *supra* note 45; Ruotolo, *supra* note 42, at 159-70. On ICANN’s relationship with U.S. public and constitutional law, see A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17 (2000).

⁶⁹ For an analysis how ICANN has escaped antitrust (or competition law) liability, see Justin T. Lepp, *ICANN’s Escape from Antitrust Liability*, 89 WASH. U.L. REV. 931, 948-61 (2012); A. Michael Froomkin & Mark A. Lemley, *ICANN and Antitrust*, 2003 U. ILL. L. REV. 1, 3-4 (2003).

⁷⁰ *Our International Office Strategy*, ICANN <https://www.icann.org/news/blog/our-international-office-strategy>.

⁷¹ See Milton Mueller, *What “Jurisdiction” Does ICANN Belong To?* INTERNET GOVERNANCE PROJECT (Nov. 7, 2017), <https://www.internetgovernance.org/2017/11/07/jurisdiction-icann-belong>.

to ICANN in any jurisdiction, just like in the U.S., remains obscure because of ICANN's status as a private organization.⁷²

*E. Uncertainty Over Human Rights Obligations
Under International Law*

Finally, such privatized global norm-making by ICANN is further complicated from a human rights perspective, because it is not clear what human rights obligations, if any, international law imposes on private 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 for human rights obligations of multinational corporations in the 1970s.⁷³

Despite the persistent complexity of this issue, many such actors do however proclaim that they will operate in conformity with international legal norms, including human rights, as part of their self-imposed procedural principles. Such commitments are particularly common when private actors perform regulatory and policymaking functions that significantly affect members of the public.⁷⁴ ICANN is not an exception: lacking an external source

⁷² International or European human rights law would seem not to generally apply to ICANN. See ZALNIERIUTE & SCHNEIDER, *supra* note 22. 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.

⁷³ 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).

⁷⁴ Javier Barnes, *Three Generations of Administrative Procedures*, in COMPARATIVE ADMINISTRATIVE LAW 306 (Susan Rose-Ackerman & Peter L. Lindseth eds. 2017).

of legal authority and legitimacy,⁷⁵ it has voluntarily imposed on itself quasi-constitutional principles and values by which it professes to operate.

III. ICANN'S ASPIRATIONS FOR HUMAN RIGHTS

In this Section, I analyze ICANN's self-imposed commitments contained in its constituent documents, and argue that while its aspirations for human rights are welcome, these aspirations nonetheless carry little, if any, legal weight.

The most obvious of ICANN's attempts to self-impose quasi-constitutional limits on its power is found in Article 4 of its Articles of Incorporation, which provides 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"⁷⁶

Furthermore, one of the outcomes of the IANA transition was that ICANN's Bylaws were updated in 2016 and now include a Core Value stipulating that ICANN will "[respect] internationally recognized human rights as required by applicable law" in its operations.⁷⁷ The inclusion of this "Core Value" in the ICANN Bylaws was a great achievement for human rights advocates. However, stemming from the language of corporate culture and management theory,⁷⁸ the term "Core Value" is ambiguous, carrying uncertain legal weight. I argue that the language of ICANN's Articles of Incorporation and the formulation of the human rights "Core Value" in its Bylaws are fuzzy and open to legal doctrinal disagreement. The fuzziness becomes even more pronounced in light of ICANN's complex status as a private body, enacting policies with global reach. To

⁷⁵ On ICANN's lack of legitimacy, see David Lindsay, *What Do the .xxx Disputes Tell Us About Internet Governance? ICANN's Legitimacy Deficit in Context*, 63 TELECOMMS. J. AUSTL. 1, 4-5 (2013).

⁷⁶ Articles of Incorporation for Internet Corporation for Assigned Names and Numbers, ICANN (9 August, 2016), <https://www.icann.org/resources/pages/governance/articles-en>.

⁷⁷ See *supra* notes 20 and 21.

⁷⁸ Lynn S. Paine, *Managing for Organizational Integrity*, HARVARD BUS. REV. (Apr. 1994), <http://hbr.org/1994/03/managing-for-organizational-integrity>.

answer the legal question as to whether ICANN's human rights obligations can be enforced based on its Articles of Incorporation and once the Core Value "comes into effect,"⁷⁹ it is important to consider three questions: First, which principles of international law might be *relevant*? Second, which international conventions might be *applicable* to ICANN? And third, which internationally recognized human rights does the applicable law require ICANN to respect? I discuss these in turn.

A. Applicability of Principles of International Law and International Conventions

First, the *relevance* of international law principles to an informal body is highly debatable. With the exception of principles of international criminal law,⁸⁰ it seems that generally no principles of international law are directly relevant for private informal actors, such as ICANN. International law is generally interpreted and understood by the international community as created by and for nation-states.⁸¹ Similarly, it could be argued that there are no international conventions that apply to ICANN at all, because a general principle of international law holds that international conventions only apply to the signatory states which ratified them.⁸²

⁷⁹ Now awaiting ICANN Board approval, as per ICANN Bylaws. *See supra* note 21.

⁸⁰ 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 Shane Darcy, *The Potential Role of Criminal Law in a Business and Human Rights Treaty*, in BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS: CONTEXT AND CONTOURS (Surya Deva & David Bilchitz eds. 2017).

⁸¹ *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 57-58 (1998).

⁸² This is a well-developed principle of international law, codified in the Vienna Convention on the Law of Treaties, Jan. 27, 1980, 1155 U.N.T.S. 331, http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

International human rights law—at least as it currently stands⁸³—is no exception to the general principles of international law and is therefore also generally understood (among the international community) to be legally binding only on states, not on private actors.⁸⁴ Informal actors, such as transnational corporations or bodies like ICANN, are thus generally excluded from direct responsibility under international human rights law.⁸⁵ Under such a state-centric conception of international law, human rights law is incapable of providing satisfactory remedies for non-state and corporate-related human rights violations.⁸⁶ Thus, legally speaking, ICANN is not directly bound by the principles of international law or any international conventions, including human rights conventions.

B. Applicable (Local) Law

Further questions arise as to which internationally recognized human rights the applicable law under the “Core Value” requires

⁸³ For ongoing efforts to change it, see Section V, *infra*, and the references cited therein.

⁸⁴ See, e.g., International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], <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 take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”); 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], <http://www2.ohchr.org/english/law/cescr.htm> (“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”). However, “international legal institutions typically only have advisory powers and are unable to ‘make’ states take particular action.” Angela M. Banks, *CEDAW, Compliance, and Custom: Human Rights Enforcement in Sub-Saharan Africa*, 32 *FORDHAM INT’L L.J.* 781, 782 (2009).

⁸⁵ For discussions of these issues in depth, see DEVA & BILCHITZ, *supra* note 80.

⁸⁶ See Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 *YALE J. INT’L L.* 1 (2002). In relation to remedies and the proposed binding treaty, see Erika George & Lisa Laplante, *Access to Remedy: Treaty Talks and the Terms of a New Accountability Accord*, in DEVA & BILCHITZ, *supra* note 80.

ICANN to respect. If no international human rights law is directly applicable to ICANN, then it follows that “applicable law” may only be national or local law (e.g., in case of the European Union, it could be directly binding EU law).⁸⁷ The critical question here becomes whether the applicable national/local law requires private bodies to respect internationally recognized human rights.⁸⁸

The answer to this question depends on the national context and whether the countries in question have ratified international human rights instruments. However, whichever the jurisdiction, the applicability of domestic human rights law to ICANN will still remain uncertain and limited because of ICANN’s status as a private organization.⁸⁹ Thus, even if a particular country has ratified the human rights convention, domestic human rights legislation most often applies only vertically—that is, to public bodies. Such legislation is rarely applicable and enforceable horizontally—to private actors. With a few exceptions where domestic human rights standards are applied horizontally (such as anti-discrimination laws, personal data protection laws, certain labor standards, or gross human rights abuses that may also be addressed under criminal law),⁹⁰ it would appear that ICANN is not generally *required* to respect internationally recognized human rights by “applicable law.” Thus, from a

⁸⁷ The draft *Framework of Interpretation*, available at <https://www.icann.org/en/system/files/files/proposed-foi-hr-04apr17-en.pdf>, states that: “‘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.”

⁸⁸ The proposed FOI clarifies: “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 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.” *Id.*

⁸⁹ See *supra* note 72.

⁹⁰ For more on horizontal application for human rights, see Knox, *supra* note 7; Dorota Leczykiewicz, *Horizontal Application of the Charter of Fundamental Rights*, 38 EUROPEAN L. REV. 479 (2013).

human rights law perspective, the statement regarding “applicable (local) law” reads as a rather weak self-imposed constraint.

