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

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Abstract

As part of a significant institutional reform in global governance of the Internet, the Internet Corporation for Assigned Names and Numbers (“ICANN”)—an internationally organised multi-stakeholder body that secures the operation of the Domain Name System (“DNS”) globally—has recently included a “Core Value” of “respect for internationally recognised human rights” in its Bylaws. Since the DNS is integral for navigating and browsing the Internet, policies governing its operation have enormous human rights implications at the global level. After more than three years of multi-stakeholder deliberations over the appropriate Framework of Interpretation (FOI) for the new Core Value, ICANN Board has finally approved it in November 2019, taking one crucial step forward towards the implementation of its newly pronounced human rights aspirations. This article critically examines ICANN’s latest human rights rhetoric and argues that the new aspirations in the Bylaws are drafted in a way that they carry little, if any, legal weight. I will further show that the new aspirations in the Bylaws are much weaker than the quasi-constitutional, self-imposed commitments in ICANN’s founding documents—the Articles of Incorporation. ICANN has proved to be reluctant to comply with those self-imposed commitments in the past; and I argue that it is, therefore, unlikely to convert its novel human rights rhetoric into practice. This raises questions about the extent of its commitment to human rights values, and whether the new Core Value amounts to little more than a veneer intended to bolster ICANN’s public image and confidence in light of the ongoing institutional reforms in Internet Governance.

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I. Introduction

Numerous political and economic battles with wide-ranging human rights implications—such as transnational governmental surveillance and censorship, Internet shutdowns or blackouts during political uprisings, and economic concerns around copyright and trademarks—are being fought by governments and private actors behind the scenes of Internet Governance by manipulating critical Internet infrastructure.¹ One of the core Internet Governance institutions, ICANN, which coordinates DNS globally, has recently embraced new aspirations for human rights as part of its efforts to enhance its legitimacy and accountability under the ongoing institutional reform, known as the IANA transition.² ICANN’s newly adopted Core Value of “respecting internationally recognized human rights” in its revised Bylaws³ is soon to come into effect, after more than three years of multi-stakeholder deliberations over the appropriate Framework of Interpretation (hereinafter the “FOI”).⁴ The ICANN Board has finally approved the FOI in November 2019, taking one crucial step forward toward the implementation of its newly pronounced aspirations.⁵

This development is significant because of the global scope of the human rights implications stemming from ICANN’s policy-making, as the DNS—which ICANN oversees—

¹ On co-optation of critical internet resources for political and economic purposes, *see generally* Laura DeNardis, *Hidden levers of Internet control: An infrastructure-based theory of Internet governance*, 15:5 INFO., COMM. & SOC’Y 720, 720–38 (2012); Samantha Bradshaw & Laura DeNardis, *The politicization of the Internet’s Domain Name System: Implications for Internet security, universality, and freedom*, 20(1) NEW MEDIA & SOC’Y, 332, 332–50 (2016).

² It is beyond the scope of this article to discuss the Internet Assigned Numbers Authority (“IANA”) transition in detail. For a brief overview, *see* Kal Raustiala, *Governing the Internet*, 110(3) AM. J. OF INT’L L. 491, 491–503 (July 2016); *see also* Joel Snyder, Konstantinos Komaitis, and Andrei Robachevsky, *The History of IANA: An Extended Timeline with Citations and Commentary*, INTERNET SOC’Y (2017), <https://www.yumpu.com/en/document/view/56851186/the-history-of-iana-an-extended-timeline-with-citations-and-commentary/12>. For a latest overview of ICANN’s efforts to enhance its legitimacy and accountability, *see* Hans Morten Haugen, *The crucial and contested global public good: principles and goals in global internet governance*, 9(1) INTERNET POL’Y REV. 1, 1–22 (2020).

³ Art. 1.2.b(vii) of the ICANN Bylaws reads: “Subject to the limitations set forth in Section 27.2, within the scope of its Mission and other Core Values, respecting internationally recognized human rights as required by applicable law. This Core Value does not create, and shall not be interpreted to create, any obligation on ICANN outside its Mission, or beyond obligations found in applicable law. This Core Value does not obligate ICANN to enforce its human rights obligations, or the human rights obligations of other parties, against other parties.” *Bylaws for Internet Corporation for Assigned Names and Numbers*, ICANN, art. 1.2b(vii) (Nov. 28, 2019), <https://www.icann.org/resources/pages/governance/bylaws-en>.

⁴ *Draft Framework of Interpretation for Human Rights*, ICANN (2017), <https://www.icann.org/public-comments/foi-hr-2017-05-05-en> [hereinafter “FOI”]. The Framework was developed by a sub-team working under the “Accountability package” Work Stream 2 and approved by all supporting organizations and Governmental Advisory Committee in October 2018 in ICANN meeting in Barcelona. *See CCWG Accountability Recommendations*, ICANN, <https://gac.icann.org/briefing-materials/public/icann64-gac-briefing-ccwg-accountability-recommendations.pdf>. For adoption of the framework (as part of CCWG-Accountability’s Work Stream 2 Final Report) by the ICANN Board, *see Approved Board Resolutions*, ICANN (Nov. 7, 2019), <https://www.icann.org/resources/board-material/resolutions-2019-11-07-en#2.c>.

⁵ ICANN Board approved the FOI as part of CCWG-Accountability’s Work Stream 2 Final Report. *See Approved Board Resolutions*, ICANN (Nov. 7, 2019), <https://www.icann.org/resources/board-material/resolutions-2019-11-07-en>.

represents one of the very few centralised points of control over the Internet, which is otherwise a decentralised “network of networks.”⁶ DNS matches Internet protocol (“IP”) addresses (think numerical labels, like 172.16.254.1) to human friendly, easy to remember domain names such as, for example, *google.com* or *amnesty.org*. The economic and cultural importance of DNS is well illustrated by recent disputes between the Brazilian and Peruvian governments and the U.S. e-commerce company Amazon, Inc. over the *.amazon* top-level domain name.⁷ Both governments and private actors have used DNS for enforcing their interests globally. For instance, in 1998, ICANN developed an international legal framework for resolving disputes between trademark owners and domain name holders, known as the Uniform Dispute Resolution Policy (“UDRP”).⁸ Despite its informal roots at ICANN, the UDRP secures economic interests of the trademark owners through a mandatory binding policy on domain name registrants.⁹ Recent scholarship also argued that ICANN is creeping into online content regulation undermining free speech in advocating for copyright protection.¹⁰ ICANN has also created the WHOIS policy, mandating the collection of personal information from anyone in the world wishing to register a domain name¹¹ Transnational private regulatory regimes, like the UDRP and WHOIS, touch upon important public policy issues, such as Internet censorship, data protection and privacy, surveillance, and intellectual property. ICANN’s aspirations for human rights and its relationship with human rights law thus become significant.

