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INTRODUCTION TO THE SYMPOSIUM ON CRITICAL INTERNATIONAL LAW AND TECHNOLOGY

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Scholarship concerned with international law, technology, and computation has been burgeoning since the mid-to-late twentieth century. Over the past decade, it has taken shape as a discernible sub-field of international legal scholarship. An International Law and Technology Interest Group was created within the American Society of International Law in 2013, for instance. By 2021, international law and technology was already considered ripe for "rethinking."[1] Some of this work has been solutionist, aimed at generating order-restoring answers to the "upset[s]" caused by technological change.[2] Some of it has been constitutionalizing, canvassing prospects for "a transformative constitutionalism for the digital human condition."[3] Much of the scholarship has sought to give humanist (or post-humanist) pause to the ever-increasing pace of technological change.

Meanwhile, some work in this field—a growing body of it—has been critical. That is, it has been pursued with a sometimes fraught combination of aims: on the one hand, confronting domination; and, on the other, extending the legacies of post-structuralism in international legal work.[4] This symposium seeks to welcome readers into this sub-field of a sub-field by highlighting some research questions and methods being pursued within it and anointing it, semi-seriously, with an acronym: CRILT.[5]

CRILT is significant because it picks up legal theoretical threads teased out in past decades by work on grammar, structure, (bad) faith, (in)determinacy, agency, and the production and reproduction of power in international law,

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[1] CUILS Webinar: Rethinking International Law and Technology (Apr. 7, 2021).

[2] Louis B. Sohn, *The Impact of Technological Changes on International Law*, 30 WASH. & LEE L. REV. 1, 18 (1973).

[3] Anita Gurumurthy & Nandini Chami, *Towards a Global Digital Constitutionalism: A Radical New Agenda for UN75*, 64 DEV. 29, 36 (2021).

[4] Post-structuralism in international law is shorthand for a body of work that has, since the 1980s, explored how international law makes the world and argued that its perverse or unjust effects are not technical defects or problems of misuse but are, rather, structural—structural features that are at once occluded and reproduced by international legal order, even as that order remains highly plastic and, in many ways, mysterious. Whereas structuralism analyzed these features in a quasi-scientific way (through analysis of language patterns or systems of signs for instance), post-structuralism cast these features as products of history or effects of reading, working, and thinking in certain ways not necessarily enduring. Readers will get a sense of the concerns and strategies characteristic of this vein of work from reading: Martti Koskenniemi, *The Politics of International Law—20 Years Later*, 20 EUR. J. INT'L L. 7 (2009).

[5] On branding in international law, including by recourse to acronyms, see Robert Wai, *Countering, Branding, Dealing: Using Economic and Social Rights in and Around the International Trade Regime*, 14 EUR. J. INT'L L. 35 (2003).

and draws these into the domain of the digital.[6] This helps mark the end of a period during which critical work in international law tended to be conflated with historical work.[7] That is not to say that CRILT is ahistorical; on the contrary, much work in this vein is deeply engaged with historical questions and materials. Nonetheless, CRILT reanimates the broader range of methods and concerns already at large in international law before critical inquiry in the field ostensibly took a "historical turn." The work ongoing in CRILT—of which this symposium provides a snapshot—demonstrates how salient these questions have become, and the new forms that they now take, with the growing global prevalence of digitality in view.

CRILT is especially timely in the context of the digitalization of many domains of international legal work. That is because it answers a demand for explanation and investigation at the level of totalities, meaning an effort to understand how different forces and phenomena relate to one another in or as many-sided wholes. Other totalities include language, consciousness, and capitalism.[8] The voraciousness and ubiquity of many digital media and communication platforms lend those platforms an all-encompassing, infrastructural, or world-making quality. And critical scholarship in international law has proven good at investigating totalities. More precisely, critical scholarship is capable of both describing totalities and simultaneously calling them into question. At a time when international legal doctrine has difficulty grappling with the phenomena of artificial intelligence, remote sensing, and the hoarding of data by the private sector, the critical repertoire in international legal scholarship offers a way of analyzing these phenomena in relation to one another and in relation to other conditions. CRILT addresses shifts in entire vocabularies or registers of practice, not just developments at the level of a particular institution, dispute, or substantive area of law. If international law is undergoing technological reconfiguration and international legal scholarship is yet to grapple with this prospect fully, it is important to assess how well-equipped that critical repertoire may be to take on this challenge, as this symposium does.

