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DOI

[10.1002/poi3.172](https://doi.org/10.1002/poi3.172)

Publication date

2019

Document Version

Final published version

Published in

Policy and Internet

License

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Citation for published version (APA):

ten Oever, N. (2019). Productive Contestation, Civil Society, and Global Governance: Human Rights as a Boundary Object in ICANN. *Policy and Internet*, 11(1), 37-60. <https://doi.org/10.1002/poi3.172>

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Productive Contestation, Civil Society, and Global Governance: Human Rights as a Boundary Object in ICANN

Niels ten Oever 

Human rights have long been discussed in relation to global governance processes, but there has been disagreement about whether (and how) a consideration for human rights should be incorporated into the workings of the Internet Corporation for Assigned Names and Numbers (ICANN), one of the main bodies of Internet governance. Internet governance is generally regarded as a site of innovation in global governance; one in which civil society can, in theory, contribute equally with government and industry. This article uses the lens of boundary object theory to examine how civil society actors succeeded in inscribing human rights as a Core Value in ICANN's bylaws. As a "boundary object" in the negotiations, the concept of human rights provided enough interpretive flexibility to translate to the social realities of the various stakeholder groups, including government and industry. This consensus-building process was bound by the organizing structure of the boundary object (human rights), and its ability to accommodate the interests of the different parties. The presence of civil society at the negotiating table demanded a shift in strategy from the usual "outsider" tactics of issue framing and agenda setting, to a more complex and iterative process of "productive contestation," a consensus-building process fueled by the differences of experience and interests of parties, bound together by the organizing structure of the boundary object. This article describes how this process ultimately resulted in the successful adoption of human rights in ICANN's bylaws.

KEY WORDS: global governance, Internet governance, boundary object theory, human rights, ICANN

一直以来学者都在讨论人权在全球治理过程方面的内容，但在互联网名称与数字地址分配机构 (ICANN, 网络治理的主要负责机构之一) 运作中是否应(以及如何)考虑人权这一问题上存在着不同见解。网络治理一般被视为全球治理创新中的一个场景; 在这样的场景中, 公民社会能从理论上对政府和产业产生相同的促进作用。本文从边界物理论 (boundary object theory) 的视角出发, 检验了公民社会参与者如何成功将人权纳入 ICANN 章程中的一项核心价值观。作为章程讨论中的“边界物”, 人权这一概念具有充分的诠释弹性——它被解释为不同利益相关者 (包括政府和产业) 组成的社会现实。这一共识建立过程受到两方面的限制, 一是边界物 (人权) 的组织结构, 二是边界物在迎合不同群体利益时的能力。公民社会在谈判讨论桌上的出现, 要求将策略从通常“旁观者”对议题框架和议程设置的看法转变为一种“富有成效的辩论”, 后者更为复杂, 具有反复性。此辩论的共识建立过程包含各群体经历和利益的不同点, 同时受到

边界物组织结构的限制。本文描述了共识建立过程最终如何促成人权被成功纳入ICANN章程之中。

关键词： 全球治理, 网络治理, 边界物理论, 人权, 互联网名称与数字地址分配机构 (ICANN)

Los derechos humanos han sido por mucho tiempo una discusión con relación a los procesos globales de gobernanza, pero ha habido desacuerdos acerca de si (y cómo) una consideración para los derechos humanos podría ser incorporada dentro del funcionamiento de ICANN, una de las entidades principales para la gobernanza del internet. La gobernanza del internet es generalmente vista como un sitio de innovación dentro de la gobernanza local; uno en el que la sociedad civil puede, en teoría, contribuir igualmente al gobierno y a la industria. Este artículo utiliza el lente de la teoría de objeto límite para examinar cómo los actores de la sociedad civil son exitosos al describir los derechos humanos como un valor fundamental en los estatutos de ICANN. Como “objeto límite” en las negociaciones, el concepto de derechos humanos proporcionó suficiente flexibilidad interpretativa para ser adaptado a las realidades sociales de varios grupos de afectados, incluyendo el gobierno y la industria. Este proceso de construcción de consenso estaba sujeto a la estructura organizadora del objeto límite (derechos humanos), y su habilidad para acomodar los intereses de las diferentes partes. La presencia de la sociedad civil en la mesa negociadora requería un cambio de estrategia de las usuales técnicas de “persona ajena” de estructuración de temas y arreglo de agendas, a un proceso más complejo e itinerante de “contestación productiva,” un proceso de construcción de consenso fortalecido por las diferencias de experiencia e intereses de las partes, ligadas por la estructura organizadora del objeto límite. Este artículo describe cómo este proceso ha resultado al final en la adopción exitosa de los derechos humanos dentro de los estatutos de ICANN.

PALABRAS CLAVES: gobernanza global, gobernanza del Internet, teoría del objeto límite, derechos humanos, ICANN

New Roles, New Process?

The early development of the Internet was characterized by permissionless innovation, informal arrangements, and an unregulated “freedom to create”—but with the rising importance of the network, the need for organization, regulation, and governance increased. Calls of this kind (such as proposals for the regulation of encryption) were met with concern, however, by Internet users, nongovernmental organizations (NGOs), hackers and academics alike, because this meant that the unprecedented freedom of expression, access to information, and enjoyment of other human rights online (thus far taken for granted), might be at stake.

The governance of the Internet is distributed over different bodies in a mode of participation described as a “multistakeholder model”—meaning that different stakeholders, such as governments, the private sector, technical operators, and civil society, make decisions jointly. Internet governance is thus distributed over a range of bodies in which the configuration and level of formalization of the multistakeholder model varies. The multistakeholder model represents an innovation in governance, because it allows for joint decision making by different stakeholders, and openness of participation by individuals and organizations

alike. While multistakeholder governance is by no means a unique feature of the Internet governance field, there is no other area in which this model has been so widely embraced.

Equal access to negotiation and decision-making processes by all stakeholders (including by civil society) is formalized in the multistakeholder model, whereas in many other arenas civil society cannot engage on an equal footing. This changes the structure of the conversation and negotiations, meaning that civil society cannot simply rely on well-proven “outsider” tactics such as framing and agenda-setting, and is therefore challenged to adopt other approaches. To study these new approaches, this article examines a case in which civil society achieved its objectives and analyzes how this was achieved. Internet governance is not the only example of a global governance process in which civil society has a seat at the negotiating table, but it is arguably one of the most formalized and influential.

