

INTRODUCTION

Special Issue: International Law and Digitalization

Editorial to the Special Issue “The Impact of Digitalization on International Law”*

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The special issue analyzes the impact of digitalization on international law—focusing on structural changes. It asks whether such changes are observable in the various fields of international law and whether we can discern cross-cutting trends and developments. The special issue combines the in-depth analysis that the contributing authors provide for specific subject matters with the bird’s eye perspective offered in a synthesizing article by myself. The fields of international law covered in this special issue include international human rights law and institutions, use of force, the principles of non-intervention, state responsibility, enforcement jurisdiction, international trade and investment law, international criminal law, and international health law.

I thank the contributors for their insightful articles and for engaging intensively with the topic of this special issue. Many of the contributors were part of the project since Maria Varaki and I prepared our initial workshop held in January 2021—and I am especially grateful for their commitment to this project and their patience during the process of publication of this special issue. I also thank in particular Inge van Hulle and Russell Miller who have enriched the special issue with their editorial support and input.

The special issue is structured as follows:

To start with, my own contribution sets out the research framework for the special issue in more detail. It outlines the elements of this framework and the benefit of assessing structural changes for international law caused or fostered by digitalization. It links the research question to the related discussions in legal scholarship, both in international law and in the broader law and digitalization context. To provide reference points not only for the contributions to the special issue but also for future research on the matter, the paper develops criteria for evaluating such changes relating to the relevant legal actors, legal norms and underlying values. Most importantly, the paper reflects on the conclusions that can be drawn from the analysis provided by the individual contributions of the special issue. It links the findings of the contributions, providing a meta-analysis of the impact of digitalization on international law.

The contributions by Yuval Shany and Rishi Gulati engage with different facets in which digitalization impacts human rights law and institutions. Yuval Shany describes the development of digital human rights and argues that a new field of digital human rights law is developing. He assesses how the structural features of this trend relate to general developments in international

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human rights law including, *inter alia*, the extra-territorial application of human rights and the role of corporate actors. The latter aspect is taken up from an institutional perspective by Rishi Gulati. He analyzes the already discernible as well as the potential future impact of the Meta Oversight Board on international law. He qualifies this body as exercising transnational hybrid adjudication and reflects, in particular, on the consequences for access to justice in the international sphere and institutional design for future grievance mechanisms by other multinational corporations.

Nicholas Tsagourias analyzes the systemic challenges that digitalization creates for the use of force regime. According to Tsagourias, these challenges include legal uncertainty and the replacement of international law as to the actors that shape international law, the modalities of its creation as well as the secondary rules applicable to this creation, especially with regard to customary law. For this analysis, Tsagourias takes into account a variety of digital tools relevant for the use of force context such as cyberwarfare and artificial intelligence used as agents in conventional warfare.

Relatedly, Lukas Willmer as well as Sara Poli and Emanuele Sommario examine how the legal response to cyberwarfare affects further fields and notions of international law. Willmer traces how the discourse regarding the principle of non-intervention has developed and whether it has influenced the content of the principle. He highlights that in particular Western states have rediscovered this notion and its protective dimension against cyber-interventions. He also shows that it remains uncertain how this principle applies to the digital context and that the proposals made by states and in legal scholarship as to this applicability can alter the values underlying the principle of non-intervention. Sara Poli and Emanuele Sommario look at cyber-warfare from the perspective of rules on state responsibility. They assess the EU cyber sanctions regime and show that the difficulties of attributing cyber-attacks to state actors challenge the implementation of the legal regime as such. They also engage with the consequences for the division of tasks and competences between member states and the EU.

Cedric Ryngaert analyzes the normative shifts that, in the context of digitalization, characterize the rules on extraterritorial enforcement jurisdiction. He observes a “fading into irrelevance of territoriality” as a governing principle of enforcement jurisdiction. With regard to cyberspace, enforcement jurisdiction no longer follows the geographic location of the data to be accessed. Further, he finds a blurring of the formerly clear line between prescriptive jurisdiction and enforcement jurisdiction. According to Ryngaert, this brings along a conceptual shift introducing broader flexibility into the rules of enforcement jurisdiction, as actors use certain permissive principles of prescriptive jurisdiction such as territorial ubiquity and the nationality principle.

Mira Burri and Rodrigo Polanco study the effects of digitalization on international economic law. Burri shows that for international trade law, legal regulation of digital trade mainly takes place in the context of free trade agreements while the WTO framework is currently not adapted to digital trade practices. She argues that free trade agreements have provided a tool for advancing “a new regulatory model for digital trade”, diverging from non-digital trade regulation. Polanco undertakes a similar assessment for international investment law. He analyzes whether investment treaties can be applied to a digitalized investment context. He concludes that although investment rules have not been formally adjusted to the digital context, there is room for adaptation by interpretation.

Mia Swart reflects on the impact of digitalization on international criminal law. She explores the way in which the role of artificial intelligence in international crimes can be legally captured. She argues for the construction of an “electronic liability” that would make it possible to hold the autonomous agents responsible under international criminal law. For this purpose, she suggests acknowledging the legal personality of autonomous agents and using the framework of strict liability for international crimes committed by such agents.

Finally, Pedro Villarreal outlines with regard to digital disease surveillance how international health law is impacted by digitalization. He shows that international law has not been able to

regulate the use of such digital tools yet and that there are indeed various normative and practical obstacles for it to do so. As to ongoing reforms, he sees only limited potential for international legal regulation to successfully address existing tensions regarding digital disease surveillance.

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