

Molly Land
New York Law School
molly.land@nyls.edu

Coding International Law

Technology is both international law's greatest opportunity and its greatest threat. In fields as diverse as Internet regulation and drones, technology is being used to encode and thereby enforce international law. This paper considers the implications of the move to technology as a regulatory mechanism for international law.

First, this paper argues that technology provides an important means for enforcing international law. Because international law lacks centralized enforcement mechanisms, international lawyers have long emphasized alternative enforcement mechanisms. They have not, however, engaged with the idea of *architecture*, and more specifically technology, as an enforcement modality. Thus, this paper begins by contending that international law scholarship has much to learn from domestic cyberlaw discussions about technology as a mechanism for regulating behavior.

Second, using the case studies of Internet regulation and drones, the paper examines the opportunities and challenges associated with employing technology as a means for implementing or enforcing international human rights and humanitarian law. "Code" (including the software code itself, its architecture, and the standards that foster technological convergence) presents an important opportunity for enforcing international law because it can augment or undermine a government's ability to regulate. For example, code can increase the likelihood that a particular state behavior will occur by making it less costly for the government to engage in that behavior. Indeed, because it determines what actions are possible in a way that is automatic, invisible, and highly efficient, code can constrain or enable the behavior of states even more effectively than law. For human rights and humanitarian law, the prospects of an effective enforcement mechanism are particularly compelling.

Yet code also poses significant risks for international human rights and humanitarian law. Because of the importance of balancing values and mediating conflicts between rights, international human rights and humanitarian law often require the exercise of judgment and discretion. The unique features of technology that make it a highly effective modality of enforcement also make it particularly ill-suited for choosing among values or resolving conflicts between rights. Thus, in the area of international human rights and humanitarian law, "code" and "law" are extremely poor regulatory substitutes. Moreover, code also presents the risk of disabling other forms of international law enforcement. Because it is invisible, regulation by technology shields the state from pressure that might otherwise be exerted in the form of diplomacy or public pressure.

Using insights from contract law theory, the paper concludes by proposing the adoption of information forcing "penalty" defaults in code used to implement international human rights and humanitarian law. Technology should not be used to automate decisions that require judgment and discretion. Instead, it should promote the disclosure of information relevant to that decision making process and foster input into and deliberation about those choices.