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Peaceful Settlement of Interstate Online Disputes

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Abstract: This paper covers the existing international law toolbox on peaceful settlement of disputes and its application to online conflicts. It reiterates the existing measures of diplomatic and judicial measures to address differing positions of states and non-state actors as well as their applicability for the unique online environment.

Keywords: cyberthreats; cyberwar; peaceful settlement of disputes; mediation; negotiation; international courts

1. Introduction

International law has always had the preservation of peace as its primary purpose (Shaw 2008, p. 1010). This objective can be clearly identified across the history of international relations as they evolved into international law. It has also been reflected in the United Nations Charter, according to which all states are under a direct and explicit obligation to settle their disputes peacefully. This guiding principle of international law is aimed at preserving peace and international security alongside ensuring international justice, should these fall into peril from unilateral armed attacks or multilateral aggression.

While all interstate disputes fall within the ambit of states' duty to solve them amicably, the United Nations Charter Chapter VI introduces additional safeguards in case of disputes directly endangering international peace and security. Per UNC Article 33,

> *"parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means."*

The United Nations Security council may therefore call upon states in such a dispute, requesting them to settle their differences peacefully. Alternatively, the Security Council may decide to investigate the dispute itself and recommend to the disputing states individual procedures and measures to be applied (Cassese 2005).

The principle of peaceful settlement of interstate disputes is one of the safeguards for maintaining international peace. It implements the customary, peremptory norm prohibiting the use of force. This customary principle has been confirmed by, among others, the 1970 United Nations Declaration on Friendly Relations as well as the 1982 Manila Declaration on The Peaceful Settlement of Disputes. The binding nature of the principle named above, as derived from customary law and these two non-binding declarations, has been confirmed by the International Court of Justice in the *Nicaragua case*. The ICJ stated that the principle of peaceful settlement of disputes compliments the prohibition on the use of force (Cassese 2005).

Therefore, the principle of peaceful settlement of disputes can be derived from universally binding customary law and has been confirmed directly in the United Nations Charter. The binding nature of states' obligation to peacefully settle international disputes raises no concern. It is its practical implementation which remains ambiguous. As technologies and international relations evolve, it is forever more challenging to identify the applicable scope

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of the (prohibited) use of force, with notions like hybrid warfare and disinformation being added to the international law vocabulary. It is equally challenging to understand how to mitigate such potential use of force in cyberspace. Looking at most recent advancements in international geopolitics, cyberattacks usually proceed or accompany state disputes or conflicts (most recently between Ukraine and Russia, 2022). Regardless of whether an interstate dispute amounts to a conflict or a violation of international law, the legal character of cyberattacks that preceded and/or accompany it thus far has escaped legal analysis.

When it comes to cyberattacks, thus far has been consensus on two issues: states are sovereign in their attribution of a cyberattack to another actor and no state has thus far attributed a cyberattack they had considered to amount to an armed attack to another state or non-state actor. In brief, no cyberattack has yet amounted to an armed attack as per state interpretation and practice. Therefore, the rich dogmatic narrative around the legal classification of cyberattacks and armed attack and the threshold to be crossed for armed self-defence to be legitimized remains speculatory. An interstate dispute, however, is a category separate from "armed attacks". While there is, purposefully, no binding legal definition, it could be defined as a difference of opinions between states regarding factual circumstances or legal interpretations. Whenever such a difference in opinions occurs, states are legally obliged to settle it amicably, with the use of peaceful means. Such a difference may clearly also include circumstances of a cyberattack or a disruption of online traffic, attributed by one state to another. Thus far no state has directly claimed responsibility for an attack they had been attributed with, hence all the state attributions made thus far with regard to cyberattacks represent a difference in opinions between states and should be settled with the use of peaceful means, described below, since, as confirmed by the UN GGE, international law applies online as it does offline.

This paper aims to address this void and looks at the scope and content of states' obligation to peacefully settle disputes in cyberspace.

2. Defining Cyber Disputes

2.1. What Is a Dispute in International Law?

Dogmatically, the concept of a dispute in international law arises in the context of intrastate adjudication. This is due to the fact that the existence of a dispute is fundamental for an international court to recognize its jurisdiction over the case and disputing parties. Therefore, when defining an international dispute, one must look to international court proceedings and decisions on admissibility. When seeking to identify a dispute as per international law, adjudication of International Court of Justice and its decisions on admissibility should serve as reference.

In its interpretation of peace treaties with Bulgaria, Hungary, and Romania the ICJ noted that the existence of an international dispute is a matter of objective determination (ICJ 1950). In international practice, states have objected to the perception of a conflict or disagreement as being a dispute when such conflict or disagreement does not involve or impact any material interests of governments or nationals (ICJ 1962). This understanding was not shared by the ICJ, only to determine that even in the absence of material interests, a conflict or disagreement may be perceived as a dispute in the meaning of the ICJ statute (Crawford 2019). The ICJ referenced the Mavrommattis case, where it was observed that "a disagreement on a point of law or a conflict of legal views" is to be understood as a dispute.[1] The ICJ noted that for a dispute to exist "it must be shown that the claim of one party is positively opposed by the other".[2]

James Crawford notes that the existence of a legal interest on the part of a claimant is an issue separate from the actual existence of an interstate dispute.[3] As reflected in international adjudication, the existence of a legal interest may be perceived as "indispensable

[1] 1923 PCIJ Series A, number 2, 11. The same issue arose in Northern Cameroon case, ICJ reports 1962, pp. 15, 20, 27. Also see: Portugal versus Australia, ICJ Reports 1995, pp. 90, 99–100.

