



GLOBAL COMMISSION
ON THE STABILITY OF CYBERSPACE

BRIEFINGS FROM THE RESEARCH ADVISORY GROUP

BRIEFINGS TO THE GLOBAL COMMISSION ON THE STABILITY OF CYBERSPACE
FOR THE FULL COMMISSION MEETING, BRATISLAVA 2018

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GLOBAL COMMISSION
ON THE STABILITY OF CYBERSPACE

PROMOTING STABILITY IN CYBERSPACE TO BUILD PEACE AND PROSPERITY

The Global Commission on the Stability of Cyberspace (GCSC) engages the full range of stakeholders to develop proposals for norms and policies that enhance international security and stability and guide responsible state and non-state behavior in cyberspace.

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ABOUT THE GLOBAL COMMISSION ON THE STABILITY OF CYBERSPACE

The Global Commission on the Stability of Cyberspace (GCSC) is helping to promote mutual awareness and understanding among the various cyberspace communities working on issues related to international cybersecurity. By finding ways to link the dialogues on international security with the new communities created by cyberspace, the GCSC has a genuine opportunity to contribute to an essential global task: supporting policy and norms coherence related to the security and stability in and of cyberspace.

Chaired by Marina Kaljurand, and Co-Chairs Michael Chertoff and Latha Reddy, the Commission comprises 25 prominent Commissioners representing a wide range of geographic regions as well as government, industry, technical and civil society stakeholders with legitimacy to speak on different aspects of cyberspace. The GCSC will be linked to existing initiatives, such as the Global Commission on Internet Governance and the London Process, through Special Representatives.

ABOUT THE BRIEFINGS

The briefings and memos included in this issue were developed by independent researchers working within the GCSC Research Advisory Group. The papers included here were submitted to the Global Commission on the Stability of Cyberspace (GCSC) in order to support its deliberations.

The opinions expressed in the publications are those solely of the authors and do not necessarily reflect the views of the GCSC, its partners, or *The Hague Centre for Strategic Studies*. The Commission does not specifically endorse the respective publications, nor does it necessarily ascribe to the findings or conclusions. All comments on the content of the publications should be directed to the respective authors.

As a result of the Commission Meeting in New Delhi in November 2017, the GCSC issued a set of Requests for Proposals (RFPs) for four research projects. The Commissioners selected the winning proposals at the Commission Meeting in Lille, France in January 2018. The researchers received the funding associated with the RFPs and were invited to present their work to the Commissioners during the Commission Meeting in Bratislava in May 2018.

MEMO 2

CONCEPTUALIZING AN

INTERNATIONAL SECURITY

REGIME FOR CYBERSPACE

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MEMO Nº2

INTRODUCTION

Policy-makers often use past analogous situations to reshape questions and resolve dilemmas in current issues. However, without sufficient analysis of the present situation and the historical precedent being considered, the effectiveness of the analogy is limited.⁸⁵ This applies across contexts, including cyber space. For example, there exists a body of literature, including The Tallinn Manual⁸⁶, which applies key aspects (structure, process, and techniques) of various international legal regimes regulating the global commons (air, sea, space and the environment) towards developing global norms for the governance of cyberspace.

Given the recent deadlock at the Group of Governmental Experts (GGE), owing to a clear ideological split among participating states, it is clear that consensus on the applicability of traditional international law norms drawn from other regimes, will not emerge if talks continue without a major overhaul of the present format of negotiations.⁸⁷ The Achilles Heel of the GGE thus far has been a deracinated approach to the norms formulation process.⁸⁸ There has been excessive focus on the content and the language of the applicable norm rather than the procedure underscoring its evolution, limited state and non state participation, and a lack of consideration for social, cultural, economic and strategic contexts through which norms emerge at the global level. Even if the GGE process became more inclusive and included all United Nations members, strategies preceding the negotiation process must be designed in a manner to facilitate consensus.

There exists to date, no scholarship that traces the negotiation processes that lead to the forging of successful analogous universal regimes or an investigation into the nature of normative contestation that enabled the evolution of the core norms that shaped these regimes. To develop an effective global regime governing cyberspace, we must consider if and how existing international law or norms for other global commons might also apply to 'cyberspace', but also transcend this frame into more nuanced thinking around techniques and framework that have been successful in consensus building. This paper focuses on the latter and embarks on an assessment of how regimes universally maximized functional utility through global interactions and shaped legal and normative frameworks that resulted, for some time, at least, in a broad consensus.

⁸⁵ Richard E Neustadt and Ernest R May, *Thinking in Time: The Uses of History for Decision-Makers*, 1st FreePress pbk. ed. 1988 (New York: Free Press, 1988), accessed 6th May 2018, <https://trove.nla.gov.au/version/44808522>.

⁸⁶ Michael SchmittSchmitt. *Tallinn Manual on the International Law Applicable to Cyber Warfare: Prepared by the International Group of Experts at the Invitation of the NATO Cooperative Cyber Defence Centre of Excellence*. Cambridge: Cambridge University Press, 2015.

⁸⁷ Eneken Tikk and Mika Kenttunen. "The Alleged Demise of the UN GGE: An Autopsy and Eulogy." 2017. Accessed May 1, 2018. <http://cpi.ee/wp-content/uploads/2017/12/2017-Tikk-Kerttunen-Demise-of-the-UN-GGE-2017-12-17-ET.pdf>

⁸⁸ Martha Finnemore and Duncan B. Hollis, "Constructing Norms for Global Cybersecurity," *American Journal of International Law* 110, no. 3 (July 2016): 427.



METHODOLOGY

DEFINING CYBER SECURITY

To embark on investigating an international security architecture, we must first arrive at a workable definition of cyber security. While arriving at a definition has been the objective of many scholarly works, a single definition is yet to be formalized. The International Telecommunications Union came up with a broad definition, which this paper will use as a reference point.⁸⁹ ITU defined cybersecurity as

“the collection of tools, policies, security concepts, security safeguards, guidelines, risk management approaches, actions, training, best practices, assurance and technologies that can be used to protect the cyber environment and organization and user's assets.”

Thus, we consider a global cyber security architecture from two separate but connected frames of reference. The first aspect, broadly termed ‘cyber hygiene’ comprises of the technical aspects of cyber security, as outlined in the ITU's definition, which includes developing safeguards to prevent computer infrastructure from risk and the sharing and co-ordination of best practices among the various concerned stakeholders. The second aspect of this architecture, which this paper will largely focus on is the development of a shared understanding on the nature of cyberspace, strategies for ensuring its continued stability and the key actors that play a role in shaping this framework. This aspect will require far more time and co-operation to arrive at a mutually acceptable understanding acceptable to most, if not all key stakeholders. Progress on these two aspects of the cyber security architecture can occur simultaneously-with technical solutions being developed in the short run, while the agreement at large is in the making.

OBJECTIVE

The objective of this report is to undertake an investigation into the procedural history of the negotiations that lead to the formation of four analogous functional regimes and assess how the processes of contestation around certain organising principles lead to an outcome of negotiated normativity. The regimes considered are:

1. The Law of the Seas and its the formation of the United Nations Convention on the Law of the Sea and its constituent Organisations-the International Sea-Bed Authority and the International Tribunal on the Law of the Sea
2. The evolution of the norm outlawing the Use of Force and the Development of International Humanitarian Law
3. International Trade Law leading to the General Agreements on Tariffs and Trade and the formation of the World Trade Organisation and
4. The evolution of the Paris Agreement.

⁸⁹ ITU. 2009. *Overview of Cybersecurity. Recommendation ITU-TX.1205*. Geneva: International Telecommunication Union (ITU). accessed April 30, 2018, <http://www.itu.int/rec/T-REC-X.1205-200804-I/en>



The background report will dissect the first two regimes in detail in chapters 2 and 3 and chapter 4 will highlight additional learnings from the trade and environmental regime. Chapter 5 will highlight the progress made in the cyber-security negotiations thus far. In doing so, it will reflect on some of the existing cyber norms, initiatives and proposals. The recommendations section in Chapter 6 will use key learnings of this investigation to propose how the norms formulation process in cyberspace could be reformed.

These regimes have been chosen for three similarities with current negotiations on cyber governance. First, they deal with the regulation of an area that offered some form of functional utility for all participating nations. Second, much like the present regime seeking to govern cyberspace, each of these regimes are the product of contestation between regional or strategic state groupings. Third, some of these regimes have led to the evolution of a central governing body or a dispute settlement mechanism. Most of these regimes have also been strained with increasing political disagreement and lower exit barriers in the past decade. Rather than viewing this development as a reason to exclude these regimes from our assessment, this report will consider the reasons that led to these recent fetters and assess the take aways these might have for cyberspace governance.

CHAPTER 1: THEORETICAL UNDERPINNINGS

In order to inform our assessment of each regime and subsequent recommendations, this chapter summarises the predominant theories on regime formation and parliamentary diplomacy that may aid the evaluation of the regimes considered in the following chapters.

CO-OPERATION AND CONTESTATION

Cyberspace and the prospect of the cyber-weapon has revolutionized traditional understandings of organizing principles of global governance in what Lucas Kello terms three degrees of cyber-revolution.⁹⁰ Third order cyber-revolution has altered the language and orientation of power through a weapon, whose transitory nature⁹¹ makes it difficult to test and dissect it through traditional means. The cyber-weapon has thus not only systematically disrupted existing relationships between states but also altered the rules and norms that regulate their conduct. Second order revolution or systemic revision occurs when a cohort of outliers such as a whimsical dictator uses the cyber weapon to challenge the edifice of the global political framework.⁹² Finally, first order revolution or systemic change refers to a drastic change in the main actors themselves with private actors entering the fray.⁹³ A traditional attack could easily be detected and acted against, thereby reducing the operations of non-state actors to small scale guerilla tactics which could not threaten the state driven edifice of conventional order. The unbound nature of the cyber weapon offers tantalizing prospects both for established actors in the international system

⁹⁰ Lucas Kello, *The Virtual Weapon and International Order* (Yale University Press, 2017) 86.

⁹¹ Max Smeets "A matter of time: On the transitory nature of cyberweapons", *Journal of Strategic Studies*, (2017) 7.

⁹² Kello 90.

⁹³ Kello 92.



who want to preserve power and for disruptors who want to use the weapon as a hitherto unforeseen avenue of gaining global influence.⁹⁴

Even though the precise definition of a regime is contested, a widely accepted definition is "norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations."⁹⁵ A functioning regime creates a convergence of expectations and lays down acceptable standards of behaviour which may foster a general sense of obligation.⁹⁶ Regime theory considers states as principal actors in the international arena and argues that states pursue absolute gains through international co-operation while realists believe that hegemons want to pursue relative gains to maintain the existing power imbalances in their favour.⁹⁷ Regimes function often in the absence of authoritative central institutions and instead rely on the convergence of interests among states.⁹⁸

Any international regime that attempts to regulate cyberspace must consider these unique characteristics while bearing in mind its élan vital as a borderless construct accessible to and therefore strategically important for modern communication, trade and the building of relationships. Regime theory has broadly been inspired by the theory of collective action that explains outcomes as the integration of party interests through co-operation or co-ordination. Arriving at an universal regime requires what are known as 'transaction costs' due to the need to coordinate among multiple actors.⁹⁹ Thus, in certain cases unilateral or bilateral bargaining may be more strategic unless the subject matter of the negotiations has an inherently entangled value and exhibits traits of the global commons, which means that there is a shared interest in its stability.¹⁰⁰

The most renowned understanding of international co-operation has been put forward by Robert Axelrod in his theorization of an iterated prisoner's dilemma.¹⁰¹ If players were to engage with each other only once in a simultaneous game, the optimal strategy for each player would be to 'defect'- that is, block the negotiations on a certain point.¹⁰² However, if the game is repeated over an unidentified period of time, as in the case of international negotiations, the incentive structure changes as states that block one aspect of the negotiation may be punished by other states which retaliate by stonewalling other points of contention that are of value to the defector. Thus,

⁹⁴ Kello 92.

⁹⁵ Stephen D. Krasner, ed., *International Regimes*, Cornell Studies in Political Economy (Ithaca, NY: Cornell University Press, 1983), 2.

⁹⁶ Anu Bradford, "Regime Theory," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, February 1, 2007), 1, accessed April 30, 2018, <https://papers.ssrn.com/abstract=2770647>.

⁹⁷ Bradford, 5.

⁹⁸ Bradford, 5.

