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Jus Contra Bellum in Cyberspace and the Sound of Silence

Johann Ruben Leiss
MLE, LL.M. (EUI), Associate Professor, Inland Norway University of Applied Science (Lillehammer) and Associate Professor II, University of Oslo
johann.leiss@inn.no

Abstract
This article explores the (in)activity of many States in contributing to the interpretative clarification of 'how' *jus contra bellum* applies in cyberspace, its negative repercussions for the work of the United Nations Group of Governmental Experts on Advancing responsible State behaviour in cyberspace in the context of international security (UN GGE) and the United Nations Open-Ended Working Group on Developments in the Field of ICTs in the Context of International Security (UN OEWG), and the way forward. In its main part, the article analyses the (legal) consequences of interpretative silence and challenges its (presumably) underlying rationale – that is, a strategy of legal ambiguity based on the traditional 'freedom of State' paradigm. This article argues that it is only by actively contributing to the clarification of the law that States ensure their voice is heard and avoid the risk that their silence is interpreted as acquiescence. Moreover, contrary to what the freedom of State paradigm implies, the subjective interpretation of the parties is not the only 'game in town'. If no interpretative agreement of States crystallises, the interpretation of *jus contra bellum* is determined by objective factors. The article concludes by arguing that from a rule of law perspective, States should be encouraged to express their views on 'how' *jus contra bellum* applies in cyberspace to ensure the efficiency and transparency of these rules, which constitute part of the backbone of a peaceful co-existence and cooperation between states.

Keywords
jus contra bellum, cyberwarfare, treaty interpretation, acquiescence, UN GGE, UN OEWG

1. Introduction
Among the great challenges to international law posed by the digitisation of our modern world is the fact that modern warfare has expanded into cyberspace.[1] As with any technical developments in human history, warfare has taken up new digital technologies.[2] Modern armies have the capability to cause death and destruction via cyberspace. At the same time, societies have become increasingly vulnerable.[3] Much critical infrastructure is digitalised,

1. On the term 'cyberspace', see François Delerue, *Cyber Operations and International Law* (CUP 2020) 10–13, 29.
2. Marco Roscini, *Cyber Operations and the Use of Force in International Law* (OUP 2014) 10 ('*Cyber Operations and the Use of Force*').
3. ibid 2; and already in Marco Roscini, 'World Wide Warfare – Jus ad bellum and the Use of Cyber Force' (2010) 14 *Max Planck Yearbook of United Nations Law* 85, 86–87 ('World Wide Warfare').

including vital services, such as the health sector, transportation, the energy sector, the business sector, and the research sector.[4] Cyber-operations may, as Roscini writes, 'disable power generators, cut off the military command, control, and communication systems, cause trains to derail and aeroplanes to crash, nuclear reactors to melt down, pipelines to explode, weapons to malfunction, banking systems to cripple'.[5] The possible modes of 'cyberwarfare'[6] range from small-scale operations – some sort of web vandalism – to severe attacks on critical infrastructure.[7] Geographical distance and time become less relevant; any target can be hit within seconds from any place in the world that has an internet connection.[8]

The fundamental question of whether the law on the use of force (the *jus ad bellum*; or in modern parlance *jus contra bellum*)[9] as enshrined in Articles 2(4) and 51 of the Charter of the United Nations ('UN Charter')[10] and in their customary equivalents apply to cyberspace seems to have been settled by now. These rules apply to cyberspace.[11] This is confirmed by numerous statements of States and by the outputs of the United Nations Group of Governmental Experts on Advancing responsible State behaviour in cyberspace in the context of international security ('UN GGE')[12] and the United Nations Open-Ended Working Group on Developments in the Field of ICTs in the Context of International Security ('UN OEWG').[13] The 2013 consensus report of the third UN GGE noted in general terms that international law and, in particular, the UN Charter applies in cyberspace.[14] The following 2015 and 2021 reports of the fourth and sixth UN GGEs made clear that the UN Charter 'applies in its entirety'.[15]

However, there is still much uncertainty on exactly 'how' these rules apply.[16] To give just

