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Fragments of fragments. The domain name system regulation: global law or informalization of the international legal order?

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The paper studies some international law aspects underpinning the project of the new Domain Name System (DNS) governance, in order to try and bridge the worlds of IT law and international law. It also deals with the issue of the fragmentation of both international and domestic legal orders with an international lawyer's perspective, and faces the approach adopted on the same issue by the global/transnational law doctrine. It uses the DNS governance in the perspective of the international legal order as a case study, framing it in the context of various informal cross-border cooperation between public authorities. It also examines the ICANN, trying to understand if it could be read as an international organization, and the gradual overcoming of the 'political question doctrine' in the US.

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1. Overview: the governance of the domain names' system between unilateralism and multilateralism

Technological progress has always influenced legal systems, including the international legal order. One may think of the international rules that regulate the conduct of States in outer space or their use of geostationary orbits, or in the fields of civil aviation, nuclear energy or scientific research on the high seas.

However, while in all the latter cases the peculiarities of the regulated issues influenced exclusively the content of some international provisions, in the case of the Internet the influence seems to have gone much deeper. It has extended not only to substantive provisions of certain sectors, particularly sensi-

tive to the advent of the Net itself but, as will be submitted, even to some functioning modes of the international legal order as a whole¹.

The relationship between the international legal order and the Internet is a bilateral one. On the one hand, the former is called upon to regulate both the infrastructure and the human behaviours that happen online. On the other, as we shall see, the legal order itself has undergone specific changes because of the dissemination of information – especially of legal models – through the Net itself by its main operators, such as government officials (that is to say States), NGOs, academics, and lawyers.

The aim of this paper is to try to identify the ways this influence – which, as we shall see later can be framed within a larger and more general trend – has been produced and how

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¹ About the overall influence of the Internet on the ways the international legal order operates see G.M. Ruotolo, 'The Impact of the Internet on International Law: Nomos Without Earth?' (2013) 2 *Informatica e diritto* 7, also available at www.ssrn.com. I will refer to my previous writings only to avoid repetitions and to allow for a reconstruction of the path that I am trying to outline.

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it has contributed to manage the fragmentation of domestic and international legal orders.

The main idea is to see if these fast moving issues can be handled from a “classical” international lawyer’s perspective and its slow-moving principles, with a view to bridge the worlds of IT law and international law.

In order to do so the paper will also have to deal with the transnational/global law doctrine that has studied the same issues, to try to understand the ways global/transnational law relates to international law.

With this in mind, this paper will use the ongoing modifications of the international law regulation of the domain name system (DNS) of the Internet as a model-case.

Let us start by reminding that, as known, the DNS is the mechanism we all benefit daily from, that allows us to identify web sites by typing names that are easy to remember (the domain names) instead of their numerical network addresses (IP addresses), and thus represents the essential ‘address book’ of the Net and one of its basic elements².

In March 2014 the United States National Telecommunications and Information Administration (NTIA), the agency of the US Department of Commerce that is responsible for advising the President on telecommunications and, more generally, on issues related to the political management of the ‘information’ sector, kick started a process of internationalization of DNS governance³.

The intention of the US Government is to dismiss the management of the domain name system, we will see later in favour of whom and in what form, appears as a major step for the governance of the Internet, since it is expected that the Net, which has already become ‘by far the most important piece of infrastructure in the global economy’, will become in short ‘the infrastructure upon which all other infrastructures are based’⁴.

Since the beginning of the spread of the Internet, the DNS governance, which is essential to the very existence of the Web itself, has always been governed exclusively and unilaterally by the United States Government. It conceived *ab origine* its role as being temporary for the Statement of Policy on the Management of Internet Names and Addresses adopted by the US Department of Commerce on 10 June 1998 affirms the commitment ‘to a transition that will allow the private sector to take leadership for DNS management’⁵.

