

# CYBER STABILITY CONFERENCE

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## **Peaceful settlement of disputes and cyberspace**

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- Importance of PSD in the cyberspace and in cyber conflicts.

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# UNITED NATIONS

- **Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security .**
- Beginning in 2004, six Groups of Governmental Experts (GGE) have studied the threats posed by the use of ICTs in the context of international security and how these threats should be addressed.
- **The work of the Groups of Governmental Experts**
  - 2009 – 2010 – [A/65/201](#)
  - 2012 – 2013 – [A/68/98\\*](#)
  - 2014 – 2015 – [A/70/174](#)
  - 2019 – 2021 – [A/76/135](#)
- Important role of the **UNIDIR (UN Institute for Disarmament Research)**



# Doctrine:

- Crawford, James. 2019. Brownlie's Principles of Public International Law, 8th ed. Oxford: Oxford University Press, p. 694.
- Delerue, Francois. 2020. Cyber Operations in International Law. Cambridge: Cambridge University Press, p. 35.
- Kulesza, Joanna. 2022. Peaceful Settlement of Interstate Online Disputes. Laws 11: 49.
- Simmons, Noah. 2014. A Brave New World Applying International Law of War to Cyber-Attacks. Journal of Law & Cyber Warfare, Vol. 4, No. 1 (Winter 2014), pp. 42-108.
- Schmitt, Michael. 2017. Tallinn Manual 2.0. Cambridge: Cambridge University Press, p. 304.
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# CONFERENCE

## The Peaceful Settlement of Cyber Disputes

- Online Conference organised by the **Sheffield Centre for International and European Law, University of Sheffield, Thursday 4th March and Friday 5<sup>th</sup> March 2021.**
- This was the first conference organised by the Sheffield Centre for International and European Law on the topic of the “peaceful settlement of cyber disputes”.
- The conference was attended by distinguished panellists from institutions in the United Kingdom, Europe, the United States and Canada and over sixty guests
- The conference was organised by **Professor Nicholas Tsagourias, Dr Russell Buchan and Dr Daniel Franchini** of the Sheffield Centre for International and European Law at the University of Sheffield.



# Introduction

- The use of information and communication technologies (ICTs) has increased rapidly over the years, resulting in a significant impact on national security and international peace and security.
- **International law plays an important role in regulating state behavior in cyberspace, with the UN Charter** being the first source of international law that states agreed upon as applicable in cyberspace.
- This presentation will provide an overview of the existing doctrinal understanding of different principles and obligations in the ICT environment.



# Introduction

- Cyber operations have become part of armed conflicts, and the international community recognizes that the “*use of ICTs [information and communication technologies] in future conflicts between States is becoming more likely*” (OEWC report, para. 16).





# ICT Environment - What does it refer to?

*“ "ICT Environment" means the Authority's computing environment (consisting of hardware, software and/or telecommunications networks or equipment) used by the Authority or the Contractor in connection with this Agreement which is owned by or licensed to the Authority by a third party and which interfaces with the Contractor System or which is necessary for the Authority to receive the Services **and** the information and communications technology system used by the Contractor in performing the Services including the Software, the Contractor Equipment and related cabling (but excluding the Authority System)”*

*Department for Transport General Conditions of Contract for Services – p.10*





# Introduction

- Understanding principles and doctrines that are likely to applied on ICT environment is crucial especially in an arena that conflicts can have severe consequences.
- It is important to promote the preventive function of legal principles in order to maintain stability, peace and cooperation between nations. By adhering to these principles and fulfilling their international obligations, countries can **avoid conflicts** to arise and work towards more prosperous world.