[2] South West Africa, ICJ Reports 1962, pp. 319, 328.

[3] James Crawford, Brownlies principles of public international law, p. 697.

basis of an justiciable dispute".[4] When considering an international dispute as directly dependent on the existence of a legal interest, the legal interest should be perceived as focal to the outcome of the case, particularly when a third party would choose to intervene based on Article 62 of the ICJ Statute.[5]

The concept of an international dispute, focal to the theme of this paper, is only one facet of the general issue that is the maintenance of international peace and security. The United Nations Charter prohibits the use of force by individual states and obliges them to address international dispute through peaceful means. There is no general obligation in international law to settle disputes amicably, however international law does offer procedures for such settlement by formal and legal procedures, which are to be consensual by their nature. The voluntary character of international settlement of disputes is therefore uniquely different from the nature of municipal law, where the courts adjudication is mandatory for individuals within their jurisdiction.

2.2. What Is an International Law Dispute in Cyberspace?

There is by far no uniform understanding of cyber disputes. Quite to the contrary, diverse terminology is used when various threats to state security, sovereignty or vital economic interests are discussed. These include references to cyber operations, cyber threats, cyber-attacks, cyber-crimes, or cyber disputes, discussed in the context of cybersecurity, cyberresilience and digital sovereignty of states or international organisations, such as the European Union. All of these concepts refer to an assessment of facts, circumstances or activities, conducted with the use of information and telecommunications technologies by state or private actors. When speaking about cyber threats it is usually understood that the underlying motivation behind a specific activity that involves the use of information and communication technologies is to destruct, disrupt, close damage to vital interests of another party.

In recent years, starting no sooner than with the 2007 Estonia attacks, many international law scholars have analyzed, researched, and written about various activities with the use of ICTs that disrupt or threaten international peace and legal order. As noted above and derived from well-established principles of international law, for an international dispute to arise, there must be differing opinions represented by states. The detection, identification and legal qualification of such occurrences remains within the sovereign authority of each state. The same must be said for attribution—attributing a cyber-attack to a specific actor, whether state sponsored or private, as per international law remains within the exclusive sovereign authority of each state. While the purpose of this paper is not to define cyber disputes as such, it is not possible to discuss measures devoted to settling cyber disputes without a brief attempt to identify them.

Reviewing most recent, comprehensive analysis of the issue by Francois Delerue, "cyber operations" are to be understood as limited to acts that only take place "within a computer network" (Delerue 2020). Delerue draws the line for cyber operations and the physical hostile acts against computers and computer networks, where "cyber operations" are all acts taking place in cyberspace (Delerue 2020). Alternatively, Scott Shackelford discusses "cyber-attacks" referring to analogous categories such as "cyber war", "cyber peace" and "cyber threats". His focus is on private companies who suffer economic losses due to criminal activities conducted with the use of ICTs (Shackelford 2015). The Tallinn Manual authors attempted a definition of a cyber operation with reference to an armed attack, where an cyber operation might constitute an armed attack depending on its scale and effects (Schmitt 2013). Regardless however of how cyber operations or cyber attacks are to be defined, there seems pertaining consensus that none of them observed thus far has reached the level of an armed attack, granting the Article 51 UNC authorisation for armed self defence. The Tallinn Manual 2.0 defines a dispute as a disagreement on a point of law

[4] northern Cameroon scoma ICJ reports 1963. pp. 15, 44–46.

[5] See generally Roseanne, intervention in the international Court of Justice 1993.

or fact coma a conflict of legal views or interests between parties relying on the definition in the Mavrommatis Palestine Concessions case (Schmitt 2017).