⁹⁹ John A. C. Conybeare, "International Organization and the Theory of Property Rights," *International Organization* 34, no. 3 (1980): 209–313.

¹⁰⁰ Four attributes of commons may be described as (1) Economic value which gives people a reason to capture them, (2) Indivisible or 'in joint supply', (3) Usable by and of interest to all players and (4) Non-excludable and non-rivalrous. Francis T. Christy, "Marine Resources and The Freedom of The Seas," *Natural Resources Journal* 8, no. 3 (1968): 425.

¹⁰¹ Robert Axelrod, *The Evolution of Co-operation* (New York, Basic Books, 1984) 174.

¹⁰² *Ibid.*



as states interact with each other and build reputations, the negotiation of optimal outcomes are possible due to a convergence of interests in the subject matter of the negotiation at large.¹⁰³

There are four key conditions, however, that facilitate successful cooperation.¹⁰⁴ **First**, both players must have low discount rates-that is they must care about the future in relation to the present.¹⁰⁵ Players who are irrational or impatient cannot fit into the paradigm of a co-operative iterated prisoner's dilemma scenario as they cannot resist the urge to cheat in round (n) rather than in round (n+1). This means that their threat to punish the other player in round (n+1) is not perceived as a credible threat by the other player. An example of this would be a 'rogue state' that is run by irrational or trigger-happy impulsive leader or a non-state actor who does not suffer reputational costs. *These states would probably not fit into the paradigm of a standard iterated co-operation game.* **Second**, the players must not know when the iterated game will end, which means that they will be continuously faced by the threat of punishment if they defect. **Third**, the payoffs from defecting must continue to be low in comparison from the payoffs available with co-operation. *Pay-offs may change over time, which may change the incentives to cooperate.* USA's withdrawal from the Paris Agreement could be seen as an example.¹⁰⁶ The reduced pay-offs in terms of complying with global environmental policy in comparison with the increased profit incentive of polluting and using the exit as optics to attract Trump's domestic support base acted as an ideal incentive to defect. *In cyberspace, this problem is particularly acute given the difficulties of attributing an attack, which may incentivise players to defect from agreed norms even after the regime has come into force.*¹⁰⁷ **Finally**, the strategies chosen by the players must be sufficiently exploitative and not too forgiving. If the response is too forgiving, the credible threat perception automatically goes down and the incentive to defect from the negotiations rises. *This would require states to operate in coalitions of like-minded states to ensure that their interests are placed on the bargaining table and are made a part of the bargain in the process.*

Trade-offs and bargaining, keeping the broader objective in mind, is undoubtedly an integral aspect of any negotiation. Therefore in order to facilitate dialogue and convergence, it is necessary for states to be entirely transparent and open about the significance of that particular issue. Once this posturing is made known to all states, trade-offs through broader packages and subpackages can commence.

¹⁰³ Douglas G. Baird, Robert H. Gertner, and Randal C. Picker. *Game theory and the law*. Harvard University Press, 1998., 164-72; Gibbons, Robert. *Game theory for applied economists*. Princeton University Press, 1992. 82-99; Indeed, the evolution of the norm of 2(4) was a product of interactions between states who jointly believed in the outlawing of war as a tool of conducting politics. The insertion of Article IV into the Outer Space Treaty, which calls for the demilitarization of Outer Space within two years of the commencement of negotiations on the Outer Space Treaty is a similar example. Both the major powers-USA and USSR recognized the immense destructive potential of using the rapidly proliferating nuclear arsenal in Outer Space and rapidly negotiated the Outer Space Treaty in order to prevent the nuclear arms race from spiralling into outer space.

¹⁰⁴ Jack L. Goldsmith and Eric A. Posner, "A Theory of Customary International Law," *The University of Chicago Law Review* 66, no. 4 (1999): 1126.

¹⁰⁵ Goldsmith and Posner, 1126.

¹⁰⁶ Demetri Sevastopulo, "US to Withdraw from Paris Pact in Blow to Obama Climate Legacy," *Financial Times*, June 1, 2017, accessed 6th May 2018, <https://www.ft.com/content/af8c9b89-6497-39c4-9804-0bebe862bf53>.

¹⁰⁷ Thomas Rid and Ben Buchanan, "Attributing Cyber Attacks," *Journal of Strategic Studies* 38, no. 1-2 (January 2, 2015): 4-37.



ROLE OF INTERNATIONAL LAW

It is crucial to remember that law and norms are not conflicting but interrelated processes. As noted by Harvard Law Professor Lawrence Lessig, law can create, change or displace the meaning of social norms.¹⁰⁸ Backing from established tenets of International Law provides legitimacy to the evolution of cyber norms and can therefore influence collective expectations, and serve as a facilitative mechanism for drawing up bargaining points and charting out the path forward. The development of international legal regimes for the regulation of various global commons including outer space, the deep sea bed and the economic exploitation of marine resources has now lead to a stable normative regime that influences state practice today.¹⁰⁹

The function of International Law and global governance structures is to enable coordination and co-operation in the long run and thereby develop a framework for the stable functioning of global polity. One of the major criticisms of both the project of International Law in general and the cyber norms effort to date has been the political erosion of attempts to obtain normative consensus.¹¹⁰ While such criticism is valid, it overlooks an equally crucial role of the language of international law and the facilitation mechanisms of global governance structures that enable such conflict, the nature of the conflict, and ways in which conflict has been resolved in the past. Monica Hakimi argues that conflict in the short run may be beneficial for actors that seek to engage in a shared governmental endeavours as it can create nuanced discourse and careful examination of issues.¹¹¹ Initial conflict can also lead to co-operation in the long run due to the entangled dimensions of cyberspace and the vitality of its existence for nation states and the international community as it stands today.

TRAJECTORY OF NORM EVOLUTION

Finnemore and Sikkink identify three theoretical phases of norm evolution at the global level.¹¹² The first phase, known as '*norm emergence*', marks the recognition of the said norm by a set of critical states who have a stake in the issue at hand. After recognition, these critical states endeavour to promote this norm at the international level by generating global discourse or in Hakimi's paradigm, conflict. This phase is known as a 'norm cascade'. Finally, after concerted discourse at the international level, states internalise these norms as obligations that are binding either due to adoption in a legal code or through societal pressure. The transition from one phase to another is known as a tipping point that is catalyzed by *norm-entrepreneurs* which may be states, groups of states or non-state actors.

¹⁰⁸ Lawrence Lessig, "The Regulation of Social Meaning," *The University of Chicago Law Review* 62, no. 3 (1995): 943–1045.

¹⁰⁹ Nico Schrijver, "Managing the Global Commons: Common Good or Common Sink?," *Third World Quarterly* 37, no. 7 (July 2, 2016): 1252–67.

¹¹⁰ "Getting beyond Norms: New Approaches to International Cyber Security Challenges" (C. Hurst and; Company, 2017).

¹¹¹ Monica Hakimi, "The Work of International Law," *Harvard International Law Journal* 58 (2017): 1.

¹¹² Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52, no. 4 (1998): 887–917.



Zartman and Berman divide the process of formal regime formation into three separate negotiating phases that broadly correspond to the three phases of Finnemore and Sikkink's analysis of norm evolution.¹¹³ In the **diagnostic phase**, parties consider the possibilities of regime formation while sounding out like-minded parties who may act as norm-entrepreneurs and exploring the possibilities of negotiating conduct. In the **formula phase**, they jointly settle on a formula which seeks to facilitate the third phase, which is known as the **details phase** where the broad formula is refined, specific details are added and in certain cases, laws are codified.

HYPOTHESIS

This report argues that the cyber norms process thus far has seen a muddling of the three phases and an excessive eagerness to extend norms of International Law to cyberspace rather than using the language of international legal rules in consonance with negotiation strategies as a mechanism for the facilitation of contestation between concerned stakeholders.

CHAPTER 2: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

INTRODUCTION

After the failure of the second United Nations Convention on the Law of the Sea, it was clear that UNCLOS III was a conference that almost all stakeholders desired but, as will be highlighted in this paper, had to be incentivised to be brought to the negotiating table to agree on the contours of a regime that would enable universal acceptance. The negotiators at UNCLOS II had failed to reach any form of agreement on the sole norm in contention, which was the breadth of the territorial sea.¹¹⁴ The motivations for pursuing multilateral agreements were different for each nation- the developed world saw this as their last chance of salvaging the exploitation of the open oceans while the newly decolonised, developing states wanted to preserve the swathes of water near their shores.¹¹⁵ As highlighted comprehensively in Robert Friedheim's *Negotiating the New Oceans Regime*¹¹⁶, the remaining sixteen years that saw the codification of the UNCLOS remains, to date, the most complex yet perhaps one of the most successful outcomes of multilateral bargaining and co-operative regime evolution.

THE NEGOTIATION IN THREE PHASES

The diagnostic phase: This phase ended without setting an agenda for a major diplomatic conference or outlining of norms or norm entrepreneurs that could create the norm. However,

¹¹³ William Zartman and Maureen R. Berman, *The Practical Negotiator* (Yale University Press, 1982), 102.

¹¹⁴ Territorial waters is the area immediately adjacent to the shores of a nation and subject to the jurisdiction of that nation. In essence, it is within that nation's sovereign domain. At present, it is defined as 12 nautical miles from the shores of the territorial state.

¹¹⁵ Alan Beesley. "The Negotiating Strategy of UNCLOS III: Developing and Developed Countries as Partners-A Pattern for Future Multilateral International Conferences." *Law & Contemp. Probs.* 46 (1983): 185.

¹¹⁶ Robert. L. Friedheim. *Negotiating the new ocean regime*. Univ of South Carolina Press, 1993.



the Sea-Bed Committee produced a list of 150 subjects and divided them into 23 groups.¹¹⁷ They also produced a list of issues. While contention was apparent among the various apparents, the diagnostic phase had clearly identified that the multilateral regime would be a universal one which would grapple with a range of issues.

The formula phase: The delegates at the third United Nations Law of the Sea Conferences in New York, Caracas and Geneva respectively were faced with two clear challenges¹¹⁸:

1. Establishment of the rules of interaction and way forward in the negotiations and
2. A formula that would take into consideration shared ideas and underpin a comprehensive treaty regime.

On point 1, they agreed that all issues would be attempted to be negotiated using consensus rather than a voting procedure that required a simple or a special majority.¹¹⁹ This was because the Group of 77 - the block representing the global south could have used the voting process to create a treaty that fit its needs.¹²⁰ This would have resulted in the developed world leaving the treaty regime altogether as the pay-offs from defecting would have been greater than the pay-offs from remaining in the regime. Both the USA and USSR realized, regarding point 2, that the final outcome would have to be a package deal reflected in a 'single-negotiating text.'¹²¹ The various components of the text were negotiated by using informal sub-groups at UNCLOS.¹²² The sub-groups agreed to the establishment of the 200 mile Exclusive Economic Zone, which would enable developing coastal states to exploit resources proximate to their territory in exchange for a 12-mile-territorial sea and a right of transit through straits that may be used for international navigation.¹²³

The details phase: Despite the striking of relative fruitful bargains during the formula phase, working out the details of the agreement took seven years. The U.S. made many attempts to 'exit' the regime altogether.¹²⁴ Henry Kissinger's dramatic re-orientation proposed a 'parallel' system of regulating the deep sea-bed in a supposed bid to balancing the sovereignty driven monopoly of access approach taken by the Group of 77 and the unlimited licensing system which the developed states wanted.¹²⁵ However, the voice of the majority Group of 77 was not to be drowned out and they constantly opposed the U.S. proposal to legitimize open-access deep sea-bed mining.¹²⁶ This issue was discussed in Committee I under the stewardship of Jens Everson of

¹¹⁷ Committee on the Peaceful uses of the seabed and Subsoil beyond National Jurisdiction, List of Issues Relating to the Law of the Sea, (A/AC.138/66).

¹¹⁸ Friedlheim, 31.

¹¹⁹ Friedlheim, 32.

¹²⁰ Alan G. Friedman; Cynthia A. Williams, Group of 77 at the United Nations: An Emergent Force in the Law of the Sea, 16 San Diego L. Rev. 555 (1979).

¹²¹ Barry Newman, "The Law of the Sea is still unwritten, but Please Don't Fret," Wall Street Journal (27 Aug 1974) quoted in Friedlheim at 33.

¹²² Barry Buzan. "'United we stand...': Informal negotiating groups at UNCLOS III." *Marine Policy* 4, no. 3 (1980): 183-204.