So far, the literature has treated civil society engagement in Internet governance discussions as either monolithic (Lentz, 2011) or divided (Milan, 2014). Civil society managed to inscribe¹ human rights in the foundational and regulatory documents of an Internet governance body for the first time in 2016, representing something of a historical achievement. In this article I argue that civil society succeeded in inscribing human rights in the legally binding bylaw of the Internet Corporation for Assigned Names and Numbers (ICANN)² because human rights functioned as a boundary object (Star & Griesemer, 1989), that is to say an arrangement which allows people to achieve some form of coordination without necessarily requiring consensus. Because human rights functioned as a boundary object it could be translated and adapted to the social worlds within and between different stakeholder groups in ICANN. I will show how diverging views between individuals and organizations within civil society actually contributed to a dialectical process and a positive outcome, a process that I call “productive contestation.”

Internet Governance, Civil Society, and Boundary Object Theory

Global governance is changing fast (Bevir, 2012; Nye, 2011). Indeed, beside the state, the private sector (Weissbrodt & Kruger, 2003) and civil society (Glasius, 2002; Keck & Sikkink, 1998; Price, 1998; Raymond & Denardis, 2015; Scholte, 2016) are making their way into governance fora and to the negotiation table. However, technological changes are out-pacing “the ability of institutions of governance to respond, as well as our thinking about governance” (Nye, 2011). Not only is the rate of change increasing, but also the importance of digital technologies in general and the Internet in particular (Benkler, 2006; Castells, 2007). This has led to a situation in which the Internet is itself mediating political and economic conflict (Bradshaw, DeNardis, Hampson, Jardine, & Raymond, 2014; DeNardis & Musiani, 2014).

Developments in global governance, and advances in the technology, have combined with the increasing importance of the Internet in our lives and societies

to drive discussions on Internet governance and regulation (Lessig, 2008; Mueller, 2010; Nye, 2014). By being distributed over different fora and organizations (DeNardis 2014; Mueller, 2010; Musiani, Cogburn, DeNardis, & Levinson, 2015) and being conducted in a multistakeholder manner involving a variety of actors on an “equal footing” (Mueller, Pagé, & Kuerbis, 2004; Raboy & Padovani 2010), Internet governance is set apart from, for example, the governance of international telecommunications, which is governed instead in a multilateral manner (Drake & Wilson 2008; Keohane, 2001) in which only governments have a final say. The processes of Internet governance are generally open for participation by different parties, such governments, the private sector, technical operators, and civil society alike, and decisions are jointly made, based on consensus (Hofmann, 2016).

The diverse set of stakeholders and Internet governance bodies and fora gives rise to a rich institutional ecology (Abbott, Green, & Keohane 2016; Star & Griesemer, 1989), which is itself the product of relatively recent governance innovation (Van Assche, Beunen, Lata, & Duineveld, 2015). Playing quite a new role in this process is civil society—the combination of individuals, organizations, and movements that belong neither to the state nor to the private sector (UN, 2004). Civil society has played an increasing part in international negotiations in the last few decades (Glasius, 2002; Hajnal, 2002; Van Rooy, 2004), but in the field of Internet governance it was never limited to lobbying, providing expertise, awareness raising, or street action (Glasius, 2002), becoming instead an inherent part of the policy and decision-making process (Bond, 2006; Frangonikolopoulos, 2012; Milan & Hintz, 2013; Mueller et al., 2004).

Civil society plays a uniquely important role in the Internet governance ecology because its motivations are different from those of other stakeholders. Its involvement is based on “ethical aspirations to better mankind” (Van Rooy, 2004, p. 8), and to provide alternative channels of communication for voices that are not otherwise heard (Keck & Sikkink, 1998, p. x). In the context of Internet governance, civil society advocates for a wide range of issues. Some of the most recurring important principles and frames include human rights, privacy, security, freedom of expression, connectivity, access, capacity, security, governance, equity, and diversity (DeNardis, 2009; Franklin, 2013; Isin & Ruppert, 2015; Rogers & Eden, 2017). Even though the right to privacy, the right to freedom of expression, and the right to security are human rights, they are not always used or understood within this frame, but rather as individual (and sometimes absolute) rights and freedoms in themselves. Human rights here are understood as “the norms and institutions of international human rights, as protected under customary international law and human rights treaties” (Land, 2009, p. 7). Thus far, the literature has treated civil society engaged in Internet governance either as a rather monolithic group with similar issues, opinions, and concerns (Lentz, 2011), or as fractured and compartmentalized (Milan, 2014). Civil society can instead be considered to consist of players who engage in strategic action, as individuals or as teams, and who pursue multiple goals within different arenas, in a complex system of dynamic interactions (Jasper & Duyvendak, 2015).

This article examines the complex articulation of alliances and negotiation, both within civil society (among individuals and organizations) as well between civil society and other actors. In order to unpick the complexity of these processes, I propose to look at how human rights functioned as a boundary object during the discussions on adding a commitment to respect human rights to ICANN's bylaws. It will show how the structure of the process, that is, the translation and adaptation of human rights to the social worlds within and between different stakeholder groups, led to this final achievement.

I use boundary object theory (Burnett & Jaeger, 2008; Gal, Yoo, & Boland, 2005; Star, 1989, 2010; Star & Griesemer, 1989) as a lens to show how human rights were translated into the social worlds of the different stakeholders in ICANN governance without losing its effectiveness. In the scene-setting article by Star and Griesemer (1989), boundary objects were defined as having three components: (i) interpretive flexibility—they have different meanings and interpretations for various groups; (ii) they have the ability to accommodate different informational and work arrangements—the structure of the object can be used in both individual and group settings and collaborations; and (iii) they exhibit a dynamic between ill-structured and more tailored uses of the objects—that is, the tension between general abstract use and specific uses in different social worlds facilitates the process of standardization of the object (Star, 2010). Boundary object theory provides us with a tool to analyze negotiations between stakeholders in multistakeholder governance. This theory seems particularly relevant for Internet governance because it aims to study the process that leads up to standardization, “the back-and-forth between ill structured and well structured; the architecture of the infrastructures involved” (Star, 2010, p. 614). This captures the dynamics of Internet governance, in which groups with different backgrounds, discourses, and objectives aim to make the Internet “work” for them, and to embed their vision in the Internet infrastructure (Sandvig, 2013). Analyzing human rights as a boundary object in the case of ICANN helps to illuminate the way in which multistakeholder negotiations are structured. Boundary objects are objects that cross the boundaries between multiple social worlds (in this case, the social worlds of stakeholder groups), that are used within them and adapted to many of them simultaneously (Star & Griesemer, 1989, p. 408), and which “‘sit in the middle’ of a group of actors with divergent viewpoints” (Star, 1989, p. 46). They “adapt to local needs” in a social world, yet are “robust enough to maintain a common identity across sites” (Star, 1989, p. 46). Concretely, “boundary objects are a sort of arrangement that allow different groups to work together without consensus” (Star, 2010, p. 602), which is of course a crucial aspect of multistakeholder negotiations and collaboration. This process could be also explained through a Habermasian framework of communicative action (Habermas, 1984; Risse, 2000), in which actors develop a shared rationality based on a process of dialogue. However, the problem with this position from a Science and Technologies Studies perspective is that the process of communicative action needs to assume a shared rationality to be developed against the background of a shared lifeworld. I will show that this