C. Enforcement Mechanisms for Self-Imposed Commitments?

The lack of direct applicability of international law would arguably be less of an issue from a human rights perspective if ICANN would voluntarily submit to external review of its adherence to its self-imposed human rights commitments; such review could occur either via adjudication, international arbitration, or judicial review. Given ICANN’s status as a semi-informal international organization, with global human rights implications stemming from its policies, enforcing its corporate and social responsibility and human rights commitments via domestic legal mechanisms, such as private law, might be less appealing.⁹¹ This is particularly so because ICANN remains under U.S. jurisdiction, and asserting legal claims against it in other jurisdictions might be challenging on practical level, as is often the case with transnational corporations.⁹² Scholars have suggested that self-imposed commitments of private actors such as ICANN could also be enforced using foreign investment treaties,⁹³ international trade agreements,⁹⁴ and international

⁹¹ For different suggestions as to enforceability of CSR Codes through domestic law, see ANNA BECKERS, ENFORCING CORPORATE SOCIAL RESPONSIBILITY CODES: ON GLOBAL SELF-REGULATION AND NATIONAL PRIVATE LAW (2015) (arguing that private law can, and should, enforce corporate self-regulation as genuine legal obligations); ANDREAS RÜHMKORF, CORPORATE SOCIAL RESPONSIBILITY, PRIVATE LAW AND GLOBAL SUPPLY CHAINS (2015) (examining the contributions made by private law to the promotion of corporate social responsibility); ANNA LOUISE VYTOPIL, CONTRACTUAL CONTROL IN THE SUPPLY CHAIN: ON CORPORATE SOCIAL RESPONSIBILITY, CODES OF CONDUCT, CONTRACTS AND (AVOIDING) LIABILITY (2015) (discussing to what extent multinational corporations can be held liable for corporate social responsibility violations).

⁹² See Ekaterina Aristova, *Tort Litigation Against Transnational Corporations in the English Courts: The Challenge of Jurisdiction*, 14 UTRECHT L. REV. 6 (2018); SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION (2004); Philip I. Blumberg, *Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 AM. J. COMP. L. SUPP. 493 (2002).

⁹³ Simma, *supra* note 30; Zhu, *supra* note 30.

⁹⁴ Powell, *supra* note 31; Peels, *supra* note 31.

arbitration.⁹⁵ Indeed, ICANN established independently administered third-party adjudication procedures back in 2005 in order to review decisions of its Board that were allegedly inconsistent with its Articles of Incorporation or Bylaws.⁹⁶

ICANN claims that the existence of processes for independent review of its actions “reinforces its transparency and accountability mechanisms.”⁹⁷ However, the existence of only one action brought against ICANN under this procedure (the infamous .xxx case, initiated over a decade ago)⁹⁸ begs the question whether the mere availability of such proceedings is sufficient to ensure that ICANN will be held accountable for human rights to the global multistakeholder community. It is surprising that more independent third-party review proceedings have not been initiated, despite the many apparent inconsistencies between ICANN’s global policies and human rights norms. Such limited deployment could stem from a lack of transparency, accessibility, and public knowledge surrounding the availability of proceedings, or it could stem from the unwillingness of affected parties to bring cases forward.

⁹⁵Katia Fach Gomez, *Enforcing Global Law: International Arbitration and Informal Regulatory Instruments*, 47 J. LEGAL PLURALISM & UNOFFICIAL L. 112 (2015).

⁹⁶ See *Reconsideration and Independent Review: ICANN Bylaws Article IV Accountability and Review*, ICANN, <https://www.icann.org/resources/pages/reconsideration-and-independent-review-icann-bylaws-article-iv-accountability-and-review>. ICANN has designated the International Centre for Dispute Resolution (<https://www.icdr.org>) to operate the independent review process. On the number of independent review proceedings, see *Answers to Recurring Questions Regarding the Independent Review Process ICANN* (June 19, 2010), <https://www.icann.org/resources/pages/irp-questions-2010-06-19-en>, which 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>.”

⁹⁷ *Id.*

⁹⁸ 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, all relevant submissions and arbitration declaration are available at <https://www.icann.org/resources/icm-v-icann-2012-02-25-en>, visited 20/03/2018.

Recently, ICANN has updated an independent review procedure as part of the IANA transition to make it “more transparent, efficient, and accessible, and designed to produce consistent and coherent results that will serve as a guide for future actions.”⁹⁹ An updated independent review includes the establishment of a “Standing Panel” from which panelists will be selected to preside over each IRP dispute,¹⁰⁰ and ICANN is currently seeking community input over the selection and composition of panelists. However, the “Call for Action” and public comments on this accountability measure are not advertised in the “Open” section of the ICANN’s Call for Public Comments, but rather are hidden away on ICANN’s blog page.¹⁰¹ It is thus questionable whether ICANN is genuinely interested in bringing the reform, availability, and importance of the independent review procedure to the attention of the wider public.

D. No Obligation to Enforce

Finally, irrespective of the considerations about the state-centric nature of human rights law or the limited actual use of independent review, the impact of the human rights Core Value is further complicated by its own language:

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

⁹⁹ Göran Marby, *Independent Review Process Standing Panel—Call to Action*, ICANN (Mar. 9, 2019) <https://www.icann.org/news/blog/independent-review-process-standing-panel-call-to-action>.

¹⁰⁰ ICANN Bylaws, Art. 4, §§ 4.3(j), (k).

¹⁰¹ See the comment by Volker Greimann, left on 00:26 UTC on March 12, 2019 on ICANN blog post, calling for action and comments on independent review procedure, “It would be helpful if ICANN would not hide public comment requests in their blog posts. It has a page to announce and collect public comments and this should be used for all public comments. The community cannot monitor all possible communication channels used by ICANN to ensure no requests for comment are missed. If you want to reach out for comments, do so in a transparent and above all consistent manner.” Marby, *supra* note 99.

obligations of other parties, against other parties.¹⁰²

The second sentence of this statement is particularly ambiguous and could be read in two different ways. The first reading would suggest that ICANN is not obligated to enforce the human rights obligations of its own or other parties *against other parties*. Such a reading however, makes little sense, because ICANN is not a regulator with any enforcement capacity in the first place, so the reference to having ‘no obligation to enforce against other parties’ seems to have little logical or legal meaning. The second way to read the sentence would suggest that ICANN is not obligated 1) *to enforce its human rights obligations* nor 2) *to enforce human rights obligations of other parties against other parties*. Following the second reading, it could be argued that even if ICANN actually had certain human rights obligations (by virtue of the applicable law imposing them on private actors), the self-imposed Core Value does not obligate it “to enforce its human rights obligations.” Such a pronouncement leaves one wondering whether ICANN had reserved itself a right not to act whenever its policies in fact do disregard human rights, even if they are required to act by applicable law. Whichever the reading, however, it could be argued that the ambiguity of such a caveat negates the impact of the Core Value and confuses the intended beneficiaries of the Bylaw.

E. So What Has ICANN Promised to Respect in Its Constituent Documents?

The preceding legal analysis of ICANN’s Articles of Incorporation and Bylaws has highlighted that they were drafted in a manner that enables ICANN to downgrade or even eschew its human rights responsibilities.

This brings into question a principal impetus for adding the human rights Core Value in the updated Bylaws. The reading of

¹⁰² See Article 1.2.b(vii) of the BYLAWS FOR INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, as amended Oct 1, 2016, <https://www.icann.org/resources/pages/governance/bylaws-en>.

the Bylaw thus far leaves one wondering whether it was adopted simply to soothe the pressure coming from certain parts of ICANN community and particularly civil society. Doubts surrounding ICANN's genuine impetus become even stronger when considering the changing institutional structure of ICANN as part of the IANA transition, where ICANN is now under enormous pressure to demonstrate its accountability to the global multistakeholder community.

The questionable impetus for adopting the Bylaw is further evidenced by the draft Framework of Interpretation (FOI)¹⁰³ for interpreting the new human rights aspirations. I suggest that the FOI opens the door to further legal interpretations that are antithetical to universal human rights norms. For example, human rights groups that lobbied ICANN to include the human rights language in the Bylaws (such as Article 19 and the Cross-Community Working Party on ICANN's CSR to Respect Human Rights) referred to the terms 'value' and 'commitment' as interchangeable in the media, suggesting that the inclusion in the Bylaw of the 'value' rather than 'commitment' was not initially perceived as a cause for concern.¹⁰⁴ However, the FOI later emphasized explicitly that human rights were included in the Bylaws simply as a 'Core Value,' rather than as a 'Commitment.'¹⁰⁵ This further suggests that the language in the Bylaw might not be as promising as initially perceived by the human rights advocates.

ICANN is not alone in relying on this type of tenuous language. For example, the OECD guidelines also include similarly flexible language for compliance with international norms and domestic law, language that could be interpreted as demoting the

¹⁰³ See FOI, *supra* note 21.

¹⁰⁴ See, e.g., a short comment by Niels ten Oever, who facilitated the CCWP-HR. Niels ten Oever, *Human Rights Catch Up With ICANN*, OBSERVER RES. FOUND. (Feb 16, 2016), <http://www.orfonline.org/article/human-rights-catch-up-with-icann>. For the interchangeable use of terms, see *ICANN Board Agrees to Human Rights Commitment*, ARTICLE 19 (Feb. 4, 2016), <https://www.article19.org/resources/icann-board-agrees-to-human-rights-commitment/>.

¹⁰⁵ "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 Draft FOI, *supra* note 87.

human rights responsibilities of private actors to a virtually non-existent status.¹⁰⁶ The flexible language, together with the lack of enforcement for self-imposed voluntary obligations, points to an unsettling human rights vacuum in informal private governance regimes such as ICANN. The vacuum results precisely because such regimes seem to be unreachable by either national or international human rights laws. But is this really a governance vacuum or could some structures still address the gap in human rights protection? In other words, could other initiatives—beyond enforceable commitments—effectively cover this gap? Given the legal obscurity of ICANN’s pledges for human rights (as well as the lack of enforceability of its self-imposed commitments via independent review), I ask whether voluntary CSR aspirations can bridge this gap in the following Section.

