

**INTERNET GOVERNANCE AND HUMAN RIGHTS:
ICANN'S TRANSITION AWAY FROM UNITED STATES CONTROL**

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The Internet has become an important medium that supports several basic human rights, including freedom of expression and the right to privacy.¹ Internet governance, and particularly the policies and procedures that keep the Internet functioning, are essential to ensure that those basic human rights continue to be operational online. ICANN, the Internet Corporation for Assigned Names and Numbers, is a principal actor in Internet governance through its technical management of Internet domain names and addresses; it also sets policy for information contained in the publicly-available WHOIS database of registered domain names.² The assignment of domain names and the requirements for public disclosure of personal information about registered domain name owners implicate the rights of free expression and privacy respectively.

ICANN is a California nonprofit corporation. Its responsibilities for the technical functioning of domain names and numbers assignments (Internet Assigned Numbers Authority or "IANA") have been supervised by the United States government, specifically the National

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¹ See, e.g., U.N. Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Report to the Human Rights Council*, Seventeenth Session Agenda Item 3, United Nations General Assembly, U.N. Doc. A/HRC/17/27 (May 16, 2011) (by Frank La Rue) "[T]he Internet has become an indispensable tool for realizing a range of human rights, combating inequality, and accelerating development and human progress" at p.22; and "The Special Rapporteur underscores the unique and transformative nature of the Internet not only to enable individuals to exercise their right to freedom of opinion and expression, but also a range of other human rights, and to promote the progress of society as a whole." at p.1.

² See ICANN, *Welcome to ICANN*, available at <https://www.icann.org/resources/pages/welcome-2012-02-25-en>.

Telecommunications and Information Administration (“NTIA”), under a contract with the Department of Commerce.³ In 2014, NTIA announced a plan to relinquish its supervisory role and transition the IANA functions to a global multistakeholder community.⁴ Consideration of that transition is now underway. On March 10, 2016, ICANN’s Board of Directors delivered the IANA Stewardship Transition Proposal (the “Transition Proposal”) to NTIA for review and approval.⁵ NTIA’s response is expected shortly.

This paper describes the human rights concerns related to ICANN’s transition from stewardship by the U.S. government to an independent, multistakeholder organization, reviews and evaluates as inadequate its proposed commitment to human rights as set forth in the Transition Proposal, and suggests certain opportunities for further input by the global Internet community.

ICANN and Freedom of Expression

ICANN, through its IANA functions, creates policy governing the management of generic and country code top level domains (“gTLDs” and “ccTLDs” respectively) such as .com, .net and .org and .uk, .au and .cn and the introduction of new gTLDs into the Internet’s Domain

³ See 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.

⁴ See Press Release, *NTIA Announces Intent to Transition Key Internet Domain Name Functions* (March 14, 2014), <https://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>.

⁵ IANA Stewardship Transition Coordination Group (ICG), *Proposal to Transition the Stewardship of the Internet Assigned Numbers Authority (IANA) Functions from the U.S. Commerce Department’s National Telecommunications and Information Administration (NTIA) to the Global Multistakeholder Community* (March 2016), <https://www.icann.org/en/system/files/files/iana-stewardship-transition-proposal-10mar16-en.pdf>.

Names System (“DNS”).⁶ In 2011, ICANN launched a program to accept new gTLDs from registry applicants.⁷ The stated goal was to expand the Internet’s namespace to foster diversity, encourage competition, and enhance the utility of the DNS.⁸ New domain names, for example .islam, .gay and .sucks, will have expressive and communicative elements. ICANN’s policies on approving applications for new gTLDs will have a significant impact on who can use those new top level domains and therefore the accessibility of related information on the Internet. For example, the decision who is awarded the .gay gTLD would determine whether it will be used to facilitate communications relevant to the LGBT community worldwide or will be monopolized by someone else for other potentially discriminatory purposes.

ICANN makes these decisions with respect to the gTLDs and awards new gTLDs through registry agreements with winning applicants.⁹ The ccTLD manager for each country makes such decisions (or delegates them to others) exercising substantial, but not total, autonomy from ICANN.¹⁰

⁶ *Supra* note 2. See also J. Postel, *Domain Name System Structure and Delegation*, (March 1994), <https://www.ietf.org/rfc/rfc1591.txt>.

