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THE NECESSITY FOR BINDING HUMAN RIGHTS OBLIGATIONS FOR PRIVATE ACTORS IN THE DIGITAL AGE: A SUBMISSION TO THE UN HUMAN RIGHTS COUNCIL ON NEW AND EMERGING TECHNOLOGIES

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The Necessity for Binding Human Rights Obligations for Private Actors in the Digital Age: A Submission on New and Emerging Digital Technologies and Human Rights

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Thank you for the opportunity to make a submission to this inquiry. I do so in a private capacity as a scholar of technology law and human rights law at UNSW Law in Sydney, Australia.

I would like to make the following points,[2] which I will also elaborate in more detail below:

1. Today's new and emerging digital technologies pose unique and unprecedented challenges to human rights.
2. These challenges are particularly acute because such new and emerging digital technologies and the overall digital infrastructure – both material and virtual – tend to be both owned and coordinated not by public actors whose behaviour and policies are traditionally bound by human rights law, but by private actors.
3. These challenges are further fortified by an unparalleled concentration of power in the hands of a few companies which have gained it by commodifying and exploiting our personal information.
4. Existing efforts focused on voluntary 'social and corporate responsibility' and ethical obligations of tech and advertising companies are insufficient and incapable to tackle these challenges.
5. The existing international human rights framework is not adequate to safeguard human rights in an era of rapid technological innovation because its obligations are limited to states, and not such private actors.
6. Binding obligations for private actors under international human rights framework are needed to ensure protection of fundamental rights in the digital age for three main reasons:
    - Firstly, to rectify an imbalance between hard legal commercial obligations and human rights soft law.
    - Secondly, to ensure that individuals whose human rights have been affected can access an effective remedy.
    - Finally, because private actors are themselves engaging in the balancing exercise around fundamental rights, an explicit recognition of their human rights obligations is crucial for the future development of access to justice in the digital age.

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[2] Discussed in detail by Monika. Zalnieriute, "From Human Rights Aspirations to Enforceable Obligations by Non-State Actors in the Digital Age: The Example of Internet Governance and ICANN,' *Yale Journal of Law & Technology* (2019), Vol XXI, *forthcoming;* available at SSRN: https://ssrn.com/abstract=3333532.

Unique Challenges and Difference from Earlier Technologies – Private Dominance

Today's new and emerging digital technologies pose unique and unprecedented challenges to HR that are different from earlier periods of technological innovation in several important respects. Firstly, for their technical capabilities, allowing for a fundamentally different degree of, invasiveness, censorship, surveillance and behavioural manipulation. Importantly, however such new and emerging digital technologies and the overall digital infrastructure – both material and virtual – tend to be both owned and coordinated not by public actors whose behaviour and policies are traditionally bound by human rights law, but by private actors.[3] In the context of Internet policy, various private companies and quasi-governmental bodies control aspects of Internet infrastructure and are able to enforce public and private legal regimes via that infrastructure globally. For example, a private non-profit US body, Internet Corporation for Assigned Names and Numbers (ICANN) has imposed enforcement of intellectual property interests via the mandatory Uniform Dispute Resolution System (UDRP) because of its control of parts of Internet infrastructure.[4]

Similarly, digital environment tends to be dominated by a small group of companies, that have gained unparalleled concentration of power in their hands by commodifying and exploiting personal information.[5] We are used to traditionally referring to these companies as 'tech companies' when in in fact, most of them are 'advertising companies'. Often, such companies deploy digital technologies, such as GPS and Internet, that were largely developed via public funding for private profit.[6] For example, private advertising companies, such as Facebook, are able to set de facto standards on human rights, such as freedom of expression in the digital age because of its control over large virtual infrastructure online.[7]

Thus, in the digital age, private actors exercise the most influence over our social, political economic lives. This disbalance of power in terms of an individual (and increasingly, state actors) vs. such private companies, as well as the role of such companies in the wider economic and geopolitical context is the most concerning and different aspect of the emerging technologies, when compared to earlier technologies and periods.

[3] See Monika Zalnieriute and Stefania Milan, 'Internet Architecture and Human Rights: Beyond Human Rights Gap,' *Policy & Internet,* 2019. Vol 11(1).

[4] On the UDRP and human rights gap in such privatized law enforcement, see Monika Zalnieriute, 'Beyond the Governance Gap in International Domain Name Law: Bringing the UDRP in Line with Internationally Recognized Human Rights,' *Stanford Journal of International Law,* forthcoming in Vol XX, March 2020*, forthcoming,* accepted version could be provided; Monika Zalnieriute, 'Reinvigorating Human Rights in Internet Governance: The UDRP Procedure Through the Lens of International Human Rights Principles,' *Columbia Journal of Law and the Arts*, Jan 2020, Vol 43, *forthcoming,* accepted version could be provided.