⁶ Art. 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).” *Articles of Incorporation of Internet Corporation for Assigned Names and Numbers*, ICANN (Nov. 21, 1998), <https://www.icann.org/resources/pages/articles-2012-02-25-en>. Additionally, the ICANN Strategic Plan of 2004–2006 states: “The mission of The Internet Corporation for Assigned Names and Numbers [] 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.” *ICANN Strategic Plan 2003–04 to 2006–07*, ICANN (Nov. 2004), <https://www.icann.org/en/system/files/files/strategic-plan-2004-2007-16nov04-en.pdf>. “Network of networks” is a widespread reference to the Internet. See, e.g. OXFORD DICTIONARY OF ENGLISH LANGUAGE, ‘Internet’, <http://www.oed.com/view/Entry/248411?rkey=EcsKli&result=1#eid> (last visited Jan. 31, 2020).

⁷ See Kieren McCarthy, *Jeff Bezos Finally Gets .Amazon After DNS Overlord ICANN Runs out of Excuses to Delay Decision Any Further*, THE REGISTER, https://www.theregister.co.uk/2019/05/21/bezos_finally_gets_amazon/ (last visited Dec. 11, 2019); see also Patricia Vargas-Leon & Andreas Kuehn, *The Battle for Critical Internet Resources: South America vs. Amazon. com, Inc.*, 7 L., ST., & TELECOMM. REV. 37, 38 (2015).

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

⁹ For more on the UDRP, see Monika Zalnieriute, *Reinvigorating Human Rights in Internet Governance: The UDRP Procedure Through the Lens of International Human Rights Principles*, 21 COLUM. J.L. & ARTS 197, 197–235 (2020); Monika Zalnieriute, *Beyond the Governance Gap in International Domain Name Law: Bringing the UDRP in Line with Internationally Recognized Human Rights*, 56 STAN. J. INT’L L. 79, 79–122.

¹⁰ See Annemarie Bridy, *Notice and Takedown in the Domain Name System: ICANN’s Ambivalent Drift into Online Content Regulation*, 74 WASH. & LEE L. REV. 1345, 1348 (2017).

¹¹ See ICANN, *About WHOIS*, <https://whois.icann.org/en/about-whois>. 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, 303–25 (2008).

This relationship, as I will explain, is complicated not least because ICANN is not a state actor or intergovernmental body; it is organized as multi-stakeholder body and registered as a private organization in California, USA. The role of non-state actors in protection of human rights in the digital era remains unclear: numerous soft law pronouncements and multi-stakeholder initiatives exist,¹² but efforts to establish legally binding obligations for private actors on the international level have not materialized into a treaty since the early discussion in the 1970.¹³ Ever-increasing power of non-state actors over economic, social, and political affairs and regularly resurfacing scandals about misuse of our data and voter manipulation led many governments, academics, and civil society to reconsider the regulation and human rights duties of private actors.¹⁴

These discussions have attracted conflicting opinions: some argue that voluntary commitments to human rights by private Internet actors suffice,¹⁵ while others are unconvinced in light of the information about the complicity of private actors in mass-surveillance and voter manipulation programmes, as revealed by Edward Snowden's revelations and the more recent Cambridge Analytica scandal.¹⁶ Constitutional lawyers and human rights advocates have traditionally focused on the limits of power exercised by nation-states, and not private organizations.¹⁷ A strand of scholarship and activists, these days known as the "business and

¹² 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*, OECD, <http://mneguidelines.oecd.org/text>. For multi-stakeholder initiatives, *see, e.g.*, U.N. GLOBAL COMPACT, <https://www.unglobalcompact.org>. Internet governance has not been an exception to the soft law and voluntary initiatives trend, with numerous voluntary multi-stakeholder initiatives. *See, e.g.*, GLOBAL NETWORK INITIATIVE, www.globalnetworkinitiative.org [hereinafter "GNI"]; RANKING DIGITAL RIGHTS, www.rankingdigitalrights.org.

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

¹⁴ *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 formed and is a multi-stakeholder group fostering a cooperative analysis of online platforms' responsibility to respect human rights; for the outcome document, *see* LUCA BELLINI & NICOLO ZINGALES, PLATFORM REGULATIONS: HOW PLATFORMS ARE REGULATED, AND HOW THEY REGULATE US: OFFICIAL OUTCOME OF THE UN IGF DYNAMIC COALITION ON PLATFORM RESPONSIBILITY (2017).

¹⁵ *See, e.g.*, NICOLAS SUZOR, LAWLESS: THE SECRET RULES THAT GOVERN OUR DIGITAL LIVES. (Cambridge University Press, 2019); Erika George, *Corporate Social Responsibility and Social Media Corporations: Incorporating Human Rights Through Rankings, Self-Regulation and Shareholder Resolutions*, 28 DUKE J. COMP. & INT'L L. 521, 538 (2018); REBECCA MACKINNON, CONSENT OF THE NETWORKED: THE WORLD-WIDE STRUGGLE FOR INTERNET FREEDOM (2012). *But cf.* Ian Brown, *Internet Self-Regulation and Fundamental Rights*, 1 INDEX ON CENSORSHIP 98, 98–106 (2010).

¹⁶ On Cambridge Analytica, *see* Carole Cadwalladr & Emma Graham-Harrison, *Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach*, THE GUARDIAN, Mar. 17, 2018, <https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election>.

