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## THERE AND BACK AGAIN? RUSSIA'S QUEST FOR REGULATING WAR IN CYBERSPACE

**Abstract:** *The divergence between Russia and Western States on the question whether international humanitarian law (IHL) applies to cyberspace is still omnipresent in the debates at the UN Open-ended Working Group. Russia has several times submitted a draft or a concept for a binding legal instrument; however, they have not included considerable suggestions on IHL. Furthermore, Russia is actively using cyber means in an aggressive war against Ukraine, which makes its calls sound hollow. How then can one explain Russia's quest for a treaty for cyberspace, especially regarding IHL? This article aims to shed some light on this question in the broader context of Russian approaches to international law-making and its historic role in developing IHL rules.*

**Keywords:** cyberspace, ICT, international humanitarian law, international law-making, rules-based world order, Russia, United Nations

### INTRODUCTION

Russia has not changed its approach towards the applicability of international law to States behavior in cyberspace: principles of international law and the rules of the United Nations (UN) charter do apply, but according to Russia specialized regimes such as international humanitarian law (IHL) cannot be “just applied” and extrapolated to cyberspace.<sup>1</sup> Russia keeps advocating for a new legal instrument for regulating States behavior in cyberspace. In July 2023, the Russian delegation to the UN Open-ended Working Group on security of and in the use of information and communications technologies (OEWG) submitted yet another concept pro-

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<sup>1</sup> See generally E. Korzak, *Russia's Cyber Policy Efforts in the United Nations*, 11 Tallinn Papers 4 (2021), pp. 5–10; L. Lumiste, *Russian Approaches to Regulating Use of Force in Cyberspace*, 20(1) Baltic Yearbook of International Law 111 (2022), pp. 112–116.

posal for a convention<sup>2</sup> – a proposition it has tabled several times over the years<sup>3</sup> and which thus far has not fallen on a fertile ground. During the substantive session in December 2023, the Russian delegation tabled a proposal to make the OEWG a permanent decision-making body, whose mandate would also include the development of legally binding rules,<sup>4</sup> demonstrating Russia's intention to remain on its chosen course. It seems that Russia may be trying to repeat the path that led to success with respect to the cybercrime convention process: in addition to submitting a draft convention,<sup>5</sup> it succeeded in establishing a process with a specific mandate through which “a comprehensive international convention on countering the use of information and communications technologies for criminal purposes” would be developed.<sup>6</sup>

What prompts Russia to push for a new legally binding instrument, instead of accepting the applicability of existing international law rules with respect to conduct in cyberspace? In this article, the author argues that the course of action described can, to some extent, be explained by Russia's state-centric approach to international law-making. This approach aims to preserve the status of States as the sole subjects of international law with law-making capacity, as opposed to empowering transnational corporations, international non-governmental organisations (NGOs), or other non-state actors in the law-creation process. The first section will therefore delve into the Russian approach to international law-making and highlight some of

<sup>2</sup> Letter dated 15 May 2023 from the Permanent Representatives of Belarus, the Democratic People's Republic of Korea, Nicaragua, the Russian Federation and the Syrian Arab Republic to the United Nations addressed to the Secretary-General, A/77/894, 16 May 2023.

<sup>3</sup> *Ibidem*; Letter dated 12 September 2011 from the Permanent Representatives of China, the Russian Federation, Tajikistan and Uzbekistan to the United Nations addressed to the Secretary-General, A/66/359, 14 September 2011; 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, A/69/723, 13 January 2015; Statement by the Representative of the Russian Federation at the Fourth Session of the UN Open-Ended Working Group on Security of and in the Use of ICTS 2021–2025, NY 10065, 7 March 2023, available at: <https://tinyurl.com/mtw652m3> (accessed 30 August 2024). See also K. Mačák, *From Cyber Norms to Cyber Rules: Re-Engaging States as Law-Makers*, 30 *Leiden Journal of International Law* 877 (2017), p. 881; Korzak, *supra* note 1, pp. 5–10.

<sup>4</sup> Concept paper on a permanent decision-making Open-ended Working Group on security of and in the use of information and communications technologies, available at: [https://docs-library.unoda.org/Open-Ended\\_Working\\_Group\\_on\\_Information\\_and\\_Communication\\_Technologies\\_-\\_2021/ENG\\_Concept\\_paper\\_on\\_a\\_Permanent\\_Decision-making\\_OEWG.pdf](https://docs-library.unoda.org/Open-Ended_Working_Group_on_Information_and_Communication_Technologies_-_2021/ENG_Concept_paper_on_a_Permanent_Decision-making_OEWG.pdf) (accessed 30 August 2024).

<sup>5</sup> Draft on Convention on Countering the Use of Information and Communications Technologies for Criminal Purposes, Draft, 29 June 2021, available at: <https://tinyurl.com/yfzzyyu> (accessed 30 August 2024).

<sup>6</sup> The UN General Assembly adopted resolution 74/247, establishing the respective committee. The resolution was initially submitted to the Third Committee of the UN by Russian Federation, Belarus, Cambodia, China, Democratic People's Republic of Korea, Myanmar, Nicaragua, and Venezuela. See UNGA Resolution of 20 January 2020, *Countering the use of information and communications technologies for criminal purposes*, Doc. A/RES/74/247; UNGA, *Countering the use of information and communications technologies for criminal purposes. Report of the Third Committee*, 25 November 2019, A/74/401; Agenda item 107 of the Seventy-fourth session of the draft resolution on Countering the use of information and communications technologies for criminal purposes, 11 October 2019, A/C.3/74/L.11.

the most relevant aspects, and how the current processes regarding norm-creation for cyberspace have tendencies opposite to the Russian perspective.

However, as will be shown in the second and third sections, the other side of the coin is Russia's pragmatic endeavor to enforce its power-status and to limit its adversaries' capabilities. In the second section, the article will examine accusations made by Russia against the West and, in particular, the United States (US) concerning attempts to replace international law with a "rules-based order" altogether. This suggests that the issue of creating new binding rules to regulate cyberspace fits into the broader philosophical-political disagreements on international law, rather than being merely a question of the specifics of a new domain.

In the third section, the article will delve into the specifics of IHL. It will be argued that Russia's push for a new treaty law on IHL's applicability in cyberspace is guided by historic maneuvers. Historically Russia, including its predecessors the Russian Empire and the Soviet Union, has been an advocate and a major player in establishing the fundamental instruments of IHL, as discussed in section 3.1. However, such activism has been motivated more by a perspective of gaining advantage in future conflicts than by mere humanitarian concerns. The third section thus offers a brief recap of Russia's (including the Russian Empire and the Soviet Union as its predecessors) role in the development of IHL, highlighting the occurrences of the above-discussed tendencies in previous Russian practices. This will be followed by a discussion on how the same tendencies are evident in the discussions on IHL and cyberspace.

The applicability of international law to cyberspace is not a clear-cut case – not all States accept it, nor is there clarity on how the rules apply. Turning to both legal policy and legal history may help to further our understanding of where we stand in this regard. Additionally, the article adopts a degree of the realist approach to international relations, as it explores power politics on a global scale and links this to the processes of international law-making and the history of Russia's contributions to international humanitarian law. By doing so, the author seeks to contribute to a more comprehensive discussion on Moscow's efforts in the field of international law and cyberspace.

## **1. WHO CAN MAKE INTERNATIONAL LAW, AND HOW?**

### **1.1. Russia's approach to international law-making**

In Russian scholarly writings, the approach to creation of rules of international law rests on two fundamental conditions. Firstly, a rule must fit under the categories in Art. 38 of the International Court of Justice (ICJ) Statute. The late Danilenko, a renowned Russian international law scholar, noted regarding the status of Art. 38 of the ICJ Statute that until the community of States stipulates a new "constitutive norm" establishing new forms of law-making, Art. 38 is to be considered as

exhaustive.<sup>7</sup> The binding effect of a rule, and its character as law, is derived from the inter-state process through which it came into existence.<sup>8</sup> The authority of Art. 38 itself is derived from “a complex process of a gradual formalization of the lawmaking process within the community of states.”<sup>9</sup> This in turn leaves no room for discussion on whether it is shaped by the commitment of concerned States in a given moment, which would allow leeway for accepting, for example, the UN General Assembly resolutions as law.<sup>10</sup>

Central to the understanding of law-making is also the question of who are considered as subjects of international law, as this determines who has the capacity of law-making. Russian legal discourse concerning the matter is dominantly state-centric.<sup>11</sup> Compared to the views of legal scholarship of the Soviet Union, the change for Russia has only taken place regarding international organisations, which are now also accepted as subjects of international law.<sup>12</sup> Individuals, transnational corporations, or non-governmental organisations cannot “objectively” be considered subjects of international law.<sup>13</sup> The difference is that the Western approach – which traditionally also considers States as the main subject of international law – is to empower or include non-state actors in the international legal processes.<sup>14</sup> For Russia, as will be demonstrated also in the section on informal international law making, this is a stretch.

