2000

The Internet and Public International Law

John M. Rogers
University of Kentucky College of Law, jrogers@pop.uky.edu

The Internet and Public International Law

KENTUCKY
LAW JOURNAL

VOLUME 88 | 1999-2000 | NUMBER 4

THE INTERNET AND INTERNATIONAL LAW

FOREWORD

The Internet and Public International Law

BY JOHN M. ROGERS*

It is perhaps commonplace to observe that recent developments in information technology are revolutionizing most aspects of our lives. Anything that affects our lives so profoundly will, of necessity, have a significant effect on the law. We can expect that the information revolution will have a comparably significant impact on the international system of binding obligations often called public international law. Just what that will be is of course extremely difficult to predict. Compounding that difficulty is the lack of consensus on just what actually amounts to the public international legal system. Scholars and lawyers still debate fundamental questions regarding the sources of public international law, the ways in which public international law binds, and indeed whether it in fact binds.

* Thomas P. Lewis Professor of Law, University of Kentucky. B.A. 1970, Stanford University; J.D. 1974, University of Michigan.

The theme of the annual meeting of the Section on International Law of the Association of American Law Schools, held in the first week of the new millennium, was the effect of the Internet on public international law. The idea was not only to explore the effect of the new technology on the law, and vice versa, but also to see if the changes can give us some additional perspective on what public international law is and how it works. The contents of this Symposium, articles and essays reflecting the panel contributions of the Association of American Law Schools Section meeting, supplemented by two thoughtful student notes, provide significant and often surprising insights into how international law and Internet technology have and will affect each other. The Symposium also permits us to examine the nature of the international legal system from a fresh standpoint.

In this introduction, I describe briefly the articles, essays, and notes in this Symposium. I then attempt some preliminary observations about what their insights suggest about the nature of public international law.

Professor Joseph W. Dellapenna starts by putting the Internet's impact on international law in the far broader context of the effect of technology on law generally. He uses the example of how maritime law principles developed as a direct result of technological limitations on the ability of ships to stay in contact with their home ports. In treating the general relation of technology to law, Dellapenna steps back to define his terms, and to probe the intellectual foundations necessary to treat the subject. Rejecting the argument that all knowledge (and therefore all law) is socially constructed, he posits that "material conditions of [a] time shape intellectual fashions at least as much as intellectual fashions shape material conditions."[1] The two develop, he says, in a type of unpredictable interactive loop. "Changes in science and technology have transformative power because the prevalent ideas in science and technology today are central to the material conditions in which those ideas arise."[2]

Dellapenna then describes a number of ways in which science and technology have changed public international law. Most obvious are the technological subjects to which international regimes have been applied, such as nuclear energy, outer space, oceanic resources, aviation, and now, international electronic commerce. Dellapenna calls these the "ends" of international law, and includes human rights among the ends affected by technological change. He also anticipates changes in the "means" by which

---

[1] Joseph W. Dellapenna, *Law in a Shrinking World: The Interaction of Science and Technology with International Law*, 88 KY. L.J. 809, 828 (1999-2000).

[2] *Id.* at 830.

international law functions. Globalization driven by technology has fostered, for instance, the flow of power from nation-states to region-based organizations such as the European Union.

Finally, Dellapenna argues that the very structure of the international legal process is changing as a result of the information revolution. He explains that the structure of law is governed, at a deeply embedded level, by the way in which law is recorded and recalled. There are fundamental differences among oral law, scribal law, printed law, and "digital law." For example, the invention of the printing press made text more inherently unchangeable: even if one copy of a book is altered, all the other copies remain the same. The very uniformity of printed text may convey a deep message about the immutability or consistency of law. Putting law on the Internet, in contrast, not only makes it available at lower cost to a wider audience (an insight we might have expected), but also it does this in a way that can be easily changed by either the author or the reader. The latter characteristic may ultimately have a more profound effect on the law as an intellectual construct. This is just one example of how "digital law" may differ in structure from printed law. The ultimate way in which the interactive loop of technology and law develops remains to be seen. In the face of such uncertainty, Dellapenna concludes, those who hope to make reasonably appropriate decisions must "attend[ ] to the intellectual structures as well as to the material conditions"[3] of decision-making processes.[4]

Dean Henry H. Perritt, Jr. follows with a piece that is full of insights about how the Internet is changing the public international legal system. Perritt first argues that the Internet is a more portentous technological development than, for instance, radio or television, because it is inherently global and because it has very low economic barriers to entry.

Although the Symposium, to keep its scope manageable, was to focus on public international law, Perritt tests the confines of the public law/private law distinction. To the extent that he is impelled to do so by the social results of technological developments, his piece exemplifies the changes in thinking that Dellapenna anticipates. Conflict of laws issues, for instance, are raised more often these days because of the globalization of

---

[3] *Id.* at 879.

[4] Professor Dellapenna has provided a wealth of citations to related areas of inquiry in international law and jurisprudence. Here Dellapenna perhaps reflects, by example, the very influence of digital law that he discusses. Every reader is invited down a different path of further inquiry, much as is the case when one "surfs" the Internet.

trade, and such issues require solutions from the public international law system. "Public law defines the contours of private law."[5]

Perritt argues that the Internet improves the effectiveness of the international legal system in three ways. First, it facilitates the development of new law by making the negotiation of treaties easier and by increasing the effectiveness of nongovernmental actors and institutions that push for such regimes. Second, the Internet promotes governmental acceptance of public international law, again by empowering nongovernmental actors, and also by making international and comparative law more accessible to judges and legislators around the world. Third, the Internet aids in detecting violations of international law and in imposing sanctions, by empowering those who are harmed by the violations, such as ethnic minorities. Perritt advocates steps to improve and protect these effects, such as increasing access and improving bibliographic resources. In this regard he supports preserving the open infrastructure of the Internet, in an effort to provide resistance to exercises of monopoly power.