Therefore, when attempting to define a cyber dispute, one that should be subject to the application of peaceful settlement measures, a reference to the general understanding of such a dispute and its reference to the online environment should be made. A cyber dispute is therefore a difference of opinions by states regarding facts of a given case or conduct of actors involved in specific events, granted such facts or events are directly realted to online activities. It can therefore be the case of attribution of a cyber-operation, where states differ as to the actors involved or the sequence of events. It may also be the case of different identification, interpretation or use of digital evidence, cyber forensics or open-source information. As a matter of example, one could easily reference a hypothethical case of cyber attribution where state A claims to have sufficient cyber forensic evidence to attribute a given cyber operation to state B, refraining however from disclosing such evidence. State B might claim in such an event that it is in disposition of other facts, digital evidence or interpretation that leads it to believe that such an attribution is unjustified or false. Such differing opinions on activities performed with the use of ICTs, their nature, scope, and actors involved would be exemplary for a cyber dispute. The Tallinn Manual 2.0 offers an example of one state alleging that another has hacked into its critical infrastructure is connected to the Internet and has therefore violated its sovereignty (Schmitt 2017). Such a dispute may arise also with regards to the due diligence standard applicable in specific circumstances. Noting the technical challenges of attributing an act to a state, the dispute may resolve around a state omission—its failure to introduce all necessary measures in order to prevent harm or damage to a neighboring state. such a neighboring state in cyberspace would mean any country potentially or effectively impacted by a cyber activity. It could also be argued that a failure to prevent cyberespionage activities amounting to the infiltration of networks located within states jurisdiction, could also fall into the same category. Any case where a specific claim by one state is rejected by another, rising above the level of general tension between parties, could therefore be identified as a cyber dispute. States failing to find consensus on the interpretation of facts or events related to harmful activity with the use of ICTs would be in a position to deploy international law measures for the peaceful settlement of such a dispute.

3. State Obligation to Settle Disputes by Peaceful Means

3.1. Scope and Meaning

As for the current reading of international law, states are to endeavour to resolve their disputes in a peaceful manner. Such an obligation is well accepted in treaty based and customary norms of international law. This implies that states must engage through various means to achieve a peaceful resolution for their conflicting views or opinions. The obligation to peacefully settle interstate disputes originates from centuries of international law, dating back to late 19th century with the Alabama claims arbitration. Granted that it has been confirmed, amongst others by the United Nations Group of Governmental Experts (UN GGE), that international law applies offline as it does online, it is only appropriate to assume that this well-established principle of international law should be applied to cyber disputes as defined above.[6]

As for early 21st century, the recognised measures, and procedures to peacefully settle international disputes include the non-binding negotiations, good offices and mediation, as well as arbitral and judicial methods. Specifically, the *1970 UN Declaration on Principles of International Law concerning friendly relations and cooperation among states* requires nationals authorities to "*seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement*" or "*resort to regional agencies*

[6] Report of the UN Group of Governmental Experts (GGE) on Developments in the Field of Information and Telecommunications in the Context of International Security, adopted as UN General Assembly Resolution A/RES/70/237.

or arrangement or other peaceful means of their choice".[7] As per the current understanding of these principles, there is no direct obligation for states to choose a particular measure for a given dispute, although such an obligation may be enshrined within a dedicated treaty. Furthermore, states are not obliged to address a dispute through a particular mechanism which they have not consented to. This implies that a specific measure to mitigate an international conflict may only be implemented when both parties to the said conflict agree. Moreover, should one of the means of dispute settlement fail to bring the expected result, states are under a legal obligation to seek a settlement of the dispute by other peaceful means, agreed between them. Such a solution has been reflected in Principle 2, para. 3 in the *1970 UN Declaration* as well as in Paragraph 7 of the *Manila Declaration*. Moreover, when attempting to settle a dispute peacefully, states are required to refrain from any action, which may aggravate the situation as to endanger international peace and security. Such an obligation is enshrined in paragraph 4 principle 2 of the *1970 UN Declaration* as well as in paragraph 8 of the *Manila Declaration*.

Such an understanding of the obligation to peacefully settle disputes implies that a state violates its international obligation when it wilfully and in bad faith denies an opportunity to negotiate, mediate or accept good offices or implement any other peaceful procedure proposed by the counterparty. Similarly, should a particular mean or procedure fail to deliver a peaceful resolution, state's failure to seek further procedures that might help to solve a potential international conflict are to be regarded as contrary to its international obligation, derived from the norms named above. Consequentially, any action that might aggravate the existing conflict is also to be perceived as contrary to the international obligation of the dissenting party.[8]

As for the *1970 Declaration*, state parties seeking settlement are expected to consent with regards to the peaceful means they see suitable to the specific nature and context of an individual argument. As M.N. Shaw notes, it is broadly recognised for these means and measures to not form any specific hierarchy or imply obligations upon state prioritising one method over another in any particular circumstance.[9] These specific measures and their applicability for cyberspace related disputes are in more details described below.

3.2. Diplomatinc Means

3.2.1. Negotiation

The least complex measure for states to settle disputes is negotiation. It requires the least amount of direct effort, consisting of direct participation of disputing countries in bilateral or multilateral talks. Negotiation does not involve third parties and is non-binding. This means that it can be halted at any moment by either party, suspending it or simply walking away from the negotiating table, without any binding commitments upon it.

Negotiation is to be conducted in good faith, where the complementary norm on good faith applies. This means that negotiating parties are to sit at the negotiating table with the direct intent of achieving consensus and solving the dispute or at least identify the differences in their negotiating positions. The non-binding nature of negotiations implies that any commitments made by states during negotiations may not serve as basis for holding the state accountable, should the negotiations not be successfully concluded in a formal compromise consensus or treaty.