¹⁷ *See, e.g.*, John Knox, *Horizontal Human Rights Law*, 102 AM. J. INT'L L. 1, 3 (2008).

human rights” movement, started confronting non-states actors for their impact on the exercise of human rights.¹⁸ Because the “business and human rights” movement paid most of its attention to global production chains, modern slavery, trafficking and exploitation,¹⁹ a distinct yet related movement on “digital rights” has emerged, which focuses on the substantial policy and de facto standard-setting power by private actors in information policy, such as on Internet platforms and informal Internet policy-making bodies. Such a movement has a long tradition, and is known as “digital constitutionalism.”²⁰ Despite ICANN’s enormous power and policy-making capacity with global implications, its problematic relationship with human rights has been often overlooked by digital constitutionalists (let alone business and human rights scholars) who are often preoccupied with the role of Internet platforms, such as Facebook or Google.²¹

This article contributes to the business and human rights and digital constitutionalist scholarship by examining ICANN’s aspirations for human rights in its updated bylaws and the legal obligations under which ICANN must uphold them. It is not the purpose of this article to scrutinise specific ICANN policies from a human rights perspective—many seem to conflict with internationally recognized human rights norms, and other scholarship has detailed them.²² Instead, this article zooms in on the new human rights aspirations established by ICANN, and, by critically

¹⁸ For an overview of the movement and research agenda, see Surya Deva, et al., *Business and Human Rights Scholarship: Past Trends and Future Directions*, 4.2 BUS. AND HUM. RTS. J. 201, 208 (2019); Florian Wettstein, et al., *International business and human rights: A research agenda*, 54.1 J. OF WORLD BUS. 54, 55 (2019).

¹⁹ See, e.g., JUSTINE NOLAN & MARTIJN BOERSMA, *ADDRESSING MODERN SLAVERY* (2019). The book is a good example of these latest efforts.

²⁰ “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, *Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights*, BERKMAN KLEIN CTR. FOR INTERNET & SOC’Y 2 (2015). For an overview of digital constitutionalist efforts, see Kinfe Michael Yilma, *Digital Privacy and Virtues of Multilateral Digital Constitutionalism—Preliminary Thoughts*, 25 INT’L J.L. & INFO. TECH. 115, 118–119 (2017).

²¹ For exceptions, see Monika Zalnieriute, *From Human Rights Aspirations to Enforceable Obligations by Non-State Actors in the Digital Age: The Case of Internet Governance and ICANN*, 21 YALE J.L. & TECH. 278, 284 (2019); Monika Zalnieriute, *Reinvigorating Human Rights in Internet Governance: The UDRP Procedure Through the Lens of International Human Rights Principles*, 43 COLUM. J.L. & ARTS 197, 202 (2020). Digital rights discourse largely focuses on freedom of expression and privacy responsibilities of Internet Platforms. See, e.g., Nicolas Suzor, *Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms*, 4(3) SOCIAL MEDIA + SOCIETY 1, 4; PLATFORM REGULATIONS: HOW PLATFORMS ARE REGULATED AND HOW THEY REGULATE US (Luca Belli & Nicolo Zingales eds., 2017). For civil society and corporate initiatives on digital rights, see, e.g., GLOBAL NETWORK INITIATIVE (“GNI”), www.globalnetworkinitiative.org (last visited Feb. 25, 2020); RANKING DIGITAL RIGHTS, www.rankingdigitalrights.org (last visited Feb. 25, 2020). Business and human rights literature just recently started paying attention to the “governance gaps” in the regulation of the Internet, but has been limited to Internet platforms and information intermediaries. 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 (2018).

²² For a general overview of how human rights interact with and may be undermined by ICANN policies, see Monika Zalnieriute & Schneider Thomas, *ICANN’s Procedures and Policies in the Light of Human Rights, Fundamental Freedoms and Democratic Values*, COUNCIL OF EUROPE, (2014)12 DGI 1, 7. For a detailed analysis on how the UDRP (which is one of the main ICANN policies) impacts the international human rights norms, see Monika Zalnieriute, *Reinvigorating Human Rights in Internet Governance: The UDRP Procedure Through the Lens of International Human Rights Principles*, 43 COLUM. J.L. & ARTS 197, 200 (2020); Monika Zalnieriute, *Beyond the Governance Gap in International Domain Name Law: Bringing the UDRP in Line with Internationally Recognized Human Rights*, 56 STANFORD J. INT’L L. 79, 79-122 (2020).

examining ICANN's wording in the context of international human rights law, aims to assess its (legal) credibility. The new ICANN Core Value on human rights, along with the accompanying Framework of Interpretation, has been formulated using tenuous and legally fuzzy language, and serves to illustrate the wider disconnect of the human rights rhetoric and practice from private actors. While ICANN has recently added the Core Value on human rights to its updated bylaws, it has been unwilling to implement and enforce the self-imposed, quasi-constitutional commitments in its Articles of Incorporation during the twenty years of its existence.²³ This raises questions about whether the new Core Value on human rights amounts to little more than a veneer intended to strengthen public confidence in ICANN and bolster its public image in light of the ongoing IANA transition of institutional reforms in Internet Governance.

II. ICANN and Human Rights

ICANN is a private actor, managing a critical Internet resource, the DNS, which matches computer addresses to human-friendly domain names. Because the DNS is integral for navigating the Internet, the human rights implications of the DNS are important for their enormous scope and global reach. The wide implications of the DNS and the cultural, strategic and economic importance of domain names are illustrated by the substantial litigation,²⁴ legislative action,²⁵ and scholarly and civil debates²⁶ over the domain names. In addition, the recent disputes over the *.amazon* top-level domain name among the Brazilian and Peruvian governments and the U.S. e-commerce company Amazon, Inc., show that the coordination of ICANN's ongoing DNS institutional reforms entails important implications for many areas of international law and Internet governance.²⁷

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

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

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

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

²⁶ For examples of the civil society debate surrounding domain name disputes, see the work of IP-Justice and the Noncommercial Users Constituency within ICANN. See IP JUSTICE, <http://www.ipjustice.org> (last visited Feb. 25, 2020); NONCOMMERCIAL USERS CONSTITUENCY, <https://www.ncuc.org> (last visited Feb. 25, 2020). Scholarly debate started with early literature on ICANN and its policies. See, e.g., A. Michael Froomkin, *ICANN's "Uniform Dispute Resolution Policy"—Causes and (Partial) Cures*, 67.3 BROOKLYN L. REV. 605, 651–78 (2002); DAVID LINDSAY, *INTERNATIONAL DOMAIN NAME LAW: ICANN AND THE UDRP* (2007); KONSTANTINOS KOMAITIS, *THE CURRENT STATE OF DOMAIN NAME REGULATION: DOMAIN NAMES AS SECOND-CLASS CITIZENS IN A MARK-DOMINATED WORLD* (2010).