IV. CRITICAL ANALYSIS OF ICANN’S CSR TO RESPECT HUMAN RIGHTS

Lacking enforceable obligations for private actors in international (or national) human rights law, human rights advocates instead rely on voluntary commitments, soft law pronouncements, and a vague managerial concept of corporate and social responsibility (CSR). This approach has also been adopted within the ICANN community, as suggested by the newly established Cross-Community Working Party on ICANN’s Corporate and Social Responsibility to Respect

¹⁰⁶ See Robert C. Blitt, *Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance*, 48 TEX. INT'L L.J. 33, 55 (2012) (arguing that under the OECD guidelines, “a corporation might pursue business opportunities in a ‘rogue’ state that has neglected to ratify relevant international human rights treaties, and thus empower itself to act in a manner that would breach human rights norms if undertaken elsewhere”). Similarly, Blitt noted that under the OECD Guideliness, “a corporation acting under the pretense of complying with domestic law could intentionally exclude from its workforce members of a persecuted minority group yet still claim to be satisfying the guidelines.” *Id.* at 56.

Human Rights (CCWP-HR)¹⁰⁷ and its numerous reports.¹⁰⁸ CCWP-HR, led by the Non-Commercial User Constituency of ICANN, is an informal structure within the ICANN community founded in 2016 and not financially supported by the ICANN organization. It is understandable that civil society aims to increase ICANN's accountability for human rights by employing any means available, including CSR. However, in this Section, after introducing the relevant corporate human rights instruments, I will argue that voluntary commitments and CSR are insufficient to ensure the accountability of private actors for human rights.

A. Soft Law Human Rights Instruments and ICANN

The most widely accepted and endorsed benchmark of the corporate human rights agenda is the UN Guiding Principles on business and human rights, which were unanimously endorsed by the UN Human Rights Council (HRC) in 2011.¹⁰⁹ The Principles pronounce that while governments retain the exclusive responsibility to *protect* and fulfill human rights obligations, corporations are required to *respect* human rights.¹¹⁰

¹⁰⁷ According to ICANN Non-Commercial Constituency's Website, "The Cross Community Working Party on ICANN's Corporate and Social Responsibility to Respect Human Rights (CCWP-HR) seeks to map and understand the issues and potential solutions related to corporate and social responsibilities of the Internet Corporation for Assigned Names and Numbers (ICANN). This is related, but not limited to policies, procedures and operations, with a particular focus on ICANN's responsibility to respect human rights." *See CCWP on ICANN and Human Rights*, ICANN (June 8, 2018), <https://community.icann.org/display/gnsononcomstake/CCWP+on+ICANN+and+Human+Rights>; *see also* Stefania Milan & Niels ten Oever, *Coding and Encoding Rights in Internet Infrastructure*, 6 INTERNET POL'Y REV., no. 1, 2017 (providing a close examination of civil society efforts withing ICANN).

¹⁰⁸ *See, e.g.*, Monika Zalnieriute, Issue Report for the Cross Community Working Party on ICANN's Corporate and Social Responsibility to Respect Human Rights: Practical Recommendations for ICANN, ARTICLE 19 (June 2015), https://www.article19.org/data/files/medialibrary/38003/ICANN_report_A5-for-webv2.pdf; Monika Zalnieriute, ICANN's Corporate Responsibility to Respect Human Rights, ARTICLE 19 (Feb. 2015), <https://www.article19.org/data/files/medialibrary/37845/ICANN-PAPER-WEB.pdf>.

¹⁰⁹ UN Guiding Principles, *supra* note 2.

¹¹⁰ UN Guiding Principles, *supra* note 2, at ¶ 13. As Blitt, *supra* note 106 explains, to a lesser extent, the UN Guiding Principles also address certain responsibilities relating to remedying human rights violations. *See* UN Guiding Principles, ¶¶ 22–27 (discussing various judicial, administrative,

These are understood to include, at a minimum, those rights articulated under the Universal Declaration of Human Rights¹¹¹ and the main instruments through which the UDHR has been codified: the International Covenant on Civil and Political Rights¹¹² and the International Covenant on Economic, Social and Cultural Rights,¹¹³ as well as fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.¹¹⁴ In short, the UN Guiding Principles proclaim that private actors, such as ICANN, should avoid causing or contributing to human rights impacts,¹¹⁵ should seek to mitigate them,¹¹⁶ and should have policies and procedures in place, such as due diligence, to prevent and mitigate such impacts.¹¹⁷

The UN Guiding Principles have been widely praised by states, intergovernmental organizations (such as the OECD¹¹⁸ and the

legislative, and other appropriate mechanisms for providing effective remedies when business-related human rights abuses occur).

¹¹¹ Universal Declaration of Human Rights, GA Res. 217A, U.N. GAOR 3rd Sess., UN Doc. A/810, at 71 (1948), <http://www.un.org/en/universal-declaration-human-rights/>.

¹¹² International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1967).

¹¹³ International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Mar. 23, 1976) [hereinafter ICESCR].

¹¹⁴ Adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998 (Annex revised 15 June 2010)

¹¹⁵ See UN Guiding Principles, *supra* note 2, at Principle 13.

¹¹⁶ See *id.* at Principle 14.

¹¹⁷ See *id.* at Principle 15.

¹¹⁸ For instance, the OECD updated its *Guidelines for Multinational Enterprises* by specifically incorporating the Guiding Principles into a new chapter. See OECD, *supra* note 2, at 4. For a critique of the updated OECD Guidelines, see Reinert, Kenneth A., Oda T. Reinert & Gelaye Debebe, *The New OECD Guidelines for Multinational Enterprises: better but not enough*, 26 DEVELOPMENT IN PRACTICE 816 (2016).

EU¹¹⁹), companies,¹²⁰ and corporate human rights initiatives.¹²¹ However, the UN Principles have also been criticized by leading NGOs, such as Amnesty International and Human Rights Watch, for “simply endors[ing] the status quo: a world where companies are encouraged, but not obliged, to respect human rights.”¹²² The UN Principles describe this duty to respect human rights as

¹¹⁹ *Business and Human Rights: New United Nations Guidelines*, EUROPEAN COMMISSION (June 17, 2011), http://ec.europa.eu/enterprise/newsroom/cf/itemdetail.cfm?item_id=5220.

¹²⁰ For business support, see Letter from Bob Corcoran, Vice President, Corporate Citizenship, General Electric, to Professor John G. Ruggie, Special Representative of the Sec’y-General on the Issue of Human Rights and Transnational Corps. (May 20, 2011), <http://www.global-business-initiative.org/SRSGpage/files/GE%20letter%20to%20John%20Ruggie.pdf>; see also Letter from Richard Wong, Vice President, Global Corporate Soc. Responsibility and Emp. Relations, Flextronics, to Professor John G. Ruggie, Special Representative of the Sec’y-General on the Issue of Human Rights and Transnational Corps. (May 25, 2011), <http://www.global-business-initiative.org/SRSGpage/files/Letter%20to%20Ruggie%20110525%20flextronics.pdf> (“writing to thank and commend” Ruggie for his framework); Letter from Edward E. Potter, Dir., Global Workplace Rights, Coca-Cola, to Professor John G. Ruggie, Special Representative of the Sec’y-General on the Issue of Human Rights and Transnational Corps. (May 26, 2011), <http://www.global-business-initiative.org/SRSGpage/files/Guiding%20Principles%20Endorsement%20from%20Coke.pdf> (offering congratulations to Ruggie for his framework on behalf of the Coca-Cola Company).

¹²¹ For example, the UN Global Compact—the largest corporate citizenship and sustainability initiative—noted that the Guiding Principles provides “further operational clarity” for the Global Compact’s own foundational human rights principles. See *U.N. Global Compact Participants*, U.N. GLOBAL COMPACT (July 28, 2011), <http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html>. For a critical perspective on the UN Global Compact, see Christian Voegtlin & Nicola M. Pless, *Global Governance: CSR and the Role of the UN Global Compact*, 122 JOURNAL OF BUSINESS ETHICS 179 (2014); Graham Knight & Jackie Smith, *The Global Compact and Its Critics: Activism, Power Relations, and Corporate Social Responsibility*, in *DISCIPLINE AND PUNISHMENT IN GLOBAL POLITICS: ILLUSIONS OF CONTROL* (Janie Leatherman ed., 2008) (describing “how the attempts to expand global CSR regimes through the UN Global Compact and the UN Norms for Business have been limited in their ability to impact actual practices”).

¹²² *U.N. Human Rights Council: Weak Stance on Business Standards*, HUM. RTS. WATCH (June 16, 2011), <http://www.hrw.org/en/news/2011/06/16/un-human-rights-council-weak-stance-business-standards>. *United Nations: A Call for Action to Better Protect the Rights of Those Affected by Business-Related Human Rights Abuses*, AMNESTY INT’L 2 n.4 (June 14, 2011), <https://www.amnesty.org/download/Documents/32000/ior400092011en.pdf>.

neither binding nor voluntary.¹²³ They have been criticized for cementing the view that the corporate role in relation to fundamental rights is itself a very limited one and needs to be distinguished clearly from that of the state.¹²⁴ Yet, such a view has been strongly contested by philosophers, business ethicists, and lawyers, who contend that there are good reasons why corporations and other non-state actors should indeed be recognized as having a wide range of positive obligations in relation to fundamental rights.¹²⁵ Others have noted that the Principles have successfully replaced a term with clear legal meaning under international law—“obligation”—with the fuzzier concept of “responsibility.”¹²⁶

In addition to the more general UN Guiding Principles, several other initiatives have developed Internet-specific voluntary principles for the information, communications, and technology (ICT) sector. For example, the European Commission has published the ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights,¹²⁷ while the Global Network Initiative, an NGO that brings together companies, academics, and other internet organizations, has

¹²³ U.N. Human Rights: Office of the High Commissioner, *Frequently Asked Questions About the Guiding Principles on Business and Human Rights*, U.N. Docs. HR/PUB/14/3 at 9 (2014) (discussing the legal status of the Principles).