¹²³ James.E. Bailey III. "The Exclusive Economic Zone: Its Development and Future in International and Domestic Law." *La. L. Rev.* 45 (1984): 1269.

¹²⁴ Richard Darman. "The law of the sea: Rethinking US interests." *Foreign Affairs* 56, no. 2 (1978): 373-395.

¹²⁵ Friedlheim, 35.

¹²⁶ Williams and Friedman, 556.



Norway. Even though the final outcome had technical issues, it was a negotiation that had taken on board multiple stakeholders.¹²⁷ The G77 advisors drove the articles on the deep sea-bed which gave the seabed authority a broad-ranging variety of powers on the regulation of deep sea-bed mining.¹²⁸

The discussions on the deep sea-bed lead to cascading of the norm demarcating this area as the 'Common Heritage of Mankind.' (CHM) Originally articulated by Maltese Ambassador at the United Nations General Assembly in 1967,¹²⁹ the concept claims that certain commons or elements that are of benefit to all of mankind must not be appropriated by states or individuals or corporate entities but be exploited under an international regime that facilitates exploitation in a manner beneficial to mankind as a whole.¹³⁰ After a thorough evaluation of the norm during debates at the LOSC Conference, This has now arguable evolved into customary international law and internalised by the international community due to the recognition of the symbiosis between equity and efficiency fostered through the principle.¹³¹

COALITIONS

The Group of 77 comprised of more than 120 states when the negotiations started and had a heterogenous group of members who were differentiated by region - Latin American/Caribbean/African/Asian or by special interest issues stemming from geographic disadvantages, such as being a landlocked state. Yet, they Ambassadors Koh and Jayakumar have highlighted that even among this broad coalition there was solidarity in areas where their interests converged but not so much congruence on other issues such as the Exclusive Economic Zone (EEZ), which were of relevance only to coastal states.¹³²

Despite these differences, the use of the coalition had an influential impact on the negotiations. When this Group banded together on a certain issue, that was to be the 'default position' with which the other countries either had to negotiate or defect.¹³³ *This posed interesting strategic questions as it required the G77 to use their power of numbers to push forward their agenda and exhibit their 'voice' in the process while ensuring that their push was not aggressive enough to cause developed states to defect.*

¹²⁷ Friedlheim, 35.

¹²⁸ Danny.M. Leipziger and James. L. Mudge. "Seabed mineral resources and the economic interests of developing countries." (1976).

¹²⁹ Prue Taylor. "Common Heritage of Mankind Principle." In Klaus Bosselmann, Daniel Fogel, and J. B. Ruhl, Eds. *The Encyclopedia of Sustainability, Vol. 3: The Law and Politics of Sustainability*. 64–69. Great Barrington, MA. Berkshire Publishing.

¹³⁰ John E. Noyes, The Common Heritage of Mankind: Past, Present, and Future, 40 DENV. J. INT'L L. & POL'Y 447 (2012).

¹³¹ Noyes 456.

¹³²Tommy Koh, and Shanmugam Jayakumar. "The negotiating process of the Third United Nations Conference on the Law of the Sea." In *United Nations Convention on the law of the sea*, 1982. p. 29-134 (54).

¹³³ Friedlheim, 337.



NORM ENTREPRENEURS

The Asian-African Legal Consultative Committee, (now Asian-African Legal Consultative Organisation), which was set up during the Bandung Conference of the Non-Aligned Movement in 1955¹³⁴ acted as a norm entrepreneur and lobbying group for many rules that became codified to create a more equitable legal framework. At the meeting of the Working Group of the AALCC on the Law of the Sea held in Geneva in 1971, at the request of the AALCC, several delegates submitted papers highlighting the positions of their respective states on the prevailing complex issues, which could be identified as norm emergence.¹³⁵ The delegation of Kenya submitted an iconic paper on the 'exclusive economic zone' concept.¹³⁶ The delegation of Indonesia submitted a paper on 'The Concept of Archipelago' and the Malaysian delegate submitted a paper on 'International Straits'.¹³⁷ These ideas were raised before the Second Committee of the Law of the Seas Conference and treated as a cohesive representation of the perspectives of Asian and African states on these complex legal issues in the norm cascade process.¹³⁸ Following the success of these existing initiatives the AALCC worked towards the development of a cohesive legal regime that sought to regulate the deep sea-bed¹³⁹ Just after the third session of the Law of the Sea Conference in Geneva (1975), which produced the Single Negotiating Text (SNT), the AALCC prepared a detailed study of these drafts in order to further advise member states on the Law of the Sea and recraft existing norms in a manner conducive to the unique socio-economic interests of Asian and African states.¹⁴⁰

ROLE FOR INTERNATIONAL LAW

There was little scope for extension of traditional principles of international law to the UNCLOS negotiations as the objective of the agreement was to modify the Grotian regime which recognised the high seas as a global commons unfettered by sovereignty and freedom for use by all.¹⁴¹ The inexhaustibility of resources within the ocean and the increasing ideological dogma of post-colonial states in favour of a New International Economic Order¹⁴² required a drastic re-

¹³⁴ Barry .Sen "*Evolution and growth of AALCC as a Forum for International Co-operation*" Asian-African Legal Consultative Committee. *Essays on international law*. Asian-African Legal Consultative Committee, 1981. 3- 21.

¹³⁵ Secretariat of the AALCC, *Report of the Twentieth, Twenty-First and Twenty-Second Sessions Held in Seoul (1979), Jakarta (1980) and Colombo (1981)*(New Delhi, 1981), 20.

¹³⁶ Sompong Sucharitkul. "Contribution of the Asian-African Legal Consultative Organization to the codification and progressive development of International Law." (2007).

¹³⁷ Kennedy Gastorn. "AALCO's Contributions to the Development of the Law of the Sea." Lecture, Wuhan University, Beijing, 2017: 7.

¹³⁸ Secretariat of the AALCC .*Report of the Seventeenth, Eighteenth and Nineteenth Sessions Held in Kuala Lumpur (1976), Baghdad (1977) and Doha (1978)* (New Delhi, 1981,19-58.

¹³⁹ AALCC 20-25.

¹⁴⁰ AALCC 20-25.

¹⁴¹ Hugo Grotius, *Freedom of the Seas or the Right which belongs to the Dutch to Take part in the East Indian Trade* (trans Ralph Van Deman Magoffin) (New York: Oxford University Press, 1916).

¹⁴² The New International Economic Order ('NIEO') was officially endorsed by consensus of the UN General Assembly vide Resolution 3201 'Declaration on the Establishment of a New International Economic Order' A product of the rejuvenated era of decolonisation, the New International Economic Order sought to further principles of sovereign equality, interdependence and co-operation among all states, irrespective of the nature of their socio-economic



orientation of International Law for the regime to function rather than a mere re-orientation of existing principles that were grossly outdated.

Most claims were sought to be justified through an appeal to their acceptance as customary international law. Most of these proposals lead to greater conflict in the short run as each coalition utilised their own ideological extraction of international law to compete and ultimately synthesize with the conflict. For example, Latin American states strived to highlight a distinctively regional norm called the 'patrimonial sea'¹⁴³ which lay the edifice for discussions on an Exclusive Economic Zone (EEZ) and was used regularly by the G77 during the negotiation process.

CONTESTATION AND EXIT

The newly minted dogma of the 'New International Economic Order' acted as a prism through which the developing world viewed these negotiations and used this to re-claim sovereignty from western hegemony.¹⁴⁴ They used it as a tool for contestation on many issues, including the negotiation of the Exclusive Economic Zone and left this ideological concept immune from a bargaining move or trade-off. On other issues, however, there were several trade-offs forged. For example, the G77 allowed access to sea-bed minerals on the grounds of increased financial support for the International Seabed Authority or tighter production controls that would protect mineral producing states.

These trade-offs on the deep sea-bed mining provisions, in particular were not good enough for the United States.¹⁴⁵ The U.S. delegation returned to the Law of the Sea Conference in 1982 with an entire reconceptualization of the law on which consensus had been obtained over the course of the negotiations.¹⁴⁶ The U.S. return was not marked by a desire to negotiate but instead was an attempt to re-orient the negotiations in its favour by threatening exit. This did not work however and the Conference adopted the Law of the Sea Convention in April, 1982 without meeting U.S. demands. The U.S. then announced that it would not be signing the treaty in June, 1982. The U.S. exiting the negotiations did not cast a shadow on the legitimacy or enforceability of the Law of the Seas regime and the legal framework flourished nevertheless. The presence of the United States was not imperative for a regime that was designed to be multilateral. In this instance, the US played its cards wrong and misread the potential adverse effects on regime stability if it withdrew. *Given how robust the crystallized norms had become by the time UNCLOS came into force, US opinion on the treaty mattered little in the context of fervent dogma exhibited by states who wanted to re-claim their lost sovereignty.*

systems. See Giorgio Sacerdoti, "New international economic order," Oxford Public International Law, accessed 6th May 2018, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1542>.

¹⁴³ Jorge.A. Vargas. "The legal nature of the patrimonial sea: a first step towards the definition of the exclusive economic zone." *German YB Int'l L.* 22 (1979): 142.

¹⁴⁴ Lawrence Juda. "UNCLOS III and the new international economic order." *Ocean Development & International Law* 7, no. 3-4 (1979): 223.

¹⁴⁵ James. L. Malone. "The United States and the Law of the Sea after UNCLOS III." *Law and Contemporary Problems* 46, no. 2 (1983): 33.

¹⁴⁶ Malone 33.



DISPUTE SETTLEMENT AND COORDINATION MECHANISM

The 1982 United Nations Convention on the Law of the Sea created the International Tribunal for the Law of the Sea as a neutral third party dispute settlement mechanism to resolve disputes between two states on any issue covered by UNCLOS. Judges are appointed on the basis of 'equitable geographical distribution'¹⁴⁷ As the Convention did not enter into force until 1994, the ITLOS became operational only in that year. It has so far adjudicated 23 disputes with 1 dispute pending before it at the present moment.¹⁴⁸ The disputes have spanned a wide range of issues, ranging from maritime delimitation to Part XV of UNCLOS that provides for compulsory adjudication but still allows states to retain a choice in the procedure they wish to adopt for resolution of the dispute. While states have generally chosen to refer their disputes to ITLOS, states have also approached the International Court of Justice or arbitration procedures due to more certainty in the former and more control over the process in the latter.¹⁴⁹ *This underscores the potential benefits and drawbacks of setting up dedicated dispute settlement mechanisms as opposed to relying established dispute settlement mechanisms.*

A coordination mechanism also exists under the Law of the Seas Regime in the form of the International Seabed Authority (ISA). Based in Kingston, Jamaica, it was set up to regulate mineral-related activities in the international sea-bed area, including in areas beyond the limits of national jurisdiction. As per Article 154 of UNCLOS, the Assembly of the ISA undertakes a systematic review of the functioning of ITLOS and suggests recommendations that may improve its impact. The Review of the ISA in 2016, articulated that the ISA has made significant efforts at organising and regulating activities in that area although there is still some doubt on how state entities are controlled effectively.¹⁵⁰ This fear is compounded by the fact that the authority largely operates behind closed doors and there is no published data on how contracts are awarded.¹⁵¹ The Report suggests that there needs to be an independent and transparent regulatory body that is capable of enforcing the regulations devised by the ISA in order to ensure the efficacy of its functioning.

CONCLUSION

The UNCLOS negotiation is an example of the successful use of parliamentary diplomacy that sought to gain legitimacy by ensuring broad participation from a variety of states and taking into consideration a range of strategic concerns. Although the diagnostic phase did not generate anything substantive, it did signal to all states that any agreement regulating the seas must be based on universal consensus. In the formula phase, they agreed on voting rules for the negotiation process and decided on the outcome of the negotiations, which was to be a single

¹⁴⁷ "EJIL: Talk! – Election of Judges to the International Tribunal for the Law of the Sea," accessed April 30, 2018, <https://www.ejiltalk.org/election-of-judges-to-the-international-tribunal-for-the-law-of-the-sea/comment-page-1/>.

¹⁴⁸ Hakimi, Monica. "The Work of International Law." *Harv. Int'l LJ* 58 (2017): 1.

¹⁴⁹ "EJIL: Talk! – The Hamburg Tribunal Heats Up? Is ITLOS Now in Business?," accessed April 30, 2018, <https://www.ejiltalk.org/the-hamburg-tribunal-heats-up-is-itlos-now-in-business/>.