It is also useful to point out that many statements made by the NTIA have acknowledged the intention of the United States ‘to preserve the security and stability of the Internet’s Domain Name and Addressing System’. Consequently, it pledged to take ‘no action that would have the potential to adversely impact the effective and efficient operation of the DNS’.

To this end, the US Government declared its will to ‘maintain its historic role in authorizing changes or modifications to the authoritative root zone file’⁶.

Although the servers on which DNS data are stored are scattered all over the planet, and thus largely outside the US border, the practice does not show formal protests from other States about the legitimacy of the unilateralism of the US Government over the domain name system⁷.

In 2003 the United Nations’ World Summit on Information Society (WSIS)⁸ discussed and studied the possible mechanisms to ensure wider international involvement in the governance of the Internet, and in particular in the management of the system of domain names. The study was conducted by the Working Group on Internet Governance (WGIG), a ‘mixed’⁹ group whose task, assigned by the WSIS itself, was ‘to investigate and make proposals for action, as appropriate, on the governance of Internet’.

The work of the WGIG ended with a report that recognized that no Government should play a prominent role in the governance of the Internet. It pushed, therefore, for a greater internationalization, even establishing a new ‘global’ advisory body – the Internet Governance Forum (IGF) – with the task of discussing public policies related to key elements of Internet governance. This was with a view to promoting sustainability and maintaining an open debate between all interested bodies (governmental, intergovernmental and even private organizations). Its ambition was to facilitate the exchange of information and best practices and to promote *ex ante* and evaluate *ex post*, on an ongoing basis, the implementation by the States of the principles adopted at the WSIS, and even addressing issues related to critical resources of the Internet, such as IP addresses¹⁰.

can be seen from the above-mentioned text, the original intention of the US was to hand over the DNS government to the ‘private’ sector. We will see later whether that is about to happen and how.

⁶ *US Principles on the Internet’s Domain Name and Addressing System*, www.ntia.doc.gov.

⁷ The only notable exception came from the Brazilian government; see G.M. Ruotolo, *Internet-ional Law – Profili di diritto internazionale pubblico della Rete* (2012 Cacucci editore) 55, at note 19.

⁸ The WSIS was proclaimed by the UN General Assembly with resolution 56/183 of 21 December 2001, doc. A/RES/56/183, on www.un.org and was managed by the International Telecommunications Union (ITU).

⁹ We use the term ‘mixed’ with reference to groups and institutions whose composition provides for the participation of representatives of both States and ‘classic’ international organizations alongside with non-governmental organizations (NGOs) and private entities. The term ‘multi-stakeholder’ is also often used.

¹⁰ To date IGF has met nine times: from 30 October to 2 November 2006 in Athens; from 12 to 15 November 2007 in Rio de Janeiro; from 3 to 6 December 2008 in Hyderabad; from 15 to 18 November 2009 in Sharm El Sheik; from 14 to 17 September 2010 in Vilnius; from 27 to 30 September 2011 in Nairobi; from 6 to 9 November

² For a comprehensive reconstruction of the legal issues related to DNS see D. Lindsay, ‘International Domain Name Law: ICANN and the UDRP’, Oxford, 2007; E.M. Weitzenboeck, ‘Hybrid net: the regulatory framework of ICANN and the DNS’ (2014) *International Journal of Law and Information Technology* 49; K. McGillivray, ‘Give it away now? Renewal of the IANA functions contract and its role in internet governance’ (2014) *International Journal of Law and Information Technology*, 3.

³ The official declaration that starts up that proceeding, doc. NTIA, Office of Public Affairs, (202) 482-7002, can be downloaded at www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions.

⁴ C. Bildt, ‘The Future Global Order’ (2015) *Digital Power Series – Part 1* (20th July 2015), downloadable from the European Council on Foreign Relations website, at www.ecfr.eu/article/commentary_the_future_global_order3072.

⁵ See it at www.ntia.doc.gov/federal-register-notice/1998/statement-policy-management-internet-names-and-addresses. As

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