# PART 1.

# PRINCIPLE OF PEACEFUL SETTLEMENT OF DISPUTES

*An obligation*



# The principle of peaceful settlement of disputes

- The principle of the peaceful settlement of international disputes is one of the fundamental principles of international law. Under this principle it is commonly understood that all disputes between states and other subjects of international law of any nature and origin should be resolved exclusively by peaceful means.
- From historical point of view, we can outline three main stages of its development. The first stage includes holding of The Hague Peace Conferences of 1899 and 1907. They are regarded as fundamental events in the formulation and evaluation of this principle as one of the most important in international law in the context of security and peaceful coexistence of states.



# The principle of peaceful settlement of disputes

- The second stage, covering the period 1914–1945, is characterized as the most tragic in the world history due to the first and the second world wars.
- These dramatic events caused the foundation of the League of Nations – a universal organization in which the principle of the peaceful settlement of international disputes received the first recognition, but not authoritative enough to completely establish itself in international law.
- Finally, it is the creation of the United Nations and its activities aimed at improving the mechanism for settling international conflicts and ensuring universal security that represents the final stage in the formation of the principle of the peaceful settlement of international disputes/



## Article 2 (3) of the UN Charter:

*“ All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered ”*

The states' obligation to resolve their differences by pacific methods gained more significance with the prohibition of the use of force formulated in article 2 (4):

*“ All Members shall refrain in their international relations from the threat or use of force .. ”*



# The principle of peaceful settlement of disputes

- It implements the customary, peremptory norm prohibiting the use of force :
  1. *1970 UN Declaration on Principles of International Law concerning friendly relations and cooperation among states*
  2. *1982 Manila Declaration on The Peaceful Settlement of Disputes.*

**The binding nature of the principle PSD has been confirmed by the International Court of Justice in the Nicaragua case.**

- However, its **practical implementation remains ambiguous**:

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 y it thus far has escaped legal analysis.





# The principle of peaceful settlement of disputes

- When it comes to **cyberattacks**: An interstate dispute is a category separate from “armed attacks”.
- There is **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.
- (UN GGE), “International law applies online as it does offline”





## Article 2 (3) of the UN Charter:

*“All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered”*

The states' obligation to resolve their differences by pacific methods gained more significance with the prohibition of the use of force → formulated in article 2 (4):

*“All Members shall refrain in their international relations from the threat or use of force ..”*



## Article 33 of the UN Charter:

*“The 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 principle of peaceful settlement of disputes

- 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.



# 1. Diplomatic Means of PSD:

## 1.1. 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.

Negotiation is to be conducted in good faith, where the complementary norm on good faith applies (*Mavrommatis case* (IPCJ 30 August 1924)–(*Notteböhm case* 1955).

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.



## Recommendation:

- In the international discourse it has been thoroughly discussed that **creating a global center for cyber attribution and forensic evidence** might support such process is between states.
- The 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.



# 1. Diplomatic Means of PSD:

## 1.2. Good Offices and Mediation

The involvement of third states or institutions is also provided for an international law.

Similar to negotiations, neither of these is binding and both are to be performed in good faith.

Mediation might prove the most effective measure of settling international disputes when it comes to those related to ICTs. Cyber disputes are usually closely linked to attribution, forensic evidence or due diligence and state's failure to provide it.





## Recommendation:

- Dedicated cyber-crime and **cyber security sections within the *Interpol*** seem a good venue for states to discuss issues of cyber evidence and cyber attribution in an amicable manner.
- 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.





# 1. Diplomatic Means of PSD:

## 1.3. Inquiry

- 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.
- A commission of inquiry has proven particularly useful in specific circumstances throughout the years. 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.
- 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.



## Recommendation:

- A dedicated service, providing technical expertise could be offered by international organizations 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.



# 1. Diplomatic Means of PSD:

## 1.4. 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.

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.

**It is important to take appropriate note of the technical expertise necessary to provide conciliation with regard to cyber disputes.**



# 1. Diplomatic Means of PSD:

## 1.5. Regional Organisations

Article 52 para 1 and 2 UN 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

Articles 34 and 35 UNC: give the Security Council and the General Assembly decisions the supremacy over regional arrangements and decisions with regards to peaceful settlement of disputes.