¹⁵⁰ "Comments by the Legal and Technical Commission on the Interim Report on the Periodic Review of the International Seabed Authority pursuant to Article 154 of the United Nations Convention of the Law of the Sea and the Comments by the Review Committee," 1, accessed May 1, 2018.

¹⁵¹ Todd Woody, "Seabed mining can decide the fate of the deep ocean," Text, GreenBiz, September 28, 2017, accessed April 30, 2018, <https://www.greenbiz.com/article/seabed-mining-can-decide-fate-deep-ocean>.



negotiated text. Over a period of seven years that saw the formation of coalitions and the use of trade-offs and sub-packages, the present Law of the Seas regime was born. Norm-entrepreneurs such as the AALCC and coalitions such as the G77 banded together to press for a re-orientation of existing constructs such that the emerging economies may also benefit from the regime. There was constant reference to the participants ideological extractions of international law. The concepts of the patrimonial sea, sovereign equality and the New International Economic Order were repeatedly used as a frame of reference to facilitate discussion and consensus, in the long run. Due to the comprehensiveness of the final treaty and the large number of states that eventually came on board, exit by the United States did not matter for the survival of the regime.

CHAPTER 3: OUTLAWING THE USE OF FORCE AND THE DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW

INTRODUCTION

International peace and stability is an entangled domain that all states have an interest in. Bearing this in mind, two separate bodies of law have crystallized to deter the possibility of the world reverting back to a continued state of barbaric warfare. The first, known as 'jus ad bellum' or the 'right to go to war' is embodied in the prohibition on the use of force in Article 2(4) of the U.N. Charter. The second, known as Jus in Bello (law in war) or International Humanitarian Law regulates conduct during warfare and is largely codified in the Hague Conventions and the Geneva Conventions and its Additional protocols. While the forms of interaction that lead to the codification of each of these bodies of law may have varied slightly, a common thread running through the development of both these bodies of law is that alongside considerations of *realpolitik* and strategic considerations - that ideas by individuals or groups of actors mattered in the development of each of these bodies of law.

NORM OUTLAWING THE USE OF FORCE

The origins and history of the main stakeholders involved in the development of this norm is captured comprehensively in Oona Hathaway and Scott Shapiro's 2017 unique history on the evolution of the norm entitled *The Internationalists*.¹⁵²

The diagnostic phase: Before states entered the fray or the conception of the norm became a subject of discourse at multilateral fora, individuals conceptualized, theorized and re-defined the norm. Before the dawn of what Hathaway and Shapiro term 'the outlawry movement',¹⁵³ Hugo Grotius (dubbed 'The Father of International Law') defended warfare as an alternative to the Courts system for the prosecution of wrongs or restoration of rights. This remained the status quo in International Law until a Chicago-based commercial lawyer named Samuel Levinson collaborated with John Dewey, then Professor of Philosophy at Columbia University, Levinson wrote an article for *The New Republic* entitled "The Legal Status of War" where he argued that

¹⁵² Oona Hathaway and Scott Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (Simon Schuster, 2017).

¹⁵³ Hathaway and Shapiro, 109.



instead of working on onerous codes that sought to regulate the conduct of atrocities during warfare, war must be outlawed in its entirety.¹⁵⁴ *Despite the unique thought process and argumentation evident in the piece, backing at the institutional level was necessary to ensure legitimacy.*

James Shotwell, then Professor of History at Columbia University and adviser to President Wilson during the Versailles negotiations, sought to take the normative outlawing movement forward but also add to this process some 'teeth' or sanctions mechanism.¹⁵⁵ He corresponded with French Foreign Minister Briand and induced American Secretary of State Frank Kellogg to co-ordinate negotiations on the draft of a universal pact that would outlaw war. There were 31 signatories by the effective date.¹⁵⁶ Even though the Pact was unable to constrain the routine use of warfare by states and the outbreak of World War II itself, it sowed the seeds for what would become a far more all encompassing norm in the form of Article 2(4). Again, despite its irrelevance and lack of enforcement at the time, the Kellogg-Briand Pact is an example of an international norm whose emergence was utilised to frame conflict and then create consensus in the long run.

The language of the peace-pact was utilised by the Sub-Committee on International Organisation through a treaty which was originally drafted by James Shotwell in a recognition of the errors in judgment that occurred as a result of a toothless League.¹⁵⁷ A final proposal called "Plan for the Establishment of an International Organisation for the Maintenance of International Peace and Security" was presented to President Roosevelt of the United States and would serve as a draft for future negotiations on the regime.¹⁵⁸

The formula phase: As World War II drew to a close, the British, American and Soviet delegates discussed what the contours of world order, post World-War II, would look like.¹⁵⁹ The enforcement of the prohibition on the use of force was an obvious inclusion given the tremendous destruction suffered even by the victors during the War. There were no incentives to defect from this co-operative equilibrium. Disagreement existed only on the enforcement of the norm. Soviet Ambassador Andrei Gromyko was adamant and would not concede on retaining veto powers for all permanent members of the UNSC even in matters that directly involved them. As a way of moving forward despite dissenting opinions, and instead of destroying all the progress made during the diagnosis phase, the delegates adopted a draft text that ultimately became the present U.N. Charter, but with an added note which clarified that the voting procedure was still under consideration.¹⁶⁰

¹⁵⁴ Hathaway and Shapiro, 109.

¹⁵⁵ Harold Josephson. *James T. Shotwell and the rise of internationalism in America*. Fairleigh Dickinson Univ Press, 1974: 39-40; Hathaway and Shapiro 117-121.

¹⁵⁶ Hathaway and Shapiro, 122.

¹⁵⁷ Hathaway and Shapiro, 198.

¹⁵⁸ "Plan for the Establishment of an International Organisation for the Maintenance of International Peace and Security," December 23, 1943, FRUS, 1944, VI 1 (General), 615.

¹⁵⁹ Hathaway and Shapiro, 199.

¹⁶⁰ U.S. Department of State, Dumbarton Oaks Documents on International Organisations, 2223: 13.



The details phase: In February 1945, representatives of fifty nations and forty two non governmental groups congregated to usher in the United Nations organisation.¹⁶¹ However, as president Truman mentioned in his opening address, the Conference was not a mere formality as the issue of voting procedures at the UNSC still had to be agreed upon.¹⁶² The smaller powers resisted the use of the veto power, which struck them as being inherently inequitable. However, the voice of the major powers carried through and the veto powers were retained. The negotiation of Article 2(4) was far more simple as this norm had already been explored in great detail both in the diagnosis and formula phases and on June 26, 1945, all 50 nations present signed the UN Charter.¹⁶³

INTERNATIONAL HUMANITARIAN LAW

The diagnostic phase: Due to progress made on the codification of the Laws of War through the 1907 Hague Conventions, there was already some agreement on the nature of the rules that would govern war, although these agreements were pragmatic considerations fostered on reciprocity rather than a desire to create a new international regime. So the diplomats who negotiated the Geneva Conventions in 1949 already had the substance ready at hand, from the Hague Conventions and from international custom, which was coupled with their collective understanding of all that had gone wrong during the atrocities of World War II. The four Geneva Conventions were *negotiated without much contestation due to the uncontroversial and aspirational nature of the norms* contained therein.¹⁶⁴ Right from the time of their drafting, the Conventions were not entirely relevant for a world that was fast changing with different modes of warfare and different kinds of actors, such as newly decolonized states entering the fray.¹⁶⁵ An update and re-orientation of the regime was needed. Norm emergence, cascade and internalization occurred relatively fast but the norms themselves were out of date and lacked specific codification which could create a robust regime protecting civilians and medical personnel during the conduct of hostilities.

Addressing this, the International Committee of the Red Cross took the initiative to press for another Conference in 1974 and had already prepared a draft treaty carving out specific obligations and legal guarantees. This draft was prepared based on the experiences of their personnel and from the criticisms of the Conferences of Governmental Experts in 1971 and 1972.¹⁶⁶

The formula phase: The Conference titled the Geneva Conference on the Re-affirmation and Development of International Humanitarian law was convened in 1974 by the Swiss government

¹⁶¹ Hathaway and Shapiro, 211.

¹⁶² "Harry S. Truman: Address to the United Nations Conference in San Francisco," accessed April 30, 2018, <http://www.presidency.ucsb.edu/ws/?pid=12391>.

¹⁶³ Hathaway and Shapiro, at 213.

¹⁶⁴ John Dwight Ingram. "The Geneva Convention is Woefully Outdated." *Penn St. Int'l L. Rev.* 23 (2004): 79.

¹⁶⁵ Dwight, 79.

¹⁶⁶ George H. Aldrich, Establishing Legal Norms through Multilateral Negotiation--The Laws of War, 9 Case W. Res. J. Int'l L. 9 (1977).



which was the depository of the original Geneva Conventions.¹⁶⁷ Although approximately 120 delegations are believed to have attended - the number of active participants may have been around 70. The community believed that a comprehensive agreement with broad-based state participation was required for a robust re-orientation of Humanitarian Law.¹⁶⁸ The first Conference was held up by procedural baggage such as whether invitations should be extended to national liberation movements- a question that was decided by a majority vote.¹⁶⁹ Similarly, the question of whether national liberation wars qualified as international armed conflicts was also decided by majority vote, which meant that the protections provided for in the Geneva Conventions apply.¹⁷⁰ This irked United States, at which point, they threatened to exit the negotiations.¹⁷¹ The second session of the Conference was marked by trade-offs and compromises - a pattern which continued into the Third Session of the Conference. Compromises had to be made on certain key issues and voting on the less contentious ones.¹⁷² A particularly contentious issue was the granting of Prisoner-of-War status for guerilla fighters given the North Vietnamese tactics used in the Vietnam War which the US was entangled in. Another point of contestation between the Western States and those lead by the Soviet Bloc was regarding the principle of proportionality. The Soviet bloc and other representatives from the third world believed that this would grant military commanders too much discretion during an armed conflict.¹⁷³ The Western States responded by claiming that proportionality did not mean abandonment of the conduct of hostilities but lay in a more realistic understanding of the extent to which the laws of war could regulate this conduct.

The details phase: *Many of the contentious issues during the formula phase were overlooked through the utilisation of vague or ambiguous language* in the final draft. The issue about guerrillas was resolved by stating that combatants must identify themselves as soon a there is 'deployment' - a convenient term because no one had an understanding of what it meant.¹⁷⁴ Finally, after such diplomatic wrangling for four years, Additional Protocol 1 that dealt with external armed conflicts and Additional Protocol II which dealt with internal armed conflicts were negotiated. Despite the broad array of compromises, the new conventions plugged many of the gaps left by the original Geneva Conventions. The term 'civilian' was defined for example and given a vast array of protections. In many ways, the codification tilted the balance of the laws of war towards humanitarianism from military necessity.¹⁷⁵ Four decades after their adoption, there are now 174 State Parties to AP I and 168 State Parties to AP II.

¹⁶⁷ Aldrich, 10.

¹⁶⁸ Aldrich, 10.

¹⁶⁹ Kalshoven, Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The First Session of the Diplomatic Conference, 5 NETH. Y.B. INT'L L. 3 (1974).

¹⁷⁰ Amanda Alexander, 'A short History of International Humanitarian Law' 26 EJIL 1 (2015), at 124.

¹⁷¹ They ultimately did not sign. Reagan, Ronald. "Letter of transmittal." *The American Journal of International Law* 81, no. 4 (1987): 910-912.

¹⁷² Amanda Alexander, 'A Short History of International Humanitarian Law' 26 EJIL 1 (2015), at 124.

¹⁷³ *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva* (1974-1977), vol. 14 (1981).

¹⁷⁴ George.H. Aldrich. "Guerilla Combatants and Prisoner of War Status." *Am. UL Rev.* 31 (1982): 871.

¹⁷⁵ Antonio Cassese, 'A Tentative Appraisal of the Old and the New Humanitarian Law of Armed Conflict', *The New Humanitarian Law of Armed Conflict*. Vol. 1. Editoriale scientifica, 1979.