²⁷ See Kieren McCarthy, *Jeff Bezos Finally Gets .Amazon After DNS Overlord ICANN Runs out of Excuses to Delay Decision Any Further*, THE REGISTER (May 21, 2019), https://www.theregister.co.uk/2019/05/21/bezos_finally_gets_amazon/ (last visited Feb. 25, 2020); see also Patricia Vargas-Leon & Andreas Kuehn, *The Battle for Critical Internet Resources: South America vs. Amazon.com, Inc.*, 7 L., ST., & TELECOMM. REV. 37, 51 (2015).

U.S. Government.²⁸ Despite ICANN’s formal status as a private corporation, it is widely viewed to have an important global public dimension as the body responsible for the “governance of an intrinsically international resource of immense importance to global communications and economies.”²⁹ Since its inception, ICANN has operated 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 organisations.³⁰

Following the Snowden revelations in 2013 and the increasing distrust of the U.S. government by important geopolitical players, such as China and Russia, and by its allies in the EU and Latin America, the U.S. government decided to cease its supervision of ICANN in 2016.³¹ The ongoing transition of ICANN’s oversight from the U.S. government to a “global multistakeholder community” could be seen as the climax of a long history of controversy over the U.S. government’s control and supervision over the DNS administration.³² As part of these institutional reforms, ICANN has updated its Bylaws with a new ‘Core Value’ of ‘respecting internationally recognized human rights as required by applicable law’ within its scope of mission.³³ In particular, Section 1.2(b)(viii) of *Bylaws for Internet Corporation for Assigned Names and Numbers*, adopted on May 27, 2016, reads:

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

[. . .]

(viii) Subject to the limitations set forth in Section 27.2, within the scope of its Mission and other Core Values, respecting internationally recognized human rights as required by applicable law. This Core Value does not create, and shall not be interpreted to create, any obligation on ICANN outside its Mission, or beyond obligations found in applicable law. This Core Value does not obligate ICANN to enforce its human rights obligations, or the human rights obligations of other parties, against other parties.³⁴

²⁸ For a detailed history of ICANN, see MUELLER, MILTON RULING THE ROOT (2002). For special U.S. role, see Derrick L. Cogburn, Milton Mueller, Lee McKnight, Hans Klein & John Mathiason, *The US role in Global Internet Governance*, IEEE COMM. MAG., Dec. 2005, at 12–14.

²⁹ *ICM Registry v ICANN, Declaration of 19 February 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 art. IV, section 3 of the ICANN Bylaws. All relevant submissions and arbitration declaration are available at <https://www.icann.org/resources/pages/icm-v-icann-2012-02-25-en> (last visited Mar. 20, 2019).

³⁰ Dmitry Epstein & Brandie M. Nonnecke, Multistakeholderism in Praxis: The Case of the Regional and National Internet Governance Forum (IGF) Initiatives, 8.2 POL’Y & INTERNET 148, 149 (2016); Jeanette Hofmann, *Multi-stakeholderism in Internet Governance: Putting a Fiction into Practice*, 1.1 J. CYBER POL’Y 29, 30–31 (2016).

³¹ See Press Release, NTIA, NTIA Finds IANA Stewardship Transition Proposal Meets Criteria to Complete Privatization (June 9, 2016) (on file with author). ICANN’s activities (including IANA) have been previously supervised by the US government under the U.S. Department of Commerce, Award/Contract, No. SA1301 -12-CN-0035, October 1, 2012, https://www.ntia.doc.gov/files/ntia/publications/sf_26_pg_1-2-final_award_and_sacs.pdf (last visited Jan. 20, 2020).

³² Raustiala, *supra* note 2.

³³ *Bylaws For Internet Corporation for Assigned Names and Numbers*, ICANN, art. 1.2(b)(viii) (Nov. 28 2019), <https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf>.

³⁴ *Id.*

the FOI was approved in October 2018 by ICANN supporting organizations and Governmental Advisory Committee (“GAC”) and was finally approved by the ICANN Board in November 2019.

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

In the following sections, I will analyze which “internationally recognized human rights” the “applicable law” might require ICANN to “respect” in its new role as an independent body accountable to a global multistakeholder community. I will do so by juxtaposing the text of the Bylaw and the FOI against the analysis of the relationship between international human rights law and private actors, as well as the examination of ICANN’s earlier self-imposed commitments in its founding documents—the Articles of Incorporation.³⁹

III. ICANN’s Rhetoric and Aspirations

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

A. “Internationally Recognized Human Rights”

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

³⁷ ICANN, BOARD OF DIRECTORS SUBMISSION NO. 2019.11.07.1b, CONVENING OF THE ROOT SERVER SYSTEM GOVERNANCE WORKING GROUP

<https://www.icann.org/en/system/files/bm/briefing-materials-1-1-redacted-07nov19-en.pdf>.

³⁸ Akriti Bopanna & Ephraim Percy Kenyanito, *ICANN takes one step forward in its human rights and accountability commitments*, ARTICLE 19, (Dec. 16, 2019), <https://www.article19.org/resources/blog-icann-takes-one-step-forward-in-its-human-rights-and-accountability-commitments/>.

³⁹ ICANN, *supra* note 23.

rights treaties.⁴⁰ However, the FOI explicitly acknowledges that this list is non-exhaustive (“Including, but not limited to: . . .”)⁴¹; and does not elaborate *where* the human right in question has to be “recognized” for it to fall under the “Core Value”.

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

Indeed, the majority of international law and human rights scholars today take the view that international human rights obligations also may, and actually do, derive from customary international law.⁴² Further uncertainty thus arises whether and how ICANN’s “Core Value” is meant to change with the development of international human rights law, and particularly with the development of customary international law, which changes over time.⁴³ It is not clear whether the word “recognised” was used deliberately to convey that ICANN’s commitments are not static and will evolve as international law evolves; or whether it was simply deployed to convey vagueness. It is arguably impossible to list precisely the rights that ICANN has committed to “respecting.” This vagueness in turn feasibly contributes to the chasm between ICANN’s rhetoric and its practice of human rights, as it is really hard to translate vague statements into practice.

