# Bringing the Law In: Unlearned Lessons for Diplomats and Others

Dr. Catherine Lotrionte

## INTRODUCTION

For over twenty years, "developments in the field of information and telecommunication in the context of international security" has been on the agenda of the United Nations (UN). In 2003, the UN General Assembly established the first formal group of governmental experts (UN GGE) to study existing and potential threats in the sphere of information security and possible cooperative measures to address them. From the beginning of this process, the role of international law has been part of the discussions about existing threats in cyberspace and what measures could be taken to minimize those threats. Indeed, at the conclusion of the first UN GGE in 2004, the Chairman explained that the group was unable to conclude a consensus report because, among other reasons, there were "differing interpretations of current international law in the area of international information security."[1] Since the conclusion of this first UN GGE, there have been six more GGEs, with the last one wrapped up in May 2021. Each of these groups were tasked with studying the potential threats from State malicious actions in cyberspace and how international law applied to such State actions, among other topics. In 2018, to expand the representation of States involved in the study, a parallel process–the Open-Ended Working Group (OEWG) on Information and Communication Technology Developments in the Context of International Security–was established at the UN. It is fully composed of UN members. The OEWG was directed to study, among other issues, how international law applies in cyberspace. On March 12, 2021, the OEWG adopted its Final Substantive Report.

These discussions and negotiations have gone on for nearly twenty years and yet, there has been no consensus on what specific rules of international law apply in cyberspace, never mind how they might apply in specific circumstances. Rather, the only consistent agreement in the combined reports of the GGEs and OEWG (the UN Reports) has been that

**Dr. Catherine Lotrionte** is a Senior Researcher at Georgetown University where she teaches international law and national security law, a Senior Associate in the Technology Policy Program at CSIS, and a Senior Fellow at the McCrary Institute for Cyber and Critical Infrastructure Security at Auburn University. Previously she served as the Brent Scowcroft scholar at the Atlantic Council. She is the Founder and former Director of the CyberProject at Georgetown University. Dr. Lotrionte has served as Counsel to the President's Foreign Intelligence Advisory Board at the White House and as an Assistant General Counsel at the Central Intelligence Agency. She has a JD from New York University Law School and a MA and Ph.D. from Georgetown University.

"international law, in particular the Charter of the United Nations, is applicable and essential to maintaining peace, security, and stability in the ICT environment." Even with respect to what appears to be a modest agreement on the applicability of one treaty, the UN Charter, in cyberspace, disagreement remains between the States over what provisions of the Charter apply. For example, some States have objected to the inclusion of the Charter's Article 51 on self-defense within the reports, notwithstanding the right of self-defense is part of customary international law, pre-existing the Charter. Indeed, the OEWG's ninety-one page "Compendium of statements in explanation of position on the final report" ("Compendium") released on March 25, 2021, reveals the numerous disagreements States continue to have related to specific rules of international law and their applicability to cyberspace.

While there are numerous lessons that negotiators have learned throughout this process, there are lessons about the role of international law in establishing a more stable cyberspace that the diplomats involved in the UN processes seem to have missed. Based on a careful reading of the record, those involved in negotiating and drafting the reports have failed to understand the nature of international law, including how it is created and how it develops. As the renowned international lawyer and former State Department official Louis Henkin once wrote, "Lawyer and diplomat . . . are not even attempting to talk to each other . . . it seems unfortunate, indeed destructive, that they should not, at the least, hear each other."[2] Unfortunately, it seems, as Henkin pointed out, that international lawyers and diplomats were not speaking, at least enough, to each other during the UN processes leading to confusion among States, contradictory understandings about the law, and a lack of agreement on the applicability of international law in cyberspace. In seeking to address this problem, this

essay will outline the nature of international law before identifying specific aspects of the reports that could have been clearer given a deeper understanding of international law. The hope is that this essay may facilitate a dialogue between the lawyers and the diplomats that can lead to a more sophisticated view of international law, what it is, how it is made, and the role it can play in establishing a more stable, open, and interoperable cyberspace.