NORM ENTREPRENEURS

The ICRC has played a major role in the negotiation of International Humanitarian Law across decades and in several instances has been more proactive in taking initiatives than many states.¹⁷⁶ For example vide a memorandum dated February 15, 1945, the ICRC stated that it would initiate consultations for the purpose of drafting the Geneva Conventions and brought together governments and National Societies to gather the necessary expertise and documentation.¹⁷⁷ On the basis of the deliberations and conclusions reached through these informal consultations and the preparatory conferences, the ICRC formulated the four draft conventions and re-formulated them after the Seventeenth International Conference of the Red Cross that met in Stockholm.¹⁷⁸ They then transmitted these drafts to the Swiss government which acts as the depository of the Geneva Conventions and circulated these drafts to all countries invited to the diplomatic conference in Geneva in 1949. The drafts prepared by the ICRC were used for deliberation at the Conference and provided an edifice around which negotiations could take place. They played a similar roles in the process building up to the Additional Protocols as they recognized that a world divided in the midst of the Cold War would not easily revise the tenets of humanitarian law. Again, it prepared the draft which served as the basis for deliberations at the Conference, which was then forwarded to the Swiss government which initiated the dialogue.

CONCLUSION

The norm outlawing the use of force and the codes regulating the conduct of atrocities were both products of active engagement and facilitation by norm-entrepreneurs. In the case of the norm outlawing use of force, individuals and their ideas enabled states to come together to agree on an universal principle that to this day remains the bedrock of international relations. This reorientation happened through initial agreement through the Kellogg-Briand Pact. Even though this norm was flouted, as evidenced by the outbreak of the Second World War, it laid a formula for the post-war negotiations that resulted in the articulation of Article 2(4) of the UN Charter. The trajectory of IHL was slightly different as the Geneva Conventions were signed and internalised rapidly but were not in sync with the requirements of rapidly evolving modes and consequences of warfare. Norm entrepreneurship by the ICRC and contestation between the Western and developing world finally resulted in the Additional Protocols which have been widely signed and ratified. Much like cyberspace, the outlawing and regulation of warfare mark a domain, whose stability all states have an interest in preserving and the lessons learned from this case study have much to offer in the context of cyber negotiations.

¹⁷⁶ Francis Buignon. "The International Committee of the Red Cross and the development of international humanitarian law." *Chi. J. Int'l L.* 5 (2004): 191.

¹⁷⁷ Memorandum adresse par le Comiti international de la Croix-Rouge aux Gouvernements des Etats parties d la Convention de Genive et aux Socits nazionales de la Croix-Rouge, 27 *Revue internationale de la CroixRouge* 85 (1945), quoted in Buignon 194.

¹⁷⁸ Seventeenth International Red Cross Conference (Stockholm, Aug 1948), Report (Swedish Red Cross 1948); Seventeenth International Conference of the Red Cross.



CHAPTER 4: LEARNINGS FROM TRADE AND ENVIRONMENT

This chapter endeavours to build on the detailed case studies and highlight some additional learnings from the trade and environmental regimes. While these regimes bear some similarities with the trajectory of regime evolution illustrated in the previous two chapters, the processes and outcomes of these regimes offer some further useful insights that work on the cyberspace regime should take note of.

GOVERNMENT PARTICIPATION

The process of developing the Paris Agreement saw participation from countries from across the world including developing and developed. In total 195 countries joined the agreement except for Syria - as it was in the middle of conflict and subject to U.S and E.U sanctions and Nicaragua - as it felt that the agreement was not robust enough.¹⁷⁹ In 2017, both Nicaragua¹⁸⁰ and Syria¹⁸¹ became a signatory to the agreement. Prior to Nicaragua and Syria joining, in 2017, Donald Trump announced that the United States will withdraw from the agreement.¹⁸² Despite exit by the U.S., experts have maintained that Trump's position will geopolitically hurt the U.S. and give countries like China the ability to become leaders in this arena.¹⁸³

NEGOTIATION PROCESS AND STRATEGIES

The Paris Agreement was a formal 'agreement at large' in which consensus was facilitated through extensive informal processes and networking during the conference. In his article, *The Paris Agreement on Climate Change: Behind Closed Doors*, Radoslav Dimitrov highlights the important role that diplomatic tactics play in consensus building including understanding and leveraging the nuances of structure and process, micro-dynamics of negotiations, and coordination. Radoslav provides an account of the conference and how strategies such as negotiating only with actors directly relevant to issues, limiting the number of open deliberations, and presenting text in a 'take it' or leave it fashion was key in facilitating consensus.¹⁸⁴

¹⁷⁹ Friedman, Lisa. "Syria Joins Paris Climate Accord, Leaving Only U.S. Opposed." *The New York Times*. November 07, 2017. accessed April 30, 2018, <https://www.nytimes.com/2017/11/07/climate/syria-joins-paris-agreement.html>.

¹⁸⁰ "Paris Accord: US and Syria Alone as Nicaragua Signs." *BBC News*. October 24, 2017. accessed April 30, 2018, <http://www.bbc.co.uk/news/world-latin-america-41729297>.

¹⁸¹ "US and Syria Left Alone on Climate Accord," *BBC News*, October 24, 2017, sec. Latin America & Caribbean, accessed April 30, 2018, <http://www.bbc.com/news/world-latin-america-41729297>.

¹⁸² "Statement by President Trump on the Paris Climate Accord," *The White House*, accessed April 30, 2018, <https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/>.

¹⁸³ "Why Abandoning Paris Is a Disaster for America," *Foreign Policy* (blog), accessed April 30, 2018, <https://foreignpolicy.com/2017/06/01/why-abandoning-paris-climate-agreement-is-bad-for-america-trump/>.

¹⁸⁴ Radoslav S. Dimitrov, "The Paris Agreement on Climate Change: Behind Closed Doors," *Global Environmental Politics* 16, no. 3 (July 15, 2016): 1–11.



PARTICIPATION FROM NON STATE-ACTORS

The Paris Agreement saw wide participation from governments during the conference as well as non-governmental actors – including civil society, industry, investors, state governments etc. Broadly, the UNFCCC allows for NGO participation which is facilitated through an accreditation process by the UNFCCC Secretariat. Accredited NGO's have the ability to lobby, produce formal statements, propose policy options and make presentations.¹⁸⁵ The participation from non-governmental actors in the Paris Agreement has been highlighted as playing an important role in placing additional pressure on governments during the negotiations, as well creating a series of successful commitments outside of those made by governments.¹⁸⁶ Importantly, the participation of private sectors and other key actors was not limited to the conference, and these stakeholders have continued to play an active role at the country level as governments begin to undertake policies to meet commitments.¹⁸⁷ It has also been noted that non-state actors can play an important role in the review process under the Paris Agreement by offering independent expertise, comparative insight, and push for the uptake of outcomes at the national level.¹⁸⁸

CONSENSUS AND COMPROMISE

The Paris Agreement has been represented as being based on equal compromise and reciprocal tradeoffs. Thus every government walked away from the table with gains and compromises. For example, Radoslav provides accounts of how in the end, China did not obtain legally binding action and weaker transparency standards, yet their position on finance and mitigation was accepted. Similarly the US achieved a weaker stance on the legally binding character of national actions, but their desired standard of mandatory and progressive evolution and financial differentiation was not incorporated.¹⁸⁹

RIGIDITY OF INTERNATIONAL LAW MECHANISMS

The Paris Agreement has been called out by experts as an Agreement that achieved a balance between the need for national autonomy with an international responsibility by legally requiring countries to undertake and report on actions, but leaving the exact nature of these actions up to the country.¹⁹⁰ Known as the common but differentiated responsibilities and respective

¹⁸⁵ Giese, Lucas J. "The Role of NGOs in International Climate Governance: A Case Study of Indian NGOs." (2017), accessed April 30, 2018,

https://digitalcommons.csbsju.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1037&context=honors_thesis.

¹⁸⁶ "Building Toward Breakthrough: Energizing the Paris 2015 Climate Negotiations and Post- Paris Action Agenda through Broader Engagement." Yale Climate Change Dialogue | Yale Center for Environmental Law & Policy. July 2015. accessed April 30, 2018, <https://envirocenter.yale.edu/projects/yale-climate-change-dialogue>.

¹⁸⁷ "Subnationals, Non-State Actors Are Crucial for Paris Success | UNFCCC," accessed April 30, 2018, <https://unfccc.int/news/subnationals-non-state-actors-are-crucial-for-paris-success>.

¹⁸⁸ Harro Van Asselt and Thomas Hale, "How non-state actors can contribute to more effective review processes under the Paris Agreement." *Policy Brief (Stockholm: Stockholm Environment Institute, 2016)*.

¹⁸⁹ Radoslav S. Dimitrov, "The Paris Agreement on Climate Change: Behind Closed Doors," *Global Environmental Politics* 16, no. 3 (July 15, 2016): 1–11.

¹⁹⁰ Radoslav S. Dimitrov, "The Paris Agreement on Climate Change: Behind Closed Doors," *Global Environmental Politics* 16, no. 3 (July 15, 2016): 1–11.



capabilities – it is a principle in environmental law that emerged from the 1992 Earth Summit. The principle recognizes *“the need to evaluate responsibility for the remediation or mitigation of environmental degradation based on both historical contribution to a given environmental problem and present capabilities”*.¹⁹¹ Experts have noted that the flexibility of NDCs was key to the success of the Paris Agreement.¹⁹²

The transformation of the levels of Exit and Voice available to stakeholders from the GATT to the WTO offers some interesting prospects for the study of the adequate rigidity of a legally binding agreement.¹⁹³ The GATT was initially conceptualized as a ‘gentleman’s club’ which was primarily a *political non-binding agreement with low-levels of legal discipline and therefore lower contestation because states were less incentivised to actively contest terms that would not have strict legal consequences*. This interaction worked in a bi-directional manner as the low levels of political participation prevented consensus from developing on the thornier questions of global trade. In effect, it was reduced to a business like negotiation for the reduction of tariffs rather than an agreement at large.

The World Trade Organization, however was a multi-stakeholder initiative that sought to arrive at an agreement at large that would set legally binding obligations. Due to the interconnected nature of the world trade system, exit options are scarce because most countries are members to it. This combined with high levels of legal discipline means that there is more active contestation by various groups of countries to obtain a more equitable deal in the setting of norms. This has also lead to *regime shifting by various nations who feel that regional or mega-regional trade agreements would be more conducive to their needs than the cumbersome WTO process*.

TRANSPARENCY AND ACCOUNTABILITY MECHANISMS

In the Paris Agreement, the transparency, accountability, and compliance system established is meant to ensure positive and continuous progress towards nationally defined goals. A key way this was achieved was by placing a legally binding requirement on parties to define, communicate, and undertake a nationally determined mitigation contribution. Though parties are not legally bound to achieve defined targets, it is required that policies and goals and progress towards the same must be regularly communicated and must progressively become stronger.¹⁹⁴ To facilitate this accountability and transparency, the Paris Agreement puts in place technical expert reviews, a multilateral peer review process, and a standing committee on implementation and compliance.¹⁹⁵ The role that transparency and accountability play in the Paris Agreement have been noted as key in building trust and confidence.¹⁹⁶

¹⁹¹ Bonnie Smith, “Adapting the Paris Agreement,” *Vermont Journal of Environmental Law*, n.d., accessed April 30, 2018.

¹⁹² “The Paris Agreement and Beyond: International Climate Change Policy Post-2020 | Belfer Center for Science and International Affairs.” Harvard Kennedy School Belfer Center for Science and International Affairs, accessed April 30, 2018, <https://www.belfercenter.org/publication/paris-agreement-and-beyond-international-climate-change-policy-post-2020>.

¹⁹³ Joost Pauwelyn, “The Transformation of World Trade,” *Michigan Law Review* 104, no. 1 (October 1, 2005): 1–65.

¹⁹⁴ Radoslav S. Dimitrov, “The Paris Agreement on Climate Change: Behind Closed Doors,” *Global Environmental Politics* 16, no. 3 (July 15, 2016): 1–11.

¹⁹⁵ INSIDER: An Enhanced and Effective Framework for Transparency and Accountability in the Paris Agreement | World



THE BARGAINING PROCESS

The GATT used to function on the basis of a majority vote due to its nature as a political club with relatively low levels of contestation.¹⁹⁷ The WTO has adopted a consensus approach to voting on major policy issues, which has stonewalled progress on various issues since 2001. While the consensus voting requirement does provide voice to developing countries, the exercise of voice is only considered relevant and legitimate if the veto is exercised in consonance with a coalition.

DISPUTE RESOLUTION BODY

The WTO Appellate Body is an example of an effective and independent judicial system that has managed to extricate itself from the political trappings of the WTO. They have resolved various controversial issues with reference to the laws codified in the founding agreements which has sometimes found them at odds with trade policy elites. However, their neutrality was understood by all ultimately and lead to the cementing of the WTO as an independent authority rather than a politically driven compromise.