B. “Applicable Law”

Even if it were clear which rights ICANN has committed to “respecting,” a further crucial question is whether the “applicable law” referred to in the Core Value requires ICANN to respect internationally recognized human rights. The adopted FOI states: ICANN will respect human rights, as required by applicable law (see below on applicable law).⁴⁴ “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, and so on, as well as judicial opinions, where appropriate. It is a dynamic concept inasmuch as laws, regulations, and so on, change over time.

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

⁴⁰ FOI, *supra* note 4, at 4–5 (“[t]here are a range of international human-rights declarations and covenants that could be relevant to ICANN’s Human Rights Core Value”).

⁴¹ *Id.*

⁴² See, e.g., Anthony D’Amato, *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, 25 GA. J. INT’L & COMP. L., 47 (1996). Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT’L & COMP. L., 1 (1995); Theodor Merson, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (Clarendon Press, 1989); Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUST. YBIL 82 (1988).

⁴³ See Anthony A. D’Amato & Richard Anderson Falk, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971) (on soft norms development in international law); see also Christine M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT’L & COMP. L. Q. 849, 850–66 (1989).

⁴⁴ FOI, *supra* note 4, at 4.

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.⁴⁵

1. International law

The most obvious starting point for the “applicable law” under the Bylaw is arguably human rights law, and international human rights law in particular, given ICANN’s global status and the worldwide implications of its policies. However, as I have explained in more detail in my earlier work,⁴⁶ international human rights law at least as it currently stands⁴⁷—is generally understood among the international community and political institutions to be legally binding only on states, and not on private, non-state actors.⁴⁸ By the same token, international law beyond human rights is also interpreted in a very state-centric mode, and understood by the international community as being created by and for nation states.⁴⁹ Therefore, with the exception of principles of international criminal law,⁵⁰ under current global political state-centric structures, principles of international law are not thought to directly apply to private informal actors, such as ICANN. Similarly, dominant conceptions of international law imply that *no* international conventions should be directly applied to ICANN because it is a general principle of international law that international conventions only apply to the signatory states that ratified them.⁵¹

This is not to say that international law is incapable of or suited for tackling profit or non-profit corporate behaviour. To the contrary, private actors have been involved in international affairs from the early days of development of modern international law. As the examples of British and Dutch East India Companies demonstrate, private actors made treaties with sovereign powers, had militaries and colonized continents.⁵² However, the liberal internationalism, which became

⁴⁵ *Id.*

⁴⁶ See Monika Zalnieriute, *From Human Rights Aspirations to Enforceable Obligations by Non-State Actors in the Digital Age: The Case of Internet Governance and ICANN*, 21 YALE J.L. & TECH. 278, 278–335 (2019).

⁴⁷ Recently, the efforts to extend international human rights law to private actors have been revived at the UN level. On the latest developments and progress on the UN Treaty, see BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE, *Binding Treaty*, business-humanrights.org/en/binding-treaty (last visited Jan. 18, 2020); see also Surya Deva & David Bilchitz, BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS: CONTEXT AND CONTOURS (2017).

⁴⁸ See, e.g., International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (“[w]here not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to . . .”); see also, e.g., International Covenant on Economic, Social, and Cultural Rights art. 2, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] (“[e]ach State Party to the present Covenant undertakes to take steps.”).

⁴⁹ See Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 57–58 (5th ed. 1998).

⁵⁰ “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.” Shane Darcy, *The Potential Role of Criminal Law in a Business and Human Rights Treaty*, in BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS (Surya Deva and David Bilchitz eds., 2017) (citing Rome Statute of the International Criminal Court preamble, arts. 5–8, July 1, 2002, 2187 U.N.T.S. 90).

⁵¹ See, e.g., Vienna Convention on the Law of Treaties arts. 24, 34–35, Jan. 27, 1980, 1155 U.N.T.S. 331.

⁵² Philip J. Stern, *English East India Company-State and The Modern Corporation*, in THE OXFORD HANDBOOK OF THE CORPORATION 7 (Thomas Clark et al. eds. 2018); Paul Frentrop, *The Dutch East India Company*, in THE OXFORD HANDBOOK OF THE CORPORATION 12–13 (Thomas Clark et al. eds. 2018).

the dominant political ideology after the Second World War, favoured and promoted state-centric conceptions of international law through human rights frameworks and left the private power unhindered.

Therefore, human rights law can be—at least as interpreted along state-centred conceptions—incapable of providing satisfactory remedies for human rights violations by corporate and other non-state bodies.⁵³ Informal actors, such as transnational corporations or bodies like ICANN, are thus excluded from *direct* responsibility under international human rights law, and are only encouraged to *respect* human rights under the UN Guiding Principles on business and human rights.⁵⁴ These principles were laid out and unanimously endorsed by the UN Human Rights Council (HRC) in 2011 as an acceptable “compromise” after a strong and continued pushback against binding obligations from multinational corporations, which have been frustrated since the 1970s.⁵⁵

It seems therefore that the “applicable law” under ICANN’s human rights Core Value does not include all international human rights law, at least in its current state-centric conception.

2. Domestic law

If no international law, including human rights law, is considered to be directly applicable to ICANN, then it follows that the ‘applicable law’ may only be national or supranational local law (e.g., in the case of the EU, it could be directly binding EU law). The critical question here becomes whether the national or local law requires private bodies to respect internationally recognised human rights. The answer partially depends on the national context and whether the countries have ratified international human rights instruments and apply certain norms to private actors. However, whatever the jurisdiction, the *applicability* of domestic human rights law to ICANN in those jurisdictions remains uncertain and limited because of its status as a private organisation.⁵⁶ Thus, even if a particular country has ratified the human rights conventions, domestic human rights legislation most often only applies vertically (to *public* bodies). Such legislation is rarely applicable and enforceable horizontally (to private actors).

Some human rights laws are applicable horizontally in certain jurisdictions. For example, the EU data protection law and the new General Data Protection Regulation (‘GDPR’)⁵⁷ do apply to ICANN, as it is considered a data controller -- at least jointly with the Registrars and Registries who manage domain names databases. For example, the policy for the WHOIS database is set by

⁵³ See, e.g., 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, 2 (2002). For more on remedies and the proposed binding UN Treaty on Business and Human Rights, see, e.g., Erika George and Lisa Laplante, *Access to Remedy: Treaty Talks and the Terms of a New Accountability Accord*, in BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS (Surya Deva and David Bilchitz eds., 2017).