In some circumstances states may be under an obligation to engage in negotiations as per the provisions of bilateral or multilateral treaties.[10] Additionally, international

[7] General Assembly resolution 2625 (XXV), Manila Declaration on The Peaceful Settlement of International Disputes; General Assembly Resolution 37/590; The Declaration on the Prevention and Removal of Disputes and Situations which May Threaten International Peace and Security, Resolution 43/51; Declaration on Fact-Finding, Resolution 46/59; see also M.N. Shaw, International Law, CUP 2008, 1013.

[8] Idem.

[9] Ibid. p. 1014.

[10] Ibid. p. 1015 giving examples of the 1959 Antarctic treaty Article 8 paragraph 2; 1979 Moon Treaty, Article 15; 1978 Vienna Convention on Succession of States in Respect of Treaties, Article 41; 1982 Convention on the Law of the Sea, Article 283.

courts may oblige state parties involved in a dispute two start negotiations in good faith, directly indicating issues to be considered during such a negotiation process.[11] This specific provision is to be read in light of the general stipulation of the United Nations Charter, according to which no provision of international rule implies that the "*exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the court*".[12] Whenever an obligation to engage in negotiations is to be found in an international treaty, it is to be read as an obligation to pursue such a mean of peaceful settlement of disputes in good faith and with a view of achieving consensus.[13]

With regard to international disputes which may endanger international peace, the Article 33 *UN Charter* states that parties to such disputes are to solve their dispute by negotiation, inquiry or mediation. Should these prove unsuccessful, they are to resort to more complex forms of resolution.[14] Therefore, even in such grave circumstances, when international peace might be at stake, the obligation to engage in negotiations or any other mean of peaceful settlement of disputes does not hold a binding nature as per international. One could be derived however from the overarching principle of the *UN Charter* which obliges the states to act with the aim of maintaining peace.

When applying this method to cyber disputes it would be easy to imagine states in a cyber dispute to engage in negotiations. Such negotiations should be supported by technical experts helping diplomats to understand that technical perplexities behind cyber attribution or forensic evidence. This would be particularly important when discussing Article 2 Section 3 and Article 33 Section 1 of the UN Charter, which refer to disputes the continuance of which would likely endanger the maintenance of international peace and security. The complexity of evidence and attribution with regards to cyber disputes is therefore unnatural prerequisite for parties involved to seek amicable solution to such a potential conflict. For negotiations to be conducted in good faith it is also necessary for states to disclose the forensic evidence that they hold. While trust is always an issue with regards to cyber security, the well-established practice of diplomatic negotiations in good faith could support as successful application of this method. In the international discourse it has also been thoroughly discussed that creating a global center for cyber attribution and forensic evidence might support such process is between states. While the dogmatically plausible, creation of such a center seems distant at this stage of international cooperation on the matter at hand. Given rising international tensions, states prioritize national security and are reluctant to share information on vulnerabilities disclosure.

3.2.2. Good Offices and Mediation

Negotiations are a method of directly solving interstate disputes, whereas the involvement of third states or institutions is also provided for an international law. When third parties need or wish to support dispute resolution, they can reach for good offices or mediation. Similar to negotiations, neither of these is binding and both are to be performed in good faith. Good offices is a measure that provides for a third party to facilitate an environment where disputing states may exchange their positions on a neutral ground and in favourable circumstances with the overarching theme to achieve consensus. When good officers are being performed, third party is not to get directly involved in the discussion between the disputing states. Their mandate is limited to ensuring a supportive environment for exchange of views among the disputing states.

Alternatively, mediation implies that the third party is actively involved in the discussion and mandated to offer solutions. However, as M.N. Shaw rightfully notes, the dividing line between these two measures may at times prove challenging to identify, depending

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[11] North Sea continental shelf case, ICJ reports 1969, pp. 3, 53, 41.

[12] Cameroon versus Nigeria preliminary objections, ICJ Reports 1998, pp. 257–303.

[13] See: Railway traffic between Lithuania and Poland case, PCIJ, series A/B, n. 42, p. 116. Complementarily: sec. 1, para. 10 of the *Manila Declaration*, where states should negotiate meaningfully in order to arrive at an early settlement acceptable to the parties. M.N. Shaw, op.cit., 1060.

[14] North Sea continental shelf case, ICJ Reports 1969, pp. 3, 47.

on factual circumstances (Shaw 2008). The *Hague Conventions* of 1899 and 1907 provide for specific guidance on how these two processes should unfold between the disputing states. Provisions of these treaties indicate that parties are capable of offering good offices or mediation even when states had already engaged in military hostilities, with the caveat that extending such a diplomatic measure was not to be recognised as an unfriendly act.[15] Implicitly, even in time of war states are under an obligation to engage in diplomatic resolution of disputes including negotiations, mediations or good offices.

Mediation might prove the most effective measure of settling international disputes when it comes to those related to ICTs. As noted above cyber disputes are usually closely linked to attribution, forensic evidence or due diligence and state's failure to provide it. While the creation of an international cyber attribution center is unlikely, technical expertise offered by private sector companies or international organizations such as the ITU might prove highly valuable. Dedicated cyber-crime and cyber security sections within the Interpol or Europol also seem a good venue for states to discuss issues of cyber evidence and cyber attribution in an amicable manner. Similarly, the Octopus Conference operating within the Council of Europe in the framework of the Budapest Convention would seem like a perfect venue for states to attempt to settle their cyber disputes amicably with due regard with international law and human rights standards. It is regrettable that thus far no international organization has taken it upon itself to assist states with differing opinions on individual cyber disputes to find actionable consensus.