⁷ See ICANN, *New Generic Top-Level Domains*, <https://newgtlds.icann.org/en/about/program>.

⁸ See ICANN, *New gTLD Program Reviews FAQ*, <https://newgtlds.icann.org/en/reviews/faqs>. “The goals include enhanced competition, consumer choice and consumer trust, increased market differentiation and innovation, additional geographic and service-provider diversity and increased protections.”

⁹ See ICANN, *New Generic Top-Level Domains: Contracting and the Registry Agreement*, <https://newgtlds.icann.org/en/applicants/agb/base-agreement-contracting#stats>.

¹⁰ See ICANN, *Internet Domain Name System Structure and Delegation (ccTLD Administration and Delegation)* (May 1999), <http://archive.icann.org/en/policies/icp-1-archived.htm>. ICANN’s contracts with country code managers imposes upon them some obligations, mostly to ensure the stability and interoperability of their ccTLDs as part of the global domain naming system for the Internet; but none of those obligations are directly related to human rights. See, e.g., the contract between ICANN and Instituto Tecnológico y de Estudios Superiores de Monterrey, the manager for .mx, the ccTLD for Mexico, <https://www.icann.org/en/system/files/files/mx-icann-af-22jun09-en.pdf>.

ICANN and Privacy

ICANN's policies with regard to data retention and availability in the WHOIS database thus raise significant privacy concerns.¹¹ Through contracts with independent Internet domain name registries and registrars, ICANN requires the contribution of the names and contact information of domain name owners to a decentralized, publicly-available database called WHOIS.¹² Anyone, including governments that wish to censor or repress free expression, can find the owner of any domain name in the WHOIS database simply by searching by domain name. In addition, those contracts require the registrars to retain log files, billing records and other personally identifiable information about the domain name owners, and that information may be subject to government inquiries. The availability of this information makes it easier for repressive governments to identify, surveil and repress those who use the Internet to express opposing views or to organize elements of civil society to press for social change.

ICANN's Accountability

The governance of ICANN itself is key to whether the policies and procedures it adopts and imposes upon its participating registries and registrars enhance or weaken Internet-related human rights. The NTIA required ICANN to adopt a multistakeholder model of governance that maintains the openness of the Internet, and warned that it would not accept a transition plan that

¹¹ *Supra* note 1. The United Nations Special Rapporteur stated at paragraph 84 “He also calls upon States to ensure that individuals can express themselves anonymously online and to refrain from adopting real-name registration systems.” Some domain name registrars offer proxy and privacy services that shield the domain name owner's contact information from public view, while many do not.

¹² See, e.g., ICANN, *Registry Agreement* (January 9, 2014), at p.60, <https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-09jan14-en.pdf>.

replaces NTIA's role with a government-led or an inter-governmental organization solution.¹³ ICANN has been criticized in the past for permitting its Government Advisory Committee ("GAC") to have excessive influence to the detriment of other stakeholders.¹⁴ The Transition Proposal includes recommendations for enhancing ICANN's accountability by implementing changes to its Bylaws, policies and procedures so as to ensure greater participation by the broader Internet community and by putting in place institutional safeguards against the dominance of any stakeholder group, including the GAC.¹⁵

A full discussion of those recommendations is beyond the scope of this article. However, they include the adoption of a Bylaw affirming ICANN's commitment to respect human rights and, importantly, the development of a framework for interpreting how that commitment should be manifest in ICANN's policies and procedures.¹⁶ The most recent draft of the proposed bylaw reads as follows:

Section 1.2(b)(viii). Subject to the limitations set forth in Section 27.2, within performing 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 obligations on ICANN outside its Mission, or beyond obligations found in applicable law. This Core Value shall not obligate ICANN to enforce its human rights obligations, or the human rights obligations of other parties, against other parties.¹⁷

¹³ *Supra* note 4.

¹⁴ *See, e.g.*, Article 19, *ICANN Reform: Recommendations, a policy brief* (March 2014), <https://www.article19.org/data/files/medialibrary/37494/ICANN-policy-final.pdf>.

¹⁵ *See* CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, February 23, 2016, <https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf>.

¹⁶ *Id.* at 31-32.

¹⁷ *See* Bylaws For Internet Corporation For Assigned Names And Numbers, A California Nonprofit Public-Benefit Corporation (draft dated May 26, 2016), p 5, <https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf>.