⁵⁴ Office of the High Comm’r for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect, and Remedy” Framework*, U.N. Doc A/HRC/17/31, at 13 (2011).

⁵⁵ For discussions of these issues in depth, see BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS (Surya Deva and David Bilchitz eds., 2017).

⁵⁶ See, e.g., Zalnieriute & Schneider, *supra* note 22.

⁵⁷ Commission Regulation 2016/679, General Data Protection Regulation 2016 OJ (L 119/1).

ICANN. Further, EU data protection law applies, particularly to the parts of the WHOIS database compiled and managed by the European Regional Internet Registry RIPE NCC, which is headquartered in Amsterdam.⁵⁸ Similarly, ICANN is bound by the newly adopted California Consumer Privacy Act (“CCPA”),⁵⁹ the most comprehensive and stringent privacy bill in the United States. The CCPA became effective on January 1, 2020,⁶⁰ although the California Attorney-General cannot pursue enforcement actions until 1 July 2020.⁶¹

Beyond personal data protection and information privacy laws, human rights standards are also often domestically applied horizontally in anti-discrimination laws, certain labour standards (which are more relevant for ICANN as an employer than as a policy-making body), and the gross human rights abuses that may also often be covered under criminal law.⁶²

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

C. No Obligation to “Enforce”

Finally, irrespective of the considerations referred to above about the state-centric nature of international law and limited applicability of human rights law, it is important to note that the human rights Bylaw further states: “This Core Value does not obligate ICANN to enforce its human rights obligations, or the human rights obligations of other parties, against other parties.”⁶³

While this qualification is arguably of a negating nature, it is hard to grasp what exactly the drafters intended to convey with this limitation. On the one hand, the statement could be understood as an explicit acknowledgement that ICANN does not commit to *enforce* human rights obligations (both those of ICANN and of others) “against other parties.” However, ICANN does not have any *enforcement* powers to start with - it is not a regulator of any kind and lacks any investigative or regulatory powers to be able to enforce any policies in the first place. This makes the use of the term ‘enforce’ rather dubious. On the other hand, the statement could be read as a green pass for non-compliance with the human rights “Core Value”. In such a case, it would seem that even if ICANN actually had certain human rights obligations by virtue of the “applicable law” imposed upon them as private actors (e.g., data protection obligations required by the EU or Californian law), the self-imposed “Core Value” should still not be interpreted as obligating it to

⁵⁸ 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 (2003).

⁵⁹ CAL. CIV. CODE § 1798.100 (West 2018).

⁶⁰ CAL. CIV. CODE § 1798.198(a).

⁶¹ John Stephens, *California Consumer Privacy Act*, AMERICAN BAR ASSOCIATION (Jul. 2, 2019), https://www.americanbar.org/groups/business_law/publications/committee_newsletters/bcl/2019/201902/fa_9/.

⁶² For more on horizontal application of human rights law, see John H. Knox, *Horizontal Human Rights Law*, 102 AM. J. OF INT’L L. 1, 24 (2008); see also Dorota Leczykiewicz, *Horizontal Application of the Charter of Fundamental Rights*, 38 EUR. L. REV. 479, 481 (2013).

⁶³ See ICANN, *supra* note 33.

“enforce” —or comply with—its human rights obligations.

This would be an unfortunate outcome, given that the strongest impact of the “Core Value” has always been expected to be on the policy-development processes (and ICANN itself has made this expectation public).⁶⁴ Such interpretation would imply that ICANN reserves itself a right not to act whenever its policy-development processes in fact do disregard human rights, even if required by applicable law. The earlier mentioned Implementation Assessment Report, published following the Board’s approval of the FOI in November 2019, suggests that all policy development processes, reviews, and recommendations developed by the ICANN community will have to show that policies and recommendations sent to the ICANN Board have factored in human rights considerations, as outlined under the FOI.⁶⁵ However, even then the Board and the community could still refuse to comply with the Core Value, as long as it would be “factored” into the process. Under both interpretations, the pronouncement that ICANN has no obligation to “enforce” its “obligations” leaves one wondering about the meaning and implications of such qualification and further obscures the “Core Value.”

D. Tenuous Promise in the new Core Value

The preceding legal analysis of the new ICANN’s Bylaw, as interpreted under the FOI, demonstrates that both the Bylaw and the FOI are drafted in a manner that enables ICANN to downgrade or entirely escape its human rights responsibilities. The adopted FOI further opens the door to legal interpretations that are antithetical to respect for universal human rights norms by emphasising that human rights were included in the Bylaws simply as a “Core Value,” rather than as a “Commitment.”⁶⁶ Seen in this light, the human rights Bylaw does not seem as promising as initially envisioned by human rights groups that lobbied ICANN to include the human rights language in the Bylaws. These nuances in wording did not cause great concern to human rights advocates (at least initially) who often used the terms ‘values’ and ‘commitments’ interchangeably.⁶⁷

However, in legal interpretation, language and exact terms matter. By relying on this type of vague and nebulous language, ICANN is not unique in trying to water down the legal value of its aspirations and/or commitments. For example, the OECD guidelines on transnational

⁶⁴ 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>.

⁶⁵ Akriti Bopanna & Ephraim Percy Kenyanito, *ICANN takes one step forward in its human rights and accountability commitments*, ARTICLE 19.ORG, (Dec. 16 2019), <https://www.article19.org/resources/blog-icann-takes-one-step-forward-in-its-human-rights-and-accountability-commitments/>.

⁶⁶ 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 FOI, *supra* note 4, at 3.

⁶⁷ For the interchangeable use of language, see, e.g., ICANN Board agrees to human rights commitment, Article 19.org (Feb. 4, 2016) <https://www.article19.org/resources/icann-board-agrees-to-human-rights-commitment/>; see also Bopanna & Kenyanito, *supra* note 65.

corporations also arguably entail likewise “flexible” language for compliance with international norms and domestic law. This language could be interpreted to reduce human rights responsibilities of private actors to virtually nothing.⁶⁸ In the following section of this article, I will argue that the tenuous interpretation of the new Core Value in the approved FOI is much narrower than ICANN’s self-imposed requirements in its founding document, the Articles of Incorporation.⁶⁹

IV. Self-Imposed Commitments in ICANN’s Articles of Incorporation

Despite the obscurity over applicability of international legal norms including human rights to private actors, many such actors declare that they will operate in conformity with the norms as part of their self-imposed procedural principles. ICANN is not a special case, and, lacking an external source of legal authority and legitimacy,⁷⁰ it has voluntarily undertaken to operate according to quasi-constitutional principles and values.