In general, treaty law takes priority over customary law – a hierarchy that Russia took over from the Soviet Union<sup>15</sup> and is supported by the current Russian state practice. Even though customary law is, in principle, included in the Constitution of the Russian Federation, it stands below international treaty law in the hierarchy. Art. 15(4) of the Russian Constitution – which has remained unchanged since 1993 when the constitution was initially accepted – stipulates the following:

Universally recognized principles and norms of international law as well as international agreements of the Russian Federation should be an integral part of its legal system. If an

<sup>7</sup> G.M. Danilenko, *Law-making in the international community*, Brill/Nijhoff, Leiden: 1993, p. 40.

<sup>8</sup> *Ibidem*, pp. 16–17.

<sup>9</sup> *Ibidem*, p. 29.

<sup>10</sup> On the approach of “law as a fact”, see generally E. McWhinney, *Contemporary International Law and Law-Making*, 40(3) *International Journal* 397 (1985), pp. 417–418.

<sup>11</sup> L. Mälksoo, *Russian Approaches to International Law*, Oxford University Press, Oxford: 2015, pp. 104–110. As Mälksoo points out, there are some authors who are more lenient towards accepting also non-state actors as subjects of international law (p. 106); this however is a minority view and deviates from the state practice.

<sup>12</sup> *Ibidem*, p. 104.

<sup>13</sup> *Ibidem*, pp. 107–108.

<sup>14</sup> *Ibidem*, pp. 105–106.

<sup>15</sup> R.J. Erickson, *Soviet Theory of the Legal Nature of Customary International Law*, 7 *Case Western Reserve Journal of International Law* 148 (1975).

international agreement of the Russian Federation establishes rules, which differ from those stipulated by law, then the rules of the international agreement shall be applied.<sup>16</sup>

The term “International agreements of the Russian Federation” is to be understood as the treaties Russia has ratified, and “universally recognised principles and norms of international law” entails the customary law rules of international law. The second sentence of the above-mentioned article states that in the case of a collision the rules of “international agreements” shall be applied instead of rules stipulated by domestic law, but leaves out a reference to rules of customary international law.<sup>17</sup> A certain remedy can be found in Art. 17(1), which takes a similar position with respect to “human and civil rights and freedoms” of both a treaty and customary type, as the article foresees that these shall be “recognized and guaranteed according to the universally recognized principles and norms of international law and this Constitution.”<sup>18</sup> Yet customary rules of other fields are left aside, as Art. 15(4) refers only to “international agreements”. Such a hierarchy in favour of treaties speaks volumes of the importance that is given to States’ explicit approval.

It is interesting to refer also to Danilenko’s criticism towards the ICJ definitions of *opinio juris* as “a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”<sup>19</sup> He criticises it for referring to a belief towards an already *existing* rule, deviating from the law-making character of custom-creation.<sup>20</sup> He additionally argues that ratification of treaties could not be considered as an expression of *opinio juris*, since a state agrees to be bound by the treaty, but it does not express the acceptance of the treaty rules as customary,<sup>21</sup> thus underlying once again the central importance of States’ will to the creation of a certain rule.

Another aspect guiding Russia in international law-making is the perception of international law as a tool for realizing its national interest and its foreign policy goals. The current structure of the international community as described by the

<sup>16</sup> Opinion No. 992/2020 of the Council of Europe of 4 February 2021, CDL-REF(2021)010.

<sup>17</sup> In its 1995 advisory resolution, the Supreme Court of the Russian Federation did not initially recognize customary international law as being part of Art. 15(4), but merely referred to certain treaty law and the Universal Declaration of Human Rights. In its 2003 resolution, the Supreme Court became somewhat more open towards customary international law. See M. Riepl, *Russian Contributions to International Humanitarian Law: A contrastive analysis of Russia’s historical role and its current practice*, Nomos, Baden-Baden: 2022, pp. 176–178; W. Burnham, P.B. Maggs, G.M. Danilenko, *Law and legal system of the Russian Federation*, Juris, New York: 2012, p. 29.

<sup>18</sup> Riepl, *supra* note 17, p. 181.

<sup>19</sup> ICJ, *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, Judgment, 20 February 1969, ICJ Rep 1969, p. 3, 45, para. 77.

<sup>20</sup> Danilenko, *supra* note 7, pp. 100–101.

<sup>21</sup> *Ibidem*, pp. 67, 69–70, 123. However, in the author’s view, in the argument on customary law G.M. Danilenko broadens the wording of Art. 38, as it requires “acceptance as law” not acceptance specifically as customary law.

UN Charter and formed after the WWII enshrined the power-status of the Security Council's (SC) permanent members, including the Soviet Union. The Soviet Union's endeavour to keep the conservative international law doctrine, under which it gained its initial status as a great power, served its goal to retain that power-status in the then bipolar world order.<sup>22</sup> In the same way, the understanding of the SC system as a manifestation of power-balance, a monopoly of the permanent members over use of force under international law, and the UN as the central venue for any considerable international law-making, is still of central importance for the modern Russian Federation.<sup>23</sup>

## 1.2. The tormenting informality of cyber-norms

The Russian approach described in the previous section collides with certain tendencies characteristic to Western States, causing frictions which are, among other processes also framing the debate over regulating States' conduct in cyberspace.

There is in general a considerable tendency to deviate from classical treaty-making towards more informal international law-making.<sup>24</sup> In a study on non-binding agreements, Bradley, Goldsmith and Hathaway highlighted that States – both in the North and South Americas and in Europe in general, increasingly opt for instruments that do not have a binding effect in the form of a treaty but are non-binding and concluded by various executive agencies.<sup>25</sup> Informal international law-making (IIL) as a concept has been characterized as omitting certain formalities of traditional international law-making. In a definition suggested by Pauwelyn, such formalities are related with output, process, and actors.<sup>26</sup> Output refers to the form of the outcome – which deviates from the traditional international law sources as listed in

<sup>22</sup> McWhinney, *supra* note 10, p. 400.

<sup>23</sup> See *The Concept of the Foreign Policy of the Russian Federation*, The Ministry of Foreign Affairs of the Russian Federation, 31 March 2023, available at: [https://mid.ru/en/foreign\\_policy/fundamental\\_documents/1860586/](https://mid.ru/en/foreign_policy/fundamental_documents/1860586/) (accessed 30 August 2024). Russia has expressed several times, with regard to the calls for Security Council reform, that the current prerogatives, including the veto right, are not up for discussion or any reform. See for example *Russia's Position at the Seventy-Fifth Session of the UN General Assembly*, The Ministry of Foreign Affairs of the Russian Federation, 23 July 2020, available at: [https://mid.ru/en/foreign\\_policy/international\\_organizations/1437475/](https://mid.ru/en/foreign_policy/international_organizations/1437475/) (accessed 30 August 2024); and *Russia's Position at the Seventy-Sixth Session of the UN General Assembly*, The Ministry of Foreign Affairs of the Russian Federation, 4 August 2021, available at: [https://mid.ru/en/foreign\\_policy/position\\_word\\_order/1770401/](https://mid.ru/en/foreign_policy/position_word_order/1770401/) (accessed 30 August 2024).

<sup>24</sup> See generally on informal international law-making (IIL) J. Wouters, *International Law, Informal Law-Making, and Global Governance in Times of Anti-Globalism and Populism*, in: H. Krieger, G. Nolte, A. Zimmermann (eds.), *The International Rule of Law: Rise or Decline?*, Oxford University Press, Oxford: 2019, pp. 242–264.

<sup>25</sup> C.A. Bradley, J. Goldsmith, O.A. Hathaway, *The Rise of Nonbinding International Agreements: An Empirical, Comparative, and Normative Analysis*, 90(5) *University of Chicago Law Review* 1281 (2023), pp. 1336–1338.

<sup>26</sup> J. Pauwelyn, *Informal International Lawmaking: Framing the Concept and Research Questions*, in: J. Pauwelyn, R.A. Wessel, J. Wouters (eds.), *Informal International Lawmaking*, Oxford University Press, Oxford: 2012, p. 15.