This could prove an opportunity for independent international NGO's, private parties and technical communities. One could look for example to the Cyber Peace Institute as an independent, international private body to offer such technical and political expertise. It would also be interesting to explore opportunities for technical organizations such as the Internet Corporation For Assigned Names and Numbers, Internet Society or the Internet Engineering Task Force to assist with their skill and expertise in identifying relevant standards processes and modes of behavior for cyber security and cyber resilience. There is an initial discussion on technical diplomacy and the way that technical and standard setter organizations are to play in ensuring international cyber security. Granted the depth of skill and expertise of their members, the role of such organizations in international mediations of cyber disputes would be invaluable. Complementarily, should a dispute be referring individual human rights, surveillance technologies or a bulk data collection, international organizations such as article mine teen or privacy international could assist states with their policy analysis and technical expertise to better identify the scope and meaning of individual rights impacted by the use of ICTs.

3.2.3. Inquiry

Disputes between states may regard facts or the interpretation of laws. When the factual circumstances of a case are subject to dispute, an inquiry might be useful to find at peaceful resolution. A commission of inquiry is to be instituted to support states in identifying factual circumstances around their dispute. Such a commission is to be constituted of "reputable observers" who are endowed with the task to identify and objectively describing circumstances of a given disputable case (Shaw 2008, p. 1020). The *1899 Hague conference* provided states with initial guidelines on work that a commission of inquiry should provide. Its report was to be a non-binding alternative to arbitration.[16] A commission of inquiry has proven particularly useful in specific circumstances throughout the years. United Nations has seen an increase in this form of peaceful settlement of disputes, which have been used in the context of factfinding. They have been explicitly mentioned in e.g., Article 90 of Protocol I to the 1949 *Geneva Red Cross Conventions*, which includes provisions that allow for the establishment of an international fact-finding commission. As way of example, one could point to the 1992 Security Council Resolution 780, which established a commission of

[15] Hague Convention I, Article 3, 1899.

[16] 1899 Hague Convention for the Pacific Settlement of International Disputes, Article 9.

experts to investigate violations of international humanitarian law in the former Yugoslavia. Since early 20th century however a commission of inquiry is no longer viewed as a process independent from other peaceful settlement of disputes. This is despite the fact that the *Permanent Court of Arbitration's* operational rules for fact-finding commissions of inquiry have been effective as of 1997. This relatively recent example of a statutory fact-finding commission is perceived more as an exception rather than the rule (Shaw 2008, p. 1020).

Commissions of enquiry would be the perfect fit for cyber disputes given both: their focus on professional technical assistance and the high level of technical expertise needed to understand the Internet environment, its operations, and the technical background for cyber disputes. As noted above, such commissions of enquiry could be supported by technical organizations. A dedicated service, providing technical expertise could be offered by international organizations such as the ITU or the Council of Europe as well as by international standard setting bodies themselves just to refer again to the IETF, ICANN or ISOC. Such a technical background would likely allow a feasible technical solution to be found for a dispute that might be arising between states. It would be recommendable for any future international consensus regarding cybersecurity to look to these technical organizations for assistance expertise and advice on identifying forensic evidence and ensuring feasible workable methods of settling online disputes.

3.2.4. Conciliation

Conciliation is yet another method of peaceful settlement of disputes between states that involves the active participation of a third party. Such a third party is involved in the process of peaceful settlement of an interstate dispute to actively offer solutions to be considered in good faith by the conflicting states. It can therefore be viewed to include elements of both: mediation and inquiry. Historically, conciliation has originated from factfinding commissions and permanent inquiry commissions.

As is the case with all diplomatic measures, conciliation proposals are only to be considered by states in good faith and are not in and of themselves binding. They therefore differ from international arbitration. Although the popularity of conciliation as a measure to settle disputes between states has declined in the second half of twentieth century and remained low ever since, this flexible tool for interstate dispute resolution does offer a unique opportunity for advancing international relations. They are useful when the disputing states are at a stalemate with regards to possible options for compromise or they differ on facts of the disputed case.

Conciliation as a mean for peaceful settlement of disputes has been described in much detail in the 1928 *General Act on The Pacific Settlement of International Disputes*, which was later revised in 1949. This guidance describes elements of both: a commission of inquiry and a third-party mediation.

According to this guidance and earlier international practise, conciliation is usually offered by groups of five persons, with one appointed by each of the disputing states and three individuals nominated consensually by both parties. The 1928 *General Act* describes conciliation committees are to operate no longer than six months and they are not to be open to the public. Conciliation is designed to address both: legal and factual questions and support states in addressing their concerns in these two categories. The composition of such a conciliation party is to represent both: legal and case specific expertise.