## INTERNATIONAL LAW

### *Customary International Law*

A useful starting point for the examination of the nature of international law begins with the traditional theory of sources of international law recognized in Article 38 of the Statute of the International Court of Justice (ICJ): treaties, custom, and general principles. Although even this list is not complete, given the limited space, this essay will only address the first two main sources: treaties and custom. There is no hierarchy between these two sources of law with both considered just as legally binding. Customary law is the oldest source of international law, the one which generates rules binding all States except for persistent objector States. It is the most difficult to identify at times, and a source not addressed in the UN Reports. Once an international law has been developed, whether through a treaty or customary practice that is accepted as law, if a State violates the law, international responsibility will result, and that State is obligated to stop its violation of the law and make any reparations for the harm that its violation may have caused. This contrasts with norms which are not legally binding so when they are violated, do not result in State responsibility for any wrongful act under international law. Although norms are not legally binding, those norms can develop into legally binding law if, for instance, a State negotiates a treaty incorporating the norm into the agreement or through the development of customary law.

Unlike treaty law, customary law is not a written source and, in order to determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice by States that is accepted by those States as law. In other words, customary law first develops through the widespread and consistent State practice and, secondly, when the practice in question is undertaken with a sense of legal right or obligation (*opinio juris*) as distinguished from a general practice that is undertaken as a habit or mere usage.These two elements, practice and *opinio juris*, have to be separately ascertained and are necessary in order for a rule of customary international law to exist.

The relevant practice for a customary law consists of conduct of the State, whether in the exercise of its executive, legislative, judicial, or other functions that can include both physical and verbal acts as well as inaction, under certain circumstances. Examples can include conduct of States in connection with resolutions adopted by an international organization (e.g., UN GA resolutions) or at an intergovernmental conference (e.g., UN GGE meetings); executive conduct including operational conduct on the ground; legislative and administrative

acts and decisions of national courts. While the practice does not have to be universal or perfectly consistent, it must be sufficiently widespread and representative as well as consistent. A short period of time is not necessarily a bar to the development of the necessary practice; if the practice is widespread there is no requirement that the practice must be for a specific duration of time.

Evidence of a practice's acceptance as law may take a variety of forms including public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference. While resolutions of international organizations or international conferences cannot themselves create a rule of customary international law, they can provide evidence and content of a rule of customary international law or contribute to its development. Furthermore, failure to react over time to a practice may serve as evidence of acceptance as law provided that States were in a position to react, and the circumstances called for some reaction.

Once a customary rule exists it binds all States, including those States that did not participate in the practice that led to the crystallization of the custom, subject only to what is known as the "persistent objector" principle. According to the persistent objector principle, a State that has persistently rejected a new rule as it was developing can avoid its application, as long as the objection was made known to other States clearly and persistently. Lastly, it is possible to have a rule of particular customary international law whether regional, local or other if there is a general practice among the States concerned that is accepted by them as law.

***Treaty Law***

According to the customary rule of international law of *pacta sunt servanda*, States are required to honor their agreements. As such, treaties, which are agreements between States and sometimes between States and international organizations, are a source of legal obligations under international law and legally binding on all parties to the agreement. The Vienna Convention on the Law of Treaties is the relevant law that applies to the formation, application, and interpretation of international agreements. Although not adopted by all States, most of its provisions are considered reflective of customary international law. Historically, some of the most challenging aspects of treaty law has been over the interpretation of treaty provisions that are at times vague and ambiguous. In some areas of State practice where activities are relatively new, there may not have been enough time and practice for States to conclude that a treaty regulating the activities was necessary. At other times, States may prefer that the activities remain unregulated by a new treaty or that the activities are already regulated by an existing treaty. In either case, the lack of a specific treaty covering particular activities does not mean there is no existing international law that regulates those activities. There may be other treaties applicable to those activities as well as customary international law.

Treaties can give rise to rules of international law in at least three ways. First, they can create specific rules of law that bind the parties to the treaty. Second, they can codify existing rules of customary law. For example, the inherent right of self-defense is codified in Article 51 of the UN Charter. The legal doctrine of self-defense is an ancient doctrine of international law that pre-existed the UN Charter. In more recent time, the contours of the customary right of self-defense were restated in the 1841 correspondence over the sinking of the *Caroline*. In that case, the negotiators recognized for force to be lawfully undertaken in self-defense, two criteria had to be met: 1) necessity and 2) proportionality. These two criteria have continued to inform contemporary understandings of Article 51.

