

institutions. Sure enough, in its current condition the international legal system may not be so amenable to such collaborations, nor does this system feature other characteristics that may be important for long-term regulation, such as adaptability or effective enforcement. However, notwithstanding these challenges, international lawmakers must acknowledge that the time has come to push the international legal system more decisively toward long-termism, thereby aligning its temporalities with changing global realities.

INTERNATIONAL LAW BY DESIGN

*By Christian Djéffal**

Emerging digital technologies pose significant problems at the international level. Issues related to artificial intelligence have been on the international agenda since early on: disinformation and misinformation; lethal autonomous weapons systems; or the consequences of large-scale deployment of large language models such as ChatGPT, Bard, or Luminous. While in many cases, governments, civil society, and even the companies providing the systems have called for international regulation, relatively little has happened. In short, the underlying temporal conundrum for international law is the need for agile and rapid responses to mitigate the long-term risks of technologies. I suggest that the first step is to think ahead: Imagine an international legal framework that enables lawyers and technology developers to shape emerging digital technologies such as artificial intelligence, distributed ledgers, and quantum computing. An international law that helps anticipate the risks of these technologies and mitigate them before they materialize on a global scale. Picture a legal system that guides international legal practitioners to take advantage of the opportunities presented by these technologies and to realize the core values of major international legal treaties such as human rights, the rule of law, and democracy. An international law that allows for innovations that advance the purposes of the international legal order. Such a future version of international law would constantly work toward closer integration of law and technology. What would be the elements of such an international legal order? I suggest that a recent trend in the regulation of technology, i.e., law by design obligation, fits the description we are looking for. Therefore, I will first define these norms and provide examples that already exist in international legal practice, and second, suggest ways in which international legal scholarship and practice could evolve to give effect to international law by design norms.

I. INTERNATIONAL LAW BY DESIGN OBLIGATIONS

International law by design norms are general obligations to incorporate certain international legal principles throughout the lifecycle of technologies, starting with innovation and development.¹ The idea behind international law by design obligations is to translate legal principles into sociotechnical constellations by obliging those who are creating technologies to accept the respective principles as integral goals of the development process. Instead of regulating in a detailed fashion which requirements and processes have to be observed for a technology to comply with international law, law by design obligations establish overarching objectives that organizations responsible for technology development must achieve. Such obligations create new

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¹ Christian Djéffal, *The Normative Potential of the European Rule on Automated Decisions: A New Reading for Art. 22 GDPR*, 81 HEIDELBERG J. INT'L L. 847, 857 (2020).

opportunities to interact with technologies starting with the early phases of innovation throughout their lifecycles.

A specific example of a law by design obligation stems from children's rights.² The United Nations Convention on the Rights of a Child (CRD)³ is a human rights treaty with profound impacts on digital technologies, although it was concluded before the internet was generally accessible. While it was very influential to the progressive stance taken in the United Nations Convention on the Rights of Persons with Disabilities (CRPD), the treaty itself does not mention specific technology issues. Yet, the Committee on the Rights of the Child frequently addressed questions of children's rights and devoted General Comment 25 to children's rights concerning the digital environment.⁴ The question of design already lies at the core of the problem description. The Committee stated that "[t]he digital environment was not originally designed for children."⁵ This effectively means that there is a challenge to redesign current infrastructures as well as to come up with children's rights by design standards for new technologies. General Comment 25 relies on traditional by design goals such as data protection and privacy by design and cybersecurity by design.⁶ However, it also refers to goals that are less established, such as safety by design and universal design.⁷ Specific references to human rights by design are made in the context of content recommendations in the context of social media⁸ and, in particular, technologies to profile children,⁹ games, and digital play.¹⁰ An important aspect is also to design explanations in an age-appropriate manner.¹¹ The policy measures that are laid out in the convention include instruments that can translate human rights by design requirements into specific technical settings such as "industry codes and design standards."¹² Several more specific measures in that regard are mentioned, which also include obligations with negative goals, such as to "undertake child rights due diligence, in particular, to carry out child rights impact assessments and disclose them to the public, with special consideration given to the differentiated and, at times, severe impacts of the digital environment on children."¹³

II. CHANGING INTERNATIONAL LEGAL PRACTICE

The example of children's rights has shown the general ways in which international lawyers can put principles into practice. Rather than attempting to regulate technologies, General Comment 25 sets out ways and processes by which the law, lawyers, and children's rights advocates can shape technologies in ways that protect or promote the best interests of children. It is not a specific application of children's rights to technology but rather a set of modes for engagement. This is done to extend the reach of international law and ensure that children's rights can be guaranteed in the digital environment. In this way, international law by design ties in with the theme of this year's

² This part builds on Christian Djefal, *Children's Rights by Design and Internet Governance: Revisiting General Comment No. 25 on Children's Rights in Relation to the Digital Environment*, 11 *LAWS* 83 (2021).

³ Convention on the Rights of the Child 1989, 1577 UNTS 3.

⁴ Committee on the Rights of the Child, General Comment No. 25 on Children's Rights in Relation to the Digital Environment, UN Doc. CRC/C/GC/25 (Mar. 2, 2021).

⁵ *Id.*, para. 12.

⁶ *Id.* (privacy by design is referred to at paras. 70, 77, 88, and 110; cybersecurity by design is referred to at para. 116).

⁷ *Id.* (safety by design is referred to at paras. 77, 88, and 110; accessibility by design is referred to at para. 91).

⁸ *Id.*, para. 37.

⁹ *Id.*, para. 62.

¹⁰ *Id.*, para. 108.