Tensions between states have been steadily rising in the globalised economy. These were reflected in the 1995 *UN Model Rules for The Conciliation of Disputes Between States*, which may be viewed as proof of increased interests from among the states to reengage in conciliation procedures. References to this specific method of diplomatic settlement of disputes have also been made in multilateral treaties including the 1957 *European Convention on The Peaceful Settlement of Disputes* or the 1964 *Protocol on the Commission of Mediation Conciliation and Arbitration* to the Charter of the Organisation of African Unity (now the African Union).

Conciliation is a method of peacefully settling international dispute that builds upon a mediation. As such it could include technical expertise mentioned above. We could therefore easily imagine an international organization or a technical standard setting community advising states not just with regard to forensic evidence but also on finding and implementing workable international measures to ensure national security as well as international peace. it is important to take appropriate note of the technical expertise necessary to provide conciliation with regard to cyber disputes. This siloed approach to international law, operating in vacuum, detached from discussions on Internet governance and technical operations of critical Internet infrastructures, has been an obstacle to finding workable solutions for international peace and cyberspace and the peaceful settlement of cyber disputes.

3.2.5. Regional Organisations

Article 52 para 1 and 2 *United Nations Charter* indicate that states are free to and encouraged to engage in regional arrangements or agencies, whose purpose is to maintain international peace and security. Such organisations may be better equipped to reflect regional consensus with regards to measures relevant and applicable to maintaining peace. As per implementation of Article 52 of the *United Nations Charter*, many regional regimes have been instituted by states to address this concern and the need for peaceful settlement of intrastate disputes.

Even though it is the *United Nations Charter* that directly calls upon regional organisations to offer counsel for peaceful settlement of disputes, it also emphasises in para. 4 that the competences of the Security Council and General Assembly still apply as per Articles 34 and 35 UNC.

These give the Security Council and the General Assembly decisions the supremacy over regional arrangements and decisions with regards to peaceful settlement of disputes. Effectively the Security Council, in accordance with Article 53 para. 1 UNC may, where appropriate, use regional organisations for the enforcement of their authority. This provision is a reflection of Article 24 that endows the Security Council with the primary responsibility for the maintenance of international peace of security. It also emphasises the peremptory nature of *United Nations Charter* rules, implying that in a case of conflict between the obligations of a UN member derived from the Charter and those stemming from other international law sources, the former shall prevail. Regional organisations are to support the Security Council in the maintenance of peace, UNC clearly indicates that it is the Security Council are the General Assembly who are endowed with the task of ensuring global peace.

Among many international regimes supporting and complementing the ultimate UNC purpose, there are various regional arrangements specifying its local implementation. And so, the 1957 Council of Europe *Convention for The Peaceful Settlement of Disputes* provides for legal disputes to be sent to the International Court of Justice with conciliation being the first mandatory step to be taken to achieve international consensus. Similarly, the NATO alliance offers good offices facilities as well as inquiry, mediation, conciliation and arbitration as measures supporting its overall purposes. Within the Organisation on Security and Cooperation in Europe and it's 1991 Valletta report, amended by the 1992 Stockholm decision, any OSCE party may request for the dispute settlement mechanism to be introduced within the OSCE framework. Once established, such a mechanism invites subject matter experts and facilitators to offer comments or advice with regards to the dispute between requesting parties.

In light of the observations made above it would be only natural for dedicated sections bodies or working groups of international organizations dealing with cybersecurity to offer their expertise to settle disputes. We could therefore see the United Nations using its Internet Governance Forum as a venue for states to discuss their differing opinions in a neutral environment, supported by deskilling expertise of technical and civil society actors. Depending on the will of states, who might find some comfort and the current ambiguity

of the application of international law in cyberspace, ad hoc committees or commissions operating within the framework of the United Nations or the Council of Europe could offer assistance to disputing states. depending on the success and development of such ad hoc measures better structured judicial body framework or mechanism could be set up. For example it might prove feasible for the United Nations to set up an Arbitration Tribunal for the Peaceful Settlement of Cyber Disputes, in line with the norms and principles described below.

3.3. Judicial Means—Binding Methods of Dispute Settlement

3.3.1. Arbitration

Arbitration is a result of evolving diplomatic settlement of interstate disputes. It is an advancement of non-binding diplomatic measures into a binding legal procedure. Arbitration can be dated back to late 18th century and the Jay Treaty between Britain and America, where the two disputing states set up a Joint Commission to solve controversies around the legal interpretation of their contract. The Jay Treaty arbitration was viewed successful and other states followed to implement arbitration as a popular way for dispute settlement at the dawn of the 19th century.