idealistic position does not fit with this specific case because of the different interests, interpretations, and embedded knowledge present in the different social worlds of the ICANN stakeholders. Boundary object theory, on the other hand, recognizes that there is room for disagreement and different localized practices, which are accommodated by the boundary object; it conversely represents a more adequate perspective to frame this and, possibly, other analogous processes.

Civil society brings normative visions to an area that might otherwise be interpreted only through technical or commercial lenses. It brings this normative vision through the use of the power of norms and ideas (Keck & Sikkink, 1998), the ability to influence based on a normative framework. This power of norms and ideas can be leveraged in governance negotiations and discussions (Barnett & Duvall, 2005; Finnemore & Sikkink, 1998; Pavan, 2012) by providing and supporting a specific frame (Benford & Snow, 2000) as part of the process of constructing meaning for participants and opponents (Snow & Benford, 1988). Framing processes can provide powerful categories that can shift debates; a category like “weapons of mass destruction” (Litwak, 2002) can impact negotiations in a way that stabilizes meaning and thus shapes policy (Barnett & Duvall, 2005). Framing has helped civil society to set agendas and influence negotiations by “rendering events or occurrences meaningful and thereby function[ing] to organize experience and guide action” (Benford & Snow, 2000, p. 614). This action repertoire (Tarrow, 1994; Tilly, 1989)—the set of various tools and actions available to a group—has functioned to influence those in power while actors have been absent from the negotiating table. Now that civil society has become a part of the negotiation process—at least as far as Internet governance is concerned—it is faced with coming to terms with this new reality (Carr, 2015) and developing new action repertoires to go along with it.

Recognizing human rights as a boundary object helps show how civil society leveraged its power of ideas beyond mere framing and agenda setting, managing instead to effectuate an inscription of human rights in ICANN’s bylaw and thus progress on the road to make respect for human rights an inherent part of ICANN’s processes. Using boundary object theory as an analytical lens increases our understanding of the tactics of civil society and the structure of negotiations in new global governance settings, without reducing the complexity of this player to the fictional ideal of a unified actor.

The process by which human rights functioned and got shaped as a boundary object I will call productive contestation; this describes the speculative development of the boundary object in and between the social worlds of the different stakeholder groups. This process is a phase that precedes standardization. In this period the understanding and meaning of a concept and its translations both within and across social worlds are developed and new working definitions are tested and contested. Nonproductive contestation occurs when translations of the boundary object occur that are incongruent with other social worlds.

This article seeks to contribute to the governance studies literature by using concepts from Science and Technology Studies. While it does not expand on the

theory of the boundary object *per se*, I try to show its usefulness in understanding the specific empirical case of multistakeholder Internet governance.

Methods

One way to understand civil society engagement in global governance is to consider a specific case in order to generate a hypothesis (Yin, 2009). Case studies are “an intensive study of a single case with an aim to generalize across a larger set of cases” (Gerring, 2007, p. 25). Internet governance represents a field of experimentation for global governance, in that it is relatively new and brings states and nonstate actors together in the coordination of a global resource (Broeders, 2016; Mueller, 2010; Nye, 2011). Studying the field of Internet governance can thus help us understand trends and possible future developments in the field of global governance more generally. Within the field of Internet governance, ICANN is seen as an influential case (Seawright & Gerring, 2008), and landmark evolution (Mueller, 2010).

I became involved in ICANN during my role as Head of Digital for ARTICLE 19, an international not-for-profit freedom of expression organization. The work on this article and theory building started as an ethnographic memoir while engaged in ICANN between March 2014 and July 2017. ICANN meetings are held three times per year for an average of 5 days. In addition, negotiation, discussion, and coordination takes place on mailing lists, in chat groups, and via video conferences. I was involved as a civil society actor within the Non-Commercial User Constituency (NCUC), the Non-Commercial Stakeholder Group (NCSG), the Cross Community Working Group on Enhancing ICANN Accountability (CCWG) and its Human Rights Subgroup during Work Stream 1 (WS1; the period ahead of the ICANN transition away from unilateral control from the U.S. government in 2016), and as rapporteur for the Human Rights Subgroup during Work Stream 2 (WS2 the period after the transition in which plans made during WS1 needed to be further defined and implemented, which started in 2016 and is expect to run until June 2018). This experience provided me with a first-hand account of these multistakeholder governance practices, as well as access that an external observer might not otherwise have. On the other hand, my direct involvement might also have introduced some biases vis-à-vis ICANN and its stakeholders. To counter this potential bias, I reflected on my own role in the process, I interrogated my biases by discussing parts of the argument presented here with different members of the ICANN and academic community, and I rely solely on publicly available sources for every claim made in the analysis part of this article, with explicit references to excerpts of meeting transcripts and mailing lists.

In order to gain a more comprehensive overview of the processes, I carried out a document analysis of public ICANN mailing lists, meeting transcripts, working group reports, and working group draft reports. I obtained these documents from the ICANN website, where these documents were publicly available up to the time of writing of this article. I studied the mailing lists of the

NCSG, NCUC, CCWG, and the CCWG Human Rights Subgroups during WS1 and WS2, as well as the transcripts of the calls of these groups. Furthermore, I undertook a quantitative mailing list analysis using the Python-based tool BigBang,³ to gain a deeper insight into trends and interactions. This led to an informed analysis of civil society participation in WS2 human rights processes.

Human Rights in a Time of Infrastructure Oversight Transition

This section analyzes the discussion around the addition to ICANN's bylaws of a Core Value to respect human rights. The analysis is divided in three parts. The first part describes the context in which the discussion took place; the second part describes the actors in this multistakeholder environment; and the third part describes the actual discussion. The negotiations took place during the development of a proposal for the transition of oversight and control over ICANN from the U.S. government to the international Internet community. This brought together a wide range of stakeholders with different interests, experience, and expertise who, at the end of a period of intense negotiations, agreed to the addition of a Core Value to respect human rights to ICANN's bylaws which will impact ICANN's policies and operations. The transition of the oversight function from the U.S. government to the international Internet community took place on October 1, 2016.