[5] Monika Zalnieriute, 'The Anatomy of Neoliberal Internet Governance: A Queer Critical Political Economy Perspective,' in Dianne Otto (ed), *Queering International Law: Possibilities, Alliances, Complicities and Risks,* Routledge, 2017.

[6] Mariana Mazzucato, *The entrepreneurial state: Debunking public vs. private sector myths*. Vol. 1. Anthem Press, 2015.

[7] On global de facto speech standards set by private companies and their impact on historically marginalized and discriminated groups, see Monika Zalnieriute, 'Digital Rights of LGBTI Communities: A Roadmap for Dual Human Rights Framework, in Wagner, B. *et al* (eds), *Research Handbook on Human Rights and Digital Technologies*, Edward Elgar, 2019; Monika Zalnieriute, 'The Anatomy of Neoliberal Internet Governance: A Queer Critical Political Economy Perspective,' in Dianne Otto (ed), *Queering International Law: Possibilities, Alliances, Complicities and Risks,* Routledge, 2017.

Existing Efforts Focused on 'Ethical' and Voluntary 'Responsibilities' are Insufficient to Tackle these Challenges

Existing efforts to respond to the challenges posed by new and emerging digital technologies are plentiful. Irrespective of their focus on particular human rights or specific technologies, most of the such efforts overlap and converge in their emphasis on 'ethics' and voluntary 'responsibilities' of private actors, who are crucial players in relation to digital technologies. Yet, as I have argued in academic publications, economic incentives act against the voluntary protection of human rights by informal actors and regulatory structures in the digital era.[8] Often the initiatives around CSR, and ethics – list some – may present a danger of lip services or what has become known as 'ethics washing'.[9] Emerging evidence from Snowden revelations and more recent Cambridge Analytica scandal around the capacity of Internet platforms to influence democratic elections as well as impact fundamental rights more broadly, point to clear limitations of such voluntary approaches. Indeed, voluntary initiatives efforts may be – and often are - modelled around the needs and business models of the private companies, and therefore, fundamentally insufficient to tackle the growing imbalance of power between an individual and advertising companies. Some political leaders and tribunals such as the Court of Justice of European Union, have demonstrated leadership in pushing back against the power exerted by such advertising companies and their willingness to supply personal data to governments.[10] However, such lonely efforts are not enough to fill the gap of protection of human rights in the digital age, and we need a consistent approach with legally bindings obligations for private actors.

The Inadequacy of Existing International Human Rights Framework

The existing international human rights framework is not adequate to safeguard human rights in the digital age. International human rights law – at least as it currently stands – is generally understood among the international community and political institutions to be legally binding only on States, and not private actors.[11] Informal actors, such as transnational corporations or private

[8] Monika. Zalnieriute, "From Human Rights Aspirations to Enforceable Obligations by Non-State Actors in the Digital Age: The Example of Internet Governance and ICANN,' *Yale Journal of Law & Technology* (2019), Vol XXI, *forthcoming;* available at SSRN: https://ssrn.com/abstract=3333532.

[9] Ibid.

[10] On CJEU's efforts and data privacy constitutionalization in EU, see Monika Zalnieriute, 'Developing a European Standard for International Data Transfers after Snowden: Opinion 1/15 on the EU-Canada PNR Agreement', *Modern Law Review*, 2018, Vol. 81(6), pp. 1046-1063. On political leadership at the UN, and mass-surveillance revelations creating a momentum for data privacy, see Monika Zalnieriute, 'An International Constitutional Moment for Data Privacy in the Times of Mass-Surveillance,' *International Journal of Law and Information Technology,* 2015, Vol. 23 Issue 2, pp. 99 – 133.

[11] *See, e.g.*, International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 999 U.N.T.S. 171 http://www2.ohchr.org/english/law/ccpr.htm ("Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."); *see also, e.g.*, International Covenant on Economic, Social, and Cultural Rights art. 2, Dec. 16, 1966, 993 U.N.T.S. 3 http://www2.ohchr.org/english/law/cescr.htm ("Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.").

regulatory bodies like ICANN, are generally excluded from direct responsibility under international human rights law.[12] Under such state-centric conceptions the international human rights framework, human rights law is incapable of providing satisfactory remedies for non-state and corporate-related human rights violations.[13]

As the HRC knows, the relationship between private actors and international human rights law has been a subject of intense political and scholarly debate for over four decades, since the first attempts to develop a code of conduct for human rights obligations of multinational corporations in the 1970s.[14] Despite these debates, the obligations of private actors in the digital era remained fuzzy, floating among numerous soft law pronouncements and multistakeholder initiatives.[15] Yet, the growing power and influence of private actors over public affairs, is one the most pressing human right issues of the digital age that needs to be urgently addressed.[16] Even though traditionally human rights doctrine, have focused on the exercise and limits of power by nation-states, but the gaps in human rights protection for individuals point to confront the practices of private companies and quasi-governmental policy-making bodies.[17]