Third, treaties can establish a specific rule for the parties that evolves into a general rule of customary international law. Take, for example, the Article 2(4) prohibition on the use of force in the UN Charter. Prior to the adoption of the Charter in 1945, there was no rule of customary law specifically prohibiting the use of force. In fact, States maintained the right to use force as a legitimate tool of foreign policy. While the Kellogg-Briand Pact of 1928 sought to outlaw war as an instrument of national policy, it did not seek to outlaw all uses of force. The UN Charter, however, explicitly created a prohibition against the use of force. At the time the Charter was adopted, only those States that ratified the Charter were bound by that obligation as a matter of treaty law.

Since 1945, the prohibition on the use of force embodied in Article 2(4) has become customary international law. This is because there has been both widespread State practice consistent with the rule of Article 2(4) and affirmative assertions by States that the use of force prohibition in Article 2(4) is a legal obligation. Indeed, the International Court of Justice (ICJ) has repeatedly recognized that this treaty-based rule has ripened into a universal customary rule of law. As a consequence, even non-signatories to the UN Charter treaty would be bound by the prohibition on the use of force in Article 2(4) as a matter of customary international law.

## THE UN REPORTS: WHAT THEY REVEAL

The UN Reports' lack of clarity on the terminology used has led to much confusion about what exactly the negotiators were in agreement about. For instance, despite the fact that the two groups (i.e., GGE & OEWG) were tasked to study relevant concepts, including norms, rules and principles and international law, these terms were never defined. This section identifies a few of the instances that may have contributed to confusion and the lack of progress in the study of the role of international law in this context.

Beginning with the 2013 UN GGE report, there was no clear distinction drawn between the non-binding voluntary norms outlined and the binding international rules identified within the report. Indeed, the 2013 report included both norms and international law under the same heading, titled "Recommendations on norms, rules and principles of responsible

behavior by States." Including a reference to the UN Charter treaty within a section on voluntary norms may have been the initial indication that the experts did not fully recognize the nature of treaty or customary law. Oddly, paragraph 23 within this same section, dealing with norms, rules and principles, asserts that, "States must meet their international obligations regarding internationally wrongful acts attributable to them." While this is potentially a reference to the customary law of State responsibility, it is unclear what this language means or why it would be included under a section dealing with voluntary norms. Apparently, in trying to clarify the difference between norms and law, both the 2015 UN GGE report and the OEWG report noted that norms were not intended to replace international legal obligations owed by States.

The fourth UN GGE meeting, from 2014-2015, had a new task formally added to its official mandate: to study how international law applies to the use of information and communications technologies by States. The group's final report included a new section at the end titled, "How international law applies to the use of ICTs." This section reiterated the applicability of international law and the UN Charter, specifically, to cyberspace. In paragraph 28 of this section, the report provides "non-exhaustive views on *how* international law applies to the use of ICTs by States." Here the report indicates that "the Group notes the established international legal principles, including, where applicable, the principles of humanity, necessity, proportionality and distinction . . ." Although these principles are part of well-established, binding customary international law, the report indicates that the group merely "noted" them as compared to other instances in this section where the group stated that "States must observe" other principles of international law.

Listed within the norms, rules and principles section of the 2015 UN GGE report are general descriptions of customary international laws, but the report does not use the rules' legal terminology. For example, in this section that report notes, "States should not knowingly allow their territory to be used for internationally wrongful acts using ICTs." This describes the principle of due diligence under international law. The section also mentions the legal obligation to not conduct or knowingly support activities that damage the critical infrastructure within another country. The section identifies these obligations as norms that are voluntary and non-binding, explaining that norms do not limit or prohibit action that is consistent with international law. It uses the word "should" to indicate the non-binding nature of the norms. Including these legally binding obligations within this section, with no explanation as to why, creates confusion about the meaning of the legal rules and how they are understood by those negotiating the terms of the report.

In seeking to draft a consensus report in 2017, the fifth UN GGE tried to navigate disagreements among that States about the applicability of specific international rules, including the law of self-defense, the law of countermeasures, and international humanitarian law. Ultimately, the group was unable to produce a final consensus report in 2017. In view of

the perceived failure of the fifth GGE to reach a consensus, a parallel process, including all interested UN Member States, was proposed at the UN. The establishment of the new OEWG in 2018 meant that there would be two parallel UN processes that were tasked with studying how international law applied to the use of information and communications technologies by States.