The Context: The Internet Assigned Numbers Authority Stewardship Transition

ICANN coordinates the assignment of Internet Protocol (IP) numbers and Autonomous System (AS) numbers, the management of the Domain Name System (DNS) Root Zone and Protocol Assignments, and with that it fulfills the role of the Internet Assigned Numbers Authority (IANA), which is the main coordination authority of Internet protocols and namespaces. While the architecture of the Internet is largely distributed and nonhierarchical, the root zone of the DNS is structured as an authoritative, centralized hierarchy, managed by ICANN (Froomkin, 2000). ICANN was contracted to do so by the U.S. Department of Commerce National Telecommunications and Information Administration (NTIA) after its role was fulfilled by the Internet engineer Jon Postel for many years. The growth in the importance of the network led the U.S. government to institutionalize this role, which led to the establishment of ICANN. This remarkable construction came under increasing international scrutiny when the Internet gained global importance in the 1990s and 2000s. Policymaking in ICANN is done through one of the most formalized instances of the multistakeholder model. Policies are developed by three Supporting Organizations (SOs; covering generic and country codes, and Internet addressing), which suggest policies to the Board of Directors. There are also four Advisory Committees (ACs) advise the board and the community on specific issues.

In 2014 the NTIA released a press release titled: "NTIA Announces Intent to Transition Key Internet Domain Name Functions" (United States Government,

Department of Commerce, 2014). The press release called on ICANN to bring together global stakeholders to develop a proposal for a transition of the stewardship of IANA (the function which is currently fulfilled by ICANN) from the U.S. government to the “global Internet community.” The proposal needed to:

1. Support and enhance the multistakeholder model;
2. Maintain the security, stability, and resiliency of the Internet DNS;
3. Meet the needs and expectations of the global customers and partners of the IANA services; and
4. Maintain the openness of the Internet.

The announcement also noted that it would not accept a proposal that “replaces the NTIA role with a government-led or inter-governmental organization solution,” which made clear that the NTIA was not willing to hand over ICANN oversight to the United Nations (UN) in general or to the International Telecommunications Union specifically. There was much international interest in the stewardship transition because it does not often occur that a sovereign state voluntarily hands over control of a unique and valuable resource to an entity that thus far was not defined: “the international Internet community.” The NTIA announcement jump-started two interdependent processes of cross-community work in which all constituencies played a role. One of these processes was aimed at creating a technical proposal for how ICANN would perform the IANA functions after the transitioning away from U.S. stewardship, and the second process aimed to enhance ICANN’s accountability mechanisms. The process aimed at enhancing ICANN’s accountability was the aforementioned CCWG. The CCWG separated its work into two terms: WS1, which “focused on mechanisms enhancing ICANN accountability that must be in place or committed to within the time frame of the IANA Stewardship Transition”;⁴ and WS2, which would address the full development and implementation of these solutions after the IANA Stewardship Transition had taken place in October 2016, when the contract between ICANN and the NTIA was envisaged to end. The CCWG WS1 work was organized largely through mailing lists and regular video calls, in which members (official representatives from the SOs and ACs) and participants discussed the issues at hand.

The Actors: The ICANN Stakeholders

Governments, the private sector, the technical community, and civil society actors all take part in the multistakeholder process in ICANN. These actors generally do not make policy jointly in ICANN, because (as mentioned above) the policy development processes take place in three different SOs: the Generic Names Supporting Organization (GNSO), the Country Code Names Supporting Organization (ccNSO), and the Addressing Supporting Organization (ASO). ACs (like the Governmental Advisory Committee, GAC) advise ICANN’s Board of Directors on the policies made by the SOs. When there are issues that supersede the policy areas of generic Top-Level Domains (gTLDs), country code top-level

domains, or Internet addressing, these issues are addressed by Cross Community Working Groups in which the SOs and ACs come together.

The “technical community” (as distinct from civil society) is not a stakeholder group one would necessarily encounter in other global governance bodies. The technical community often has a strong say in policy discussion because they describe “how things work,” or how the materiality of the Internet is ordered. Whereas other stakeholder groups can find “creative solutions,” the technical community often functions as “reality principle,” even though these organizations also have specific interests. The technical community comprises organizations with a narrow technical remit; for example, the ccNSO is made up of Internet registries that manage country code top-level domains. In some cases, these registries are not-for-profit foundations or companies, and sometimes even parts of the government, since they provide an important technical function on which the DNS relies, they are grouped this way. This is equally true of the ASO which is made up of Regional Internet Registries (RIRs), which are all technical not-for-profit organizations that distribute blocks of IP addresses. Just like Country Code Top-Level Domain (ccTLD) registries, RIRs have not-for-profit objectives, but are not counted as civil society, but rather as part of the technical community, who de facto set policies and procedures for themselves, because their position is often perceived to be neutral, or in the interest of the Internet at-large.

The private sector in ICANN is largely found within the GNSO where there are registries (those maintaining top-level domains), registrars (those selling domains), Internet Service Providers, the Intellectual Property Constituency, which protects the interests of owners of intellectual property, and a Business Constituency, which advocates for the general interests of businesses. While these are all private enterprises, they have widely different interests and views. The GAC is made up of governments and International Governmental Organizations. The preconditions for the distribution of communities across the SOs and ACs is laid out in ICANN’s bylaws (Figure 1).

Civil society in ICANN can be found in the NCSG, which consists of the NCUC and the Not-for-Profit Operational Concerns Constituency (NPOC), and in the At-Large Advisory Committee. The NCUC is the only place where individuals and organizations alike can become a member and engage in policymaking (albeit limited to gTLDs). This has probably contributed to the situation where the NCUC has 538 members,⁵ while NPOC has 60 organizations as members,⁶ and the At-Large Advisory Committee has 228.⁷

The Process: Negotiating a Human Rights Bylaw

In this section I will provide an analysis of the negotiations on the addition of an obligation to respect human rights to the Core Value section of ICANN’s bylaws, which are intended to “guide the decisions and actions of ICANN.”⁸ We will follow the translation and accommodation of human rights as a boundary object to different social worlds through a process of productive contestation. This section presents: first, the process of translation of human rights between