Art. 38 of the ICJ Statute, mainly treaties – but still has a normative character (with or without a binding nature).<sup>27</sup> Process informality encompasses here the forum where the law-making process takes place, such as loose networks as opposed to international organizations or diplomatic conferences.<sup>28</sup> Finally, informal law-making is characterized by engaging actors other than traditional diplomatic actors with full powers, including private actors.<sup>29</sup> All of these aspects, especially the output and actors, are related to the question of the binding nature of the instrument, or in other words – whether informal international law is *law* as such. As deeper discussion on the matter would go beyond the scope of this article, it will be not tackled here in depth, but it should be noted that there are competing schools or even philosophies: ones that consider there to be a hard line – whether law is binding or not – and the other, considering “legal normativity as a matter of degree with varying scales.”<sup>30</sup>

Several international initiatives focusing on cyberspace under international law can be characterised by the above-described features. Firstly, there are academic initiatives that aim to provide interpretation or specify how international law should be applied to States activities in cyberspace. What gives them the informal law-making quality is that the results are spelled out as cyberspace-specific norms – therefore, having the normative character, but in terms of both output and actors lack the characteristics of a traditional source of international law. One such example is the Oxford Process on International Law Protections in Cyberspace (Oxford Process). The Oxford Process is an initiative “aimed at the identification and clarification of rules of international law applicable to cyber operations across a variety of contexts.”<sup>31</sup> The initiative convenes international legal experts from different countries. The result of the process are statements on how international law applies to specific objects of protection or specific means, such as ransomware. The second example in the same “category” is the Tallinn Manual project, resulting in two academic studies: Tallinn Manual on the International Law Applicable to Cyber Warfare (Tallinn Manual) and the Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations (Tallinn Manual 2.0).<sup>32</sup> The compilation of both manuals was conducted under the auspices of the NATO Cooperative Cyberdefense Centre of Excellence (CCDCOE) by a group of legal experts. They are

<sup>27</sup> *Ibidem*, pp. 15–17.

<sup>28</sup> *Ibidem*, pp. 17–18.

<sup>29</sup> *Ibidem*, pp. 19–20.

<sup>30</sup> J. Pauwelyn, *Is It International Law or Not and Does It Even Matter?*, in: J. Pauwelyn, R.A. Wessel, J. Wouters (eds.), *Informal International Lawmaking*, Oxford University Press, Oxford: 2012, p. 128.

<sup>31</sup> *The Oxford Process on International Law Protections in Cyberspace*, The Oxford Process, available at: <https://www.elac.ox.ac.uk/the-oxford-process/> (accessed 30 August 2024).

<sup>32</sup> M.N. Schmitt, *Tallinn Manual on the International Law Applicable to Cyber Warfare*. Cambridge University Press, Cambridge: 2013; M.N. Schmitt, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, Cambridge University Press, Cambridge: 2017.

by their nature academic works, discussing the applicability of existing international law rules on cyberspace, and therefore have no status as a source of international law. However, for example the Tallinn Manual 2.0. has had a considerable impact on the discourse of international law's applicability to cyberspace, as well as to States' positions on the respective field.<sup>33</sup> These two are just few examples of the scholarly work that generally leads – or at least significantly impacts – the discussion on how international law applies to cyberspace.<sup>34</sup>

Secondly, there are initiatives that endorse certain principles or norms and that are open for joining by both States and non-state actors. A prominent example of such an initiative is the 2018 Paris Call, that in its core text endorsed the applicability of international law to cyberspace, as well as the voluntary norms of state behaviour in cyberspace. Furthermore, the Call addressed the roles and obligations of States and non-state actors alike, bringing non-state actors to the forefront of ensuring security in cyberspace.<sup>35</sup>

The UN processes, such as the Group of Governmental Experts Advancing responsible State behaviour in cyberspace in the context of international security (GGE) and the OEWG should be also considered as noteworthy examples of informal law-making. Central to both forums mandates are (voluntary) norms – the work results of both GGE and OEWG are the consensus reports that are presented to the UN General

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<sup>33</sup> Within a few years several states have published their official positions of how international law applies to cyberspace. Though the specific issues these statements address vary, as do the depth in which they are addressed, many of them refer affirmatively, but also argue against the Tallinn Manual 2.0. See *Droit international appliqué aux opérations dans le cyberspace*, Ministère des Armées, Paris: 2019, available at: <https://tinyurl.com/yeyrn95k>; The Federal Government of Germany Position Paper, On the Application of International Law in Cyberspace Position Paper, available at: <https://tinyurl.com/bd38r9xs>; Letter of 5 July 2019 from the Minister of Foreign Affairs to the President of the House of Representatives on the international legal order in cyberspace. The appendix discusses the main issues relating to international law, 26 September 2019, available at: <https://tinyurl.com/mw89c563>; *International law and cyberspace. Finland's national positions*, available at: <https://tinyurl.com/rvab2yxj>; Basic Position of the Government of Japan on International Law Applicable to Cyber Operations, 28 May 2021, available at: <https://tinyurl.com/mr4e2c37> (all accessed 30 August 2024). In a compendium of voluntary contributions on international law's applicability to cyberspace, including statements by 15 states, the Tallinn Manual 2.0 is referenced 54 times; see Official compendium of voluntary national contributions on the subject of how international law applies to the use of information and communications technologies by States, submitted by participating governmental experts in the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security established pursuant to General Assembly resolution 73/266, 13 July 2021, A/76/136\*.

<sup>34</sup> See K. Maćak, *On the Shelf, But Close at Hand: The Contribution of Non-State Initiatives to International Cyber Law*, 113 AJIL Unbound 81 (2019), pp. 84–85; L.J.M. Boer, *International law as we know it: Cyberwar discourse and the Construction of knowledge in International Legal Scholarship*, Cambridge University Press, Cambridge: 2021, pp. 37–19.

<sup>35</sup> *Paris Call for Trust and Security in Cyberspace*, Paris Call, 11 December 2018, available at: <https://pariscall.international/en/call> (accessed 30 August 2024). 81 states have joined the Paris Call, but not Russia.



Assembly, consisting of rules, norms and principles of responsible behaviour of States, without a certain perspective of a subsequent formal law-making process.

These examples are characteristic to a trend whereby the formation of norms addressing state behaviour and traditional matters of international law – such as non-intervention, use of force, or armed conflict – is taking place with the participation of and considerable impact from different non-state actors and resulting in *soft law*. This trend is in clear opposition to the Russian understanding of who should create the normative frameworks for states and how they should be created. While several western states have relied in their statements on the Tallinn Manual 2.0,<sup>36</sup> Russia's official documents and statements have no trace of it. Instead, the Tallinn Manuals were depicted rather as tool for NATO States to impose its own set of rules to other States<sup>37</sup> or as an attempt to be a trendsetter.<sup>38</sup> When commenting on the Paris Call, the Russian Ministry of Foreign Affairs noted the message of the Call is “is in line with the spirit of Russia's approaches”, but criticized it for “putting States and non-State actors on an equal footing.”<sup>39</sup> The OEWG has brought non-state actors into the process, as it is open – upon accreditation – also to NGO-s as stakeholders, which has given rise to Russia's call that the centrality of states should be manifested in the process<sup>40</sup> and that possible future institutional dialogue bodies

<sup>36</sup> For example, *Droit International Appliqué Aux Opérations Dans Le Cyberspace*. Ministère des Armées, Ministère des Armées, Paris: 2019, available at: <https://tinyurl.com/yeYrn95k>; The Federal Government of Germany Position Paper, *On the Application of International Law in Cyberspace Position Paper*, available at: [https://ccdcoe.org/uploads/2018/10/Germany\\_on-the-application-of-international-law-in-cyberspace-data\\_English.pdf](https://ccdcoe.org/uploads/2018/10/Germany_on-the-application-of-international-law-in-cyberspace-data_English.pdf); Letter of 5 July 2019 from the Minister of Foreign Affairs to the President of the House of Representatives on the international legal order in cyberspace. The appendix discusses the main issues relating to international law, 26 September 2019, available at: <https://tinyurl.com/mw89c563> (all accessed 30 August 2024).

<sup>37</sup> L. Savin, *Tallinskoe rukovodstvo 2.0 i zahvat kiberprostranstva* [Tallinn Manual 2.0 and the takeover of cyberspace], *Geopolityka.ru*, 6 February 2017, available at: <https://www.geopolitika.ru/article/tallinskoe-rukovodstvo-20-i-zahvat-kiberprostranstva> (accessed 30 August 2024).

<sup>38</sup> S. Andreev, *Pribaltijskij kiberfront NATO* [NATO's Baltic Cyber Front], Russian International Affairs Council. 6 February 2020, available at: [https://russiancouncil.ru/analytics-and-comments/analytics/pribaltiyskiy-kiberfront-nato/?sphrase\\_id=113402965](https://russiancouncil.ru/analytics-and-comments/analytics/pribaltiyskiy-kiberfront-nato/?sphrase_id=113402965) (accessed 30 August 2024).