4. Roscini, *Cyber Operations and the Use of Force* (n 2) 1–2; and already in Roscini, 'World Wide Warfare' (n 3) 86–87.
5. Roscini, *Cyber Operations and the Use of Force* (n 2) 2.
6. For a critical discussion of this notion, see Delerue (n 1) 39–41.
7. Roscini, *Cyber Operations and the Use of Force* (n 2) 2.
8. ibid 1–2.
9. Today, *jus ad bellum* is increasingly referred to as *jus contra bellum*, cf Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart 2012) passim; Delerue (n 1) 275. Note that this article is concerned with *jus contra bellum* issues but not *jus in bello* issues, the latter referring to the question of how the laws of war would govern the use of cyber-attacks during an ongoing armed conflict.
10. Charter of the United Nations (opened for signature 26 June 1945, entered into force 24 October 1945) 3 Bevans 1153. The *jus contra bellum* also includes Chapter 7, Article 42 UN Charter, which deals with UN Security Council authorization.
11. Cf Delerue (n 1) 1–2.
12. The UN GGE was established in 2002 by the UN Secretary-General at the request of the UN General Assembly, cf A/Res/56/19 (2002). Since 2004, six working groups have been convened, with the last one in 2019, cf 2004/2005 A/RES/58/32 (2003); 2009/2010 A/RES/60/45 (2006); 2012/2013 A/RES/66/24 (2011); 2014/2015 A/RES/68/243 (2014); 2016/2017 A/RES/70/237 (2015); 2019/2021 A/RES/73/266 (2019). The UN GGE reports to the UN General Assembly. The UN General Assembly considered and endorsed – by consensus – the 2010, 2013 and 2015 UN GGE reports, cf A/RES/65/41 (2011); A/RES/68/243 (2014); A/RES/70/237 (2015). Up until recently, the UN GGE was the primary inter-state forum for discussions on the legal regulation of cyberspace, cf Anders Henriksen, 'The End of the Road for the UN GGE Process: The Future Regulation of Cyberspace' (2019) 5 (1) *Journal of Cybersecurity*, 1; Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 *International Organ* 887. For more information on the UN GGE, see the UN Office for Disarmament Affairs <www.un.org/disarmament/group-of-governmental-experts/>, and Digital Watch observatory <https://dig.watch/processes/un-gge>.
13. The UN OEWG was established in 2018 as a second UN forum for the discussion of the regulation of cyberspace, A/RES/73/27 (2018). For more information on the UN OEWG, see the UN Office for Disarmament Affairs <www.un.org/disarmament/open-ended-working-group/>, and Digital Watch observatory <https://dig.watch/processes/un-gge>.
14. A/Res/68/98 (2013).
15. A/Res/70/174 (2015) and A/76/135 (2021) [71(d)].
16. See Eneken Tikk and Mika Kerttunen, 'The Alleged Demise of the UN GGE: An Autopsy and Eulogy' (*Cyber Policy Institute paper*, 2017) <https://cpi.ee/wp-content/uploads/2017/12/2017-Tikk-Kerttunen-Demise-of-the-UN-GGE-2017-12-17-ET.pdf> 32.

a few instructive and much discussed examples: What kind of ICT-related activities constitute a 'threat' or 'use of force' (Article 2(4) UN Charter)? What kind of activities constitute an 'armed attack' and might give a State cause to invoke its inherent right to self-defence (Article 51 UN Charter)?[17] Where along the spectrum of permissible to impermissible conduct do various types of cyber-attacks lie? How is mere cyber-criminality to be distinguished from warfare? Should we apply the so-called 'scale and effects' test according to which a cyberoperation constitutes a 'use of force' if its scale and effects are comparable to the scale and effects of a 'traditional' use of kinetic force? How can we attribute use of force in cyberspace?[18] More generally, how do we apply rules that are based on the existence of geographical borders, over which States exercise sovereignty, to cyberspace, in which such borders are far from distinct?[19]

Considering these open questions, it is all the more remarkable that many States shy away from actively contributing to the interpretative clarification of the law. They do not publish interpretative statements and do not make their practice of cyberwarfare public.

Part 2 discusses the (in)activity of States to contribute to the interpretative clarification of 'how' *jus contra bellum* applies in cyberspace and discusses its negative repercussions for the work of the UN GGE and UN OEWG. Part 3 discusses possible explanations for the (legal) politics behind this interpretative silence. It argues that silence can be explained by a strategy of legal ambiguity, which finds its legal rationale in the traditional 'freedom of State' paradigm. The aim of this strategy is to keep the *jus contra bellum* in limbo and open scope for manoeuvre to cope with new technical developments and remaining strategic uncertainties in cyberwarfare.