CHAPTER 5: PROGRESS IN CYBERSPACE

The inextricable weaving of the Internet of Things (IoT) into commerce, social interaction and military strategy universally has rendered its nature similar to any other 'global commons. States have clearly diagnosed that an international regime is needed to govern its use and restrict its weaponization in order to ensure its continued stability and utility. However, the amorphous and ever-changing nature of cyberspace and the vastly contested perceptions of the phenomenon has stood as challenges to the international community from arriving at a formula that could precipitate shared notions of cyber governance for three key reasons. First, *there is a cultural divide on the essence of cyberspace - as a free-flowing entity that states should patrol with as light a touch as possible and the idea of information sovereignty, which prefers strict sovereign regulation.* Second, *the unknown potential of pursuing offensive strategies in cyberspace and the limited potential of deterrence given the difficulties of attribution incentivise states to defect from the co-operative equilibrium* simply because they remain unsure regarding the quantity of pay-offs when they cheat or co-operate. This also *prevents them from displaying all their preferred strategies and outcomes at the negotiation table as that would tie their hands in case a future opportunity for strategic exploitation opened up.* The utility of cyberspace in altering or re-orienting prevailing global power asymmetries is a reality the cyber governance project must grapple with. Finally, *the increased role of non-state actors in the prevailing cyber security architecture means that state negotiators will have to understand the needs, motivations and ideologies of those operating both in the offensive and defensive realm.* The heterogeneity of

Resources Institute," accessed April 30, 2018, <http://www.wri.org/blog/2015/12/insider-enhanced-and-effective-framework-transparency-and-accountability-paris>.

¹⁹⁶ INSIDER: An Enhanced and Effective Framework for Transparency and Accountability in the Paris Agreement | World Resources Institute," accessed April 30, 2018, <http://www.wri.org/blog/2015/12/insider-enhanced-and-effective-framework-transparency-and-accountability-paris>.

¹⁹⁷ Pauwelyn 5.



actors and motivations together with the complexity of the phenomenon itself turns the regulation of cyberspace into a unique challenge for the international community.

Diagnosis Phase: In 1998, Russia proposed a treaty at the United Nations that would regulate and restrict the utilization of cyber-attacks and cyber weapons.¹⁹⁸ The initial proposal adapted its idea from norm proliferation in the avenue of arms control and disarmament. At the time, this proposal was opposed by the United States and found little support. Academic discourse on the development of an international cyber security convention was also discarded as impractical and failed to gain traction within the United Nations.¹⁹⁹

Further research on the *utilization of non-binding norms and confidence building measures as an alternative to the development of a full-fledged treaty regime lead to an alternate approach within the international community.*²⁰⁰ The approach drew from the norms based approach in regimes such as the Missile Technology Control Regime and helped shape the UN-GGE process. The GGE was set up in 2004 and comprised of independent experts from 15 states. This group was initially meant to advise the UN on promoting peace and stability in cyberspace. While the first UN-GGE was not able to finish a report, the second GGE was more fruitful and ended up releasing a report in 2010. The third GGE which presented its report in 2013 agreed on a set of founding norms for the governance of cyberspace.²⁰¹ The document basically stated that international law, state sovereignty and human rights were applicable to the governance of cyberspace. The report also stated that states must not use non-state proxies to commit cyber- attacks on other states or allow non-state actors to use their territory for the launching of cyber-attacks.

MAKINGS OF A FORMULA

The 2015 report of the fourth UN-GGE elaborated on these concepts and laid down a comprehensive framework for further discussion on cyber norm evolution. Section III of the report lays down several norms, rules and principles for responsible state behaviour in cyberspace.²⁰² The 2013 and 2015 reports of the GGE have the makings of a broad formula for devising a regime on cyberspace. However, it has not fostered agreement on many crucial normative questions, including on the definition and nature of cyberspace itself. Therefore, instead of continuing to focus on extrapolating academic theory in International Law to promulgate new norms, focus must be shifted on the process behind obtaining universal consensus on a formula that works for all stakeholders-so that work may proceed on the details phase.

¹⁹⁸ James Andrew Lewis, "Revitalizing Progress on International Negotiations in Cybersecurity" in Donahoe, Eileen, Melissa Hathaway, Paul Twomey, James A. Lewis, Joseph Nye Jr, and Eneken Tikk. "Getting beyond Norms: New Approaches to International Cyber Security Challenges." (2017): 13.

¹⁹⁹ Lewis 13.

²⁰⁰ Lewis 13

²⁰¹ "The UN GGE on Cybersecurity: How International Law Applies to Cyberspace," Council on Foreign Relations, accessed April 30, 2018, <https://www.cfr.org/blog/un-gge-cybersecurity-how-international-law-applies-cyberspace>.

²⁰² United Nations, *2015 GGE Report*: 12.



HURDLES

Drawing from what appeared to be consensus within the group on the norms process a fifth GGE was instituted by the United Nations “to study, with a view to promoting common understandings, ... how international law applies to the use of information and communications technologies by States, as well as norms, rules and principles of responsible behaviour of States, confidence-building measures and capacity-building...”²⁰³ However, due to what cyber security and International Law expert and chair of the Tallinn Manual Process, Prof. Michael Schmitt terms the ‘politicization of cyber norms,’ the UN-GGE was not able to arrive at consensus due to stonewalling by Cuba and reportedly China and Russia. Gauging from Cuba’s publicly available statement²⁰⁴, the UN-GGE disagreed on three fundamental questions. It appears from their statement that applying the contested norms of international law to the cybersphere would convert cyberspace into a ‘theatre of military action’ and legitimize unilateral punitive sanction. Mike Schmitt is critical of this position -arguing that it has no validity in international law and has been adopted by states to gain an asymmetric strategic advantage as the states engaged in the stonewalling were rarely the victims of unlawful cyber attacks.²⁰⁵ Further, as pointed out by Arun Mohan Sukumar, the dissenting states did not want the rules of the game to be dictated by militarily advanced states - a problem that can only be solved through multilateral parliamentary diplomacy that takes all stakeholders on board in the norms formation process.²⁰⁶

CONTESTATION

A core divide in the cyber norms formation process revolves around the question of sovereignty.²⁰⁷ The Sino-Russian view suggests that sovereignty in international law is absolute and no entity other than the sovereign state itself can limit the exercise of this power.²⁰⁸ Consequently, both Russia and China believe that each country has the right to manage the use

²⁰³ Michael Schmitt and Liis Vihul, “International Law Politicized: The UN GGE’s failure to advance cyber norms,” *Just Security*, Jun 30 2017, accessed 6th May 2018, <https://www.justsecurity.org/42768/international-cyber-law-politicized-gges-failure-advance-cyber-norms/>.

²⁰⁴ Declaration By Miguel Rodríguez, Representative Of Cuba, At The Final Session Of Group Of Governmental Experts On Developments In The Field Of Information And Telecommunications In The Context Of International Security, New York, June 23, 2017.

²⁰⁵ These include not knowingly allowing their territory to be used for the commission of internationally wrongful acts using Information Communication Technologies (ICTs); to cooperate for the exchange of information using ICTs; refraining in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations and to not knowingly supporting ICT activity contrary to the principles of international law.

²⁰⁶ “The UN GGE Failed. Is International Law in Cyberspace Doomed As Well?,” *Lawfare*, July 4, 2017, accessed 6th May 2018, <https://lawfareblog.com/un-gge-failed-international-law-cyberspace-doomed-well>.

²⁰⁷ Eneken Tikk and Mika Kenttunen. “The Alleged Demise of the UN GGE: An Autopsy and Eulogy.” 2017. Accessed May 1, 2018. <http://cpi.ee/wp-content/uploads/2017/12/2017-Tikk-Kerttunen-Demise-of-the-UN-GGE-2017-12-17-ET.pdf>

²⁰⁸ Assembly, UN General. “Developments in the field of information and telecommunications in the context of international security.” *UN document A/C.1* (2015): 66.; Zeng, Jinghan, Tim Stevens, and Yaru Chen. “China’s Solution to Global Cyber Governance: Unpacking the Domestic Discourse of “Internet Sovereignty”.” *Politics & Policy* 45, no. 3 (2017): 432-464.



of its own cyberspace and define its 'network frontiers'²⁰⁹ through the implementation of domestic legislation or the framing of state policy. According to this group of states, each country has the right to patrol information at its cyber borders - a view which has been a principled stand in accordance with their long-time reading of International Law.²¹⁰ According to these countries, ICTs come laden with foreign influence and can disrupt the sovereign authority of the concerned state²¹¹, which is directly at odds with the desire of the US and like-minded states in the G-7 to preserve the free-flow of information.

The Russian chair of the 2004/2005 GGE stated that issues of 'international informations security' must be discussed in light of the global information revolution.²¹² The UK and US have repeatedly stated that the use of the term in this fashion indicates that information itself is a security threat which must be guarded against.²¹³ As per their position, excessive focus on 'information security' could potentially spiral a shift towards a position where the internet no longer serves as a platform for the rapid exchange of discourse and ideas but as domains of excessive sovereign regulation.²¹⁴ The alleged Russian interference in the U.S. elections through the spread of fake misinformation and 'fake news' via social media platforms has resulted in calls for the re-evaluation of this stance and assess these actions against existing international law and national security strategy and thus amend domestic policy accordingly.²¹⁵

The ideological split on the nature of cyberspace has also resulted in two radically different approaches on how to regulate it. The United States has pushed for a soft 'norms' based approach where they seek to apply existing tenets of International law to cyberspace without creating a new treaty and promoting them aggressively.²¹⁶ The use of this terminology might be confusing as the application of International Law to any domain would result in the creation of autonomous binding obligations on all states even in the absence of a treaty. So, it remains

²⁰⁹ Yuan Yi, "网络空间的国界在哪" [Where Are the National Borders of cyberspace]? 学习时报. May 19 2016. Accessed on Jan 06, 2018, <http://www.studytimes.cn/zydx/KJJS/JUNSZL/2016-05-19/5690.html>.

²¹⁰ Yuan Yi; Tikk and Kerttunen, at 17; Grigsby, Alex. "The End of Cyber Norms." *Survival* 59, no. 6 (2017): 109-122: 111.

²¹¹ Yu Li. "如何认识与维护互联网主权" [How to Understand and Protect Internet Sovereignty]. Peoples Daily. February 2, Accessed on Jan 06, 2018, <http://media.people.com.cn/GB/16996575.html>.

²¹² 13th Plenary Meeting of the First Committee A/C.1/60/PV.13: 5.; See also 2000 Information Security Doctrine of the Russian Federation that was re-adopted in 2008 and remained in force until December 2016 when a new Doctrine on Information Security of the Russian Federation was adopted. See further the Chinese contribution in 2006, whereby the free flow of information should be guaranteed under the premises that national sovereignty and security must be safeguarded and that the historical, cultural and political differences among countries be respected (Developments in the Field of Information and Telecommunications in the Context of International Security (A/61/161)) in *Tikk and Kerttunen*, at 18.

²¹³ Assembly, UN General. "Developments in the field of information and telecommunications in the context of international security." *UN document A/C.1 (2015): 66.*

²¹⁴ Assembly, UN General. "Developments in the field of information and telecommunications in the context of international security." *UN document A/C.1 (2015): 66.*

²¹⁵ "Election Hacking, As We Understand It Today, Is Not A Cybersecurity Issue." Lawfare. January 05, 2018. Accessed Jan 06, 2018, <https://www.lawfareblog.com/election-hacking-we-understand-it-today-not-cybersecurity-issue>; "International Law and the US Response to Russian Election Interference." Just Security. January 05, 2017. Accessed Jan 06, 2018, <https://www.justsecurity.org/35999/international-law-response-russian-election-interference/>.