Pursuant to Section 27.2(a), the proposed Bylaw would not become effective:

... unless and until a framework of interpretation for human rights (“FOI-HR”) is (i) approved for submission to the Board by the CCWG-Accountability [working group] 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.¹⁸

On its face, the proposed Bylaw is far from the commitment that many stakeholders in the human rights and global Internet communities would find meaningful. First, it would obligate ICANN to respect international human rights laws only “*as required by applicable law.*” A brief review of the comments of the working group tasked with drafting the Bylaw¹⁹ and a memorandum from that working group’s retained legal counsel²⁰ both reveal considerable ambiguity and indecision as to the meaning and scope of those words. Second, it is clear from those working papers that the extent of ICANN’s commitment to comply with international human rights law “as required by applicable law” has been left to the development of the FOI-HR sometime in the future and well after NTIA is no longer looking over ICANN’s shoulder. Third, the draft Bylaw makes clear that ICANN would have no obligation to respond to any human rights violations by others, including any of the parties to which ICANN has contractually delegated any of its responsibilities, such as its approved gTLD and ccTLD managers, registries and registrars.

¹⁸ *Id.* at 137.

¹⁹ See, e.g., <https://mm.icann.org/pipermail/accountability-cross-community/2016-January/010270.html>

²⁰ See Memorandum from Sidley Austin LLP and Adler & Colvin to the Cross-Community Working Group on Enhancing ICANN Accountability, *Litigation Risk and Bylaws Provisions on Human Rights* (January 13, 2016), <http://tinyurl.com/jdtwzom>.

Thus, the proposed new Bylaw explicitly removes from ICANN any leverage it might otherwise have to obligate parties throughout its chain of governance delegation to respect internationally recognized human rights.

Applicable Law and Voluntary Guidelines

What could the qualification to respect internationally recognized human rights “*as required by applicable law*” mean? International human rights laws generally impose obligations only on States, at least explicitly.²¹ ICANN is a corporation, not a State. However, many international human rights treaties impose on States the obligation to enact domestic legislation that would apply to individuals and corporations.²² Some have argued that such treaties also impose direct legal obligations for non-State actors, including corporations, to respect those rights, even if they do not state those obligations explicitly.²³ However, the commentaries of the bodies that interpret those treaties are either ambiguous on this issue or they acknowledge that the only entities bound by them directly are the States Parties themselves.²⁴

²¹ See, e.g., Louis Henkin Et Al., Human Rights 214 (2nd ed., 2009).

²² See, e.g., International Covenant on Civil and Political Rights, art. 2(2), Dec. 16, 1966, 999 U.N.T.S. 171 and International Covenant on Economic, Social and Cultural Rights, art. 2(1), Dec. 16, 1966, 993 U.N.T.S. 3.

²³ For example, the preamble of the non-binding Universal Declaration of Human Rights declares that not only States, but also “every individual and every organ of society” have a duty “to secure their universal and effective recognition and observance”. See also Louis Henkin, “Every individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, *no cyberspace* [emphasis added]. The Universal Declaration applies to them all.” in *The Universal Declaration at 50 and the Challenge of Global Markets*, Brooklyn Journal of International Law, 17 (April 1999), p. 25.

²⁴ See, e.g., U.N. Human Rights Committee (HRC), General comment no. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13 (March 29, 2004), paragraph 8, on the obligations in the International Covenant on Civil and Political Rights: “The ... obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law.”

So “as required by applicable law” either refers to domestic civil and criminal laws that give effect to internationally recognized human rights or to international laws to which ICANN is not directly subject. If to the former, what domestic laws would be relevant? Which States will have jurisdiction over ICANN? Which States will be in a position to enforce their human rights-relevant civil and criminal laws on ICANN? As an organization having worldwide operations, the answer is unclear.²⁵ If to the latter, it would appear that the proposed human rights Bylaw will have no binding effect on ICANN and was included in the Transition Proposal merely to placate the human rights constituency without constituting any meaningful commitment.