¹²⁴ See, e.g., David Bilchitz, *The Necessity for a Business and Human Rights Treaty*, 1 BUS. & HUM. RTS. J. 203 (2016).

¹²⁵ See DEVA & BILCHITZ, *supra* note 80; Stepan Wood, *The Case for Leverage-Based Corporate Human Rights Responsibility*, 22 BUS. ETHICS Q. 63, 76–92 (2012); Michael Santoro, *Post-Westphalia and its Discontents: Business, Globalisation and Human Rights in Political and Moral Perspective* 20 BUS. ETHICS Q. 281, 291–92 (2010); David Bilchitz, *Do Corporations Have Positive Fundamental Rights Obligations?*, 125 THEORIA 11–26 (2010).

¹²⁶ See Blitt, *supra* note 106, at n.65, explaining that: “The plain meaning of ‘responsibility’ suggests a moral obligation to behave correctly or a thing that one is required to do, rather than a duty to which an actor is legally bound. Although the final Guiding Principles do not provide explicit recognition that ‘responsibility’ is distinct from ‘duty’ or ‘obligation,’ the difference is implied insofar as the term duty is invoked in regard to states only.”

¹²⁷ EU COMMISSION, *ICT SECTOR GUIDE ON IMPLEMENTING THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS* (2014), https://www.ihrb.org/pdf/eu-sector-guidance/EC-Guides/ICT/EC-Guide_ICT.pdf.

developed the Principles on Freedom of Expression and Privacy.¹²⁸ Civil society actors have also developed and promoted the Manila Principles of Intermediary Liability,¹²⁹ the African Declaration on Internet Rights and Freedoms,¹³⁰ and the Ranking Digital Rights Corporate Accountability Index,¹³¹ the last of which evaluates a set of major corporate actors in the digital space on the basis of their adherence to freedom of expression and privacy norms. These voluntary initiatives seek to ensure that companies meaningfully communicate with the public regarding relevant corporate processes for compliance with human rights principles, thereby increasing their accountability.

Interestingly, neither the UN Guiding Principles nor any other soft-law human rights instruments were officially endorsed by the ICANN community during the IANA transition. The Cross Community Working Group on Enhancing ICANN Accountability (‘CCWG-Accountability’), which is responsible for the revision and update of ICANN Bylaws,¹³² reached no consensus as to the suitability of the UN Guiding Principles for interpreting the human rights Core Value. Such non-inclusion and non-endorsement is surprising given that the Guiding Principles only encourage private actors to “respect” human rights. This status quo is strongly reaffirmed and mirrored in the ICANN Bylaws, as explained in the proposed FOI:

[The] Bylaw draws the clear line between “respect” for human rights as a Core Value and any attempt to extend the Bylaw into requiring ICANN to enforce the human rights obligations of ICANN or any other party against other parties.¹³³

¹²⁸ *The GNI Principles*, GLOBAL NETWORK INITIATIVE, <https://globalnetworkinitiative.org/gni-principles>.

¹²⁹ MANILA PRINCIPLES, <https://manilaprinciples.org>.

¹³⁰ AFRICAN DECLARATION, <http://africaninternetrights.org>.

¹³¹ RANKING DIGITAL RIGHTS, <https://rankingdigitalrights.org/index2017>.

¹³² See *supra* note 21 for CCWG’s role with regards to the Bylaws.

¹³³ 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

Given that this status quo of “respecting” human rights is strongly emphasized in ICANN’s Bylaw, the non-endorsement of the UN Guiding Principles in the Bylaws could reflect a desire to distance ICANN from the UN Guiding Principles, fearing that such principles might evolve into harder obligations over time.¹³⁴

B. (Non)Profit Motivation in Voluntary Commitments

It is commonly accepted that market forces influence readiness and corporate commitment to human rights policies. For example, classical CSR theories suggest that consumer demands for corporate responsibility, ‘naming and shaming’ practices by NGOs, pressure from socially responsible investors, and actual consumer boycotts may push private actors to abandon certain policies or values and adopt others.¹³⁵ However, these theories also suggest that private actors will only participate in soft-law initiatives and/or CSR frameworks if it pays off for them in the long run.

While profitability might not necessarily be the only reason driving corporations and private bodies to adopt human rights policies, it is nonetheless widely accepted to be the most influential.¹³⁶ When human rights and profitability conflict, the latter will often prevail. This is well illustrated by the infamous

Rights Core Value) are distinguished from the “Commitments.” See Draft FOI, *supra* note 87.

¹³⁴ Cf. Milton Mueller’s take (an influential Internet Governance scholar, commentator, and a co-founder of the Non-Commercial User’s Constituency in ICANN) on the relevance of the UN Guiding Principles for a policy-making body like ICANN. Milton Mueller, *Missing the Target: Human Rights Push Goes of the Rail*, INTERNET GOVERNANCE PROJECT (Oct. 26, 2016), <https://www.internetgovernance.org/2016/10/26/missing-the-target-the-human-rights-push-in-icann-goes-off-the-rails>.

¹³⁵ For classics works on CSR, see, e.g., DAVID VOGEL, *THE MARKET FOR VIRTUE* (2006); MOLLIE PAINTER-MORLAND, *BUSINESS ETHICS AS PRACTICE* (2008); TOM CAMPBELL & SEUMAS MILLER, *HUMAN RIGHTS AND THE MORAL RESPONSIBILITIES OF CORPORATE AND PUBLIC SECTOR ORGANIZATIONS* (2004).

¹³⁶ See Beth Stephens, *The Amoralism of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT’L L. 45 (2002).

strategic alliance between IBM and Nazi Germany,¹³⁷ as well as by the recent complicity of U.S. tech giants, such as Microsoft and Google, in restricting free speech in countries like China. In the case of the latter, even an enormous public outcry has not been enough to reverse agreements made by Google to return to China to expand its customer base.¹³⁸ While Google's commitment to human rights were questioned by many people, even a special "China search database" does not seem to prevent Google from branding itself as a defender of "Internet freedom."¹³⁹

Similarly, market forces have not been favorable for human rights protection within ICANN so far, not least because ICANN is not a traditional corporation—it is a non-profit corporation, which has no direct customers in the traditional sense, nor does it really compete with any other organization for market share in the assigned names and numbers of the Internet. Therefore, it seems unlikely that ICANN will pay attention to calls by human rights advocates, such as the CCWP-HR, to embrace its CSR obligations and to respect human rights by adopting new or modifying existing policies to ensure that they comply with human rights standards. ICANN does not have to worry that domain name registrants will no longer purchase domain names, because it is essentially a non-profit global policymaking monopoly that does not have any customers or competitors. It is precisely this non-profit status which has thus far successfully insulated ICANN from societal and regulatory pressure.

Given the lack of a profit motivation on the part of ICANN, it is difficult to see why a non-profit body managing global Internet

¹³⁷ EDWIN BLACK, *IBM AND THE HOLOCAUST: THE STRATEGIC ALLIANCE BETWEEN NAZI GERMANY AND AMERICA'S MOST POWERFUL CORPORATION* (2001).

¹³⁸ See *Google Services Set for 'Return' to China*, BBC NEWS (Nov. 2, 2015), <http://www.bbc.com/news/technology-34698642>; Bobbie Johnson, Tania Branigan & Daniel Nasaw, *We're Staying in China, Says Microsoft, As Free Speech Row With Google Grows*, GUARDIAN (Mar. 25, 2010), <https://www.theguardian.com/technology/2010/mar/25/china-microsoft-free-speech-google>.

¹³⁹ Catherine Flick, *Google's Censored Chinese Search Engine: A Catalogue of Ethical Violations?*, CONVERSATION (Aug. 3, 2018), <https://theconversation.com/googles-censored-chinese-search-engine-a-catalogue-of-ethical-violations-101046>.

resources and operating solely in the public interest should be subjected to a lower standard for human rights protection than a public body would be. Indeed, the discussion in Section II *supra* demonstrates that ICANN has qualities that are much more similar to those of public organizations and transnational policymaking networks than those of transnational for-profit corporations. Increasing involvement in ICANN by states—which are bound by both national and international human rights law obligations—points to the increasingly public dimension of this unique international body. This increasingly public dimension, in turn, suggests that the human rights duties of such a quasi-governmental international body must go well beyond those required of business corporations. While for corporations, it may seem reasonable to accept that there is a narrower scope of human rights obligations when compared to states,¹⁴⁰ the narrower scope of obligations appears not as relevant when considering non-profit corporations such as ICANN, which operate solely in the public interest. Indeed, this unique status and operation for the public interest render ICANN’s duties to respect human rights much stronger, because its social mission is not complicated by motivations for profit. Therefore, ICANN’s human rights duties should be stronger than those of a standard for-profit corporation.

C. Public Confidence and CSR

As a non-profit organization, ICANN might uphold “soft commitments” and CSR not because of competition in the market, but rather to increase public confidence in its operations and create a better public image. Other factors beyond profit considerations, such as public “naming and shaming” and pressure by regulatory bodies and civil society, might therefore be more effective.