²¹⁶ Finnemore, Martha. "Cultivating international cyber norms." *America's cyber future: Security and prosperity in the information age* 2 (2011): 89-100.



unclear why the US approach is considered a 'soft approach' to cyber governance. On the other hand Russia and China have stated that existing tenets of customary International Law were never intended apply to cyberspace and the creation of a new *lex specialis* (specific law) through the drafting of a treaty that regulates cyberspace is required.²¹⁷

THE BIRTH OF COALITIONS

Much like in the case of the other regimes, a variety of regional and strategic groupings have put forward representations of their orientation on cyber-governance.²¹⁸ The Joint Statement made by the BRICS leaders at Xiamen in September, 2017 and prioritised the equal participation of all states in cyber governance and the need to make structures that regulate cyberspace more representative and inclusive.²¹⁹ This critique applies to the GGE process where the P5 have participated in all five GGE processes. Estonia, Belarus, Brazil and India have participated in four while Canada, Egypt, Japan and Mexico have been a part of three GGE processes. Other states have been involved in two or less.²²⁰

The G7 have also used their strategic grouping to endorse the applicability of the framework of International Law and the UN Charter-including self-defense, human rights law and humanitarian law through the G7 Declaration on Responsible State Behaviour in Cyber Space in April, 2017.²²¹ The joint endorsement of this doctrine by G7 states makes their position on the applicability of International law clear although clearer articulation providing legal reasoning and pragmatic enforcement mechanisms is needed. On the other hand, India also endorsed the communique of the meeting of G20 Finance Ministers and Central Bank Governors in Baden-Baden, Germany in March 2017, which focused on the need for digital financial inclusion²²² and addresses the role of cybersecurity in the protection of financial services.²²³ The European Union High Representative of the Union for Foreign Affairs and Security Policy submitted a report that explicitly recognised the importance of developing a political response to cybersecurity threats as many of the threats themselves are geopolitical in nature. ²²⁴Further, the report acknowledged that cyberspace is a domain of operations like land, air sea and space and therefore deserves priority in EU's defense

²¹⁷ "Political and Military Aspects of the Russian Federation's State Policy on International Information Security" *Military Thought*, 2015.

²¹⁸ "Comparing Cybersecurity Norms," Carnegie Endowment for International Peace, accessed April 30, 2018, <https://carnegieendowment.org/publications/interactive/cybernorns>.

²¹⁹ BRICS. "BRICS Leaders Xiamen Declaration." (2017).

²²⁰ Australia, Ghana, Indonesia, Israel, Kenya, Malaysia and South Africa have been a part of two GGEs. Argentina, Colombia, Botswana, Cuba, Finland, Italy, Jordan, Kazakhstan, Mali, Netherlands, Pakistan, Qatar, Senegal, Serbia, Spain, South Korea, Switzerland have been involved in just 1 GGE process.

²²¹ "G7 Declaration On Responsible States Behavior In Cyberspace" www.mofa.go.jp/files/000246367.pdf

²²² Ministers, Finance. "Communiqué Meeting of Finance Ministers and Central Bank Governors." *March 2017*, at para 7, accessed April 30, 2018, <http://www.g20.utoronto.ca/2017/170318-finance-en.pdf>.

²²³ Ministers, Finance. "Communiqué Meeting of Finance Ministers and Central Bank Governors." *March 2017*, at para 7, accessed April 30, 2018, <http://www.g20.utoronto.ca/2017/170318-finance-en.pdf>.

²²⁴ "Resilience, Deterrence and Defence: Building strong cybersecurity for the EU" accessed April 30, 2018, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017JC0450&from=EN>, at 17.



strategy.²²⁵ Russia has extended its multilateral efforts regionally at the Shanghai Cooperation Organization (SCO). In 2009, the SCO arrived at an agreement that aimed to guarantee 'international information security'.²²⁶ In 2011, Russia and China were supported by other SCO countries in their submission of a draft, which was updated in 2015. These proposals lay out the rules of the road in cyberspace governance that focuses on 'international information security and sovereignty'.²²⁷ China took over the rotating Chairmanship of the Organisation this year and the next meeting will be held in Qingdao in July 2018. It is possible that Russia and China may continue to use the organisation to continue to pivot towards the signing of a cyber treaty and India's participation in this Organisation sets it up nicely to get involved in this process if it strategically suits its needs. In addition to the independent multilateral initiatives, there have also been several bilateral and tri-lateral initiatives seeking to articulate common understandings on cyber norms.²²⁸ These understandings could be useful for the purpose of building economic or diplomatic relationships with states although to be of any normative or legal significance, clearer legal reasoning would be needed.

CHAPTER 6: RECOMMENDATIONS

There were a number of factors that came together to ferment the success of the different agreements outlined above and can serve as lessons that can be carried over to the cyber negotiations process. The unique nature of cyberspace means that the recommendations need to be tailored to account for the unique nature of pay-offs and costs that the transitory nature of offensive cyber weapons or the problems of attribution in cyberspace hold for states and non-state actors. With this framework in mind, we articulate eleven recommendations under the following sub-headings: Size of negotiations, The Bargaining Process, Negotiation Strategies, Role of International law, Role of non-state actors and Dispute Resolution and coordination mechanisms.

SIZE OF NEGOTIATIONS

Recommendation 1: *There should be an agreement at large that involves all states and invites non-state actors to the table as interested stakeholders.*

Analysis: It is apparent that an agreement that regulates the entangled dimensions of cyberspace cannot be substituted by processes that involve a sample representation of states. While the GGE process marked an important point of commencement for future cyber negotiations, it cannot

²²⁵ "Resilience, Deterrence and Defence: Building strong cybersecurity for the EU" accessed April 30, 2018, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017JC0450&from=EN>, at 81.

²²⁶ Concluded between People's Republic of China, Russia, Kazakhstan, Kyrgyzstan, Tajikistan, and Uzbekistan on July 16, 2009.

²²⁷ Assembly, UN General. *Letter dated 9 January 2015 from the Permanent Representatives of China, Kazakhstan, Kyrgyzstan, the Russian Federation, Tajikistan and Uzbekistan to the United Nations addressed to the Secretary-General, UN Doc. A/69/723, annex I* (Jan. 9, 2015), accessed April 30, 2018, http://www.un.org/ga/search/view_doc.asp, 2015.

²²⁸ "Comparing Cybersecurity Norms," Carnegie Endowment for International Peace, accessed April 30, 2018, <https://carnegieendowment.org/publications/interactive/cybernorms>.



mark the end of the process and needs to be built on by involving all states. In order to foster legitimacy, strength, and sustainability of the emerging norms, there must be an agreement at large, which considers the voices of all states in a manner that encompasses widespread consent to the broad contours of the regime, even if consensus cannot be arrived at on every sub-point. This agreement at large needs to ensure that the voices of industry, civil society, and academia are also taken into account because these non-state stakeholders are becoming increasingly important for cyber governance and stability. The Environmental, UNCLOS and Use of Force regimes offer key learnings in this regard. Given the entangled dimensions of the phenomenon being negotiated, bilateral agreements that foster fragmented understandings of the concept at hand are not effective. The universal nature of these agreements not only enabled internalization of the norms and evolution of some of the legal provisions to the status of custom but also protected the regime when powerful players such as the US threatened exit from the regime. We believe the character of the cyber norms process should be 'multilateral with multi-stakeholder engagement.' Unlike other regimes, offensive operations in cyberspace impacts a wide range of actors-both in conjunction with and severed from state interests. Further, it has a range of implications for human rights and civil liberties. Therefore, it is crucial to have representatives from private sector and civil society present at the negotiations and representing their views and experiences in dealing with cyber security issues. While facilitating consensus among a diverse range of non-state entities may be difficult, it is important that their views are reflected at the table and taken into account by the decision-makers.

Feasibility: Present discourse on cyber security is fragmented into various regional or strategic groupings who harbour different understandings of cyber security and the role of an international regime that might regulate its contours. In order to build on the fragments of an existing formula, all parties must be brought to the negotiating table. The use of strategic negotiation tactics deployed by a robust and neutral coordination mechanism, which could be inter-governmental bodies such as the UN First Committee or non-governmental bodies such as the GCSC could work towards facilitating a positive outcome that can be considered by decision-makers.

THE BARGAINING PROCESS

Recommendation 2: *Ideas, research, and a pre-existing material (drafts and agreements) are critical foundations and should be leveraged.*

Analysis: As evident from our case studies, often the dawn of an all-encompassing regime are from ideas that emerge through conversations, correspondences and paper presentations by individuals, organizations or coalitions. The outlawing of war or the emergence of the Exclusive Economic Zone both originated as academic ideas that were then taken forward at the institutional level. Therefore, even though, the Tallinn Manuals have not found widespread consensus among states, it is crucial that the rigorous ideas incorporated in these texts are not ignored in the cyber governance project simply due to the fact that they have adopted a deracinated approach to the norms process. Instead, they can serve as the edifice on which future consensus can be forged.



Apart from academics, neutral non-governmental organisations can also play a crucial role. The ICRC's pre-draft of the Geneva Conventions and the Additional Protocols helped speed up the negotiations and served as the language of International Law that facilitated conflict initially and then finally, consensus. Microsoft's proposal for a Digital Geneva Convention could potentially play a future role as a foundational text.²²⁹

Feasibility: Given the wide array of academic scholarship and back-channel talks involving civil society groups, there is no dearth of ideas on the future of cyberspace. More channels of engagement, interaction and coordination between academics and policy-makers should be encouraged to ensure that these ideas play a role in the norm-creation process through bodies and forums like the IGF and the GCSC. Furthermore, there are over 70 existing multilateral and bilateral accords that should be considered and leveraged when negotiating an agreement.²³⁰

Recommendation 3: *There must be transparency in the bargaining process at two levels: (1) Internal Transparency: This would be internal to the Parties and not necessarily the public and (2) Transparency of process and outcomes: This would be communicated to the public at large which would foster confidence in the negotiation process and thereby enable states to represent a wide array of domestic and international stakeholders in the proceedings.*

Internal Transparency - All the regimes studied involved trade-offs and compromises and the formulation of packages and subpackages. Assuming all states are strategically incentivised to formulate an international regime for cyberspace due to the stability it fosters, they must be willing to compromise while sticking to their key policy requirements. However, they must be clear and transparent about the packages that are more important for their ideological or strategic needs so that the bargaining process can flourish. The New International Economic Order and the sovereign rights to the Exclusive Economic Zones was a bargaining chip that the G77 was not willing to compromise on during the UNCLOS negotiations both due to economic necessity and ideological dogma.

The case studies also demonstrate that undertaking a negotiation process with a clear understanding of country preferences can facilitate a bottom up cooperative process. In the Paris Agreement, this was in part achieved by having Parties present their 'intended nationally determined contributions' prior to COP21.²³¹

Transparency of process and outcomes - The GGE process thus far has been marred by opacity. The draft of the failed 2017 GGE has not yet been released, which has prevented widespread public debate on the stumbling blocks rather than using it as a tool for progressive conflict.

Feasibility: While transparency is an ideal notion, decision-makers must strive for the non-attributability of offensive cyber action means that states and non-state may gain greater payoffs from not disclosing their capabilities and preferences. There needs to be robust diplomatic

²²⁹ Brad Smith, "The need for a Digital Geneva Convention," Microsoft, Feb 14, 2017, accessed Apr 28th 2018, <https://blogs.microsoft.com/on-the-issues/2017/02/14/need-digital-geneva-convention/>.

²³⁰ "Comparing Cybersecurity Norms," Carnegie Endowment for International Peace, accessed April 30, 2018, <https://carnegieendowment.org/publications/interactive/cybernorms>.

²³¹ Nationally Determined Contributions (NDCs) | UNFCCC," accessed April 30, 2018, <https://unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs#eq-5>.



posturing to persuade states to adopt transparency mechanisms both during and after the negotiation process. There needs to be conviction that both the reputational gains and global stability gained through transparent strategies, commitments, and progress thus enabling responsive and collective action and response.

NEGOTIATION STRATEGIES

Recommendation 4: *Coalitions of like-minded states grouped by common ideology, interests, focus areas or identities may aid in fostering positive conflict, identifying key areas for consensus and in the development of a formula in the long run*

Analysis: A fragmented approach to cyber governance may not fulfill the goal of regulating cyberspace, but it could be a potential catalyst for a stable international system as it would allow for some certainty in the formation of strategic alliances and in national approaches to cyberspace. Coalition-building was successfully used to articulate varied state interests and anchor the negotiations throughout the UNCLOS process through groups such as the G77. Further, given the nature of contestation in cyberspace and the present lack of consensus on applicable International Law, fragmentation, through regional or strategic groupings may be the way forward in the short-run until universal minimum core markers of consensus may be found. This process led to the success of norm entrepreneurs such as AALCC during the UNCLOS negotiation process. Their recommendations and declarations aided the genesis of a formula that guided the negotiations. As outlined in the Report, existing governmental groups and forums could be potentially leveraged such as the Freedom Online Coalition, the G7, or the G20 as spaces for consensus building on specific topic areas.