<sup>39</sup> *Comment by the Information and Press Department of the Russian MFA on Russia's Approach to the French Initiative “Paris Call for Trust and Security in Cyberspace”*, The Ministry of Foreign Affairs of the Russian Federation, 20 November 2018, available at: [https://mid.ru/en/foreign\\_policy/news/1578672/](https://mid.ru/en/foreign_policy/news/1578672/) (accessed 30 August 2024).

<sup>40</sup> Statement by Head of the Russian Interagency Delegation to the First Substantive Session of the UN Open-Ended Working Group on Security of and in the Use of ICTs 2021–2025, Deputy Director of the Department of International Information Security of the Ministry of Foreign Affairs of the Russian Federation Dr. Vladimir Shin, NY 10065, 13 December 2021, available at: <https://documents.unoda.org/wp-content/uploads/2021/12/Russia-statements-OEWG-13-17.12.2021-Eng.pdf>. In its feedback to a draft report of the OEWG, the Russian delegation stressed that “we consider the implementation of rules of responsible behavior to be the prerogative of states.” See *Statements by Mr. Alexander Radovitskiy, the representative of the Russian interagency delegation, at the Fifth Session of the UN open-ended Working Group on security of and in the use of ICTs 2021–2025*, Permanent Mission of the Russian Federation to the United Nations 24 July 2023, available at: [https://russiaun.ru/en/news/i\\_240723](https://russiaun.ru/en/news/i_240723) (both accessed 30 August 2024).

should be limited exclusively to States, while the participation of non-state actors should be only informal and consultative,<sup>41</sup> mirroring Russia's general reluctance towards the concept of including civil society and business representatives in the law-making process. The modern state practice of the Russian Federation therefore not only clearly follows the legal discourse of the state-centric approach regarding subjects of international law as introduced in the previous section, but also reflects Russia's internal practices regarding civil society and the role of NGOs – the only non-state actors which may have a role in Russian society are those which align with the government's political will, are considered as “non-political”, and are without foreign connections.<sup>42</sup> In the same manner, asserting the traditional forms and forums of law-making is part of Russia protecting its power-status, not only in relation to other States but also from non-state actors such as transnational (technology) corporations, whose involvement in and impact on international law is clearly increasing.<sup>43</sup>

However, this clash between the approaches to international law-making – one accepting non-state actors as *participants*; the other seeing them as a threat to state authority – is not something that has emerged only in recent years. Already in 1993 Danilenko highlighted how there is a developing opposition between the western policy-oriented approach that prioritizes community policies and human dignity instead of the law-making procedure when considering the validity of rules; and the counterparts in the East who focus more on the “legalistic” considerations of law-making, fully controlled by States and with the need to get the explicit approval of at least the “great powers”.<sup>44</sup> Furthermore, he highlighted that there had been an increase in the number of proponents of soft law, which in his view would result in an “unprecedented expansion of the concept of law into areas of normative regulation which have never been considered as belonging to the ‘law proper’”, which in turn will lead to uncertainty resulting from such obfuscation of what is understood as law-making, and which “will only erode the concept of legal obligation and weaken the authority of law within the international community”.<sup>45</sup>

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<sup>41</sup> Statement by the Representative of the Russian Federation at the Fourth Session of the UN Open-Ended Working Group on Security of and in the Use of ICT-s 2021–2025, NY 10065, 10 March 2023, available at: <https://tinyurl.com/4tbf6dtc> (accessed 30 August 2024).

<sup>42</sup> K. Stuvøy, *The Foreign Within: State–Civil Society Relations in Russia*, 72(7) *Europe-Asia Studies* 1103 (2020), pp. 1104, 1106–1110.

<sup>43</sup> For more on technology corporations' involvement, see A.S. Tiedeke, *Self-stification of corporate actors? Tracing modes of corporate engagements with Public International Law*, 12 *European Society of International Law Paper* 1 (2022), pp. 1–24.

<sup>44</sup> Danilenko, *supra* note 7, pp. 17–21.

<sup>45</sup> *Ibidem*.

Therefore, Russia's push for a new treaty law can be considered to be in part encouraged by the state-centric, even purist tradition of international law-making. However, this should be considered as only part of the explanation. As was briefly discussed in section 1.1 and is examined in more depth below, the state's practice underlines reasons related to power-balance rather than legal purity.

## 2. OPPOSITION TO A "RULES-BASED WORLD ORDER"

Another point of divergence is the concept of a "rules-based world order". The reference to "rules-based world order" may indeed raise some questions, as it is not a legal term of art, nor established in international relations theory or political science. The phrase has been prominently and consistently has been used in the speeches and statements of US high officials. President Biden made several statements on Russia's aggression against Ukraine which omitted referring to a breach of international law, but instead depicted the aggression as threat to the "rules-based world order".<sup>46</sup> So too the 2022 National Security Strategy,<sup>47</sup> published under the name of President Biden, and the 2018 National Defence Strategy<sup>48</sup> also refer only to the "rules-based world order". Even though this strategy has highlighted general principles known from international law – such as sovereignty, territorial integrity, and condemning aggression, coercion, and external interference – the strategy does not make a link with international law.

Other Western leaders, such as heads of European States, have also made occasional references to the concept, but unlike US representatives used it interchangeably with international law.<sup>49</sup> The concept is argued to be on one hand based on the shared values enshrined in international law, but a) go beyond international law, including also soft law and international standards and norms created by international organisations; and b) lack the quality of legal rules in the meaning of their bindingness and enforceability.<sup>50</sup> The current usages and explanations of the concept

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<sup>46</sup> J.R. Biden Jr, *What America Will and Will Not Do in Ukraine*, The New York Times, 31 May 2022, available at: <https://www.nytimes.com/2022/05/31/opinion/biden-ukraine-strategy.html>; *Remarks by President Biden on the United Efforts of the Free World to Support the People of Ukraine*, The White House, Washington, 26 March 2022, available at: <https://tinyurl.com/4b9j fz28> (both accessed 30 August 2024).

<sup>47</sup> *National Security Strategy*, The White House, Washington, 12 October 2022, available at: <https://www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf> (accessed 30 August 2024).

<sup>48</sup> *Summary of the 2018 National Defense Strategy of the United States of America*, Department of Defence of United States of America, Virginia: 2018, available at: [https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf?mod=article\\_inline](https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf?mod=article_inline) (accessed 30 August 2024).

<sup>49</sup> J. Dugard, *The choice before us: International law or a 'rules-based international order'?*, 36(2) Leiden Journal of International Law 223 (2023), pp. 223–224.

<sup>50</sup> *Ibidem*, p. 225.

have not provided a sufficient understanding on its relationship with international law, and left it vulnerable to characterization as being a comfortable alternative for international law<sup>51</sup> and being dependent on the interests of the states upholding it.<sup>52</sup>

As possibly undermining the post-WWII architecture of international affairs, as well as having an ambiguous relation to international law, the reliance on a rules-based order by the US and other Western States has fuelled Russia's efforts to protect the status quo. Its 2023 Foreign Policy Concept considers the rules-based order as destroying the international legal order.<sup>53</sup> Foreign minister Lavrov has, on several occasions, condemned the attempt to create rules outside of the international law remit through enforcing the "rules-based order" concept as a tool to ensure unipolarity and manifest the exceptionality of the Western States, specifically of the US.<sup>54</sup> In his latest statements, Lavrov has dubbed the concept as "neo-colonial", having the aim of dividing the world as "the chosen ones who are viewed as exceptional" and the rest who are expected to "cater to the interests" of the West.<sup>55</sup> More substantial accusations rely on examples where *prima facie* the same situations have been resolved differently, regardless of the existing rules of international law.<sup>56</sup> In

<sup>51</sup> *Ibidem*, p. 226.

<sup>52</sup> N. Wright, *The UK and the international rules-based system*, The Foreign Policy Centre, 8 September 2020, available at: <https://fpc.org.uk/the-uk-and-the-international-rules-based-system/> (accessed 30 August 2024).

<sup>53</sup> *The Concept of the Foreign Policy of the Russian Federation*, The Ministry of Foreign Affairs of the Russian Federation, 31 March 2023, available at: [https://mid.ru/en/foreign\\_policy/fundamental\\_documents/1860586/](https://mid.ru/en/foreign_policy/fundamental_documents/1860586/) (accessed 30 August 2024).