Globalization, the expansive reach and impact of multinational corporations, the erosion of State power to hold those corporations accountable and the ability of NGOs to mobilize public opinion have all placed increasing focus on corporate responsibility to respect human rights. Since the private sector is not directly subject to international human rights laws and the domestic implementation of those laws varies so widely from country to country, a number of corporations have adopted voluntary codes of conduct. Many of these purport to internalize some of the human rights that are addressed in international treaties, and some corporations also impose those codes of conduct on their supply chains.²⁶ But the scope of those codes of conduct

²⁵ The Transition Proposal, if accepted by NTIA, would require ICANN to maintain its principal office in Los Angeles. Bylaws, *supra* note 17, at 130. ICANN would therefore remain subject to those laws of the state of California and the United States that give effect to the international human rights treaties that the United States has ratified, but only to the extent that those domestic laws impose obligations on corporations. The Bylaws also authorize ICANN to establish offices elsewhere, so presumably ICANN would also be subject to the laws of those countries that impose on corporations obligations to respect international human rights.

²⁶ See, e.g., Levi Strauss & Co., Worldwide Code of Conduct (2012), <http://www.levistrauss.com/wp-content/uploads/2014/01/WORLDWIDE-CODE-of-business-conduct.pdf> and Apple Inc., Apple Supplier Code of Conduct (2016), http://images.apple.com/supplier-responsibility/pdf/supplier_code_of_conduct.pdf.

varies widely. ICANN's Transition Proposal doesn't include a code of conduct—only an ambiguous bylaw and a promised framework for implementing of human rights into its policies and procedures.

The United Nations has made several attempts to develop human rights-related obligations for corporations. The most recent of these, the “UN Guiding Principles on Business and Human Rights” (“Guiding Principles”) is a non-binding, “soft law” set of standards that encourages companies in the private sector to integrate human rights across their relevant internal functions and processes.²⁷ Among its foundational principles are commitments by businesses to respect the human rights and fundamental freedoms recognized in the International Bill of Human Rights (i.e., the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) and in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work. The Guiding Principles also sets forth standards for implementation, including that businesses should adopt written policies on respect for human rights and conduct periodic due diligence and reporting to ensure that those policies are consistently adhered to. The Guiding Principles have enjoyed considerable approval and “buy-in” by the private sector. It is therefore surprising that the proposed Bylaw did not at least commit ICANN to adopt those principles.

²⁷ See U.N. Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, HR/PUB/11/04 (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. See also U.N. News Centre, Press Release, *UN Human Rights Council Endorses Principles to Ensure Businesses Respect Human Rights* (June 16, 2011), <http://www.un.org/apps/news/story.asp?NewsID=38742#.VwgzvfkrKUK>.

Other Human Rights Bylaw Concerns

The reader should note that the proposed Bylaw does not mention any particular human rights, including those that are most relevant to ICANN's work: the right to free expression or the right of privacy. Further, the proposed Bylaw makes it clear that ICANN would have no obligation to respond to any concerns about human rights violations by its agents, the managers, registries and registrars around the world to which ICANN delegates substantial Internet governance responsibilities. Finally, as noted above, ICANN's human rights commitment would not become effective until the proposed framework document, the FOI-HR, presumably setting forth the scope of that commitment, is developed and approved by ICANN's board of directors.

Perhaps the meaning of the phrase, "as required by applicable law" and the full scope of ICANN's human rights commitment will become evident when ICANN releases the FOI-HR for public comment. By relegating those activities to Work Stream 2, ICANN insures that that will take place, if at all, after NTIA approves the Transition Proposal, thus leaving NTIA out of the review and approval process for this important component of Internet governance. By then, those who are in favor of a strong ICANN human rights commitment will have lost considerable leverage to move ICANN toward that end.

Some of the most influential stakeholders, including the GAC and the current ICANN Board itself, resisted committing ICANN to any obligation to respect human rights whatsoever. That it was included in the Transition Proposal at all is a victory of sorts, but not a very encouraging one.

U.S. Congressional Interest

The proposed human rights Bylaw is part of a set of revised Bylaws that was approved by ICANN's Board of Directors on May 27, 2016 and submitted to the NTIA for review.²⁸ The NTIA is scheduled to announce whether it accepts ICANN's Transition Proposal, including the proposed Bylaws, by June 10, 2016, although that announcement might be delayed. However, both houses of Congress have expressed interest in ICANN's transition issues.