Part 4 discusses the (legal) consequences of interpretative silence and challenges its underlying rationale. The argument is that under the discursive framework provided by Articles 31–33 of the Vienna Convention on the Law of Treaties ('VCLT')[20], the interpretation – or non-interpretation – of the parties to a treaty remains a central factor to be taken into account. However, it is only by actively contributing to the clarification of the law that States ensure their voice is heard and avoid the risk that their silence is interpreted as acquiescence. Moreover, contrary to what the freedom of State paradigm implies, the subjective interpretation of the parties is not the only 'game in town'. Articles 31–32 VCLT and other factors complement the subjective dimension of interpretation with an objective one. The less the 'authentic' interpretation of the parties leads to interpretative clarification, the more the other modes of interpretation come to the fore. As such, legal ambiguity is a misnomer for the lack of centralised interpretative authority in international law. Part 5 concludes.

17. Cf Initial 'pre-draft' of the report of the UN OEWG <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2020/03/200311-Pre-Draft-OEWG-ICT.pdf> ('*UN OEWG pre-draft*') [27]. See the discussion in Delerue (n 1) 283–342, 460–482.
18. On the problem of attribution, see the comprehensive discussion in Delerue (n 1) 55–190.
19. See eg Dapo Akande, Antonio Coco and Talita de Souza Dias, 'Drawing the Cyber Baseline: The Applicability of Existing International Law to the Governance of Information and Communication Technologies' (2022) 99 *International Law Studies* 4, arguing that cyberspace is in fact not a new domain requiring domain-specific State practice and *opinio juris*.
20. Vienna Convention on the Law of Treaties (with annex) (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

2. Interpretative silence and jus contra bellum in cyberspace

2.1 Jus contra bellum in cyberspace – a question of UN Charter interpretation

The present article presumes that questions concerning the application of *jus contra bellum* to cyberspace are first and foremost a matter of UN Charter interpretation. In the author's view, the UN Charter-based *jus contra bellum* norms and their customary corollaries have merged into a single norm,[21] even though the customary manifestation is based in a different source, and insofar remains conceptually independent from its treaty corollary.[22] Article 103 UN Charter, which attaches supremacy to UN Charter law over other international law, also applies to customary international law.[23] As such, customary derogation from the UN Charter based *jus contra bellum* is excluded.

Under what conditions an interpretation of UN Charter law amounts to a modification of the rules in question must not be conclusively discussed here. While further development of the Charter by consensual re-interpretation and customary application is possible,[24] for the present purpose it is sufficient to keep in mind that it is not easily to be presumed that States want to circumvent the strict requirements for Charter amendments (Articles 108 and 109 UN Charter).[25] There are, however, notable examples of informal UN Charter modification.[26]

2.2 Widespread interpretative silence

Considering the overall picture, we see that many States remain reluctant to clearly position themselves and contribute to a clarification of 'how' *jus contra bellum* applies in cyberspace.[27] An increasing number of States have published 'cyber security strategies',[28] and a growing number of States have also begun to publish statements on international law in cyberspace.[29]