<sup>54</sup> *Foreign Minister Sergey Lavrov's remarks at the Moscow Conference on International Security*, The Ministry of Foreign Affairs of the Russian Federation, 24 April 2019, available at: [https://mid.ru/en/foreign\\_policy/news/1459008/](https://mid.ru/en/foreign_policy/news/1459008/); *Foreign Minister Sergey Lavrov's remarks at Bolshaya Igra (Great Game) talk show on Channel One*, The Ministry of Foreign Affairs of the Russian Federation, 4 September 2018, available at: [https://mid.ru/en/foreign\\_policy/news/1575413/](https://mid.ru/en/foreign_policy/news/1575413/); *Foreign Minister Sergey Lavrov's remarks at the general meeting of the Russian International Affairs Council*, The Ministry of Foreign Affairs of the Russian Federation, 8 December 2020, available at: [https://mid.ru/en/foreign\\_policy/news/1448552/](https://mid.ru/en/foreign_policy/news/1448552/); *Foreign Minister Sergey Lavrov's remarks and answers to media questions at a news conference on the results of Russian diplomacy in 2020*, The Ministry of Foreign Affairs of the Russian Federation, 18 January 2021, available at: [https://mid.ru/en/foreign\\_policy/news/1414102/](https://mid.ru/en/foreign_policy/news/1414102/) (all accessed 30 August 2024).

<sup>55</sup> *Foreign Minister Sergey Lavrov's video address to the participants in the session of the 11th St Petersburg International Legal Forum 'Foundations of the international legal order vs the "rules-based order": The future of international law'*, The Ministry of Foreign Affairs of the Russian Federation, 12 May 2023, available at: [https://mid.ru/en/foreign\\_policy/news/1869816/](https://mid.ru/en/foreign_policy/news/1869816/) (accessed 30 August 2024).

<sup>56</sup> *Ibidem*. As an example, Lavrov laments the reaction of Western states to Kosovo's withdrawal from Serbia without a referendum and points out that the Ukrainian regions of Crimea, Donetsk, Lugansk, the Zaporozhye and Kherson had 'referendums' to join Russia, arguing that Western states are not coherently following international law and apply double standard to the rest of the international community. Similarly, Foreign Ministry Spokesperson Zakharova explained how US Space Force has a task to develop rules and principles of responsible behaviour in space, neglecting the international law rules governing space. See *Briefing by Foreign Ministry Spokeswoman Maria Zakharova*, The Ministry of Foreign Affairs of the Russian Federation, 20 August 2020, available at: [https://mid.ru/en/foreign\\_policy/news/1440076/](https://mid.ru/en/foreign_policy/news/1440076/). In the context of chemical weapons, Lavrov condemned the expansion on the mandate OPCW Technical Secretariat beyond the limits of

addition, this has provided Russia with material to portray itself as the protector of international law and inclusiveness. The latter is gaining more relevance as Russia invests in gaining support among the States of the Global South,<sup>57</sup> which have different interests and understandings on the power-play of Europe and US on one hand and Russia on the other.

The same rhetoric can be seen in the debate over regulating states' behaviour in cyberspace. Russian officials have stated that the main divergence in reaching any substantial agreement on cyberspace regulation is the dichotomy of binding treaty vs the non-binding rules.<sup>58</sup> In the GGE, Russia repeatedly expressed its discontent with the way some members of the group are eager to make statements on international law, extrapolating it arbitrarily with the aim of making its own "tailored rules".<sup>59</sup> Initiatives such as Paris Trust Call<sup>60</sup> and collective attributions by States<sup>61</sup> have been viewed as manifestation of the "rules-based order", as they have not been implemented by the UN nor based on agreed-upon mechanisms between States concerned, thus also being a manifestation of the growing informality in law-making

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the Chemical Weapons Convention. *Foreign Minister Sergey Lavrov's remarks and answers to questions during the meeting with members of the Association of European Businesses in Russia*, The Ministry of Foreign Affairs of the Russian Federation, 5 October 2020, available at: [https://mid.ru/en/foreign\\_policy/news/1443521/](https://mid.ru/en/foreign_policy/news/1443521/) (both accessed 30 August 2024).

<sup>57</sup> As an example, Russia has established an annual Russia-Africa Summit in order to foster the cooperation. As minister Lavrov has indicated, such cooperation has significance from the perspective of power-balancing: "(...) our country's independent foreign policy is understood by developing countries, and the efforts of the United States and its allies aimed at isolating Russia internationally have failed". See *Interview of the Minister of Foreign Affairs of the Russian Federation S.V. Lavrov to the magazine "International Affairs"*, The Ministry of Foreign Affairs of the Russian Federation, 19 August 2023, available at: <https://tinyurl.com/pwjx3rj6> (accessed 30 August 2024).

<sup>58</sup> *Interview by Acting Director of the Department of International Information Security of the Ministry of Foreign Affairs of the Russian Federation Artur Lyukmanov to the Newsweek magazine*, The Ministry of Foreign Affairs of the Russian Federation, 3 November 2022, available at: [https://mid.ru/en/foreign\\_policy/news/1836804/](https://mid.ru/en/foreign_policy/news/1836804/); *Deputy Foreign Minister Oleg Syromolotov's interview with Rossiya Segodnya on the third session of the Open-ended Working Group on security of and in the use of information and communications technologies 2021–2025*, The Ministry of Foreign Affairs of the Russian Federation, 3 August 2022, available at: [https://mid.ru/en/foreign\\_policy/news/1824845/](https://mid.ru/en/foreign_policy/news/1824845/) (both accessed 30 August 2024).

<sup>59</sup> See the discussion in L. Lumiste, *Russian Approaches to Regulating Use of Force in Cyberspace*, 20(1) *Baltic Yearbook of International Law Online* 109 (2022), pp. 122, 125–126.

<sup>60</sup> *Foreign Minister Sergey Lavrov's answers to questions at Bolshaya Igra (Great Game) talk show on Channel One*, The Ministry of Foreign Affairs of the Russian Federation, 25 April 2020, available at: [https://mid.ru/en/foreign\\_policy/news/1430978/](https://mid.ru/en/foreign_policy/news/1430978/); *Interview by Acting Director of the Department of International Information Security of the Ministry of Foreign Affairs of the Russian Federation Artur Lyukmanov to the Newsweek magazine*, The Ministry of Foreign Affairs of the Russian Federation, 3 November 2022, available at: [https://mid.ru/en/foreign\\_policy/news/1836804/](https://mid.ru/en/foreign_policy/news/1836804/) (both accessed 30 August 2024).

<sup>61</sup> *Foreign Minister Sergey Lavrov's remarks and answers to questions during the online session "Russia and the post-COVID World," held as part of the Primakov Readings international forum*, The Ministry of Foreign Affairs of the Russian Federation, 10 July 2020, available at: [https://mid.ru/en/foreign\\_policy/news/1436807/](https://mid.ru/en/foreign_policy/news/1436807/) (accessed 30 August 2024).

discussed above, and deviating from what Russia would consider legitimate tools to regulate inter-state relations.

Paradoxically, in 2021 Russia itself proposed to the US the conclusion of a treaty that envisaged an obligation on the part of the US to prevent any eastward expansion of NATO and to deny the accession to any former member states of the Soviet Union, as well as to refrain from any military activity on the territory of such states.<sup>62</sup> Similarly, in the draft treaty with NATO, Russia suggested that Member States of the alliance that were members before 1997 should not deploy any military troops or weapons on “the territory of any other States in Europe in addition to the forces stationed on that territory as of 27 May 1997”; nor accept any further accessions.<sup>63</sup> These proposed treaties would have established an international order whereby a handful of states – Russia itself, the US, and NATO members who joined the alliance before 1997 – would have had the exceptional status to decide over the security structure of the international community. As a result, the function of international law to regulate the conduct of all States on an equal basis would have been severely undermined. While Russia was utilising the formal means of international law, its aim appears no different from what it accuses the West of doing, thus making its claims on protecting international law sound hollow, regardless of the domain. Instead, it leads to the conclusion that Russia’s efforts are mainly guided by the ambition to ensure the stability of post-WW II security architecture and its’ own position as one of the “great powers”, as discussed in the section 1.1. While not directly linked to the matter of regulating states behaviour in cyberspace, such manoeuvre leads to suspect similar pattern behind the law-making ambition for cyberspace as a highly strategic domain. In the following section, more specific and nuanced reasons shall be demonstrated based on a specific area of regulation, which for this article is IHL.

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<sup>62</sup> *Treaty between the United States of America and the Russian Federation on security guarantees*, The Ministry of Foreign Affairs of the Russian Federation, 17 December 2021, available at: [https://mid.ru/ru/foreign\\_policy/rso/nato/1790818/?lang=en](https://mid.ru/ru/foreign_policy/rso/nato/1790818/?lang=en) (accessed 30 August 2024).

<sup>63</sup> *Agreement on measures to ensure the security of The Russian Federation and member States of the North Atlantic Treaty Organization*, The Ministry of Foreign Affairs of the Russian Federation, 17 December 2021, available at: [https://mid.ru/ru/foreign\\_policy/rso/nato/1790803/?lang=en](https://mid.ru/ru/foreign_policy/rso/nato/1790803/?lang=en) (accessed 30 August 2024).