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

For the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law.⁷¹

Here an important question is what those “relevant principles of international law” and “applicable international conventions” might be. The argument that ICANN, as a private party, is not bound by the principles of international law was advocated by ICANN itself in the international arbitration proceedings between the ICM registry and ICANN over the controversial .xxx string.⁷²

A. Choice to be Bound by Principles of International Law

The .xxx proceedings, initiated over a decade ago, concerned the allocation of the .xxx top-level domain name. In particular, throughout the 2000s, ICANN has been reluctant to approve the top-level domain name .xxx for pornography sites based on “moral” concerns expressed by the George W. Bush Administration.⁷³ The registry, which had applied for the .xxx domain, eventually initiated independent review proceedings against ICANN claiming that ICANN was under obligation to act in accordance with the principle of good faith, as required by its Articles of

⁶⁸ See Robert C. Blitt, *Beyond Ruggie’s Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to Corporate Human Rights Compliance*, 48 TEX. INT’L L.J. 33, 55–56 (2012).

⁶⁹ ICANN, *supra* note 23.

⁷⁰ David Lindsay, *What do the .XXX disputes tell us about Internet governance? ICANN’s legitimacy deficit in context*, 63 TELECOMM. J. OF AUSTRALIA, 33.1, 33.4–33.5 (2013) (discussing legitimacy and ICANN).

⁷¹ Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, Aug. 9, 2016.

⁷² See *ICM Registry v. ICANN*, ICDR Case No. 50 117 T 00224 08, Declaration of 19 February 2010, <https://www.icann.org/en/system/files/files/-panel-declaration-19feb10-en.pdf>.

⁷³ On the .xxx case, see Robert D. Richards & Clay Calvert, *Adult Websites and the Top-Level Domain Debate: ICANN’s Adoption of XXX Dras Adult-Industry Ire*, 29 CARDOZO ARTS & ENT. L.J., 527 (2011).

Incorporation and Californian law.⁷⁴ In response, ICANN argued that, as a private actor, it was not bound by international law and general principles of international law, despite its declarations in the Articles of Incorporation.

The applicability of general principles of international law to ICANN and interpretation of Article 4 was not determinative in the .xxx case proceedings. The majority of the panel considered that the general principle of good faith (which was the subject of the dispute) was not only found in international law and in general principles that are the source of international law, but also in Californian corporate law, where ICANN was incorporated. However, the majority of the arbitration panel in the .xxx case disagreed with the narrow interpretation proposed by ICANN. The panel held that Article 4 of its Articles of Incorporation required ICANN to act consistently with the “*general principles of international law*” that are recognised as a source of international law under the Statute of the International Court of Justice.⁷⁵

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

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

Indeed, ICANN has also subjected some of its global policies to international law standards in practice. For example, it has explicitly chosen to apply the norms of international law in certain areas, such as the procedure concerning the “limited public interest objection” to the new generic Top-Level Domains (“gTLD”) applications. In that procedure, ICANN has decided to assess the compatibility of the particular gTLD string against “fundamental” principles of international law and the principles relating to public order and morality under international human rights law in particular.⁷⁸ Moreover, ICANN’s Governmental Advisory Committee established a Working Group on Human Rights and International Law, which focuses on aspects of ICANN’s policies and procedures which relate to human rights and relevant international law.⁷⁹ Thus, it is clear that ICANN itself has in the past deployed principles and standards of public international law in the

⁷⁴ See *ICM Registry*, *supra* note 72. The declaration is the outcome of the Independent Review Proceedings filed in accordance with art. IV, Section 3 of the ICANN Bylaws.

⁷⁵ *Id.*, at ¶ 140.

⁷⁶ *Id.*, at ¶ 138.

⁷⁷ *Id.*, at ¶ 58.

⁷⁸ See Adamantia Rachovitsa, *International Law and the Global Public Interest: ICANN’s Independent Objector as a Mechanism of Responsive Global Governance*, in *NON-STATE ACTORS AND INTERNATIONAL OBLIGATIONS: CREATION, EVOLUTION AND ENFORCEMENT* (James Summers & Alex Gough eds., 2018), available at [https://www.rug.nl/research/portal/en/publications/international-law-and-the-global-public-interest\(ba825f7e-9e93-45b8-90c9-52f4d05066ad\).html](https://www.rug.nl/research/portal/en/publications/international-law-and-the-global-public-interest(ba825f7e-9e93-45b8-90c9-52f4d05066ad).html).

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

development of its policies.

C. Bindingness of Self-Imposed Human Rights Norms

Based on such practice, there is no reason why the requirement to operate in compliance with “internationally recognized human rights” is not similarly included as a requirement under ICANN’s Articles of Incorporation. Indeed, when arguing against direct general applicability of international law to ICANN in the .xxx case, ICANN claimed that it had imposed such a requirement on itself. In particular, ICANN highlighted that it did not adopt principles of international law indiscriminately, but rather to ensure consistency between its policies developed for the world-wide Internet community and well-established substantive international law on matters relevant to various stakeholders in the global Internet community, such as general principles on trademark law and freedom of expression relevant to intellectual property constituencies and governments.⁸⁰

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

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

D. Enforcement Mechanism for Self-Imposed Commitments

The fact that international human rights law and conventions may not apply directly and generally to private actors does not negate the value of ICANN’s self-imposed commitments.⁸² Surely, self-imposed commitments are only as valuable as their enforceability. In other words, the state-centred nature of human rights law might be less of an issue if ICANN voluntarily submits to external review of its compliance. It may do this via adjudication, international arbitration or judicial review, for instance. Indeed, ICANN established an independently administered, third party adjudication procedure in 2005 to review decisions of the ICANN board alleged to be inconsistent with ICANN’s Articles of Incorporation or Bylaws.⁸³ ICANN claims that the process

⁸⁰ *ICM Registry*, *supra* note 72, at 59–60 (quoting ICANN’s Response to Claimant’s Memorial on the Merits).

⁸¹ *Id.*, ¶ 106.