The Need for Binding Human Rights Obligations for Private Actors

Imposing binding obligations for private actors under international human rights faremwork is needed to ensure protection of fundamental rights in the digital age. First of all, recognition of binding human rights obligations for private actors are needed because this would rectify the current imbalance between claims under international human rights law and other legal regimes, such as international economic law.[18] Human rights responsibilities of private actors are currently

[12] For discussions of these issues in depth, see Monika. Zalnieriute, "From Human Rights Aspirations to Enforceable Obligations by Non-State Actors in the Digital Age: The Example of Internet Governance and ICANN,' *Yale Journal of Law & Technology* (2019), Vol XXI, *forthcoming;* available at SSRN: https://ssrn.com/abstract=3333532.

[13] Ibid.

[14] The Commission on Transnational Corporations and the United Nations Centre on Transnational Corporations (UNCTNC) were established in 1974; the UN, *Draft Code on Transnational Corporations* in UNCTC, TRANSNATIONAL CORPORATIONS, SERVICES AND THE URUGUAY ROUND, Annex IV, p. 231 was presented in the 1990. For history of the controversy of the issue at the UN, see KHALIL HAMDANI AND LORAINE RUFFING, UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS: CORPORATE CONDUCT AND THE PUBLIC INTEREST (London: Routledge, 2015).

[15] For soft law pronouncements, *see,* e.g., the United Nations Human Rights Council, (2011) *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework,* A/HRC/17/31 www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf; the OECD, *Guidelines for Multinational Enterprises*, http:// mneguidelines.oecd.org/text/; for multistakeholder initiatives, see, e.g, the UN Global Compact (https://www.unglobalcompact.org/). Numerous voluntary multistakeholder initiatives for 'digital rights' exist, see, e.g, Global Network Initiative (GNI) www.globalnetworkinitiative.org; Ranking Digital Rights www.rankingdigitalrights.org.

[16] See, e.g, statements by David Kaye, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression to the 35th Session of the Human Rights Council,* A/HRC/35/22 (2017), para. 82; Joseph Cannataci, *The right to privacy in the digital age*, presentation at the INTERNET GOVERNANCE FORUM, Jôao Pessoa, Brazil (2015, November 10).

[17] See Monika Zalnieriute and Stefania Milan, 'Internet Architecture and Human Rights: Beyond Human Rights Gap,' *Policy & Internet,* 2019. Vol 11(1); Monika. Zalnieriute, "From Human Rights Aspirations to Enforceable Obligations by Non-State Actors in the Digital Age: The Example of Internet Governance and ICANN,' *Yale Journal of Law & Technology* (2019), Vol XXI, *forthcoming;* available at SSRN: https://ssrn.com/abstract=3333532.

[18] The relationship between international economic law and human rights law has been analysed but see, e.g., SARAH JOSEPH, BLAME IT ON THE WTO?: A HUMAN RIGHTS CRITIQUE (Oxford: Oxford University Press, 2013); HAFNER-BURTON, EMILIE M. FORCED TO BE GOOD: WHY TRADE AGREEMENTS BOOST HUMAN RIGHTS. Cornell

codified only in international soft law pronouncements.[19] In contrast, commercial obligations often stem from mechanisms based on hard law – be that international economic law or binding contractual agreements.

Secondly, the imposition of directly binding legal obligations on private actors, such as tech companies or ICANN, are particularly important because they would provide access to remedies for individuals, which is particularly problematic in the context of privatized Internet Governance and limited regulation of corporate actors in the digital environment. Currently, with the exception of labour, non-discrimination and data protection laws in some jurisdictions, there is no legal basis for the remedies for human rights violations by private actors, because there are no legal obligations that could be breached.[20]

Finally, the imposition of human rights obligation on private actors, such as ICANN, is crucial for the future development of access to justice in the digital age. This is because these private actors are themselves increasingly engaging in the balancing exercise of such rights

Yours sincerely,

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19 On the relationship between soft law and the CSR, see Justine Nolan, '*The Corporate Responsibility to Respect Rights: Soft Law or Not Law?'* in Deva S, Bilchitz D. CAMBRIDGE UNIVERSITY PRESS, UK 30 Oct 2017 pp. 238-265.

20 See Monika. Zalnieriute, "From Human Rights Aspirations to Enforceable Obligations by Non-State Actors in the Digital Age: The Example of Internet Governance and ICANN,' *Yale Journal of Law & Technology* (2019), Vol XXI, *forthcoming;* available at SSRN: https://ssrn.com/abstract=3333532.