# THE AFRICAN UNION FRAMEWORK

- **An African Union Convention on Cyber Security and Personal Data Protection** was drafted to establish a 'credible framework for cybersecurity in Africa through organization of electronic transactions, protection of personal data, promotion of cyber security, e-governance and combating cybercrime (signed 27 June 2014), 13 ratifications.

Article 34 Dispute settlement (negotiation and other peaceful means)

- AUCIL- Commissioner Mohamed Helal, in his capacity of special Rapporteur/ 2022 (on going) Study **"Peace and Security in Cyberspace: Proposal for an African Contribution to Developing the Rules of International Law Governing Cyberspace"**



# Recommendation:

- 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.





## 2. Judicial Means of PSD:

### 2.1. 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 (Jay Treaty between Britain and America); Article 15 of the 1899 Hague Convention for the Pacific Settlement of Disputes; Article 37 of the 1907 Hague Convention .

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.





## 2. Judicial Means of PSD:

- **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 arbitral 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 highly qualified individuals who will help solve the dispute.



## 2. Judicial Means of PSD:

### 2.2. Permanent International Courts

The Permanent Court of Justice set up in 1920 and operating within the League of Nations 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.



## 2. Judicial Means of PSD:

- 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 through 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.



## 2. Judicial Means of PSD:

*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.”*



## 2. Judicial Means of PSD:

- 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 two: 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 and that would imply also introduction of exceptions to the common international law principles.





## 2. Judicial Means of PSD:

- 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.



## PART 2.

Overview of elements of peaceful settlement of disputes discussed by states (National positions)-

*A76/136 13 July 2021*





# 1. Peaceful Settlement of Disputes

- The Group notes that, in accordance with their obligations under Article 2(3) and Chapter VI of the Charter of the United Nations, States party to any international dispute, including those involving the use of ICTs, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by such means as described in Article 33 of the Charter, namely negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
- The Group also notes the importance of other Charter provisions relevant to the resolution of disputes by peaceful means.



# 1. Peaceful Settlement of Disputes

- “Disputes”: In their use of ICTs, States must observe, among other principles of international law, State sovereignty, sovereign equality, **the settlement of disputes by peaceful** means and non intervention in the internal affairs of other States. Existing obligations under international law are applicable to State use of ICTs. States must comply with their obligations under international law to respect and protect human rights and fundamental freedoms;
- In this respect, the Group reaffirmed the commitments of States to the principles of the Charter and other international law: sovereign equality; the settlement of international disputes by peaceful means in such a manner that international peace and security and justice are not endangered.



## 2. Good faith

- This norm reflects an expectation that if a State is aware of or is notified in good faith that an internationally wrongful act conducted using ICTs is emanating from or transiting through its territory it will take all appropriate and reasonably available and feasible steps to detect, investigate and address the situation.
- It conveys an understanding that a State should not permit another State or non-State actor to use ICTs within its territory to commit internationally wrongful acts.



## 2. Good faith

- A State that is aware of, but lacks the capacity to address internationally wrongful acts conducted using ICTs in its territory may consider seeking assistance from other States or the private sector in a manner consistent with international and domestic law.
- The establishment of corresponding structures and mechanisms to formulate and respond to requests for assistance may support implementation of this norm.
- States should act in good faith and in accordance with international law when providing assistance and not use the opportunity to conduct malicious activities against the State that is seeking the assistance or against a third State



# CONCLUSION

- 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 cyber threats.
- 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.



# CONCLUSION

- International lawyers and state authorities alike should look into the International law toolbox to identify feasible and practical means for settlement of interstate disputes.
- This allows to identify the composition of such a toolbox and offer a unique opportunity to further advance the international dialogue on peaceful exploration of cyberspace.
- **Final Question: Do you think there is a Need for a Specialised Dispute Settlement Mechanism for Interstate Cyber Disputes? Or there may be only a need to amend/ complement established procedures ?**





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