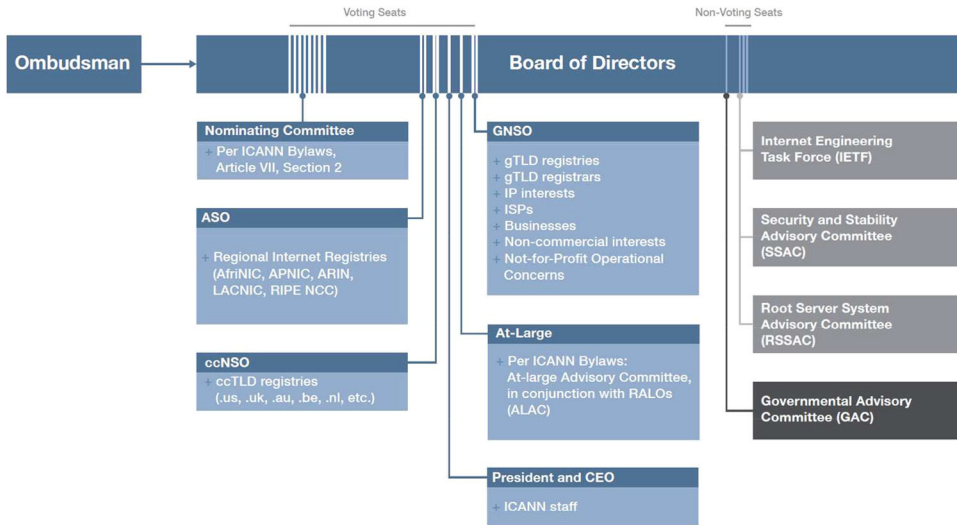


Figure 1. ICANN Organizational Chart.
Source: ICANN.

different parts of civil society; second, the accommodation of human rights to the needs and understandings of the private sector and the technical community, the translation between civil society and the intellectual property advocates; and finally, the accommodation of the ICANN board to the community consensus (see Figure 2).

Civil Society: Adapting to Different Needs

Previous research and analysis has shown that human rights as a frame has not always formed part of civil society’s advocacy agenda in ICANN (Milan & ten Oever, 2016). The earliest cohorts of civil society advocates in the NCUC were individuals lobbying for individual rights such as freedom of speech, privacy, and fair use. These are all legal concepts originating in the U.S. tradition, which also played central roles in the early U.S. Internet community (Greenberg, 2013; Levy, 1996; Turner, 2006).

Only with the arrival of new cohorts of NGOs and participants from the Global South, did a more explicit overarching human rights discourse become increasingly prevalent (Milan & ten Oever, 2016). NGOs brought with them international legal experience, an agenda for economic, social, and cultural rights, as well as experience with advocacy in multilateral bodies; but for their engagement in this complex structure they were dependent on the longstanding members’ expertise and the space carved out by the earlier civil society cohorts. This does not mean that the human rights discourse in the NCUC was not contested. During the CCWG process several prominent members spoke out against pursuing a human rights approach. One of the co-founders of the NCUC,

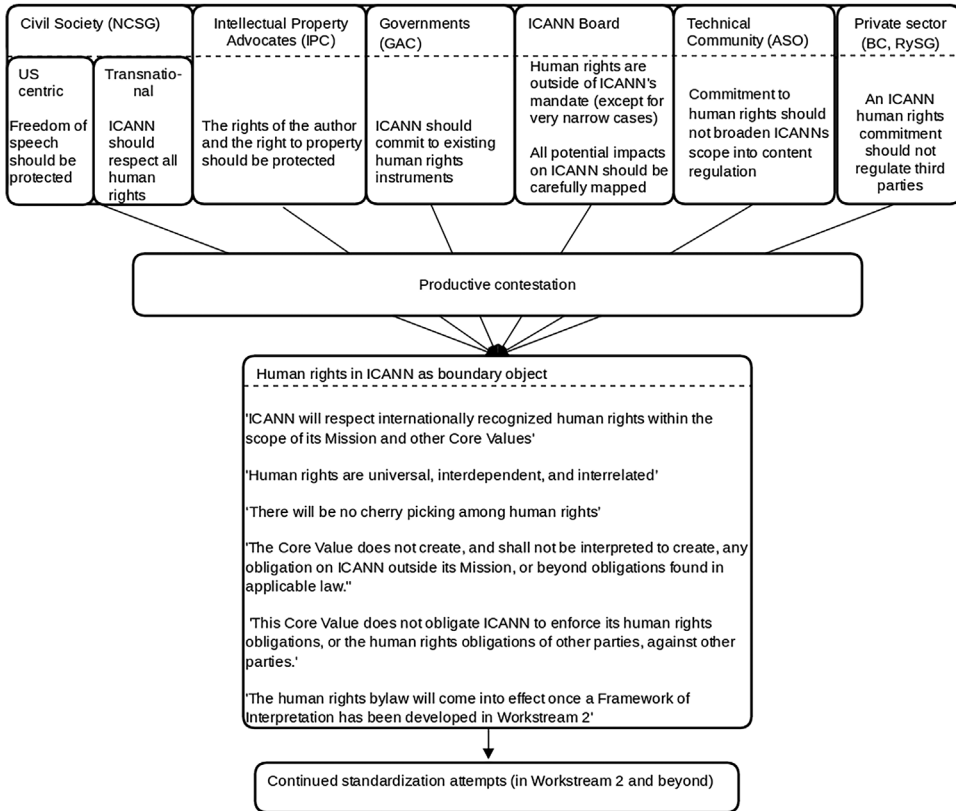


Figure 2. A Schematic Overview of the Process of Productive Contestation That Accommodated the Positions of Different Stakeholder Groups in the Human Rights Discussion During the IANA Stewardship Transition Preparations.

whose involvement with ICANN dates back to the late 1990s, wrote in a blog post about the adoption of the UN Guiding Principles on Business and Human Rights (UNGP) that “the HR effort will at best have no impact on ICANN’s policies and at worst could make ICANN into an even more controlling and intrusive regulatory force than it already is.”⁹ One NCUC member who also served as civil society representative on the GNSO council said during a GNSO council meeting that human rights were not sufficiently defined and that considering that even North Korea invoked human rights, it was not clear what human rights exactly are. He ended by stating that there should be First Amendment protections, as granted by the U.S. Constitution, which made him proud to be an American.¹⁰ This clearly illustrated the view of a cohort in civil society that viewed the U.S. Constitution as the best protection, especially for freedom of speech.

The dependence hitherto on the U.S. Constitution for the protection of freedom of expression in ICANN was not sufficient when making for a plan for a new context that should support protection of expression without the oversight of

or reliance on the U.S. government. That is where the texts of human rights declaration and treaties provided a solution, since they could facilitate standardization of the protection of these rights on the global Internet, beyond the reliance on U.S. law. At the same time, they also catered to the needs and frames of the early civil society cohorts because the protection of freedom of speech is codified as the protection of the right to freedom of expression in human rights treaties, as well as the protection of the right to privacy.