On May 19, 2016, Senators Ted Cruz, James Lankford and Michael S. Lee sent a letter to the US Secretary of Commerce and the head of the NTIA warning that an independent ICANN would increase the power of foreign governments over the Internet, complaining that the Transition Proposal does not adequately address their concerns and requesting that NTIA continue its oversight of ICANN under the current contract until those concerns are addressed.²⁹ On May 24, 2016, Representative Mike Kelly introduced a bill to the House of Representatives that would require the NTIA to extend its existing contract with ICANN through September, 2019, and thereby delay the transition substantially, unless the agency can certify that it has secured the U.S. government's sole ownership of the .gov [government] and .mil [military] top level domains.³⁰ On the same day, the Senate Commerce Committee held a hearing during which several senators voiced reservations about the U.S. government relinquishing supervision

²⁸ ICANN, *Approved Board Resolutions / Special Meeting of the ICANN Board* (May 27, 2016), <https://www.icann.org/resources/board-material/resolutions-2016-05-27-en>.

²⁹ See Letter from Cruz, Lankford and Lee to Penny Pritzker, Secretary, U.S. Department of Commerce, and Lawrence Strickling, Assistant Secretary for Communications and Information (May 19, 2016), https://www.cruz.senate.gov/files/documents/Letters/20160519_ICANNLetter.pdf.

³⁰ Bill “[t]o require the National Telecommunications and Information Administration to extend the IANA functions contract unless it certifies that the United States Government has secured sole ownership of the .gov and .mil top-level domains, and for other purposes”, H.R. 5329, 114th Cong. (2016).

of ICANN.³¹ In that hearing, Senator Marco Rubio said he would send a letter to the NTIA seeking a delay in implementing the transition until ICANN can give greater assurance that its independence will not be jeopardized.³²

None of the reservations expressed by members of Congress of which this author is aware focus on the need for a stronger human rights commitment by ICANN.³³ However, both the comments in the Senate hearing and the issues expressed in the Cruz-Lankford-Lee letter address concerns that without continued U.S. government involvement or other stronger safeguards, ICANN is likely to be unduly influenced by the GAC and foreign governments that may be far less respectful of the rights of free expression and privacy than is the United States.³⁴ Indeed, the current Transition Proposal would afford more rights of participation and voting power to the GAC than it currently possesses. In that respect, the concerns of those senators and human rights advocates appear to be aligned.

³¹ *Examining the Multistakeholder Plan for Transitioning The Internet Assigned Number Authority: Hearing Before the Senate Committee on Commerce, Science, and Transportation*, 114th Cong. (2016). Video available at time of publication of this article at <http://www.commerce.senate.gov/public/index.cfm/2016/5/hearing-to-examine-iana-transition-to-global-multistakeholder-community>.

³² See Amir Nasr, *Rubio Wants to Delay Transition of Internet Governance*, Morning Consult (May 24, 2016), <https://morningconsult.com/2016/05/24/rubio-wants-to-delay-transition-of-internet-governance/>. “Before any plan can be implemented, we [must] ensure that changes in the transition proposal are applied, that they operate as envisioned, and they don’t contain unforeseen problems that could undermine the multi-stakeholder model or that threaten the openness, security, stability the resiliency of the internet,”

³³ Indeed, the Cruz-Lankford-Lee letter criticizes the Transition Proposal for including any commitment to respect internationally recognized human rights as “open[ing] the door to the regulation of content” and unjustifiably expanding ICANN’s core mission. *Supra* note 29, p. 2.

³⁴ The governments of Russia, China, Iran and India, among others, have been active in urging more government control over the Internet. See, e.g., Jack Goldsmith and Tim Wu, *Who Controls the Internet? Illusions of a Borderless World* 171 (Oxford University Press, Inc. 2006).

Although the period for public comment to the ICANN working groups and its Board of Directors closed before this article was published, both NTIA and Congress are reviewing the Transition Proposal, including the revised Bylaws, and would presumably welcome communications from those who remain concerned that ICANN's proposed human rights commitment does not go far enough.

Conclusion

Transitioning ICANN to a self-governing institution, free of any oversight by the United States and subject to the whims of its most influential stakeholders, is a risky proposition. If implemented without sufficient safeguards to guarantee such basic human rights as free expression and privacy, the Internet as we know it now could be in peril. ICANN's stakeholders should use the transition process to reconsider the importance of human rights in its Internet governance mandate and adopt a stronger, more meaningful bylaw--one that ensures that both ICANN and the registries and registrars to whom it delegates many of its activities will give high priority to the rights of free expression and privacy.