¹¹ *Id.*, para. 39.

¹² *Id.*, para. 24.

¹³ *Id.*, para. 38.

Annual Meeting, “The Reach and Limits of International Law to Solve Today’s Challenges.” International law by design addresses technologies and technological infrastructures over time to enable the goals set by international law. This has important implications for several aspects of international law. Firstly, international law by design norms are an example of a proactive stance in international law. They do not merely focus on remedying violations. They aim to shape the reality in which international law operates in a way such that, at best, violations of the law are prevented. This proactive approach implies that international law must necessarily broaden its scope. It cannot solely consider technologies at a single point in time, but must seek to influence them from the early stages of innovation to the point of use in society. This extension of temporal aspects also means that international legal practice must be ready to adapt to changing circumstances in an interdisciplinary environment. It should be involved in all stages of the development and use of technology to have an impact. This would require people responsible for technology to adapt to innovation and technology development processes such as co-creation or agile software development to ensure that the law can have an impact. International lawyers need to learn how to meaningfully contribute to and intervene in these processes. This is a major challenge for international legal scholarship. Indeed, it is an area in which international lawyers are called upon to develop approaches for adapting international legal practices to new tasks.

In terms of specific approaches, I would like to present the research project Reflective Legal Advice on Innovations and Technology Developments (RechTech), which offers ways in which a proactive international legal practice could be realized. The project aims to explore law as a co-productive force and resource for technology design and to enable collaboration and interaction between law and technology. To this end, the project will develop and refine two intervention approaches targeting processes of innovation and the problematization of human rights in development processes.

The first intervention enables the realization of fundamental principles of international law, including human rights, democracy, and the rule of law. It establishes a co-creation format that combines risk assessment and innovation methods for public administration stakeholders who pursue public goals but normally do not participate in technology development. Using this method, we regularly generate innovative ideas. It is tailored to emerging technologies that are already in use in society, but have the potential to be scaled up. We have tested this approach multiple times in the context of artificial intelligence in workshops providing general information on artificial intelligence and its governance. The workshop begins with an introduction to several AI applications that are already in use. Participants choose an application and go through a guided group exercise with a facilitator that consists of three phases. In the first phase, the group conducts a technology impact assessment of the existing application of the technology. In the second phase, participants begin to co-create new ideas through analogies. They select an idea for the third phase, in which they think about the sociotechnical design of their concept, before reconstructing the values embedded in their suggestions. A concrete example would be to start with AI translation tools also used in public administration, such as the World Intellectual Property Organization translation tool.¹⁴ One idea that came up in several workshops was to build an AI to simplify the language. Reflecting on this idea showed us that international legal values are indeed embedded: such systems promote accessibility for people with disabilities, which is in line with the right to accessibility in Article 9 of the CRPD.¹⁵

¹⁴ INTERNATIONAL TELECOMMUNICATIONS UNION, UNITED NATIONS ACTIVITIES ON ARTIFICIAL INTELLIGENCE (AI) 247 (2023).

¹⁵ On the scope, see generally Francesco Seatzu, *Art. 9*, in THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY (Valentina Della Fina, Rachele Cera & Giuseppe Palmisano eds., 2017).

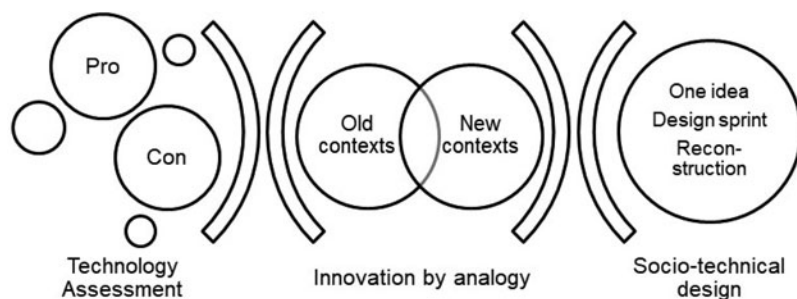


FIGURE 1: RechTech Co-creative Method¹⁶

The second intervention aims to incorporate material principles of international law like human rights, the rule of law, and democracy within technical infrastructures. It bridges the gap between self-assessment and engagement of those affected by the technologies. The main objective of the second intervention is to confront innovators and developers of robotic technologies at an early stage with the freedoms, rights and interests of those who will use the technologies. We are currently in the process of creating a liability tool that will allow developers, in the first step, to make an initial mapping of the benefits and risks of a given technology. In the second step, they will be guided to present an early prototype to affected stakeholders and learn from this interaction. While on the surface the discussion is about liability law and stakeholder interests, the actual content of the conversation in many cases quickly turns to proportionality tests in the context of human rights.

III. OUTLOOK

Law and design approaches are becoming increasingly popular in various fields of law. Understanding legal activities more proactively and constructively could open up interesting spaces and avenues for international lawyers. However, this is a challenging process that will require international lawyers to engage with other fields and partially adapt to new environments to effectively communicate international law. The value of these efforts would be to extend the reach of international law in a major societal transformation that is already shaping the infrastructures that also shape the reach and the limits of international law. This makes it not only a fascinating area of research but also a question of what international law and the international community will look like tomorrow.

HUMAN RIGHTS AND THE CONCEPT OF TIME IN CONTENT MODERATION: META'S OVERSIGHT BOARD

*By Jenny Domino**

I. INTRODUCTION

The Oversight Board is now in its third year since it first started accepting cases from Facebook and Instagram users in October 2020. Described then as a “wild new experiment” in online speech

¹⁶ This figure is from the author.

* Oversight Board at Meta.