The 1899 Hague Convention for the Pacific Settlement of Disputes also refers directly to international arbitration as one of the recommended means to solve interstate arguments. As per its Article 15 "the settlement of differences between states by judges of their own choice and on the basis of respectful law" is one of the explicitly named measures for solving differences between states. This description is understood to define international arbitration and as such has been reflected in, among others, Article 37 of the 1907 Hague Convention as well as by the Permanent Court of International Justice and the International Court of Justice in their adjudications.[17]

Because arbitration was recognized as the most successful way of settling interstate arguments, states have used it as the default when diplomacy fails (Shaw 2008, p. 1049). The establishment of the Permanent Court of Arbitration (PCA), following the 1899 and 1907 Hague Peace Conferences, confirmed the binding nature of states' legal obligation to accept the terms of its award. The Permanent Court of Arbitration is different from regular international or national courts as it does not have a fixed panel of judges. A list of PCA judges who can potentially be attributed to advise on a specific case is provided to states, who then decide upon further members of the arbitrational panel, competent to advise and assess given case of dispute. State parties to the PCA each nominate a maximum of four such highly qualified individuals, to be selected for the arbitration of individual disputes. Individuals enrolled into the list of judges should be of highest competency in questions of international law of the highest moral reputation as well as disposed to accept the duties of an arbitrator. The court itself does not adjudicate cases as a usual court would but rather offers to states a choice to identify highly qualified individuals who will help solve the dispute.

Recent years have seen an increased number of cases presented to international arbitration, also with the use of assistance from the PCA. As international economic law has evolved, arbitration played a forever more significant role. In a globalized economic environment arbitration offers a flexible fast-paced and relatively cheap mechanism for solving case specific disputes with qualified advice.

The PCA evolution has included procedure and advice on arbitration not just between and among states, but also included situations involving non state actors. It also covers cases outside traditional state authority (e.g., bilateral investment treaties) as well as interests of more than one state, with the example of the 2001 Optional Rules for Arbitration of Disputes Relating to Natural Resources or The Environment.

[17] The Permanent Court of Justice, The case of the interpretation of article 3 paragraph 2 of the Treaty of Lausanne, PCIJ Series B, number 12, page 26; International Court of Justice, *Qatar versus Bahrain*, ICJ Reports, 2001, paragraph 113.

The PCA does not hold the exclusive authority to advise on arbitration. Arbitration can be arranged in a number of ways, where states may decide to appoint a single arbitrator or a panel of judges. As per usual practice states will appoint the same number of judges each, with the chairman or the empire appointed by either the parties jointly or those judges who had already been agreed upon between them. Furthermore, it has become usual practice to suggest a head of state or a former state official to be a single arbitrator. As per this practice, such an arbiter then nominates experts in the field of relevant international law or other disciplines, who will act on their behalf.

Where states have not agreed otherwise, the default mechanism proposed by the PCA is for each stage to select two judges from the panel, where just one of them may hold the nationality of the selecting state. It is up to these selected judges to decide upon a chairman or a chairwoman and where no agreement can be achieved, a third party will be assigned to nominate the empire,

Arbitration is non-binding unless such an obligation is enshrined in a treaty, one that is case specific or of general in nature. When no such treaty between the states exists, their explicit compromise can be the basis for arbitration. Such a compromise indicates the scope of the arbitration and the judges as well as the rationae materiae as basis for the decision.

3.3.2. Adjudication—Permanent International Courts

As noted above, decision of an arbitration tribunal may be binding to the parties, yet its jurisdiction is not mandatory, unless required by a treaty binding disputing parties. This is not the case for permanent international courts. In the late 19th century, aiming to advance existing arbitration procedures, states have agreed to introduce permanent international judicial bodies with the Permanent Court of Justice set up in 1920 and operating within the League of Nations.

The PCIJ was to complement existing arbitration mechanisms and safeguard international peace since, as noted above, dispute settlement, including through judicial means, has always been a way to prevent war. Despite the failure of the League of Nations and the horrors of the Second World War, the international community agreed to maintain a permanent international court as a quick and easily accessible way for states to solve their disputes in an amicable manner. As a result of this policy, Article 92 of the UN Charter allowed for the creation of the International Court of Justice (ICJ) as the principal judicial organ of the United Nations. Historically it follows the PCIJ, also with regard to its adjudication and with its statute closely resembling the original statute and jurisdiction of the PCIJ.

While the detailed description of the ICJ mandate falls outside the scope of this brief paper, the competence and jurisdiction of the court remains a subject of international discussion. We view international adjudication as mandatory, yet practically states must explicitly accept ICJ jurisdiction for it to be able to decide upon a case where an individual state is a party. In general, the ICJ jurisdiction is based on the agreement of the States. The manner in which this approval is communicated affects the way in which a case is presented to the Court. Such an agreement may be derived from special agreement, as per Article 36, paragraph 1, of the Statute or through a direct reference in a treaty or convention. Article 36 explicitly grants the ICJ jurisdiction over cases referred to it by the parties thought a notification to the Registry following an agreement, which indicates the subject of the dispute and its parties, as per Article 40, para. 1 ICJ and Art. 39 Rules of Court. ICJ holds compulsory jurisdiction in legal disputes between states accepting the same obligation, that is recognizing the ICJ jurisdiction in legal disputes. As per Article 36, paragraphs 2–5 of the ICJ Statute states parties to the Statute:

> *"may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:*
>
> *(a) the interpretation of a treaty;*
> *(b) any question of international law;*

(c) *the existence of any fact which, if established, would constitute a breach of an international obligation;*
(d) *the nature or extent of the reparation to be made for the breach of an international obligation."*

In the case of *forum prorogatum*, that is if a state has not recognized the jurisdiction of the Court at the time when an application instituting proceedings is filed against it, that State has the possibility of subsequently accepting such jurisdiction to enable the Court to entertain the case. The ICJ has jurisdiction as of the date of acceptance.