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

⁸³ *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> (last visited Feb. 3, 2020). ICANN has designated the International Centre for Dispute Resolution (<https://www.icdr.org/>) to operate the independent review process.

for independent review of ICANN’s actions “reinforces its transparency and accountability mechanisms.”⁸⁴

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

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

E. Limited Compliance with the Self-Imposed Commitments

Indeed, the review proceedings have not been initiated beyond the .xxx occasion, despite widely perceived inconsistencies between ICANN’s global policies and human rights norms. Various stakeholders and civil society organisations have criticized many ICANN policies, including ICANN’s WHOIS policy mandating collection and public disclosure of personal data of all domain name registrants,⁸⁶ to due process concerns and limits on freedom of expression to protect trademark rights under the Uniform Dispute Resolution Policy,⁸⁷ to excessive personal data retention requirements in the ICANN registrar accreditation agreements.⁸⁸ In addition to the .xxx controversy and proceedings, ICANN has been involved in a scandal over the .gay top level

⁸⁴ *Id.*

⁸⁵ On the number of independent review proceedings, see *Answers to Recurring Questions Regarding the Independent Review Process*, <https://www.icann.org/resources/pages/irp-questions-2010-06-19-en>, which clearly states that: “[o]ne 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>.

⁸⁶ On data privacy issues in WHOIS, see Stephanie E. Perrin, *The Struggle for WHOIS Privacy: Understanding the Standoff Between ICANN and the World’s Data Protection Authorities* (Jun. 2018) (unpublished Ph.D. dissertation, University of Toronto), <https://tspace.library.utoronto.ca/handle/1807/89738>.

⁸⁷ See, e.g., Milton L. Mueller, *Rough Justice: A Statistical Assessment of ICANN’s Uniform Dispute Resolution Policy*, 17(3) THE INFO. SOC’Y 153 (2001); A. Michael Froomkin, *ICANN’s “Uniform Dispute Resolution Policy” — Causes and (Partial) Cures*, 67(3) BROOKLYN LAW REVIEW 605 (2002); DAVID LINDSAY, INTERNATIONAL DOMAIN NAME LAW: ICANN AND THE UDRP (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).

⁸⁸ MONIKA ZALNIERIUTE & THOMAS SCHNEIDER, ICANN’S PROCEDURES AND POLICIES IN THE LIGHT OF HUMAN RIGHTS, FUNDAMENTAL FREEDOMS AND DEMOCRATIC VALUES (Oct. 8, 2014), <https://rm.coe.int/16806fc29c>.

domain name attracting outcry from human rights activists for failing to respect the freedom of expression and freedom of assembly of the LGBTI community.⁸⁹ In May 2019, ICANN finally allocated .gay top level domain name, but not to the community application, endorsed by the International Lesbian, Gay, Bisex, Trans and Intersex Association (ILGA), but rather to a private applicant.⁹⁰

However, neither the outcry from human rights activists, nor dozens of letters to ICANN from the EU data protection authorities⁹¹ and various NGOs⁹² over violations of data privacy rights in the WHOIS policy and the Registrar Accreditation Agreement of 2013 have convinced ICANN to revise those policies. Therefore, it would seem that the capacity of ICANN's informal multistakeholder structure, and its self-imposed commitments, to hold it to human rights values has been very limited to date. It is hard to see how this long-standing practice would change with the coming into force of the human rights Bylaw which, as argued above, is much weaker than the requirements under ICANN's Articles of Incorporation.

V. Conclusion

This article critically examined ICANN's new aspirations for human rights and argued that not only do they carry little, if any, legal weight, but they are weaker than the quasi-constitutional, self-imposed requirements already in ICANN's Articles of Incorporation. The analysis of the new aspirations also illustrated that, as far as human rights protection is concerned, this is an instance where there is a significant disconnect between human rights rhetoric and practice. While ICANN has adopted the new Core Value, it has also proved reluctant to comply with its self-imposed human rights commitments in practice during the 20 years of its existence. The article suggests that this informal global policy-making body is, therefore, unlikely to convert its latest human rights rhetoric into practice. In turn, this raises questions about whether the new Bylaw provisions amount to little more than a masquerade aimed at improving public confidence in the context of an institutional transition – public confidence being particularly important now because ICANN is, in its own words, “officially accountable to the global multi-stakeholder community.”⁹³

⁸⁹ On .gay issues further, see Laura DeNardis & Andrea M. Hackl, *Internet control points as LGBT rights mediation*, 19.6 INFORMATION, COMM. & SOC'Y 753, 753–770 (2016); Monika Zalnieriute, *The anatomy of neoliberal Internet governance: A queer critical political economy perspective* in QUEERING INT'L LAW 67–88 (Dianne Otto ed., 2017). On gTLDs more generally, see EVE SALOMON & KINANYA PIJIL, APPLICATIONS TO ICANN FOR COMMUNITY-BASED NEW GENERIC TOP LEVEL DOMAINS (gTLDs): OPPORTUNITIES AND CHALLENGES FROM A HUMAN RIGHTS PERSPECTIVE, COUNCIL OF EUROPE (2016).

⁹⁰ See *.gay Registry Agreement*, <https://www.icann.org/resources/agreement/gay-2019-05-23-en> (last visited Feb. 3, 2020).

⁹¹ See Article 29 Working Party, letter to ICANN of 8th January 2014, Ref. Ares (2014) 22160, https://ec.europa.eu/justice/article-29/documentation/other-document/files/2014/20140108_letter_icann.pdf; Article 29 Working Party, letter to ICANN of 11th April 2018, <https://www.icann.org/en/system/files/correspondence/jelinek-to-marby-11apr18-en.pdf>.

⁹² For example, Derechos Digitales and the Statewatch pressured ICANN not to adopt its RAA policy. See, e.g., Derechos Digitales, *Letter to ICANN of July 19, 2012*, <http://www.derechosdigitales.org/wp-content/uploads/letter-of-concern-ICANN-Derechos-Digitales.pdf>; Chris Jones, Statewatch, *Want to set up a website? The 'Five Eyes' want your personal data* (Jan. 2013), <http://www.statewatch.org/analyses/no-234-websites-five-eyes.pdf>.

⁹³ See ICANN, *Overview of the IANA Stewardship Transition*, <https://www.icann.org/stewardship-accountability> (last visited April 3, 2019).