Feasibility: Overlapping consensus among multiple fragmented groupings is possible if the various coalitions approach the negotiations willing to make compromises while not letting go of the core ideological basis of their groupings. For example, the G77 entered into trade-offs with the western states on various issues but none that threatened the establishment of an Exclusive Economic Zone under the agenda of the New International Economic Order.

Recommendation 5: *In order to work out the various formulae, informal negotiation must be encouraged.*

Analysis: Informal negotiation among a variety of smaller groups will allow delegates to engage with each other as individuals that represent the social, cultural and economic needs of the citizens of that state or region rather than engaging in a deracinated format as macro-state units. This mode of engagement was particularly fruitful in the Law of the Seas and the Paris Agreement negotiations as it converted a 'one-size-fits-all' approach into a more inclusive one that sought to recognize the diverse concerns of participating states. Progress can be made one issue at a time rather than trying to work out the details of all issues simultaneously once a broad formula has been agreed upon.

Feasibility: This recommendation is feasible once all delegates have been brought together for the negotiation process. It will also facilitate engagement and informal dialogue with non-state actors.



Recommendation 6: *Voting must seek to facilitate consensus by using tactics such as the Indaba strategy*

Analysis: The mode of voting on issues must seek to facilitate consensus. A process that builds on voting by the majority would amplify the voices of coalitions but could therefore reduce the incentives for major powers to stay on in the agreement. This was seen in the UNCLOS, IHL and the Paris Agreement. The harms of exit by a major power for the future of the regime must thus be considered. In the case of UNCLOS, the development of IHL or the Paris Agreement, the US exit did not threaten the existence of the regime. However, if the US were to exit the WTO and set up parallel regimes, then the future of the trading system would need re-evaluation. In the case of cyberspace, it is too early to risk exit by any country from the negotiations altogether due to the entangled nature of cyberspace and the lack of an already established broad formula. Instead, modes of negotiation that allow consensus to emerge without jeopardizing the process must be adopted. The Indaba negotiation strategy that obliges dissenters to propose alternate paths may be useful to ensure that any stonewalling is done after considering the path ahead.

Feasibility: While apparent divisions discussed in cyberspace negotiations as discussed Chapter 5 make the emergence of consensus on certain issues difficult, consensus on the least common denominator must be the goal of any negotiation.

Recommendation 7: *Large regimes are decades in fruition. A small start does not dictate the eventual result.*

Analysis: Most multilateral regimes evolve over a long period of time in order to enable the accommodation of multiple views and interests. It is important to not set a fixed deadline and enable the negotiations to evolve organically. However, while a diplomatic agreement is in the making, more urgent progress is needed on developing technical solutions that can prevent internet infrastructure from being attacked or utilised as third-party systems when an attack is being carried out. Cooperation with non-state actors can facilitate the needed research and development of these solutions.

Feasibility: As long as a coordination mechanism that enables various stakeholders to interact regularly is set up, allowing time to accommodate diverse viewpoints should be beneficial for the cyber norms process.

ROLE OF INTERNATIONAL LAW

Recommendation 8: *International Law must be used as a tool for the facilitation of positive conflict but the cyber norms process must be careful to not delve into the details of its application until a broad formula has been worked out.*

Analysis: As seen in the UNCLOS negotiations, reference to existing principles of International law or regional understandings such as the notion of the patrimonial sea are key for laying out a framework for further discussion. These principles serve as a common baseline on which first, positive conflict and then, consensus can emerge. Before jumping on to the applicability of specific norms of International Law in cyberspace, there must be consensus on what the broad contours of the agreement would be. For that to happen, there needs to be a common



understanding on the essence of cyberspace, the extent to which it can be weaponized and the rights and obligations of sovereign nations in this sphere. Before arriving at answers on specific questions such as the applicability of standards of self-defense or standards of attribution, broader questions on the nature of cyberspace and the extent of sovereignty that may be exercised therein need to be answered first.

Recommendation 9: *The cyber norms process is not ready for the imposition of rigid, legally binding obligations as a desired outcome yet.*

Analysis: The legally binding outcomes of the process should not be envisaged until a formula has been agreed upon. However, at this stage, the focus should be on national capacity building and voluntary compliance with cyber security requirements much like the INDCs at the Paris Agreement. A rigid legally binding agreement risks amplifying contestation or increasing Exit by many key players, something the process can ill-afford at this state due to the nascency of the negotiations and the real need to cull out a workable agreement. Once a shared formula is arrived at, the objective-either in the form of a global treaty or 'soft norms' can be agreed upon driven by increasing political participation by stakeholders who feel incentivised to improve the outcome of the process.

Feasibility: Texts such as the Tallinn Manual set out a useful trajectory for the application of international law. However, the cyber norms process is not ready to apply these norms in detail and must therefore use existing principles of international law to arrive at a clear picture on the formula first.

ROLE OF NON-STATE ACTORS

Recommendation 10: *Wide participation by non-state actors can be key in negotiation processes. Identification of norm-entrepreneurs and supporting them may be important for a successful outcome.*

Analysis: Involvement of non-state actors can create external pressure for outcomes to be reached that are acceptable to the public, can contribute to the objectives of the agreement, and can play an important role in accountability at the national level of state commitments. At the sametime, states are often reluctant to take initiatives on matters which would require an agreement at large as the transaction costs of facilitating consensus would be greater than the individual benefits of a stable regime. Therefore, multi-stakeholder non-state bodies and forums pursuing multi-stakeholder models of Internet Governance such as the, GCSC, IGF, ICANN, ISO, ITU, and ISOC should continue to play a role-both in finding areas for collaboration, generating ideas, normative content, and developing standards that could inform a future agreement. These forums and bodies can also serve as spaces for bringing multiple actors to the table to discuss key issues and in doing so establish a foundation for future discussion. Such interactions are already taking place. For example, ICANN and OAS have signed an MOU to cooperate on common areas of interest relevant to cyber security.²³² Such bodies can and do play an important role in

²³² "ICANN and OAS to work together to increase regional cyber security, 30 Oct 2015, ICANN blog, accessed Apr 28th 2018, <https://www.icann.org/news/announcement-2015-10-30-en>.



areas such as capacity building - for example the ITU undertakes capacity building efforts towards harmonizing regulatory frameworks and the Global Forum on Cyber Expertise undertakes capacity building efforts inline with international legal frameworks.²³³ Apart from non-governmental organizations, large private sector organizations most significantly affected by the weaponization of cyberspace should also be consulted so that the formula agreed upon takes into account their experience, understanding, and requirements. It is crucial that governments also continue to engage with these non-state actors throughout the negotiation process.

Feasibility: There are multiple non-state actors that have been involved in the present multi-stakeholder cybersecurity process. The key lies in enabling them to play a role in either coordinating the arrangement or providing valuable expertise, depending on the nature of the organisation.

DISPUTE RESOLUTION AND COORDINATION BODY

Recommendation 11: *A dispute resolution or co-ordination body is needed but the present legal regime is not robust enough to create a mechanism that adjudges cyber disputes yet.*

Analysis: The dispute resolution mechanism in the cyber norms process can emerge at two stages. Right now, even before the conclusion of the formula phase of the negotiations, a global consortium that establishes best practices and conducts cyber security inspections may be crucial. This is because until a more cohesive formula is drawn up, a judicial tribunal will not be able to rule on International cyber disputes.

Once a formula has been arrived at and political consensus has enabled the framing of parameters for attribution of cyber offensive attacks, a judicial body with teeth such as the WTO Appellate Body may be considered.

Feasibility: Feasibility of setting up these coordination mechanisms depends on the willingness of various stakeholders to fund, arrange and support the functioning of these mechanisms.

²³³ Sash Jayawardene, Joris Lakis and Erin Jackson, "Cyber Governance: Challenges, Solutions, and Lessons for Effective Global Governance". November 2015, The Hague Institute for Global Justice.



ANNEX SUMMARY OF FINDINGS

Aspect of Negotiation	UNCLOS	Use of Force/ Development of IHL	Trade	Environment	Implications for Cyber
Size	Multilateral- more than 150 + negotiating states, 150 + negotiating issues	Use of Force: Kellogg-Briand Pact had 31 signatories by effective date; 14 states party to the negotiations. Initially, 50 parties signed the UN Charter IHL: Geneva Conventions ratified by 196 states; Additional Protocol ratified by 174,168 and 73 states respectively and had around 120 members participating in negotiations	Started off small - 23 countries at GATT 1947 but WTO has 164 members	174 states And the EU were parties; 196 signatories	Should be an all- encompassing agreement at large
Formal/ Informal Bargaining Process	Number of informal bargaining groups and sub- committees on various issues	Formal bargaining process driven by heads of states and leading diplomats	Business style tariff reductions at GATT, more holistic law-driven consensus building at WTO	Multilateral process with 'formal informals'	Informal bargaining processes to diagnose an appropriate formula
Rigidity of International Law	Output was a single negotiated treaty text	Engraved into Article 2(4) has been recognized as customary international law IHL: Codified body of law in the Four Geneva Conventions and two Additional Protocols	GATT: Low levels of legal discipline, WTO: Rigid structure of International Law	Internally Determined Contributions (INDCs)- voluntary compliance	Until formula diagnosis, a 'light touch' approach should be adopted that ensures 'cyber hygiene' without forcing states to make commitments



Aspect of Negotiation	UNCLOS	Use of Force/ Development of IHL	Trade	Environment	Implications for Cyber
Time	Took 15 years as there was no time pressure. Diagnostic Phase: 6 years; Formula Phase: 2 years; Details Phase: 7 years	Pact of Paris was negotiated between 1925-1929 although the informal origins of the idea came as early as 1919; UN Charter was negotiated within a year of the Dumbarton Oaks Conference in 1944 IHL: Geneva Conventions negotiated quickly in the aftermath of World War II. Additional Protocols took longer between 1974-77	GATT was negotiated quickly after World War II. Came into effect by 1947. Uruguay Round setting up the WTO took 8 years.	Negotiations officially took between 30 Nov-12 Dec, 2015 but built on 4 decades of environmental jurisprudence	Should not set a fixed deadline until a formula emerges
Negotiation Strategies	Use of trade-offs and packages/sub-packages	Use of trade-offs to determine what the functioning of UNSC would be like and the core norms of IHL	Tariff reductions were the initial trade-off but as the WTO mandate grew to fields such as Intellectual Property, informal mechanisms had to be deployed to facilitate consensus	Use of trade-offs and sub-packages	Clear use of trade-offs and sub-packages in a transparent manner so that all parties are aware of the bargaining chips
Decision Rule	Consensus or near consensus in decision-making	Use of Force: Consensus among the major powers Geneva Conventions: Majority Vote with negotiation on key substantive issues	Simple majority at GATT; Consensus with every party having a veto at WTO	Indaba negotiation strategy	Facilitative consensus along the lines of the Indaba orientation



Aspect of Negotiation	UNCLOS	Use of Force/ Development of IHL	Trade	Environment	Implications for Cyber
Evidence of Exit and Voice	Multiple coalitions such as the Group of 77 formed to give 'voice' to the needs of developing countries. USA did not sign the treaty in 1982	Entire process was driven by the major military powers at the time. Article 2(4) was driven by the victors of World War II, so there was not much scope for the exercise of 'voice' although there was contestation among the major powers	GATT-Low Legal discipline-High Exit-Low Voice; WTO-	USA has indicated that they will exit the Agreement	Should try to ensure maximum voice for all participants while ensuring that the tipping point for exit is not met
Use of Non-State Groups	Largely state-centric process	Academics that originally conceptualised the idea leading up to KB Pact; IICRC emerged as a major norm entrepreneur in the field of IHL	While NGOs are now increasingly coming into the fray, the original negotiations were largely state-centric initiatives	NGOs and specialist groups were invited to the negotiation process and helped drive consensus	Groups like the GCSC should endeavour to facilitate consensus, prepare research and take initiatives at conferences. There must also be constant state engagement with the private sector
Set up of Dispute Resolution/ Co-ordination Body	ITLOS; International Sea-Bed Authority	ICJ//UNSC	WTO Dispute Settlement Body	Climate Change Displacement Co-ordination Agreement to tackle forced migration due to environmental reasons	Cyber consortium that ensures cyber hygiene compliance and fosters co-ordination in international cyber dispute resolution and investigations



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