Under Article 35, para. 2 of the ICJ Statute, the court is open to states not parties thereto. Relevant conditions, subject to the special requirements included in agreements in force, are to be identified by the Security Council, with due regard not to result in inequality before the Court. Such a case has been subject to the 1946 Security Council Resolution 9. To have admission to the ICJ, a state must file a declaration with the ICJ Registry. In such a declaration a state is to accept ICJ jurisdiction, in accordance with the UN Charter and agree to comply with the ICJ decision in good faith. It also agrees to accept all obligations of a UN member, as per Article 94 of the UN Charter. Such a statement may refer to a dispute or disputes already arisen or to disputes which may arise in the future.

Applying these principles to the cyber domain it is safe to say that states are not ready to address their cyber disputes through existing judicial processes. Reasons for this state of affairs are twofold: limited credibility of forensic evidence and certain benefits derived from current ambiguity of state international obligations and cyberspace. while the UNGG observed that international law applies online as it does offline, it has refrained from specifying what this means in practical terms. Moreover, there are states interested in introducing a dedicated separate regime for cyberspace as husband a case for the law of the sea or environmental law. Introducing such a dedicated regime would imply also introduction of exceptions to the common international law principles. For political reasons it seems that the international community is not ready to use judicial methods of cyber disputes settlement. This is complemented by the challenges of cyber attribution and forensic evidence with states reluctance to share the information that they have in their disposal. with this in mind it is safe to say that negotiations mediations and good services would be the best suited methods for peaceful settlement of cyber disputes. This is due to their flexible nature and once supported by technical expertise of international technical communities they might prove the most feasible methods for settling cyber disputes.

4. Peacefully Settling Intrastate Disputes in Cyberspace

General Comments

All of the measures described above maybe directly applied to settling interstate disputes in cyberspace. Whether negotiation, mediation, arbitration, or judicial proceedings, all of these are well suited to support states to solve their disputes related to online communications and data transfers. As noted by the UN GGE, international law applies offline as it does online. With this in mind it is safe to say that all states are under a direct obligation to solve that dispute through peaceful means. Where the notion of an armed attack or do use of force provokes much ambiguity in the online context, the flexible concept of dispute is relatively easy to define as a difference in opinions between states or non-state actors as to the factual or legal circumstances of a given case or event. Whenever there is a difference of opinions between states and, possibly, non-state actors reading of international law and their obligations, rights, and necessary conduct, they are all under an international obligation to settle such controversies in a peaceful manner.

While the nonbinding meditation, negotiation or good counsel are freely available to states, it is arbitration and judicial proceeding that provoke most interest with regards to settling interstate disputes in cyberspace. Questions that need to be answered focus around the availability of arbitration and judicial proceedings with regards to cyber threats cyber-attacks or restriction of individual freedoms my state-imposed procedures or sanctions.

5. Outlook

As international law's application in cyberspace increases, it is likely that states will be forever more inclined to look into international law toolbox to also settle their disputes around cyberattacks or cyberthreats. As per the UN Charter all states are under a direct obligation to settle their disputes amicably. Whether a cyberthreat is a stand-alone occurrence or accompanies other rogue action, when diplomacy fails, states are under an obligation to engage in a dialogue of their choice, whether alone (negotiations) or with the aim of third parties (e.g., mediation) to seek a peaceful compromise to their dispute. The non-binding nature of all the diplomatic means of dispute settlement support the flexibility of these international law instruments.

Binding international measure to settle interstate disputes are more challenging to implement with regard to online disputes. The concept of an international convention for cyberspace remains dim, yet online activity can, with some effort, be qualified as falling within a number of international conventions that, e.g., recognize ICJ jurisdiction. An interesting example would be the 1948 Convention on the Prevention and Punishment of the Crime of Genocide which includes the prohibition of relevant propaganda (Article III). As per its Article IX, disputes between contracting parties 'relating to the interpretation, application or fulfilment' of the convention may be submitted to the ICJ at the request of any of the parties to the dispute. As per its Article III direct and public incitement to commit genocide punishable. Should a state incite genocide through its online activities to allow for such incitement to happen from within its jurisdiction, it might be faced with a direct complaint to the ICJ, one which they will be obliged to answer to, particularly given the universal customary character of the prohibition of genocide (Mettraux 2019).

As global tensions increase, also with regard to online disputes, and the discussion on the law of armed conflict for cyberspace is to no avail, international lawyers and state authorities alike should look into the international law toolbox to identify feasible and practical means for settlement of interstate disputes. The documents named above allow to identify the composition of such a toolbox and offer a unique opportunity to further advance the international dialogue on peaceful exploration of cyberspace.

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