Special Focus: Three Perspectives on the Implications of the GDPR for International Law

The General Date Protection Regulation (GDPR) is not the only international legal instrument[1] on data protection but it certainly is one of the most influential and polarising ones: Since it has become applicable in May 2018, it has influenced several data protection reform processes around the world, inside as well as outside of the European union (EU) – notably also in the United States (US),[2] India[3] and Brazil.[4] Its interpretation by supervisory authorities, leading to fines worth millions of Euro,[5] and courts, such as by the European Court of Justice (ECJ) in its *Google v. CNIL* decision of September 2019[6] have sparked controversy globally.[7]

For international law, the GDPR poses various pressing questions on the right to privacy and its balancing with competing interests, such as national security or economic interests. It furthermore evokes broader questions on the regulation of the digital environment: Which authority is eligible to regulate international data processing and more generally the digital environment? This special focus presents three different perspectives on some of the most pressing questions evoked by the GDPR.

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[1] We understand "international legal instrument" in a broad sense, including treaties between states, secondary law set by international organisations and the *sui generis* law of the European Union.

[2] California Consumer Privacy Act (CCPA), Assembly Bill No. 375, 29.7.2018.

[3] India, The Personal Data Protection Bill, Bill No. 373. The bill was introduced on 11.12.2019 in India's parliament; as of 29.10.2020 the bill is still pending.

[4] Brazil, General Data Protection Law (LGPD), Federal Law No. 13,709/2018, 15.8.2018.

[5] The highest fine amounted to 110 million Euro for the international hotel group Marriott International Inc. by the UK's Information Commissioner's Office, URL: <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2019/07/statement-intention-to-fine-marriott-international-inc-more-than-99-million-under-gdpr-for-data-breach/>.

[6] ECJ, Judgment of 24.9.2019, *Google v. CNIL*, C-507/17.

[7] *A. Keane Woods*, The CJEU Facebook Ruling: How Bad Is It, Really?, 4.10.2019, <https://www.lawfareblog.com>; *J. Daskal*, Internet Censorship Could Happen More Than One Way, 25.9.2019, <https://www.theatlantic.com>; see also the symposium "The GDPR and International Law", AJIL Unbound 114 (2020), 1 et seq.

The GDPR's Extra-Territorial Scope

Stephan Koloßa analyses one of the most controversial aspects of the GDPR: Its potential extraterritorial scope under Art. 3 (2) GDPR. Art. 3 (2) GDPR establishes jurisdiction for data processing of individuals located in the EU, even when the data processing is taking place outside of the EU – the so-called "domestic-market principle".[8] Commentators have criticised this as jurisdictional overreach of the EU, in effect forcing companies to bend to GDPR standards even when their business mainly operates on the territory of a third state.[9] Companies conducting their business outside of the EU may find themselves in the undesirable situation of being obliged to comply with diverging and potentially conflicting regulatory regimes for data processing.

Koloßa contextualises the jurisdictional clause of the GDPR in the context of general international law. He shows that the main basis for the exercise of jurisdiction in international law is in principle territorial jurisdiction, but that there are various instances in which the exercise of jurisdiction over extraterritorial constellations has been accepted by international courts. In this regard, he argues that the exercise of extraterritorial jurisdiction may be justified due to states' duty to protect under human rights law. This duty requires states to take all appropriate measures to secure human rights on their territories, regardless of whether detrimental impacts on human rights stem from activities conducted inside of a state's territory or extraterritorially. In his view, the duty to protect may hereby open up potential leeway for a more flexible exercise of jurisdiction, based on a sufficient nexus to the regulated subject matter. He shows that the expansive approach taken in the GDPR aligns with the jurisprudence of the ECJ on the right to be forgotten, and in particular with its judgement in *Google v. CNIL.* In this judgement the ECJ – although it accepted in the specific case that *Google* delists certain entries in its search engine only regionally via geo-blocking (and not globally as requested) – left the door open for EU legislation to adopt a more expansive approach to delisting.[10]

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[8] Art. 3 (2) GDPR: This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to: 1. the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or 2. the monitoring of their behaviour as far as their behaviour takes place within the Union.