This was the first time that human rights functioned as a boundary object, between the U.S. Constitution, the U.S.-originating practice of protection of speech through the DNS, and practices and traditions of protection of freedom of expression outside of the United States. This was possible because human rights fulfilled the three criteria that were initially defined for it (Star & Griesemer, 1989). It provided:

1. *Interpretive flexibility*: human rights accommodated the U.S. Constitutional protection for speech as well as protecting freedom of expression in other parts of the world, and could be translated to also do so in the DNS—that is, to ensure the DNS would not be leveraged as a means to stifle expression;
2. *The structure of information and work process needs and arrangements*: the Universal Declaration for Human Rights¹¹ and human rights conventions, as well as the literature based on it and experiences advocating for human rights and implementing human rights in political and legal environments, provided sufficient experience, language, and contexts to facilitate abstract and specific uses as well as collaborations;
3. *The dynamic between ill-structured and more tailored uses of the objects*: only states are bound by customary international law and human rights treaties, but recent developments such as the UN Global Compact and the UNGPs, which provide guidance for nonstate actors to respect human rights, provided voluntary frameworks and implementation experience which functioned as example, inspiration and reference point in both a positive sense (in relation to human rights impact assessments)¹² and a more contentious sense (in relation to chain-responsibility).¹³

Human rights catered to different cohorts in civil society because it encompassed the frames of the respective groups. We will see in the next section how civil society contributed to its translation to different social worlds and how this coincided with productive contestation—the process by which consensus and workable definitions are built through testing new definitions that cater to different interests, or by chiseling away the parts that do not fit.

Beyond Civil Society: Limited Definition

In the process of working toward standardizing and operationalizing respect for human rights in ICANN, civil society pushed forward on the work on human rights, and human rights helped to structure the discussion between different parts of civil society, thus resulting in a process I term “productive contesta-

tion”—a consensus-building process that benefits from the tension built by the differences of experience, knowledge, and interests of the parties involved. Civil society representatives would, during the whole CCWG process, be the people who put human rights on the agenda and push to keep it on the agenda whenever it was removed or declared to be “out of scope.” The inclusion of human rights as part of the IANA transition even became an issue, in the words of one participant, “to die in a ditch over.”¹⁴

Government representatives who were more familiar with the language of human rights urged the community to not (re-)define human rights, but to make a high-level commitment to them, given they were already laid out in international law.¹⁵ Members of the private sector responded that there might be significant risks in committing to international human rights and that the potential consequences should be studied in detail and mapped before making any commitment.¹⁶ A former ICANN CEO, who was now part of the private sector, added that all potential impacts of human rights on ICANN should be mapped out first before committing to them,¹⁷ whereas civil society was arguing for assessing ICANN’s impacts on human rights. A solution was found by converging on a limited definition (Star, Bowker, & Neuman, 2003), in which it was made explicit that a commitment to human rights would and should not expand ICANN’s mission.

Among Stakeholder Groups: Translations

A similar arc could be observed in other stakeholder groups, where initially the relation between human rights and ICANN was not clear. For instance, the chair of the ICANN Board and Internet veteran Steve Crocker, who observed during ICANN51 in Los Angeles, that “Human rights is sort of even stronger than motherhood and apple pie,” but that he did not see any connection between human rights and ICANN.¹⁸ Steve Crocker and others made the argument several times that ICANN had a purely technical function, and that it therefore did not impact on human rights. It was no surprise that civil society put human rights on the agenda in one of the CCWG subgroups, Working Party 2 (WP2), which also dealt with defining the new ICANN mission and bylaws during WS1. Nonetheless, human rights was moved from the WP2 work plan by the group’s rapporteur, working for one of the largest gTLD registries, who informed the CCWG plenary mailing list in March 2015 that: “Various suggestions about giving ICANN a human rights mission was [sic] not included: ICANN is not in the business of content and giving ICANN a promotion of human rights was problematic.”¹⁹

This opposition changed when civil society participants started translating human rights concepts to the ICANN context. One example was the translation of human rights principles such as the right to due process to ICANN’s Independent Review Process and other dispute resolution instruments. Similarly, the right to freedom of expression related to rules in the Applicant Guide Book for the auction of gTLDs,²⁰ and ICANN’s activities as an employer related to the

International Labor Association's Declaration on Fundamental Principles and Rights. This translation—or “the task of reconciling meanings” (Star & Griesemer, 1989, p. 388) of a concept across social worlds—ensured that people could “work together” (Star & Griesemer, 1989, p. 389). This position was galvanized by the agreement reached and confirmed toward the end of 2015 that ICANN would not enforce human rights obligations on third parties, but solely focus on respecting human rights in its own policy development processes and operations.²¹

When it was clear ICANN would respect human rights within its own scope and mission, the discussion shifted to individual human rights, and the balancing of the interests of different groups. This tested the ability of human rights as a boundary object to be “both plastic enough to adapt to local needs and constraints of the several parties employing them, yet robust enough to maintain a common identity across sites” (Star & Griesemer, 1989, p. 393). The Right to Property was regularly mentioned as a concept of contention. This is because there is an inherent tension between the Intellectual Property Constituency on the one hand and parts of civil society that have strong views on freedom of expression on the other. While intellectual property advocates wanted to protect trademarks and potential violations of trademark and copyright, both in terms of content and domain names, through DNS freedom of expression advocates aligned with the technical community, and the existing ICANN bylaws, on the idea that ICANN has a technical function and does not engage in content regulation. This coincided with the discussion on the potential inclusion of a reference in the new bylaw to one particular human right (such as freedom of expression or the right to property), to several human rights, or to all of them. Here the civil society participants advocated that human rights are “universal, interrelated and interdependent,”²² and that there should be no “cherry-picking”²³ among different human rights; a position subsequently also embraced by representatives of the Intellectual Property Constituency. This led to some contention in both the Intellectual Property Constituency as well as in the NCSG, where people argued that the right to property, the right of the author, and freedom of expression should be singled out. In this situation, human rights accommodated both groups and bridged the concerns by functioning as a boundary object that allowed “social worlds which share the same space but different perspectives” (Star & Griesemer, 1989, p. 412) to translate each other perspectives, because the full set of human rights make the boundary object recognizable from both social worlds, therefore allowing both to progress.