On March 12, 2021, the OEWG adopted its Final Substantive Report. The Final Report acknowledged and supported the previous consensus reports of the GGE, although with some differences in language and not including several international legal principles that were included in the 2015 GGE report. While called a breakthrough by some, as far as the clarification of the applicability of international law, it would be a reversal of what limited progress on the topic had been made during the 2013 and 2015 GGE negotiations. The seeming confusion about the nature of international law generated through the UN GGE process and reflected in the reports may have contributed to the fact that the sole reference to international law in the OEWG report is the same reference made in the 2013 UN GGE report that "international law, in particular the Charter of the United Nations, is applicable and essential to maintaining peace, security and stability in the ICT environment." Notably, the OEWG report does not specify in any detail what rules of law the States agreed were applicable in cyberspace.

## THE PRACTICE OF STATES

As the OEWG report concluded, further common understanding about how international law applies to State use of ICTs is needed. To be able to do this, however, diplomats tasked with studying how international law applies in this space need to fully understand the very nature of the law and how it develops. One important aspect of the development of international law, and in particular, of customary international law, as stated above, is the practice of States. Therefore, diplomats also must understand the practice of States in cyberspace as they assess the applicability of international law, and in particular, customary international law. In other words, those involved in the UN processes ought to be cognizant of the State practice that has been taking place in cyberspace over the last decades. It is through such State practice, coupled with *opinio juris,* that customary international law develops. Indeed, where there has been extensive State practice in cyberspace with States publicly attributing malicious cyber activity to other States and invoking international law, customary rules can crystalize and therefore, such practice needs to be part of any international discussions about intentional law and cyberspace.

For instance, in 2018, the United Kingdom accused Russia of a "flagrant violation of international law" for carrying out a "campaign of cyber-attacks" that included the disruption of transport systems in Ukraine. In 2020, Russia was accused of violating international law in a 2019 cyber-attack on Georgia that knocked out the national TV station and government websites. Because of these attacks, in March 2020, for the first time the issue of cyber-attacks was

raised as a separate issue that threatened international peace and security at the UN Security Council. Estonia, the United States, and the United Kingdom condemned the "widespread disruptive" cyber-attacks by the Russian military service, GRU, that were part of Russia's broader campaign of hostile and destabilizing activity against Georgia. In cases such as these, where States have indicated their position on malicious cyber activities violating international law, it is incumbent on diplomats negotiating agreements related to cyber activities and international law to understand the relevance of such State practice and its role in the confirmation of, or development of, customary international law. Furthermore, just as importantly, are those occasions when States engage in malicious cyber practices and other States do not articulate any violation of international law.

## CONCLUSION

The OEWG Compendium makes clear that there were disagreements over the final language in the report by the States. Related to international law, some States objected to the lack of specificity of international rules within the report while others expressed concern over confusion and lack of clarity about international rules. These concerns may explain why the Final Report could go no further than to simply reaffirm that, in cyberspace, international law and the UN Charter apply.

According to the diplomat George Kennan, the role of diplomacy was to facilitate change as it occurred in the world environment. According to Kennan, international law was "too abstract, too inflexible, too hard to adjust to the demands of the unpredictable and the unexpected . . . ."[3] Writing in 1951, Kennan viewed international law as not useful for the tasks of the diplomat that involved a nation's vital interests and military security. Kennan may have mistakenly been focusing only on some stultified concept of international law and not on the way in which international law develops through State practice to meet the needs of States in ensuring the peace and security of the international community. Irrespective of why Kennan had this critical view of the role of law in diplomacy, this cynical "realism" about international law does not reflect the facts of international life.

Today, diplomats and other foreign policy makers must necessarily recognize international law as important to their tasks. Indeed, the cyber diplomats have done so by their attempts to include the role of the law in regulating States' use of ICTs. The narrow view of international law, however, that has dominated the UN discussions on cyberspace has neglected important lessons about State practice and international law over the last couple of decades as States have developed cyber capabilities and used them in their international relations. The fruitful next steps for all of these cyber diplomats ought to include a thorough review and understanding of the nature of international law, its creation and development, and how it is applicable in the cyberspace context, given the practice of States.

## NOTES

1. Rauchhaus, R., Evaluating the Nuclear Peace Hypothesis:A Quantitative Approach, Journal of Conflict Resolution, Vol. 53, IMr. Krutskikh, A/C.1/60/PV.13, 5, October 17, 2005, https://undocs.org/pdf?symbol=en/A/C.1/60/PV.13.
2. Louis Henkin, How Nations Behave: *Law and Foreign Policy* 4 (1979).
3. George Kennan, *American Diplomacy*, 1900-1950, 99 (1952).