Why might critical international lawyers be well-equipped to grapple with the normative power of the technological (that is, the world-making force of computation now operating in many domains of international legal concern)? Taking our cue from a line of thought familiar to students of critical international law since Martti Koskenniemi's *From Apology to Utopia*,[9] we might say that indeterminate law is bound to meet indeterminate technology. In digital operations, a descending narrative of technological liberation competes with the ascending daily experience of subjection to an ever more digital life. In other words, digital mediation introduces another level, beyond law, at which work is required to produce effects of determinacy; another medium, alongside law, in which any sense of a proper, stable, or predictable fate or meaning emerging effortlessly from received doctrines or other inputs has to be *generated* from conditions of instability, ambivalence, contradiction, and difference. Just as any sense of law as determinate and determinative (of the shape of the world or just outcomes in the world) must be produced repeatedly if it is to subsist, digital mediation introduces another level at which effects of determinacy may be produced or not (as this does not always eventuate). Koskenniemi and others have analyzed how determinacy effects are produced at the level of international legal argument. The routing of aspects of international

[6] As noted in the opening paragraph, much of the work in international law and technology is concerned not with technology in the fullest sense but rather with technologies of computation especially digital computation (although more recently this has extended to speculation about quantum computation).

[7] Fleur Johns, *Critical International Legal Theory*, *in* International Legal Theory: Foundations and Frontiers (Jeffrey L. Dunoff & Mark A. Pollack eds., 2022). On this period, see also Anne Orford, International Law and the Politics of History 18–69 (2021).

[8] For an influential discussion of the significance, distinctiveness, and value of the category of totality, see Georg Lukács, History and Class Consciousness: Studies in Marxist Dialectics (Rodney Livingstone trans., 1971).

[9] Martti Koskenniemi, From Apology to Utopia: On The Structure of International Legal Argument (new ed., 2005); *see also* David Kennedy, International Legal Structures (1987).

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legal work through digital technology (for example, in lawyers' efforts to grapple with the use of automated weaponry and international organizations' recourse to digital interfaces in emergency relief work)[10] compounds uncertainty as to whether these determinacy effects will hold in physical, electrical, practical, and discursive registers. In the normative domain of digital technology, a second-order indeterminacy rides atop, alongside, or underneath the oscillations of ascending and descending argument in international law. Having worked hard to understand the latter, CRILT scholars may be especially well-positioned to probe this combination of patterns.

Koskenniemi's subsequent articulation of a "culture of formalism" for the critical project in international law paid homage to international lawyers' professional commitment to working in "resistance to power" amid irrepressible divergence, without being able to ensure the virtue of their work.[11] This commitment could very well be applied to the digital domain as well. The search for a language of the universal without falling into the trap of the imperial is a move that we find recurring in the contributions to this symposium. With the digital domain interpenetrating the legal, however, this search becomes more complicated. The digital domain features its own descending arguments on "ethics" and "governance" and an ascending formalism regarding the reproducibility of the outcomes of computer research. As noted above, digital computation compounds the uncertainty, ever-present within law, as to whether and how these arguments' incommensurability might be put to rest. Far from securing international lawyers' normative footing, computation may redouble their instability and propensity to become part of the problems that they address. Likewise, recourse to legal argument may intensify the unresolved status of computational outputs (i.e., their facticity or normativity). Paraphrasing Koskenniemi, "the choice to refer to 'law'" when confronting technological governance and technological formalism "is not politically innocent."[12]

The Repertoire of Critical International Law—What Has Changed?

Koskenniemi's prominence notwithstanding, there is no universal canon of critical scholarship in international law, even as his work remains an explicit or implicit point of reference for many. By way of other points of reference, David Kennedy, the most influential United States-based scholar of critical approaches to international law, assembled "a list of slogans" two decades ago. These were not shared articles of faith but were recognizable to those who had engaged, up to that point, in the "collective intellectual project of disciplinary criticism and renewal" known as "New Approaches to International Law" (NAIL).[13] The slogans captured some words commonly used, and moves repeatedly performed, by NAIL-allied scholars "to generate the feeling of being outside the disciplinary vernacular" of international law.[14] And they remain salient for critical scholarship in international law, including CRILT, today. They are as follows:

- Write history against the progress narrative;
- The politics of international private law;

[10] Max Liljefors, Gregor Noll & Daniel Steuer, War and Algorithm (2019); Fleur Johns, #Help: Digital Humanitarianism and the Remaking of International Order (2023).