The Last Steps: Tacking Back and Forth Between the Ill-Structured and the Well-Structured

With the translation to different social worlds and the accommodation of the boundary object, respect for human rights came closer to being standardized in ICANN's procedures. However, this section shows how a boundary object can also resist standardization and demand a higher level of interpretative flexibility, forming part of the process of productive contestation. One of the final topics of

contestation during WS1 was the discussion on which human rights document should be explicitly mentioned in the new bylaw. The deadline for finalizing the work before the contract between ICANN and the NTIA ran out in October 2016 was fast approaching, so there was a palpable sense of urgency. Governmental representatives, and the civil society representative on the Board of Directors (who nevertheless worked his career in the Swiss government), preferred a sole reference to the Universal Declaration of Human Rights (UDHR), whereas several other individual civil society participants preferred a reference to the UDHR, the Internet Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR),²⁴ with some civil society participants also wanting to include a reference to the UNGPs. This was countered by many participants in the CCWG, because it was unclear what a commitment to binding documents like the ICCPR and ICESCR would entail for ICANN, and there were severe concerns about the possibility for chain responsibility that might come with adopting the UNGPs. Civil society representatives countered that the UDHR was merely an aspirational document, and therefore quite weak. This standoff signals the resistance to detailed standardization at this point in time, or “the process of tacking back-and-forth between the ill-structured and well-structured aspects of the arrangements” (Star, 2010, p. 601). The conflict was resolved by not mentioning a specific declaration, covenant, or instrument, but by instead using the phrase “internationally recognized human rights,” without defining in WS1 which documents would be applicable. It was also agreed that the bylaw would receive a “Framework of Interpretation” (FOI), to be developed in WS2; allowing for even more detailed translations of the boundary object, and working toward standardization. Until this FOI was developed, the Human Rights bylaw would not come into force. This appeased both the civil society representatives who wanted human rights to be part of WS1 and the bylaws, as well as the other participants who were of the opinion that it needed further elaboration before it came into force. This was the proposal that gained consensus in the CCWG and was approved by the ICANN community, and thereafter by the ICANN board and the NTIA, which led the U.S. government to voluntarily rescind direct control over ICANN and handing stewardship over to the “international Internet community.”

Productive Contestation at Work

This article has shown how human rights functioned as a boundary object in the negotiations that took place during the IANA stewardship transition, both within civil society and between civil society and other stakeholder groups.

Human rights functioned as a boundary object within civil society, translating between the social worlds of different cohorts of civil society advocates with different backgrounds and experience; this showed that civil society is not a monolith, but rather consists of different cohorts and factions. On the one hand, there were free speech advocates, often with a North American background, and

on the other hand there were more recent participants in ICANN who had a broader conception of rights and more experience with the human rights framework (Milan & ten Oever, 2016). Human rights provided structure to the discussion, which allowed for the accommodation of both perspectives. I call this a process of “productive contestation,” because despite disagreement and conflict between the parties, the interpretative flexibility of human rights as a boundary object allowed for a historical achievement. Whereas human rights in civil society could be translated to an overarching norm between the different groups, norms by themselves do not always have sufficient pull to structure consensus among actors outside of civil society. Human rights needed to be translatable to the respective social worlds of the stakeholders in the overall institutional ecology, in order to result in a productive outcome. This requires both active translators, as well as contestation from the different social worlds to make the boundary object “work.”

Human rights, in the context of ICANN, was “worked on by local groups who maintain[ed] its vaguer identity as a common object, while making it more specific, more tailored to local use within a social world” (Star, 2010, pp. 604–605). Governments translated it to their own environments, in which they were already beholden to human rights as part of their treaty obligations; civil society understood it as development toward a standardization in the ICANN process of rights that are relevant to ICANN, such as the right to freedom of expression, the right to privacy, the right to freedom of association, and the right to due process;²⁵ intellectual property advocates felt reassured by the right to property and the right of the author; for the business sector it helped to fulfill the fourth criterion of the NTIA, which was “to maintain the openness of the Internet.” Human rights as a boundary object allowed different stakeholders to have different interpretations, while having enough immutable content to maintain its integrity. This process clearly does not resemble the Habermasian ideal of an encounter based on dialogue in which agreement and understanding are produced based on a shared rationality. Rather, what we see is the accommodation of different social worlds with their own interpretations, interests, and embedded knowledge, which are made to work thanks to the structuring properties of human rights as boundary object.

The process of negotiation was a standardization effort to create a practice of respecting human rights in ICANN procedures, as well as an effort to develop an understanding of what human rights in the context of Internet governance meant and entailed for the various stakeholder groups. When stakeholder groups developed interpretations that were incongruent with the interpretations of other stakeholder groups, contestation emerged. The structure and functioning of the boundary object led to a productive contestation, because it allowed for the accommodation between different social worlds, and thus for the development and exploration of specialized identities of the boundary object, while keeping a common overarching and recognizable identity. Contestation comes into play when the common identity is threatened or when incongruent identities are developed in different social worlds. Productive contestation happens when the

boundary object is further explored or developed toward standardization by providing the basis for a collaboration, while also accommodating dissent through a process of translations and interpretative flexibility. In this case, this happened both within the civil society stakeholder group (between different cohorts of civil society actors), as well as between stakeholder groups.

Human rights as a boundary object allowed for sufficient interpretative flexibility to: offer the assurance of the informational structure of the human rights treaties (such as the UDHR, ICCPR, and ICESCR); offer process guidance as is provided in the UNGPs; and allow for the customization of the process in WS2. This allowed civil society to start a process of standardization, and embed human rights in the regulatory documents of a central Internet governance body, an inherent part of the Internet infrastructure, while still tacking back-and-forth between the ill-structured and the well-structured aspects of this particular boundary object (Star, 2010, p. 614).

While there is now a commitment to respect human rights in ICANN's bylaws, this does not necessarily mean a concrete policy change, because the bylaw will only get activated once a framework of interpretation is developed in WS2, which is expected to take from August 2016 until June 2018. Some critics might argue that this means that nothing concrete has been achieved, except for the prospect of more discussion after the IANA transition in October 2016. I argue that the development of a framework of interpretation paves the way for a process of further standardization. When the bylaw is implemented after the development of a framework of interpretation, the boundary object will become standardized; potentially leading to new practices (and communities of practice) that could also function in turn as boundary objects—such as the practice of undertaking human rights impact assessments of ICANN policies in the Policy Development Processes, or of engaging in human rights impact assessments of the operations of ICANN as an organization.