### 3. NEW RULES FOR WAR IN CYBERSPACE

#### 3.1. Russia's role then and now in IHL development

Russia's role in the development of international humanitarian law is curious and noteworthy of exploration in order to take note of certain tendencies that can be seen in the practice of the modern-day Russian Federation.

Tsarist Russia had an active, or even leading, role in most of the first IHL instruments. Upon the invitation of Tsar Alexandr II, an international conference on prohibiting certain projectiles was convened in 1868, resulting in the St. Petersburg Declaration. Soon thereafter, in 1874, it was followed by the Brussels conference, which adopted a declaration on the laws and customs of war, tabled by the Russian Government. Even though the declaration was not ratified by States, it served as the basis for the Hague Conventions.<sup>64</sup> The 1899 and 1907 Hague Conferences were also convened at the invitation of the Russian tsar, Tsar Nicholas II. Not to mention that one of the fundamental principles of IHL – the Martens clause – was named after the Russian diplomat and international lawyer Fyodor Fyodorovich Martens, who played a major role in sculpting the outcome of the previously-mentioned international conferences.

While the nuances of the 19<sup>th</sup> century processes go beyond the scope of this article, it is however, worth pointing out that tsarist Russia's efforts to further the development of rules for battlefield may have been motivated by more than mere humanitarian concerns.<sup>65</sup> On one hand, it has been suggested that similarly to other States, Russia sought to enhance control over their military forces going through structural changes.<sup>66</sup> On the other hand, tsarist Russia's turn to international law as a mechanism to regulate the means of warfare in general was an endeavour to limit its neighbours growing military strength.<sup>67</sup>

During the Soviet period, Russia changed its course. As Riepl summarizes, the period was tainted with the shadow of the World War II (WWII), which was waged as ideological war by both Stalin and Hitler and had disastrous effects regarding IHL.<sup>68</sup> Secondly, the Soviet ideology did not pay much tribute to law as such. Its

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<sup>64</sup> *Project of an International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874*, International Humanitarian Law Databases, 27 August 1874, available at: <https://ihl-databases.icrc.org/en/ihl-treaties/brussels-decl-1874> (accessed 30 August 2024).

<sup>65</sup> See generally L. Mälksoo, *Review of Michael Riepl, Russian Contributions to International Humanitarian Law: A Contrastive Analysis of Russia's Historical Role and Its Current Practice*, 33(3) *European Journal of International Law* 1025 (2022), pp. 1026–1027.

<sup>66</sup> E. Benvenisti, A. Cohen, *War is Governance: Explaining the Logic of the Laws of War From a Principal-Agent Perspective*, 112(8) *Michigan Law Review* 1363 (2014), pp. 1384–1388.

<sup>67</sup> E.B. Pashukanis, *Ocherki po mezhdunarodnomy pravu* [Essays on international law], Sovetskoe zakonodatel'stvo, Moscow: 1935, p. 33.

<sup>68</sup> Riepl, *supra* note 17, p. 83.

central focus was on building the communist society, which was primarily focused on the economic architecture of the community.<sup>69</sup> However, it brought along with it the idea of “socialist international law”, which was supposed to apply in relations between socialist states<sup>70</sup> and which did not include IHL.<sup>71</sup> IHL thus fell to the “backseat” in the Soviet Union’s agenda in general. In addition to the socialist international law concept, IHL was endangered with the “just war” theory that occasionally caught some attention, the crux of which is whether the war is waged for a just cause, which in turn would justify all kinds of means of war.<sup>72</sup>

Coming now to the Soviet Union’s contribution to the development of the most important IHL instruments of the 20<sup>th</sup> century, the Soviet Union played odd cards. Firstly, the Soviets boycotted the preparatory conference of Government Experts that was to prepare for Diplomatic Conference in 1949. However, Soviet Union decided at the last minute to participate in the Diplomatic Conference itself.<sup>73</sup> The rationale for such a change of heart was, as Mantilla suggests, its aim to shame and moralize the Western States for their hypocrisy in not supporting the progressive developments of humanitarian law. Such a strategy had two main goals. The first was to gain “moral credit” in the global struggle for dominance. The second was the possibility to have binding rules to “tame” the strongly militarized Western States, and in doing so to gain some advantage in future armed conflicts,<sup>74</sup> much in line with similar practice of the tsarist Russia discussed above. Both reasonings are also mirrored in the debate for information and communication technologies (ICTs), as will be discussed below (section 3.2).

The substantive contributions of the Soviet Union were, however, noteworthy. Their role was crucial to the inclusion of common Art. 3 of the Geneva Conventions on armed conflicts of a non-international character. As the article was opposed by several other great powers, Soviet support was rendered crucial.<sup>75</sup> The Soviet delegation contributed immensely to the rules on the protection of civilians from indiscriminate acts and to the Fourth Geneva Convention.<sup>76</sup> They also pushed for weapons control with respect to nuclear and chemical weapons. In this instance the hypocrisy of the Soviet position tainted the endeavour – for while the aim was

<sup>69</sup> *Ibidem*.

<sup>70</sup> *Ibidem*, pp. 85–86.

<sup>71</sup> *Ibidem*, pp. 87–88.

<sup>72</sup> *Ibidem*, pp. 91–93.

<sup>73</sup> G. Mantilla, *The Origins and Evolution of the 1949 Geneva Conventions and the 1977 Additional Protocols*, in: M. Evangelista, N. Tannenwald (eds.), *Do the Geneva Conventions Matter?* Oxford University Press, New York: 2017, p. 43.

<sup>74</sup> *Ibidem*, pp. 42–43; see also Riepl, *supra* note 17, pp. 118–120.

<sup>75</sup> Mantilla, *supra* note 75, p. 45; Riepl, *supra* note 17, p. 124.

<sup>76</sup> Riepl, *supra* note 17, pp. 121–122.

to delegitimize the use of nuclear weapons by the Western countries, the Soviet Union was itself developing such weapons.<sup>77</sup>

What downgraded these major contributions was the Soviet Union's strong stance on sovereignty. The Soviet Union opposed several enforcement mechanisms, such as empowering the International Committee of the Red Cross (ICRC) with oversight rights or creating a tribunal for war crimes.<sup>78</sup> The Soviet Union followed the same approach for the Additional Protocols – the attempts to strengthen external monitoring mechanism met with opposition of the Soviet Union and its allies and were, ultimately, subordinated to states' consent.<sup>79</sup> As van Dijk put it while commenting on the Soviet approach in 1949:

The Soviets understood, better than most other imperial powers, that they could accept virtually any text as long as it did not infringe upon their sovereign discretion to refuse outside supervision when waging war against anti-Soviet insurgents.<sup>80</sup>

After the dissolution of the Soviet Union, the newly established Russian Federation, as the successor state for the Soviet Union, inherited the IHL treaty obligations,<sup>81</sup> including the Hague declarations, the Geneva Conventions, and the Additional Protocols of 1977. At the same time it has taken a cautious approach towards accession to any new instruments – for example different weapons control treaties, such as the Anti-Personnel Mine Ban Convention; the Convention on Certain Conventional Weapons; the Convention on Cluster Munitions; or the Arms Trade Treaty. Russia has explained its choice to opt out of these Conventions by the lack of viable alternatives and the utility of the weapons,<sup>82</sup> seeing accession as giving up its military advantage,<sup>83</sup> possibly affecting its economic interests,<sup>84</sup> and/or considering the existing IHL framework as sufficient.<sup>85</sup>

Interestingly, the last reasoning has also been used with respect to lethal autonomous weapon systems (LAWS). One would think that the Russian approach to new technologies such as LAWS would evoke a similar approach to cyber capabilities. This however is not the case. In November 2023, the First Committee of the UN

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<sup>77</sup> Mantilla, *supra* note 75, p. 47.

<sup>78</sup> *Ibidem*. See also Riepl, *supra* note 17, p. 125.

<sup>79</sup> Mantilla, *supra* note 75, p. 61.

<sup>80</sup> B. van Dijk, *The Great Humanitarian: The Soviet Union, the International Committee of the Red Cross, and the Geneva Conventions of 1949*, 37(1) *Law and History Review* February 209 (2019), p. 233.

<sup>81</sup> Note from the Permanent Mission of the Russian Federation in Geneva transmitted to the ICRC on 15 January 1992, available at: <https://casebook.icrc.org/print/pdf/node/20794> (accessed 30 August 2024).

<sup>82</sup> Riepl, *supra* note 17, p. 143.

<sup>83</sup> *Ibidem*, pp. 144–145.