Thus far however, public confidence and public image have not proven to be strong factors for ICANN in embracing its CSR to respect human rights. A potential reason for this is that ICANN

¹⁴⁰ Bilchitz, *supra* note 124.

is not a widely known organization, and many people are unaware of the human rights implications of its activities. Pressure by NGOs¹⁴¹ or by data privacy commissioners¹⁴² and authoritative intergovernmental organizations (such as the EU Commission¹⁴³ or Council of Europe¹⁴⁴), have been ineffective in preventing ICANN from adopting certain policies that seem to strongly contradict human rights law. For example, an outcry from human rights activists over the *.gay* top level domain name has not motivated ICANN to pay more attention to the rights of freedom of expression and freedom of assembly of the LGBTI community.¹⁴⁵ Similarly, dozens of letters to ICANN from the EU data protection authorities¹⁴⁶ and various NGOS¹⁴⁷ over violations of data privacy rights in the WHOIS policy and in the Registrar Accreditation Agreement of 2013 have seemingly done little to bother ICANN, in terms of any decrease in public confidence or in trust from regulatory authorities. Moreover, ICANN's main accountability mechanism of independent

¹⁴¹ *E.g.*, Derechos Digitales and the Statewatch pressured ICANN not to adopt its RAA policy. *See* Letter from Derechos Digitales to Dr. Steve Crocker, Chair of the ICANN Board (July 19, 2012), <https://www.derechosdigitales.org/wp-content/uploads/letter-of-concern-ICANN-Derechos-Digitales.pdf>; Chris Jones, *Want to Set Up a Website? The 'Five Eyes' Want Your Personal Data*, STATEWATCH, <http://www.statewatch.org/analyses/no-234-websites-five-eyes.pdf>.

¹⁴² *See* Letter from the Article 29 Working Party to ICANN (Jan. 8, 2014), https://ec.europa.eu/justice/article-29/documentation/other-document/files/2014/20140108_letter_icann.pdf; Letter from the Article 29 Working Party to ICANN (Apr. 11, 2018), <https://www.icann.org/en/system/files/correspondence/jelinek-to-marby-11apr18-en.pdf>.

¹⁴³ At a meeting of the ICANN GAC in July 2013 in Durban the EU Commission's representative has also expressed "concerns as regards data protection and in particular as regards the purpose of the processing and the retention of the data." *See* Transcript of GAC Plenary Staff Update on New gTLDs (July 13, 2013), <https://archive.icann.org/en/meetings/durban2013/node/39579.html>.

¹⁴⁴ *See, e.g.*, various reports facilitated by Council of Europe. *E.g.*, Zalnieriute & Schneider, *supra* note 22; Eve Salomon & Kinanya Pijl, *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, <https://rm.coe.int/16806be175>.

¹⁴⁵ On *.gay* issues further, see DeNardis & Hackl, *supra* note 63; Zalnieriute, *supra* note 63. On gTLDs more generally, see Salomon & Pijl, *supra* note 144.

¹⁴⁶ *See supra* note 142.

¹⁴⁷ *See supra* note 141.

arbitration, which can be used to challenge its decisions, has been employed only once since 2005.

Therefore, public accountability and the informal multistakeholder structure of ICANN have had a limited effect in actually holding the organization to human rights values. Public confidence might, however, become increasingly important, as ICANN is in the process of the IANA transition and is no longer supervised by the U.S. government, with ICANN declaring in its own words that it is “officially accountable to the global multistakeholder community.”¹⁴⁸

D. Voluntary Commitments and CSR as “Social Branding”

A widespread practice by private actors of upholding CSR norms solely for the purpose of increasing public confidence has led some scholars to argue that CSR policies have been captured by business interests and commodified,¹⁴⁹ as these policies are often used as marketing or social branding tools.¹⁵⁰ In the case of ICANN, such CSR commodification does not relate to the promotion of its products (as it does not sell any), but rather to the strengthening of its institutional image in the global Internet governance regime as a relevant, transparent, and accountable institution that respects human rights.

While ICANN is a non-profit, quasi-governmental corporation, its income is generated from numerous for-profit entities, such as registries and registrars that it contracts with.¹⁵¹ Thus ICANN perhaps could be indirectly compared to what some scholars describe as “market-oriented NGOs.” These are sponsored by

¹⁴⁸ See *Overview of the IANA Stewardship Transition*, ICANN, <https://www.icann.org/stewardship-accountability>.

¹⁴⁹ See Ronen Shamir, *Corporate Social Responsibility: A Case of Hegemony and Counter-Hegemony*, in BOAVENTURA DE SOUSA SANTOS & CÉSAR A. RODRÍGUEZ-GARAVITO, *LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY* 92 (2005).

¹⁵⁰ Ivan Manokha, *Corporate Social Responsibility: A New Signifier? An Analysis of Business Ethics and Good Business Practice*, 24 *POLITICS* 56 (2004).

¹⁵¹ *Current Financial Information*, ICANN, <https://www.icann.org/resources/pages/governance/current-en>.

businesses but aim to be associated with civil society organizations; they “disseminate and actualize corporate-inspired versions of ‘social responsibility.’”¹⁵² An example of a market-oriented NGO is the International Chamber of Commerce (ICC).

Some have convincingly argued that a powerful platform for “corporate-inspired versions of social responsibility” was created by the UN Guiding Principles.¹⁵³ For example, the organization Rights and Accountability in Development (RAID) uses empirical evidence collected during the five years since the adoption of the UN Guiding Principles to argue that corporations endorse the UN Guiding Principles because they “offer companies a way to manage human rights risks, thereby protecting their business reputation, insuring against claims, and managing problems to avoid their escalation. Ultimately, like any other risk management process, it is an approach which protects profits by reducing costs.”¹⁵⁴

E. CSR as a Risk and Information Management Tool

Empirical research by RAID further suggests how corporations might adopt company-based grievance mechanisms to overcome barriers to accessing judicial review, while at the same time introducing numerous controls to monopolize information, such as legal waivers and confidentiality clauses. This essentially channels victims through a review mechanism of the company’s own making, which is centrally devised and controlled.¹⁵⁵

This is relevant for ICANN, as its institutional structure is based on contractual agreements and memoranda of understanding, and is filled with numerous legal waivers and confidentiality clauses.¹⁵⁶ Lack of compliance with human rights laws is often

¹⁵² Shamir, *supra* note 149 at 105.

¹⁵³ *Id.*

¹⁵⁴ RIGHTS AND ACCOUNTABILITY IN DEVELOPMENT (RAID), PRINCIPLES WITHOUT JUSTICE: THE CORPORATE TAKEOVER OF HUMAN RIGHTS iii–vi (2016), http://www.raid-uk.org/sites/default/files/principles_without_justice.pdf.

¹⁵⁵ RAID, *supra* note 154.

¹⁵⁶ For an in-depth description of ICANN contractual structure, see Bygrave, *supra* note 37, at 50.

well hidden behind the numerous legal actions and waivers between ICANN and various parties. For example, as mentioned in Section II *supra*, ICANN is seeking injunctions to ensure that accredited registrars keep collecting and revealing personal information in WHOIS, as required under its contracts, which contravenes the EU data protection framework under the GDPR. Similarly, the incompatibility of the Registrar Accreditation Agreement (RAA)¹⁵⁷ agreement with the EU data protection law is managed via the so-called “data retention waiver” system, exempting several registrars from the specified data retention requirements, so that they can comply with EU data protection law.¹⁵⁸

It is not yet clear how such “legal management” systems will be impacted (if at all), once the human rights Bylaw comes into effect. The Impact Assessment Evaluation of the new Bylaw by the ICANN staff states, “The area where ICANN will be most impacted is in bringing in tools so that the policy development takes into account human rights considerations.”¹⁵⁹ Does this mean that ICANN will adopt ex ante human rights impact assessments for each policy it is developing, and will not simply try to manage incompatibility ex post? It would be naive to expect that when implementing the human rights Core Value, ICANN would act fundamentally differently from other transnational corporations, and without resort to legal management mechanisms, such as the waivers which it has readily employed in the past.

¹⁵⁷ 2013 Registrar Accreditation Agreement, ICANN, <https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en>.

¹⁵⁸ See, e.g., Update on 2013 RAA and Data Retention Waiver Process, ICANN, <https://www.icann.org/news/blog/update-on-2013-raa-and-data-retention-waiver-process>.

¹⁵⁹ See ICANN, PROPOSED CONSIDERATIONS CONCERNING ICANN’S HUMAN RIGHTS CORE VALUE IN THE NEWLY ADOPTED ICANN BYLAWS 3 (2017), <https://gac.icann.org/reports/public/ccwg%20-%20ws%20impact%20assessment%20-%20human%20rights%20foi%20-%20august%202017.pdf>.