[11] "Even if formalism may no longer be open as a jurisprudential doctrine of the black and white of legal validity (a position perhaps never represented by anyone), nothing has undermined formalism as a culture of resistance to power, a social practice of accountability, openness, and equality whose status cannot be reduced to the political positions of any one of the parties whose claims are treated within it. As such, it makes a claim for universality that may be able to resist the pull towards imperialism." Martti Koskenniemi, The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960, at 500 (2002).

[12] Koskenniemi, *supra* note 9, at 616.

[13] David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. Int'l L. & Pol. 335, 489, 496 (1999–2000).

[14] *Id.*

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- Law as culture;
- Not interdisciplinarity but counterdisciplinarity;
- There is more than one market;
- Economics is multiple (sub-slogans: institutionalism, path dependence, unstable equilibrium);
- Link internal and external critiques;
- Down with proceduralization, with process, with participation;
- Be skeptical about the sites of liberal political engagement, human rights, the new "civil society";
- Engage the new "civil society," support new social movements, seek post-development strategies;
- Identities are important; *After Identity*;[15]
- Identities are hybrids, constructs, and projections;
- Celebrate intersectionality: the First World in the Third, the Third World in the First;
- Read liberalism symptomatically, its doctrines and institutions are the surface face of a desire;
- Be alert for the will to power;
- Embrace the dark side—of modernism, of law, of liberalism; and
- Ambivalence rules: perilous, pervasive, personal, political ambivalence.[16]

For the purposes of this introduction, Kennedy's list offers a useful, albeit non-exhaustive catalogue of projects that international law scholars of a critical bent have pursued in lieu of "the field's canonical inquiries."[17] Taking stock in this way also enables a quick-and-dirty assessment of which moves (if any) demand reassessment or re-routing in light of international law having since entered the "digital age."[18]

Looking back at this list now, it seems hard to justify striking anything from it, although CRILT scholars are tweaking and adding to it. The focus on the doctrines and institutions of liberalism, and on routine sites of liberal political engagement, for example, seems to speak of and to a time when liberalism was more ascendant than is the case now. Were this list to be rewritten today, one might note that many scholars, including some CRILT scholars, are looking just as searchingly at illiberalism, theocracy, and neofascism, in their many permutations. The idea of embracing liberalism's "dark side" seems to carry a different inflection, and to be associated with a different set of risks, to those apparent in 1999, even though it may still be a worthwhile undertaking.

If the list still holds currency, it may be because many of the terms and moves it records in shorthand seem to have taken on a life, in the decades since, that may not have been anticipated at the time of writing. The adage "[i]dentities are important," for instance, likely was not understood to encompass digital identities at the time of Kennedy's writing. Nonetheless, this slogan underscores the value of tracing technologies' constitutive effects: for instance, in digital border technologies' racialized regulation of global movement.[19]

"After identity" likewise remains a salient catchphrase for CRILT, as is apparent in the essay by Geoff Gordon of the T.M.C. Asser Institute in The Hague, Rebecca Mignot-Mahdavi of the University of Manchester, and Dimitri

[15] The latter was the title of a book, published in 1995, that explored the significance of national, sexual, and other identities in and for international legal work while calling into question legal strategies premised on protecting traditional identity groups. After Identity: A Reader in Law and Culture (Dan Danielsen & Karen Engle eds., 1995).

[16] Kennedy, *supra* note 13, at 496.

[17] *Id.* at 497.

[18] The idea of international law now occupying and playing a role in shaping a global "digital age" is a trope commonly reproduced in international legal scholarship. *See, e.g.*, Catherine Powell, *Race and Rights in the Digital Age*, 112 AJIL Unbound 339 (2018). As such, it is one that we adopt here, even while recognizing that much remains tendentious about this idea, including its periodization, its comprehensiveness, and all that it sets aside.

[19] E. Tendayi Achiume, *Digital Racial Borders*, 115 AJIL Unbound 333 (2021).

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Van Den Meerssche of Queen Mary University of London.[20] As they show, data-driven practices of governance produce subjects as transient clusters of attributes rather than as abstract, autonomous entities or identities classified along stable criteria of difference. Analysis of identity-formation in international law and related strategizing needs to adapt accordingly, they contend, and critical scholarship's longstanding attentiveness to identities' mutability and hybridity might aid this task.