<sup>84</sup> *Ibidem*, p. 149. Riepl explains how Russia considered the Arms Trade Treaty a “weak treaty” with drawbacks, and adds that at the same time Russia is the second largest weapons exporter. Though not expressed as such, the economic consideration is evident.

<sup>85</sup> *Ibidem*, p. 147.

General Assembly approved a draft resolution on lethal autonomous weapons, addressing the negative effect that LAWS may have on international security and stability and seeking the views of the states on the “challenges and concerns they raise from humanitarian, legal, security, technological and ethical perspectives and on the role of humans.”<sup>86</sup> Russia voted against the draft resolution and took the position that the discussion was neglecting the positive features of such weapon systems, and opposed the development of any legally-binding international instrument as well as a moratorium on developing and using these systems.<sup>87</sup> It has made several efforts to substantiate its claims. In 2020, 2022 and 2023, Russia submitted Working Papers to the GGE, which gave a substantial overview on how Russia implements the rules and principles of IHL in its domestic regulations regarding LAWS.<sup>88</sup>

Considering the compliance mechanisms for IHL, Russia has pursued the approach taken by Soviet Union during the negotiations of the Geneva Conventions and the Additional Protocols, by avoiding the few that have been called to life<sup>89</sup> and/or opting out as soon as there has been any scrutiny towards itself, as was the case with the ICC.<sup>90</sup>

### 3.2. New domain, old habits

In several of its statements, the Russian delegation has argued that “[D]iscussions in the OEWG have clearly demonstrated that the majority of States do not share the opinion on the full and automatic applicability of existing international legal

<sup>86</sup> Seventy-eight session of the draft resolution on lethal autonomous weapons systems, 12 October 2023, A/C.1/78/L.56.

<sup>87</sup> *First Committee Approves New Resolution on Lethal Autonomous Weapons, as Speaker Warns ‘An Algorithm Must Not Be in Full Control of Decisions Involving Killing’*, United Nations, 1 November 2023, available at: <https://press.un.org/en/2023/gadis3731.doc.htm>. See also Potential opportunities and limitations of military uses of lethal autonomous weapons systems, 15 March 2019, CCW/GGE.1/2019/WP.1, available at: [https://docs-library.unoda.org/Convention\\_on\\_Certain\\_Conventional\\_Weapons\\_-\\_Group\\_of\\_Governmental\\_Experts\\_\(2019\)/CCW.GGE.1.2019.WP.1\\_R%2BE.pdf](https://docs-library.unoda.org/Convention_on_Certain_Conventional_Weapons_-_Group_of_Governmental_Experts_(2019)/CCW.GGE.1.2019.WP.1_R%2BE.pdf) (both accessed 30 August 2024).

<sup>88</sup> National Implementation of the Guiding Principles on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems, available at: <https://documents.unoda.org/wp-content/uploads/2020/09/Ru-Commentaries-on-GGE-on-LAWS-guiding-principles1.pdf>; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, 9 August 2022, CCW/GGE.1/2022/WP.9, available at: <https://documents.un.org/doc/undoc/gen/g22/446/61/pdf/g2244661.pdf> (both accessed 30 August 2024). Concept of Activities of the Armed Forces of the Russian Federation in the Development and Use of Weapons Systems with Artificial Intelligence Technologies, 7 March 2023, CCW/GGE.1/2023/WP.5.

<sup>89</sup> See Riepl, *supra* note 17, pp. 157–162.

<sup>90</sup> Rasporáženie Prezidenta Rossijskoj Federacii ot 16.11.2016 No. 361-rp “O namerenii Rossijskoj Federacii” [Order of the President of the Russian Federation dated November 16, 2016 No. 361-rp “On the intention of the Russian Federation not to become a party to the Rome Statute of the International Criminal Court”], available at: <http://publication.pravo.gov.ru/Document/View/0001201611160018> (accessed 30 August 2024). Russia withdrew its signature just after the Office of the Prosecutor had concluded there is an international armed conflict between Russia and Ukraine, see *Report on Preliminary Examination Activities 2016*, International Criminal Court, Den Haag 2016, para. 158.

norms to the use of ICTs”<sup>91</sup>, and that there is a need to move from voluntary, non-binding rules, norms and principles towards binding rules.<sup>92</sup> In addition to its general state-centrist approach to law-making and its aim to ensure its status as a decision-maker, the previously laid out patterns from history can shed some light on why IHL has become as one of the central issues of divergences.

Considering the rhetoric of the statements made by Russia where it claims to protect the interests of the broader community of states and general international order, the chosen approach can be considered motivated by the possibility to gain, once again, “moral credit”. Similarly to the 1949 Soviet Union’s rhetoric in Geneva, the Russian Federation today also refers to the hypocrisy of the West for not being willing to agree upon new binding rules. Western states’ opposition to a legally binding instrument is depicted as an endeavour to preserve the voluntary nature of rules and norms discussed under the auspices of the UN in order “to keep their hands free in information space.”<sup>93</sup> Such scene-setting is also in line with the general appeal towards the Global South, a part of Russia’s foreign policy which is discussed in section 2.

Russia has accused the West also for expecting “to take on the role of arbitrators and, in the best traditions of Orwell’s ministries of truth and peace, to appoint those responsible for the illegal use of ICTs on a “highly likely” basis.”<sup>94</sup> This brings into

<sup>91</sup> Statement by the representative of the Russian Federation at the informal intersessional meeting of the Open-ended Working Group on Security of and in the Use of ICTs 2021-2025, 7 December 2022, available at: [https://docs-library.unoda.org/Open-Ended\\_Working\\_Group\\_on\\_Information\\_and\\_Communication\\_Technologies\\_-\\_2021/Russia\\_-\\_statement\\_on\\_international\\_law\\_-\\_OEWG\\_intersessionals\\_07.12.2022.pdf](https://docs-library.unoda.org/Open-Ended_Working_Group_on_Information_and_Communication_Technologies_-_2021/Russia_-_statement_on_international_law_-_OEWG_intersessionals_07.12.2022.pdf). See also Statement by the Representative of the Russian Federation at the Fourth Session of the UN Open-Ended Working Group on Security of and in the Use of ICTs 2021–2025, NY 10065, 7 March 2023, available at: <https://tinyurl.com/mtw652m3>; and Statement by the Russian Interagency delegation at the Fifth Session of the UN Open-ended Working Group on Security of and in the Use of ICTs 2021–2025, NY 10065, 25 July 2023, available at: [https://docs-library.unoda.org/Open-Ended\\_Working\\_Group\\_on\\_Information\\_and\\_Communication\\_Technologies\\_-\\_2021/Russia\\_-\\_OEWG\\_ICT\\_security\\_-\\_statement\\_-\\_CB\\_25.07.2023\\_-\\_ENG.pdf](https://docs-library.unoda.org/Open-Ended_Working_Group_on_Information_and_Communication_Technologies_-_2021/Russia_-_OEWG_ICT_security_-_statement_-_CB_25.07.2023_-_ENG.pdf) (all accessed 30 August 2024).

<sup>92</sup> Statement by Head of the Russian Interagency Delegation to the First Substantive Session of the UN Open-Ended Working Group on Security of and in the Use of ICTs 2021–2025, Deputy Director of the Department of International Information Security of the Ministry of Foreign Affairs of the Russian Federation Dr. Vladimir Shin, NY 10065, 13 December 2021, available at: <https://documents.unoda.org/wp-content/uploads/2021/12/Russia-statements-OEWG-13-17.12.2021-Eng.pdf> (accessed 30 August 2024).

<sup>93</sup> Statement by the representative of the Russian Federation at the informal intersessional meeting of the Open-ended Working Group on Security of and in the Use of ICTs 2021–2025, 8 December 2022, available at: [https://docs-library.unoda.org/Open-Ended\\_Working\\_Group\\_on\\_Information\\_and\\_Communication\\_Technologies\\_-\\_2021/Russia\\_-\\_statement\\_on\\_rules\\_norms\\_and\\_principles\\_-\\_OEWG\\_intersessionals\\_08.12.2022.pdf](https://docs-library.unoda.org/Open-Ended_Working_Group_on_Information_and_Communication_Technologies_-_2021/Russia_-_statement_on_rules_norms_and_principles_-_OEWG_intersessionals_08.12.2022.pdf). See Statement by the Representative of the Russian Federation at the Fourth Session of the UN Open-Ended Working Group on Security of and in the Use of ICTs 2021–2025, NY 10065, 7 March 2023, available at: <https://tinyurl.com/mtw652m3> (both accessed 30 August 2024).