Conclusions

In this article I have shown that, during the discussions on the transition of the control over ICANN from the U.S. government to an entity called “the international Internet community” from June 2014 until October 2016, human rights functioned as a boundary object, meaning that it was sufficiently familiar and acceptable as a concept to all stakeholders, but at the same time meant something different for the different groups in their respective social worlds. This allowed for human rights to “both inhabit several intersecting social worlds (...) and satisfy the informational requirements of each of them” (Star & Griesemer, 1989, p. 393), while also adapting to the structure of information and work process needs and arrangements, providing interpretive flexibility, and tacking back and forth between structured and more tailored uses of the concept of human rights (Star, 2010; Star & Griesemer, 1989).

Human rights formed a bridge between the information infrastructure in ICANN and international law, and allowed for local interpretations by different

stakeholder groups, while keeping a recognizable conceptual integrity across social worlds in a process of productive contestation. The power of ideas helped civil society to put the topics on the agenda, but the functioning of human rights as a boundary object structured the multistakeholder negotiations, which would not have been possible without the translations made by civil society actors. The arrangement of the negotiations was built on the translation between the social worlds of respective stakeholders in these negotiations, and translations between existing legal and political texts, practices and experience of human rights, the ICANN context, and the NTIA criterion for the maintenance of an open Internet.

Boundary object theory offers a lens to analyze negotiations in a multi-stakeholder environment in which stakeholders with different backgrounds and perspectives govern a global resource. It has shown how civil society was able to leverage a long-discussed topic during a time of transition, and to engage in a cross-community process of productive contestation; the development, negotiation, and inscription that altered the infrastructure of a global governance institution.

Further research is needed to compare whether similar patterns can be observed in other multistakeholder Internet governance organizations in particular (such as the Internet Engineering Task Force and Institute of Electrical and Electronics Engineers), and within global governance in general. Another possible angle for further research is understanding whether the intentional choosing of concepts and topics that can function as boundary objects is a tried and tested action repertoire of civil society in global governance, or whether it is being developed as part of a new repertoire of strategic action. In order to understand the effectiveness of civil society's participation in negotiations in the multistakeholder model, and thus potentially some of its democratic affordances, it is crucial to build an understanding of whether civil society actually has a say and is able to influence the outcomes of discussions, while structurally having access to fewer resources than other stakeholder groups. A final angle for further research could be analysis of how the commitment to human rights actually impacts ICANN's operations and its policy development processes—especially where it comes to discussions touching on freedom of expression, copyright, privacy, and social, economic, and cultural rights.

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Notes

1. The concept of inscribing human rights harks back to the idea that all infrastructure is socio-technical; that is, technology is produced by society, and in turn it provides the basis for the

existence and extension of modern society (Edwards, 2003). In the field of Science and Technology Studies the term “inscribing” is used to describe “the work of innovators [which] is that of ‘inscribing’ this vision of (or prediction about) the world in the technical content of the new object” (Akrich, 1992, p. 208). An inscription is further described as “the result of the translation of one’s interest into material form” (Callon, 1990, p. 143). About the object of inscriptions it is written that “any component of the heterogeneous network of skills, practices, artifacts, institutional arrangements, texts, and contracts establishing a social order may be the material for inscriptions” (Monteiro & Hanseth, 1996, p. 330).

2. ICANN plays a central role in the coordination of the distribution of domain names and Internet addresses, which is crucial for the functioning of the Internet. It coordinates the assignment of Internet Protocol (IP) numbers and Autonomous System (AS) numbers, and the management of the Domain Name System (DNS) Root Zone and Protocol Assignments.
3. <http://dataactive.github.io/bigbang/> (accessed September 15, 2017).
4. <https://community.icann.org/display/acctcrosscomm/Charter> (accessed September 10, 2017).
5. <https://www.ncuc.org/about/membership/> (accessed August 31, 2017).
6. <https://www.npoc.org/about/members/> (accessed August 31, 2017).
7. <https://atlarge.icann.org/alses> (accessed August 31, 2017).
8. <https://www.icann.org/resources/pages/governance/bylaws-en/#article1> (accessed March 12, 2017).
9. <http://www.internetgovernance.org/2016/10/26/missing-the-target-the-human-rights-push-in-icann-goes-off-the-rails/> (accessed August 31, 2017).
10. <https://meetings.icann.org/en/marrakech55/schedule/tue-ncsg/transcript-ncsg-08mar16-en.pdf> pp. 39–40 (accessed May 10, 2017).
11. The Universal Declaration is an aspiration document adopted by the UN General Assembly in 1948, which would form the foundation of international human rights law.
12. http://sched.ws/hosted_files/icann572016/16/Transcript%20NCUC%20Hyderabad%2006%20Nov%202016.pdf (accessed November 30, 2017).
13. <http://www.internetgovernance.org/2016/10/26/missing-the-target-the-human-rights-push-in-icann-goes-off-the-rails/> (accessed August 31, 2017).
14. <https://community.icann.org/x/K6vRAw> (accessed May 9, 2017).
15. <https://mm.icann.org/pipermail/wp4/2015-August/000001.html> (accessed August 31, 2017).
16. <https://mm.icann.org/pipermail/wp4/2015-August/000025.html> (accessed August 31, 2017).
17. <https://mm.icann.org/pipermail/wp4/2015-August/000052.html> (accessed August 31, 2017).
18. <https://la51.icann.org/en/schedule/tue-board-ncsg/transcript-board-ncsg-14oct14-en.pdf>, p. 5. (accessed May 10, 2017).
19. <https://mm.icann.org/pipermail/accountability-cross-community/2015-March/001550.html> (accessed May 9, 2017).
20. https://community.icann.org/download/attachments/53772653/article19_ICANN_1706_reviewed.png?version=1&modificationDate=1466841961000&api=v2 (accessed August 31, 2017).
21. <https://community.icann.org/download/attachments/56132135/ICANN%20Commitment%20to%20Human%20Rights-210817658-v2.pdf?version=1&modificationDate=1446762030000&api=v2> (accessed March 12, 2018).
22. <http://mm.icann.org/pipermail/wp4/2015-November/000265.html> (accessed September 1, 2017).
23. <http://mm.icann.org/pipermail/wp4/2015-October/000184.html> (accessed September 1, 2017).
24. The UDHR, ICCPR, and ICESCR are together called the “International Bill of Human Rights.” The UDHR is an aspirational document, whereas the ICCPR and the ICESCR contain binding commitments.
25. https://community.icann.org/download/attachments/53772653/article19_ICANN_1706_reviewed.png?version=1&modificationDate=1466841961000&api=v2 (accessed March 12, 2018).

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