The call to "[e]ngage the new 'civil society,' [and] support new social movements" sounded by some critical scholarship in international law likewise takes on a new inflection when extended to social media platforms. As highlighted in the essay by Dorothea Endres of the Graduate Institute of International and Development Studies in Geneva, Luisa Hedler of Copenhagen Business School, and Kebene Wodajo of the University of St. Gallen, social media platforms and socio-technical practices characteristic of their operation now exert significant normative force in the global politics of representation, conditioning the power of social movements insofar as they rely on such platforms to mobilize.[21] Illuminating this, and the ambivalent role of human rights working both within and against this phenomenon, the essay works in the tradition of linking "internal" and "external" critiques of bias.[22] There have emerged different reasons, perhaps, to "[b]e skeptical about . . . the new 'civil society.'"

"Be[ing] alert to the will to power" is what drives the essay by Gabriela Argüello, Matilda Arvidsson, and Niels Krabbe, all scholars from the University of Gothenburg.[23] They explore projections that unmanned aerial vehicles (UAVs) might close the enforcement gap of international environmental law in marine ecosystems, taking their cue from feminist and posthumanist scholarship. Kennedy's assertion that "[i]dentities are hybrids" is apt here: a technology portrayed as a force for environmental preservation promotes opportunities for resource extraction, data reappropriation, and informal law enforcement. UAVs extend the human deep into the marine ecosystem, offering a conduit for long-standing phantasies of human augmentation.

Lovisa Häckner Posse of the University of Gothenburg and Hedvig Lärka of Lund University "examine liberalism symptomatically" by comparing how liberal doctrine and institutions in taxation and migration frame the database as a legal source.[24] Databases play an important role in the functioning of Swedish migration courts, a role not acknowledged so as to maintain traditional conceptions of legal decision making. In the ongoing process of making laws on the subject of corporate income tax, however, the metaphor of a database of information exchanged via bilateral treaty networks becomes larger than life and blocks a comprehensive analysis of tax sovereignty as an issue. With these framings, the database is arguably hiding in plain sight. By pursuing an evidence-based conceptualization of its actual uses, both the legal ideologies that render it invisible, and the "desires" that drive them, are rendered examinable in the same move.

Finally, the essay by Priya Gupta of McGill University demonstrates new opportunities that CRILT presents for "[w]rit[ing] history against the progress narrative."[25] Far from progressively ameliorating racial domination, Gupta shows that states and international organizations further entrench racial hierarchy through their automation of border control measures, military surveillance and policing, and evaluative practices associated with global finance.

[20] Geoff Gordon, Rebecca Mignot-Mahdavi & Dimitri Van Den Meerssche, *The Critical Subject and the Subject of Critique in International Law and Technology*, 117 AJIL UNBOUND 134 (2023).

[21] Dorothea Endres, Luisa Hedler & Kebene Wodajo, *Bias in Social Media Content Management: What Do Human Rights Have To Do with It?*, 117 AJIL UNBOUND 139 (2023).

[22] MARY L. GRAY & SIDDHARTH SURI, GHOST WORK: HOW TO STOP SILICON VALLEY FROM BUILDING A NEW GLOBAL UNDERCLASS (2019).

[23] Gabriela Argüello, Matilda Arvidsson & Niels Krabbe, *Marine Ecosystem Bodies as Entangled Environments and Entangled Laws: Drones and the Marine Environment*, 117 AJIL UNBOUND 145 (2023).

[24] Hedvig Lärka & Lovisa Häckner Posse, *Hiding in Plain Sight? Conceptualizations of Databases in Migration Law and International Tax Law*, 117 AJIL UNBOUND 151 (2023).

[25] Priya Gupta, *Automating Racialization in International Law*, 117 AJIL UNBOUND 156 (2023).

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In all these settings, Gupta argues, automated decision-making in reliance on digital proxies for race is insulated from criticism by the opacity of machine learning processes. In such contexts, the practice of exposing racially discriminatory effects will frequently not be enough to expunge them because of the many ways in which machine learning algorithms depend on bias to function.[26]

Clearly, much has changed in the technological instantiations of domination and structural bias on the international plane—matters with which critical scholarship in international law has long been concerned. Nevertheless, as the essays in this symposium demonstrate, the repertoire of critical international law is unusually well-equipped to address these shifts. This makes CRILT a rich and felicitous sub-field of international law in which to read and write even as "[a]mbivalence [still] rules" within it.

[26] Louise Amoore, *Machine Learning Political Orders*, 49 Rev. Int'l Stud. 20 (2023).

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