<sup>94</sup> Statement on Behalf of Mr. Artur Lyukmanov, Director of the Department of International Information Security of the MFA Of Russia, at the Fifth Session of the UN Open-Ended Working Group on Security of and in the Use of ICTs 2021–2025, NY 10065, 24 July 2023, available at: [https://docs-library.unoda.org/Open-Ended\\_Working\\_Group\\_on\\_Information\\_and\\_Communication\\_Technologies\\_-\\_2021/Russia\\_-\\_OEWG\\_ICT\\_security\\_-\\_statement\\_by\\_A.Lyukmanov\\_24.07.2023\\_-\\_ENG.pdf](https://docs-library.unoda.org/Open-Ended_Working_Group_on_Information_and_Communication_Technologies_-_2021/Russia_-_OEWG_ICT_security_-_statement_by_A.Lyukmanov_24.07.2023_-_ENG.pdf) (accessed 30 August 2024).

focus also the question of attribution, where Russia deems it necessary to prove and substantiate any attribution of an internationally wrongful act in or through the ICT environment with “undisputable technical facts.”<sup>95</sup> If it follows the example of the IHL compliance mechanisms, it is however unlikely that Russia would subject itself to the jurisdiction of such an institution, even if it would agree upon with the creation of it. The goal would rather be to subjugate others to a control mechanism, but preserve its sovereign freedom, following the pattern of the Soviet Union as discussed in the previous section.

Secondly, the situation could be considered similar insofar as regards the perception of a “militarized West” and the need to gain additional advantage for future conflicts, as was the case with both Tsarist Russia and the Soviet Union. More and more states have established cyber commands.<sup>96</sup> Western states with considerable military power are also well known for their cyber capabilities. Additionally, a great proportion of tech giants are located in the US.<sup>97</sup> Even though Russia is highly active in conducting cyber activities itself in and through cyberspace, and the absence of specific rules would be assumably beneficial to it, its strength is in “unpeace”<sup>98</sup> capabilities – cyber activities that *do not* reach the threshold of use of force and take place mainly outside of an armed conflict. Therefore, the ambition to set binding rules may be a pragmatic calculation to enhance its position in the “cyber battlefield” through fixing the “rules of the game” for its adversaries, while not necessarily considering those rules to be binding on itself. This is all the more likely when considering that, similarly to attribution, Russia is likely to carry on the approach of asserting its “sovereign discretion to refuse outside supervision”, as concluded by van Dijk.<sup>99</sup>

<sup>95</sup> Statement by Head of the Russian Interagency Delegation to the First Substantive Session of the UN Open-Ended Working Group on Security of and in the Use of ICTS 2021–2025, Deputy Director of the Department of International Information Security of the Ministry of Foreign Affairs of the Russian Federation Dr. Vladimir Shin, NY 10065, 13 December 2021, available at: <https://documents.unoda.org/wp-content/uploads/2021/12/Russia-statements-OEWG-13-17.12.2021-Eng.pdf>. See also Statement by the Representative of the Russian Federation at the Fourth Session of the UN Open-Ended Working Group on Security of and in the Use of ICTS 2021–2025, NY 10065, 7 March 2023, available at: [https://docs-library.unoda.org/Open-Ended\\_Working\\_Group\\_on\\_Information\\_and\\_Communication\\_Technologies\\_-\\_2021/ENG\\_Russian\\_statement\\_How\\_international\\_law\\_applies.pdf](https://docs-library.unoda.org/Open-Ended_Working_Group_on_Information_and_Communication_Technologies_-_2021/ENG_Russian_statement_How_international_law_applies.pdf) (both accessed 30 August 2024).

<sup>96</sup> In 2018, at least 61 nations had established a military cyber force, see J. Blessing, *The Global Spread of Cyber Forces, 2000–2018*, in: T. Jančárková, L. Lindström, G. Visky, P. Zotz (eds.), *13th International Conference on Cyber Conflict Going Viral*, NATO CCDCOE Publications, Tallinn: 2021, pp. 233–255.

<sup>97</sup> E.g. the five tech-giants Google, Amazon, Facebook, Apple, and Microsoft are US-based companies. The same goes for SpaceX, a company that offered Ukraine internet connection for a period after the Russian aggression against Ukraine, see F. Schwaller, *Starlink is crucial to Ukraine – here's why*, Deutsche Welle, 14 October 2022, available at: <https://www.dw.com/en/starlink-is-crucial-to-ukrainian-defense-heres-how-it-works/a-63443808> (accessed 30 August 2024).

<sup>98</sup> “Unpeace” is here used as introduced by Lucas Kello “the new range of rivalrous activity that falls between the binary notions of war and peace, which together do not adequately capture the full spectrum of cyber activity”. See L. Kello, *The Virtual Weapon and International Order*, Yale University Press, New Haven: 2017.

<sup>99</sup> *Ibidem*, p. 14.



Insofar as regards the applicability of the rules of IHL to states activities in the ICT environment, the Russian delegation has argued that “there is no consensus within the international community on the qualification of malicious use of ICTs as armed attack according to Article 51 of the Charter of the United Nations. Therefore, there is no ground to assess the legality of the use of ICTs from the point of view of international humanitarian law.”<sup>100</sup> However, it should be pointed out that the applicability of IHL and the classification of a conduct as a prohibited “threat or use of force” or an “armed attack” under the UN Charter are legally distinct questions, falling in separate categories of *jus in bello* and *jus ad bellum*. This occasional blending of *ius ad bellum* and *ius in bello* can be seen as slipping back to the “just war” concept, promoted to a degree by the Soviet Union. IHL applicability is triggered whenever an armed conflict takes place. In the case of an international armed conflict (IAC), this means whenever there is a resort to armed force between States.<sup>101</sup> Therefore, it must be established whether armed force in the meaning of common article 2 of the Geneva Conventions is used. It is under discussion whether a cyber operation alone could amount to such armed force. However, an armed conflict can be established using traditional kinetic operations, which then may be accompanied by cyber operations.

Therefore, Russia’s past endeavours in IHL reveal certain plausible patterns and motives of Russia’s international law-making, patterns and motives that are more linked to fortifying its own position regarding possible conflict than with a mere positivist approach to international law. The latter in turn helps to untangle its controversial claims and deeds when it comes to IHL and cyberspace.

## CONCLUSIONS

Russia’s considerable efforts in advocating a binding instrument for States’ conduct in cyberspace confirms the importance of the domain for Russia and how Russia sees its potential effect on inter-state relations and modern warfare. It treats the questions that have arisen in the debate on regulating cyberspace as part of a broader

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<sup>100</sup> Statement by the representative of the Russian Federation at the informal intersessional meeting of the Open-ended Working Group on Security of and in the Use of ICTs 2021-2025, 7 December 2022, available at: [https://docs-library.unoda.org/Open-Ended\\_Working\\_Group\\_on\\_Information\\_and\\_Communication\\_Technologies\\_-\\_2021/Russia\\_-\\_statement\\_on\\_international\\_law\\_-\\_OEWG\\_intersessionals\\_07.12.2022.pdf](https://docs-library.unoda.org/Open-Ended_Working_Group_on_Information_and_Communication_Technologies_-_2021/Russia_-_statement_on_international_law_-_OEWG_intersessionals_07.12.2022.pdf). The same wording was used in a Statement by the Representative of the Russian Federation at the Fourth Session of the UN Open-Ended Working Group on Security of and in the Use of ICTs 2021–2025, NY 10065, 7 March 2023, available at: <https://tinyurl.com/mtw652m3> (both accessed 30 August 2024).

<sup>101</sup> Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 Octobre 1995, para. 70, available at: <https://www.icty.org/x/cases/tadic/acdec/en/51002.htm>; *Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949*, International Humanitarian Law Databases, commentary on Article 2, para. 218, available at: <https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-2/commentary/2020> (both accessed 30 August 2024).

political-philosophical debate on international law and a matter of enforcing the power structure established after WWII. Therefore, its position on the need for a new binding instrument can be explained by its approaches to international law-making in general and its need to assert its position as a decisive authority in the agreement on rules. Agreement with the currently dominant view that international law applies in its entirety, and that instead of a new treaty there is a need to agree on the interpretations of the existing norms, would mean consenting to opening the debate up to non-state actors and informal forums. Furthermore, arguing fiercely for new rules for cyberspace fits into the general paradigm of confrontation between Western exceptionalism and Russia's promotion of international law.

Russia's active use of cyber means in its aggressive war against Ukraine, combined with the fact that the draft concepts it has tabled at the UN are missing suggestions on IHL, rather plainly demonstrate the insincerity of its claims on the need for new rules on the use of cyber means in times of war. Rather, such calls can be explained through law-making patterns known from Soviet Unions' historic experience in the field of IHL. Therefore, instead of heading back towards the progressive development of IHL, which the tsarist Russian Empire is often remembered for, the modern Russian Federation has rather turned to the playbook of the Soviet Union.