F. Would Regulatory and Punitive Action Help?

Given the limited ability of multistakeholder accountability mechanisms to hold ICANN to its self-imposed human rights commitments, regulatory action against private actors in Internet governance might provide lessons for holding ICANN accountable for its human rights commitments. In this regard, a relationship between influential Internet platforms and EU regulators (such as the EU Commission and the Article 29 Working Party) could provide such lessons for ICANN, as well as for the business and human rights movement more generally.¹⁶⁰ In particular, Google's market dominance saga and Facebook's Cambridge Analytica scandal suggest that private actors will rarely change their policies and procedures unless threatened with direct legal and punitive actions by influential institutions, such as the EU Commission or the U.S. Department of Commerce, for disregarding and violating fundamental rights norms.¹⁶¹

Such legal or punitive action has not yet been taken against ICANN. However, the situation might change given that the EU General Data Protection Regulation (GDPR) came into force in May 2018 and is directly applicable to private actors.¹⁶² The GDPR applies to ICANN, because it is arguably a data controller under the EU data protection legislation. Thus, the GDPR has put many private actors on alert, because it gives a direct legal mandate for the European Data Protection Authorities to impose fines of up to 4 percent of an organization's global turnover for data protection violations. Indeed, over the past two years, ICANN has paid increasing attention to the GDPR in its policy discussions, recognizing the potential incompatibility between the GDPR's foundational principles of purpose limitation and

¹⁶⁰ See, e.g., *Google Facing Regulatory Action in Six EU Countries Over Privacy Policy Issues*, OUT-LAW (Apr. 3, 2013), <https://www.out-law.com/articles/2013/april/google-facing-regulatory-action-in-six-eu-countries-over-privacy-policy-issues>.

¹⁶¹ For more on the relationship between U.S. corporate giants and the EU regulators and judiciary in the context of personal data and privacy, see Henry Farrell & Abraham Newman, *The Transatlantic Data War: Europe Fights Back Against the NSA*, 95 FOREIGN AFF. 124 (2016).

¹⁶² Commission Regulation 2016/679, 2016 O.J. (L 119) 1 [hereinafter GDPR].

data minimization on one hand¹⁶³ and ICANN's data collection and retention requirement on the other hand. Despite numerous warnings of a significant GDPR impact, ICANN has, however, failed to update its contractual agreements. Instead, it pleaded for a special one-year exemption from the GDPR with the EU data protection authorities, which was refused.¹⁶⁴ As a result, just before the GDPR came into force, ICANN imposed a temporary emergency policy.¹⁶⁵ It will incur the GDPR fines and legal action if it fails to adopt changes and operational reforms in its policies, particularly its WHOIS and RAA data collection and retention requirements.

G. Conclusion on ICANN's CSR to Respect Human Rights

In sum, while the UN Guiding Principles, and CSR more generally, provide a global framework, embedding critical concepts such as respect for human rights and due diligence for corporate actors, their limited capacity to change corporate policies and practices (as well as the numerous problematic ways in which they are being implemented) make their potential impact on ICANN doubtful. Even if ICANN were to adopt and implement Ruggie-inspired human rights impact assessments, due diligence, and organization-based resolution mechanisms, they are unlikely to change much. Growing empirical evidence suggests that such mechanisms are being used strategically and “perhaps cynically [] by the private actors to keep the risks at a minimum without necessarily introducing substantial change in their policies and operations.”¹⁶⁶

¹⁶³ See Article 5(1) (b) and (c) of GDPR, stating that “Personal data shall be: (b) collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes (‘purpose limitation’); (c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (‘data minimization’).”

¹⁶⁴ Kieren McCarty, *Internet Overseer Continues Wall-Punching Legal Campaign*, REGISTER (Aug. 21, 2018), https://www.theregister.co.uk/2018/08/21/internet_overseer_continues_wallpunching_legal_campaign.

¹⁶⁵ *Id.*

¹⁶⁶ RAID, *supra* note 154.

Indeed, ICANN itself has acknowledged publicly that:

Based on the understanding that neither the Core Value, the FOI nor the Considerations presented alongside the FOI are intended to impose obligations on ICANN, the FOI appears to strike a workable balance The FOI as written is also not expected to have a significant impact on ICANN's contractual compliance work. The FOI upholds that ICANN is not obligated to enforce its own human rights obligations, or the obligations of other parties, against other parties.¹⁶⁷

In ICANN's own words, its narrow technical mission does not include the protection of human rights. ICANN's historical resistance to human rights norms could be understood as a desire to stay out of political debates and the complex balancing exercise between competing human rights. ICANN's motivation to keep its human rights duties at a minimum are also based on the typical reasons for why private actors resist legal obligations, such as increased compliance costs and exposure to additional liability. In this Article, I have argued that ICANN's structure is interdependent with many private for-profit entities, such as registries and registrars that it contracts with, as discussed in Section IV.D *supra*. Ultimately, ICANN is financially dependent on these private actors,¹⁶⁸ who are part of the formal structure of ICANN and who hold voting rights in policy development processes.

Therefore, ICANN's resistance to a more substantial human rights framework is related to the interests of those companies as well as pressure from other powerful actors, such as trademark owners or law enforcement agencies. This was precisely the case with the introduction of the UDRP, which promotes the interests of trademark owners and large U.S. corporations at the expense of the free speech and due process rights of domain name

¹⁶⁷ See ICANN, *supra* note 159.

¹⁶⁸ See *supra* note 151.

holders.¹⁶⁹ Similarly, civil society and NGOs have noted how demands from the Five Eyes intelligence and law enforcement agencies have been translated and included into the RAA agreement.¹⁷⁰ Therefore, ICANN—representing one of the centralized points of control on the Internet—is a convenient structure for certain interest groups to enforce their rights via backdoor channels. Imposition of enforceable human rights obligations would limit such backdoor enforcement of private rights and interests. Unsurprisingly, such attempts have been strongly resisted by private actors in the past.

It may appear at first glance that ICANN changed its approach by undergoing structural reforms as part of the IANA transition and by including the formal aspiration for a human rights Core Value in the ICANN Bylaws. However, the preceding Sections suggested that ICANN's pronouncement closely resembles the practice of other private actors: declaring formal compliance with voluntary CSR initiatives in order to strengthen institutional image and attract societal approval. (Such approval was particularly important after the IANA transition.) However, the shallowness of the newly pronounced aspiration is reflected in ICANN's legal efforts within the German courts to ensure that the GDPR standards are not applied to WHOIS.¹⁷¹

This Section questioned whether the ICANN Bylaw can provide anything more than lip service to human rights protection. I argued that the Bylaw might just act as an obfuscation mechanism for incompatibility of many of ICANN's policies with internationally recognized human rights. Normatively, ICANN's CSR to respect human rights should be stronger than that of for-profit companies. In reality however, ICANN's unique status as an informal public policymaking body has so far successfully shielded it from regulatory pressure and action. Given the shortcomings of voluntary commitments and their

¹⁶⁹ See, e.g., KOMAITIS, *supra* note 24; Zalnieriute, *supra* n 24 (critiquing URDP).

¹⁷⁰ Derechos Digitales and the Statewatch expressed their opinion on the issue. See *supra* note 141.

¹⁷¹ See *supra* Section II.C and *supra* note 65.

enforcement, in the final Part of this Article, I will argue that the recognition of directly binding obligations for private actors are necessary for realizing human rights in the digital age.

V. WHY BINDING OBLIGATIONS IN INTERNATIONAL LAW MATTER IN THE DIGITAL AGE

The ever-expanding human rights gap in global regulatory regimes and the failure to effectively regulate private actors, such as ICANN, for human rights violations in their policies have generated intense debate among scholars, civil society, and human rights bodies.¹⁷² Some have argued for the development of international law to extend human rights obligations to private actors.¹⁷³ Others have highlighted the need for the development of new categories of human rights law; in particular, they have called for the establishment of global—as opposed to ‘international,’ which suggests a focus on ‘national’ states—human rights law in addition to the existing frameworks of national and international human rights law;¹⁷⁴ such a framework would extend beyond nation-states.

¹⁷² See, e.g., Steven Bittle & Laureen Snider, *Examining the Ruggie Report: Can Voluntary Guidelines Tame Global Capitalism?*, 21 CRITICAL CRIMINOLOGY 177 (2013); Olivier De Schutter, *Towards a New Treaty on Business and Human Rights*, 1 BUS. & HUMAN RTS. J. 41 (2016); Bilchitz, *supra* note 124; Frédéric Mégret, *Would A Treaty Be All It Is Made Up To Be?*, JAMES G STEWART (Feb. 4, 2015), <http://jamesgstewart.com/would-a-treaty-be-all-it-is-made-up-to-be>; John G. Ruggie, *Get Real or We'll Get Nothing: Reflections on the First Session of the Intergovernmental Working Group on a Business and Human Rights Treaty*, BUS. & HUM. RTS. RESOURCE CTR. (July 23, 2015), <http://business-humanrights.org/en/get-real-or-we-ll-get-nothing-reflections-on-the-first-session-of-the-intergovernmental-working-group-on-a-business-and-human-rights-treaty>; *Natural Resources Sector: UN Expert Calls for Binding Human Rights Treaty for Corporations*, OHCHR (June 18, 2015), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16097>; Surya Deva, *Scope of the Legally Binding Instrument to Address Human Rights Violations Related to Business Activities (ESCR-Net & FIDH Treaty Initiative Working Paper)*, https://www.escr-net.org/sites/default/files/scope_of_treaty.pdf.

¹⁷³ See, e.g., Lee McConnell, *Analogy and Normative Development: Assessing the Feasibility of a Business and Human Rights Treaty*, 66 INT. & COMP. L.Q. 143 (2017); DEVA & BILCHITZ, *supra* note 80; David Bilchitz, *Corporations and the Limits of State-Based Models for Protecting Fundamental Rights in International Law*, 23 IND. J. GLOBAL LEGAL STUD. 143 (2016).