Perritt also argues that the Internet is naturally more amenable to private ordering schemes than to public regulation. Traditionally accepted territorial rules of court jurisdiction at least arguably do not work so well with regard to Internet commerce.[6] Less territorial regimes, such as those applied to the sea and outer space, according to Perritt, are informative but not entirely suitable models for Internet regulation. More conceivable, he contends, are relatively thin intergovernmental frameworks for private ordering. Among the many examples he suggests are the internationally-controlled private corporation to regulate Internet domain names, and the credit card charge-back system in the United States.

Professor Wedgwood follows with an Internet-inspired thought experiment that challenges our very notion of what statehood means in international law. Can there be a state subject to international law that exists solely on the Internet? This is not so fanciful as it might first seem, given the serious recent concern that computer intelligence may be able to replicate itself and take power from humans sometime in the twenty-first century. Professor Wedgwood notes the recent spate of admissions to the

---

[5] Henry H. Perritt, Jr., *The Internet is Changing the Public International Legal System*, 88 KY. L.J. 885, 892 (1999-2000).

[6] Professor Jack Goldsmith has taken issue with the more extreme versions of the argument. *See* Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998). Goldsmith argues that the differences between Cyberspace transactions and other transnational transactions have been overstated, and that traditional legal tools and technology have the potential to resolve the multijurisdictional regulatory problems implicated by Cyberspace.

United Nations of micro-states like Monaco and Nauru. She asks, why must a state be territorial? The Internet may permit the type of cultural and political commonality that formerly required, as a practical matter, territorial integrity. The very conceivability of states with Cyberspace "territory" forces us to think more clearly about the fundamental meaning of statehood as it now exists.[7]

Two thoughtful student notes conclude this Symposium issue of the *Kentucky Law Journal*. Each deals with problems of copyright enforcement in Cyberspace. One is concerned with the rights of creators of intellectual property. The other comes from the different perspective of preserving the vigorous freedom of the Internet system.

Heather McGregor explains that geographical locale is important to several aspects of traditional protection of intellectual property. For instance, the location of first publication is relevant to choice of law, and the location of property is relevant to personal jurisdiction. Where intellectual property on the Internet has no easily ascertainable physical place, location-related legal principles provide less protection for intellectual property. Possible solutions include Internet self-regulation schemes. Also, until new international agreements can be achieved, McGregor proposes for the short term a scheme of standard presumptions about other countries' copyright laws.[8]

From the other perspective, Justin Williamson examines the huge potential liability of Internet service providers in the United States for relatively innocent copyright infringement. He explains how the Digital Millennium Copyright Act of 1998 protects such providers, but only when a complex body of requirements are met. When the Act's protections do not apply, Internet service providers are subject to copyright infringement suits under general copyright law. Recent federal cases under that law have not been consistently sensitive to the practical difficulties of Internet service providers who merely provide the means by which customers violate copyrights.[9]

Is there an overall insight we can derive about the nature of the international legal system? A general tension in legal philosophy between natural and positive theories of law manifests itself in differing concepts about what international law is and how it works. On one side, international

---

[7] Ruth Wedgwood, Essay, *Cyber-Nations*, 88 KY. L.J. 957 (1999-2000).

[8] Heather McGregor, *Law on a Boundless Frontier: The Internet and International Law*, 88 KY. L.J. 967 (1999-2000).

[9] Justin Williamson, *Online Service Provider Copyright Liability: Is the Digital Millennium Copyright Act the Answer?*, 88 KY. L.J. 987 (1999-2000).

law is thought of as an ideal, an aspect of the Ultimate Good that law and lawyers and legal systems eternally strive for. On the other side, international law may be thought of as a system of binding obligations among states. On this more positivist view, international law is a system dependent for its existence and content on the nature and desires of the states themselves, and thus no more eternal or unchanging than those states. Under this conception, international law would cease to exist if states were to cease to exist. Systems of binding obligations among other entities might of course remain, but they would be different systems. None of this denies the existence of Ultimate Good, which positivists may well assume. The descriptive point[10] is only that systems of binding obligations live and die, form and deform, inspire and expire, without being tied to that Good. It can be objectively misleading to assume the contrary.

At one or another level of abstraction, the essays in this Symposium reflect that law in general, and international law in particular, is determined by the nature of its subjects. How people communicate may change fundamentally the importance of territory to the nature of the nation-state. Professor Wedgwood expresses this most colorfully, but the idea courses through many of the papers. The remarkable speed of technological change may cause changes in the nature of statehood to be perceivable, for the first time, over a relatively short period. If international law can be seen to morph *as the nature of statehood morphs*, the view of international law as a system of binding obligations, and not as an aspect of the Ultimate Good, should become all the harder to deny.

---

[10] I was (constructively) criticized recently for not providing a normative justification for viewing public international law as a system that may conflict with other systems of binding obligation (i.e., domestic law). *See* Curtis A. Bradley, Book Review, *International Law and United States Law*, 93 AM. J. INT'L L. 757, 759-60 (1999). But to the extent that my characterization of international law is descriptive, no normative justification is required. By analogy, no normative justification is required for the view that the earth revolves around the sun rather than vice versa. We can accept the view, inter alia, simply because it explains things better.