[9] *T. Bromund*, The U.S. Must Draw a Line on the EU's Data-Protection Imperialism, Heritage Found, 9.1.2018, <https://www.heritage.org>.

[10] ECJ, Judgment of 24.9.2019, *Google v. CNIL*, C-507/17, para. 58.

Designed to Serve Mankind?

Critical of the expansive approach to extraterritorial jurisdiction is *Roxana Vatanparast.* In her article she contends that the GDPR may contribute to a form of digital hegemony of the EU in the sphere of data protection regulation – supported by the EU's own claim to have enacted the GDPR "to serve mankind". She argues that the European model of what she perceives as a primacy of privacy rights over other legal interests may not be shared universally. In her analysis she is observing three social shifts caused by the GDPR: A practical shift on data collection practices, a stabilising shift for the public discourse on data processing and a shift with regard to the normative elevation of privacy right claims by "data subjects". The legislative history leading to the GDPR shows, as she argues, that the GDPR is in line with a "bias" towards individual privacy rights in the EU, already underlying the legislative predecessor of the GDPR – the European Commission (EC) Data Protection Directive 95/46/EC – and also shown in recent judgments of the ECJ on privacy. She claims that the GDPR – by focusing exclusively on privacy – falls short of addressing the power structures and problematic business practices underlying data collection practices, hereby perpetuating "informational capitalism". In her case study of current data protection reforms in India she highlights that in an emerging economy the balancing process between privacy and other societal interests, such as economic development, may deviate from the European model. Even though some norms of the GDPR have been picked up in the Indian Data Protection bill without controversy, she hereby points at the limits of the GDPR as a global standard-setter.

The Normative Potential of the European Rule on Automated Decisions

In comparison to its jurisdictional aspects, the role of the GDPR for the regulation of artificial intelligence has been less discussed. Artificial intelligence is increasingly used in everyday life, and often in a rather self-evident beneficial manner, such as e.g. in the case of traffic lights. But what if an individual is negatively affected by automated decision-making, e.g. by an administrative act purely based on automated decision-making without human intervention?

In his contribution *Christian Djeffal* analyses how this problem is addressed by Art. 22 GDPR. He traces the genesis of the norm from its origins first in French law and Directive 95/46/EC – the GDPR's predecessor. He argues that Art. 22 GDPR should be interpreted as a "law-by-design" norm which would oblige companies to include legal considerations already into the technology design. In his view, such an interpretation would have unchartered normative potential. He highlights the influence the regulation of automated decision-making on the EU level has had on the Modernised Convention 108 on Data Protection of the Council of Europe which again has influenced data protection and automated decision-making regulation outside of Europe, e.g. in Argentina or Uruguay. With a view to the blanket prohibition of automated decision-making in some countries he argues that a blanket prohibition may be unnecessary as individuals' interests can be duly taken into account through other ways, e.g. through transparency obligations, the explicit prohibition of discrimination, or through a justiciable individual right to object.

The Völkerrechtsblog-Symposium and Our Expression of Thanks

Overall, all articles show that the GDPR is a legislative reaction to a highly dynamic and highly contested normative field. As mentioned above, in a digitally connected international order, increasingly shaped by data collection practices, various interests – from the interests of individuals, to those of processors, to broader economic, political, and geopolitical interests – are at stake. Regulating this field requires careful calibration of all these interests involved. It remains to be seen which role the GDPR can and should play in this calibration process.

The articles published in this special focus continue the discussion that took place in an online symposium of the *Völkerrechtsblog* in May 2019 on the occasion of the first anniversary of the GDPR becoming binding law in the EU member states.[11] Two of the authors contributing to this special focus already participated in the symposium. We would like to thank the editors in chief of the Zeitschrift für ausländisches öffentliches Recht und Völkerrecht – Heidelberg Journal of International Law, *Armin von Bogdandy* and *Anne Peters*, as well as the managing editor, *Rainer Grote*, for

[11] The symposium can still be accessed online under <https://voelkerrechtsblog.org/symposium/gdpr-as-global-standard-setter/>.

providing this platform to deepen the discussion started during the symposium.

Leonhard Kreuzer/Erik Tuchtfeld