¹⁷⁴ Rachel J. Anderson, *Reimagining Human Rights Law: Toward Global Regulation of Transnational Corporations*, 88 DENV. L. REV. 183 (2010)

These numerous scholarly proposals have not yet been incorporated into international policy and law, because of enormous political resistance from private actors, for whom such developments would be costly. This resistance has been present since the first attempts to develop a binding code of conduct for multinational corporations in the 1970s.¹⁷⁵ Recently however, international political discourse has shifted from CSR and soft law toward hard law for private actors and human rights, with the initial “Zero Draft” negotiations of the UN Treaty on Business and Human Rights having taken place in October 2018.¹⁷⁶

The potential design and enforcement options of such a treaty are being extensively discussed by business and human rights scholars, though I cannot delve into these issues in this Article.¹⁷⁷ Instead, I focus on the normative side of the argument

(arguing that human rights law should not be mixed with a narrower category of international human rights law, and that a new category of human rights law needs to be developed: that is global human rights law and regime, which would entail “three main elements: a Global Law Commission, global laws and regulations, and universal civil jurisdiction”)

¹⁷⁵ As was mentioned earlier, the United Nations Centre on Transnational Corporations (UNCTNC) was established in 1974. *Draft Code on Transnational Corporations*, in UNCTC, TRANSNATIONAL CORPORATIONS, SERVICES AND THE URUGUAY ROUND, Annex IV at 231 (1990).

¹⁷⁶ See *Binding Treaty*, BUS. & HUM. RTS. RES. CTR., business-humanrights.org/en/binding-treaty (providing the latest developments and progress on the UN Treaty on Business and Human Rights); see also *Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises With Respect to Human Rights*, U.N. HUM. RTS. COUNCIL, <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntnc.aspx>; Human Rights Council, *Elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with Respect to Human Rights*, 26th Sess., U.N. Doc. A/HRC/26/L.22/Rev.1 (June 25, 2014) (resolution adopted by 20 votes in favour, 13 abstentions and 14 against); Human Rights Council, *Human Rights and Transnational Corporations and Other Business Enterprises*, 26th Sess., U.N. Doc. A/HRC/26/L.1 (June 23, 2014).

¹⁷⁷ For different options for business and human rights treaty, see Douglass Cassell & Anita Ramasastry, *White Paper: Options For a Treaty on Business and Human Rights*, 6 NOTRE DAME J. INT’L COMP. L. 1 (2016); Bonita Meyersfeld, *A Binding Instrument on Business and Human Rights: Some Thoughts for an Effective Next Step in International Law, Business and Human Rights*, 1 INT’L J. HUM. RTS. & BUS. 18 (2016); de Schutter, *supra* note 172.

and discuss why the imposition of hard legal human rights obligations on private actors is crucial in Internet governance. I argue that such an imposition is necessary for three reasons. First, it is needed to rectify an imbalance between hard legal commercial obligations and soft human rights law. This imbalance is deeply reflected in ICANN's policies. Second, binding obligations would ensure that individuals whose human rights have been affected are able to access an effective remedy. This is not envisaged under the new ICANN Bylaw on human rights, precisely because of the fuzziness around ICANN's obligations to respect internationally recognized human rights in its policies. Finally, I argue that because private actors are themselves engaging in the balancing exercise around such rights, an explicit recognition of their human rights obligations is crucial for the future development of access to justice in the digital age.

Of course, counterarguments could be (and are) made against imposing human rights obligations on private actors. The main such counterargument in the context of ICANN is that human rights obligations could make ICANN's multistakeholder process much more politicized and therefore less functional. In particular, the 154 national governments involved in ICANN have dichotomous views about the scope and importance of human rights, particularly on issues such as freedom of expression, data protection, and privacy. However, differing governmental attitudes toward human rights are a cross-cutting issue across many forms of Internet governance and other areas of global governance. If these differences have not prevented the articulation of binding norms for those governments, nor should these differences prevent such an articulation for private actors.

A. Existing Imbalance Between Human Rights Obligations and Other Legal Regimes

First, recognition of binding human rights obligations for private actors is important because it would rectify the current imbalance between claims under international human rights law

and other legal regimes, such as international economic law.¹⁷⁸ As I discussed in the previous Sections, human rights responsibilities of private actors are currently codified only in soft law pronouncements.¹⁷⁹ In contrast, commercial obligations often stem from mechanisms based on hard law, whether it be international economic law or binding contractual agreements.

The imbalance between rights becomes particularly significant given that ICANN has the ability to exert regulatory authority and enforce particular legal rights or interests, because it controls the DNS. This imbalance is well illustrated by ICANN's Uniform Dispute Resolution Policy (UDRP), through which the DNS has been used to enforce the claims and rights of the trademark owners. Many critics have observed that trademark claims seem to be given a more serious consideration than human rights concerns in the UDRP process.¹⁸⁰ Moreover, recent research suggests that ICANN is also quietly creeping into "content policing" for the protection of copyright via DNS, because of increasing pressure from corporate copyright holders.¹⁸¹ Legally binding human rights obligations on ICANN

¹⁷⁸ The relationship between international economic law and human rights law is beyond the scope of this Article. *But see, e.g.*, SARAH JOSEPH, BLAME IT ON THE WTO?: A HUMAN RIGHTS CRITIQUE (2013); EMILIE M. HAFNER-BURTON, FORCED TO BE GOOD: WHY TRADE AGREEMENTS BOOST HUMAN RIGHTS (2013); COURTNEY M. HERCUS, THE LOST DISCOURSES OF INTERNATIONAL ECONOMIC RIGHTS: A CRITICAL APPROACH TO THE CONSTRUCTION OF HUMAN RIGHTS (2016). Susan Ariel Aaronson, *At the Intersection of Cross-Border Information Flows and Human Rights: TPP as a Case Study* (INST. INT'L ECON. POL'Y, Working Paper No. 2016-12, 2016); JANET DINE & ANDREW FAGAN, HUMAN RIGHTS AND CAPITALISM: A MULTIDISCIPLINARY PERSPECTIVE ON GLOBALISATION (2006); FREDERICK ABBOTT ET AL., INTERNATIONAL TRADE AND HUMAN RIGHTS: FOUNDATIONS AND CONCEPTUAL ISSUES (2006). For examples of more special tensions, see, e.g., Simma, *supra* note 30, Zhu, *supra* note 30.

¹⁷⁹ On the relationship between soft law and CSR, see Justine Nolan, *The Corporate Responsibility to Respect Rights: Soft Law or Not Law?* in DEVA & BILCHITZ, *supra* note 80, at 138.

¹⁸⁰ See *supra* note 59.

¹⁸¹ See Bridy, *supra* note 12, at 2 (quoting the Comments of the Motion Picture Ass'n of Am., Inc. ("MPAA") 2, submitted in U.S. Patent and Trademark Office, Voluntary Best Practices Study, Docket No. PTO-C-2013-0036 (Aug. 21, 2013), available at <http://www.uspto.gov/ip/officechiefecon/PTO-C-2013-0036.pdf> (claiming that "all players in the Internet ecosystem," and "the various intermediaries

would be much more effective than a non-binding aspirational CSR in imposing limits on mission creep, because binding obligations would be given more serious consideration when colliding with commercial interests.

Similarly, ICANN's WHOIS and RAA pay greater attention to demands by powerful actors, such as law enforcement representatives, while often failing to pay sufficient attention to human rights considerations, because they are not mandated but are rather "voluntary" and "soft."¹⁸² While ICANN's policy development processes are generally open to the public and formally everyone can participate, some negotiations and lobbying are not subject to the general transparency and public scrutiny standards. For example, negotiations with law enforcement officials in ICANN are often conducted behind closed doors, as are some discussions with private commercial actors. The current situation—in which commercial rights under international law or even private quasi-judicial regimes, such as the UDRP, trump human rights—does not reflect the normative philosophical position in which human rights are recognized as norms that hold superior status given their basis in the dignity of individuals.¹⁸³ Thus far, as international law has developed, there has been little clarity as to whether fundamental rights are recognized to have this superior status and how they intersect with other bodies of international law.¹⁸⁴ While some have argued that the imposition of direct legal obligations on private actors may still not address some of the human rights issues that

that facilitate online commerce and speech . . . must play a meaningful role in addressing the problem of rampant piracy on the Web").

¹⁸² For data privacy concerns in WHOIS, see 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; Milton Mueller & Mawaki Chango, *Disrupting Global Governance: The Internet WHOIS Service, ICANN, and Privacy*, 5 J. INFO. TECH. & POL. 303 (2008). For more on WHOIS, see generally GARTH O. BRUEN, *WHOIS RUNNING THE INTERNET: PROTOCOL, POLICY, AND PRIVACY* (2015).

¹⁸³ See ERIKA DE WET & JURE VIDMAR, *HIERARCHY IN INTERNATIONAL LAW: THE PLACE OF HUMAN RIGHTS* (2012).

¹⁸⁴ On the hierarchy of norms in international law, see, e.g., Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291 (2006); Marri Koskeniemi, *Hierarchy in International Law: A Sketch*, 8 EUR. J. INT'L L. 566 (1997); de Wet & Vidmar, *supra* note 183.

arise in the digital age,¹⁸⁵ it is hard to see how the current situation, limited to encouragement based on soft law pronouncements, helps to at all fill the existing human rights vacuum in digital governance. I argue here that private actors such as ICANN will not take their human rights obligations seriously when enacting global policies implicating human rights, unless the current imbalance between human rights norms and other legal regimes is rectified. This imbalance can only be rectified with a recognition that private actors are directly bound by international human rights law.

B. Remedy for Individuals

Second, the imposition of directly binding legal obligations on private actors are particularly important because they would provide access to remedies for individuals, which is particularly problematic in the context of privatized Internet governance. Currently, there is no legal basis for remedies for human rights violations by private actors, because there are no legal obligations to be breached.¹⁸⁶

While many private actors in Internet governance do provide certain company-based remedial mechanisms, these are often limited because of the fuzziness surrounding the human rights obligations of private actors. For example, powerful Internet platforms have developed innovative frameworks, such as Wikipedia's and eBay's online dispute resolution (ODR) systems, which provide users with a range of scalable options, from additional information to formalized mediation and arbitration.¹⁸⁷ Similarly, in response to lobbying efforts by

¹⁸⁵ Emily Laidlaw, *Online Platform Responsibility and Human Rights*, in BELLI & ZINGALES, *supra* note 4, at 74.

¹⁸⁶ Bilchitz, *supra* note 124, at 220. More generally on remedies available for international human rights violations, see Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1 (2002). In relation to remedies and the proposed binding treaty, see Erika George & Lisa Laplante, *Access to Remedy: Treaty Talks and the Terms of a New Accountability Accord*, in DEVA & BILCHITZ, *supra* note 80.

¹⁸⁷ ETHAN KATSH & ORNA RABINOVICH-EINY, DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF DISPUTES 122–25 (2017).

powerful corporations, such as Disney, ICANN also developed the UDRP to ensure that the rights of the trademark holders are respected. However, because of the lack of legally binding human rights obligations, ICANN did not develop any similar system to respect the human rights of the domain name registrants in its policies. Currently, individuals whose human rights were affected by ICANN policies, such as WHOIS or UDRP, can only approach traditional state-based remedy mechanisms, such as courts or non-judicial enforcement bodies. (The latter might include Data Protection Authorities, Privacy Commissioners, and Consumer Protection Authorities.) However, access to state-based mechanisms is often complicated or even entirely precluded by jurisdictional considerations and ICANN's status as a private company formally located in the United States.

Precisely because of these complications, CSR and the UN Guiding Principles stipulate that state-based mechanisms are not sufficient for companies to fulfill their requirements for an “effective remedy” under the UN Guiding Principles. To satisfy this criterion, traditional state-based tools must be supplemented by industry-based or company-based mechanisms.¹⁸⁸ The UN Guiding Principles articulate seven criteria for a mechanism to be compatible with an effective remedy: it must be legitimate, accessible, predictable, equitable, transparent, rights-compatible and a source of continuous learning.¹⁸⁹ While questions remain over whether such criteria in practice require that private mechanisms replicate due process in its entirety,¹⁹⁰ one thing is clear: there must be access to a remedy to begin with. Remedies for violations of due process, property rights, or freedom of expression are not provided by, for instance, ICANN's UDRP procedure. To make matters worse, the lack of an internal appeal procedure in the UDRP is supplemented by the refusal of courts in certain jurisdictions to accept claims related to the UDRP.¹⁹¹

¹⁸⁸ UN Guiding Principles, *supra* note 2, at ¶¶ 25-30.

¹⁸⁹ *Id.* at ¶ 31.

¹⁹⁰ Laidlaw, *supra* note 185, at 73.

¹⁹¹ See, e.g., *YoYo.email Limited v. Royal Bank of Scotland Group PLC* [2015] EWHC (Ch) 3509 (Eng.) (where the UK High Court of Justice stated that “a proper construction of the UDRP clause [providing for independent court resolution of a controversy that is the subject of a UDRP

A close reading of ICANN's human rights aspirations, undertaken in the previous Sections of this Article, makes it obvious that ICANN does not currently look to introduce any new mechanisms for an effective remedy for human rights violations.

C. Future Development of Access to Justice in the Digital Age

Finally, the imposition of human rights obligations on private actors is crucial for the future development of access to justice in the digital age. Private actors are themselves increasingly engaging in balancing exercises of these rights. As mentioned, ICANN has clearly engaged in a balancing exercise between the rights of trademark holders on one hand and the right to freedom of expression of the registrants in the UDRP Policy on the other hand. Paradoxically, despite the lack of an effective remedy for individuals, ICANN's UDRP is often hailed as an outstanding model for access to justice in light of a technological change, as well as for the development of global policies governing alternative dispute resolution (ADR) mechanisms. These ADR mechanisms are seen as essential for maintaining "equitable access to justice in cyberspace,"¹⁹² because the role of national and regional courts in solving Internet-related disputes has often been portrayed as contributing to Internet fragmentation.¹⁹³

States are also facilitating ADR mechanisms. For example, the EU adopted a Directive on ADR,¹⁹⁴ which creates an online dispute resolution platform enabling users to connect with

proceeding] does not give rise to a separate cause of action in favour of the [registrant that is the losing party in that proceeding].").

¹⁹² Jacques de Werra, *ADR in Cyberspace: The Need to Adopt Global ADR Mechanisms for Addressing the Challenges of Massive Online Micro-Justice*, 26 SWISS REV. INT'L & EUR. L. 289, 289 (2016).

¹⁹³ On Internet fragmentation, see William J. Drake, Vinton G. Cerf & Wolfgang Kleinwächter, *Internet Fragmentation: An Overview*, in WORLD ECONOMIC FORUM'S FUTURE OF THE INTERNET INITIATIVE (FII) (January 2016), <https://www.weforum.org/reports/internet-fragmentation-an-overview>; see also MILTON MUELLER, WILL THE INTERNET FRAGMENT? (2017).

¹⁹⁴ Directive 2013/11, of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes 2013, 2014 O.J. (L 165/63) at 63–79.

private ADR providers to resolve low-value e-commerce disputes.¹⁹⁵ Some jurisdictions, such as British Columbia, are already operating an online tribunal (Civil Resolution Tribunal)¹⁹⁶ for small claims, while the United Kingdom is developing a system of online courts.¹⁹⁷ Similarly, the famous right-to-be-forgotten judgment by the European Court of Justice in *Google v. Spain* has created (even if indirectly) a similar private resolution system run by Google for solving content-related disputes requiring a balancing exercise between the right to data privacy and freedom of expression.¹⁹⁸

Proponents argue that the time has come to move beyond low-value e-commerce disputes to instead focus on online platforms and content-related issues, including those relating to human rights.¹⁹⁹ However, we are far past that point, with private actors already engaging in de facto balancing exercises between competing human rights, as demonstrated by the right-to-be-forgotten case. State facilitation of private remediation mechanisms might fulfill the state's duty to enable access to justice in the digital age; however, numerous problems and gaps emerge because those private service providers are not bound by human rights law—national or international—in the way that states are. The recognition of human rights obligations on private actors is therefore crucial for the future development of access to justice in the digital age.

VI. CONCLUSION

This Article has explored the problematic relationship between private regulatory regimes and human rights in the digital age, using ICANN as a case study. I argued that we need enforceable

¹⁹⁵ See *Online Dispute Resolution*, EUROPEAN COMMISSION, <https://ec.europa.eu/consumers/odr/main/index.cfm?event=main.home2.show&lng=EN>

¹⁹⁶ See CIVIL RESOLUTION TRIBUNAL, <https://civilresolutionbc.ca>.

¹⁹⁷ See *Prisons and Courts Bill: Fact Sheets*, GOV.UK (Feb. 23, 2007), <https://www.gov.uk/government/publications/prisons-and-courts-bill-fact-sheets>. The first step in this process is the development of a system for issuing and responding to civil money claims online; which has been launched for trial in summer 2017.

¹⁹⁸ Case C-131/12, *Google Spain, SL, v. Agencia Espanola de Proteccion de Datos*, 2014 E.C.R. 317.

¹⁹⁹ Laidlaw, *supra* note 185, at 78.

human rights obligations for informal policymaking bodies such as ICANN to fulfill their global public interest role and guarantee human rights protection in the digital age. Recognition of binding obligations for ICANN is even more acute now as it is undergoing significant institutional changes and as it engages in an ever-expanding ‘mission creep’ via the ongoing accountability reforms of the IANA transition. Binding obligations are also crucial because proposals increasingly use some of ICANN’s policies, such as the UDRP, as a model and a possible source of guidance for the development of global ADR mechanisms. If such ADR systems are modeled on ICANN’s policies, which, we have seen, lack basic procedural safeguards for human rights, the role of fundamental human rights (and their protection) in global ADR policy would very limited.

The implications of the human rights vacuum extend far beyond ICANN and concern an imbalance between human rights law and other legal regimes. These implications also concern an effective remedy for individuals, as well as access to justice in the digital age more broadly. The human rights vacuum exists wherever hard law commercial obligations collide with soft law human rights pronouncements in Internet governance in an international context. Such a vacuum will only expand in the future, because organizations like ICANN are effectively private global monopolies exercising public functions, and they lack economic motivation to uphold human rights norms. This economic motivation, assumed by the CSR movement, is hardly present in institutions such as ICANN.

The human rights vacuum reflects broader trends of privatization of the judiciary and of human rights in the digital era; it also illustrates how states are coping with Internet-related challenges in light of the traditional role of the state, concepts of territoriality, and judicial systems. Economic incentives act against the protection of human rights on the Internet by private actors, whose ever-increasing role in Internet governance necessitates a reframing of their legal duties by recognizing human rights obligations that are directly binding upon them. Even if the roles of governments and private actors are changing

faster than ever, the protection of fundamental human rights in the digital age should not disappear with those changes.