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21. On Article 51 UN Charter and the customary right to self-defence, see Paulina Starski, 'Silence Within the Process of Normative Change and Evolution of the Prohibition on the Use of Force: Normative Volatility and Legislative Responsibility' (2017) 4 *Journal on the Use of Force and International Law* 14, 16–17 <https://doi.org/10.1080/20531702.2016.1268802>. On the customary status of Articles 2(4) and 51, see *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14 ('*Nicaragua merits*'), 94 [176] (self-defence), 98 [187] (the prohibition of the use of force); see also the analysis in Christine Gray, *International Law and the Use of Force* (OUP 2004) 244; see also Robert Kolb, *Ius contra bellum: Le droit international relatif au maintien de la paix* (Helbing Lichtenhahn & Bruylant 2003) 166.
22. *Nicaragua merits* (n 21) 95 [177].
23. Andreas L Paulus and Johann R Leiss, 'Article 103' in Bruno Simma, Daniel-Erasmus Kahn, Georg Nolte, Andreas L Paulus (eds), *The Charter of the United Nations: A Commentary* (3rd ed, OUP 2012) 2110, 2133 [68], with further references ('*Article 103*').
24. Georg Witschel, 'Article 108' in Simma and others (n 23) 2199, 2204–2205 [10]; Anthony D'Amato, 'Trashing Customary International Law' (1987) 81 *American Journal of International Law* 101, 104; Paulus and Leiss (n 23) 2133 [69]; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding UNSC Res 276 (1970) UN Doc S/RES/276* (Advisory Opinion) [1971] ICJ Rep 16, 22 [22].
25. Second Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation by Special Rapporteur Georg Nolte, A/CN.4/671 (2014) ('ILC's second report on subsequent practice') 51–60 [118]–[142].
26. See Robert Kolb, *The Law of Treaties: An Introduction* (Edward Elgar 2016) 195–196.
27. Cf Akande, Coco and de Souza Dias (n 19) 7.
28. See the overview by the NATO Cooperative Cyber Defence Centre of Excellence <https://ccdcoe.org/library/strategy-and-governance/>.
29. These statements include: Australia's submission on international law to be annexed to the report of the 2021 UN GGE <www.internationalcybertech.gov.au/sites/default/files/2021-06/Australia%20Annex%20-%20Final%2C%20as%20submitted%20to%20GGE%20Secretariat.pdf> ('Australia's submission 2021'); Statement by Richard Kadlčák on Czechia's position before the UN OEWG from 11 February 2020 <https://ccdcoe.org/uploads/2018/10/CZ_Statement-OEWG-International-Law-11.02.2020_English.pdf> ('Czechia's position 2020'); Estonia's contribution to be annexed to the 2019-21 report of the UN GGE <https://ccdcoe.org/uploads/2018/10/Estonian_contribution_on_international_law_to_the_gge_may_2021_English.pdf> ('Estonia's position 2021');

However, only a relatively small number of States has provided (relatively) detailed interpretations – within or outside the UN GGE and UN OEWG context – of 'how' *jus contra bellum* applies in cyberspace. The scope and detailedness of their interpretative statements vary widely.[30] Most States confirm an application of the prohibition of the use of

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Speech on Estonia's position by President Kersti Kaljulaid in Tallinn from 29 May 2019 <www.president.ee/en/official-duties/speeches/15241-president-of-the-republic-at-the-opening-of-cycon-2019/index.html> ('Estonia's position 2019'); Finland's position paper on <https://ccdcoe.org/uploads/2018/10/Finland_International-law-and-cyberspace_national-positions_ENG.pdf> ('Finland's position paper 2020'); Statement on Finland's position by Janne Taalas before the UN OEWG from 10 and 11 February 2020 <https://ccdcoe.org/uploads/2018/10/Statement-on-International-Law-by-Finnish-Ambassador-Janne-Taalas-at-2nd-session-of-OEWG.pdf> ('Finland's position 2020'); France's position paper, International Law Applied to Operations in Cyberspace <https://www.justsecurity.org/wp-content/uploads/2019/09/droit-internat-appliqu%C3%A9-aux-op%C3%A9rations-cyberespace-france.pdf> ('France's position paper 2019'); France's response to Resolution 73/27 and Resolution 73/266 <www.diplomatie.gouv.fr/IMG/pdf/190514-_french_reponse_un_resolutions_73-27_-_73-266_ang_cle4f5b5a-1.pdf> ('France's response'); Germany's position paper on the Application of International Law in Cyberspace from March 2021 <https://ccdcoe.org/uploads/2018/10/Germany_on-the-application-of-international-law-in-cyberspace-data_English.pdf> ('Germany's position paper 2021'); Speech on Germany position on Cyber Security as a Dimension of Security by Ambassador Norbert Riedel, Commissioner for International Cyber Policy, Federal Foreign Office, Berlin, at Chatham House, from 2015 <www.auswaertiges-amt.de/en/newsroom/news/150518-ca-b-chatham-house/271832> ('Germany's position 2015'); Transcript of the keynote speech on Israel's position delivered by Israeli Deputy Attorney General Roy Schöndorf on 8 December 2020, (2021) 97 International Law Studies, 395-406 <https://digital-commons.usnwc.edu/ils/vol97/iss1/21/> ('Israel's position 2020'); Italy's position paper on International Law and Cyberspace from 2021 <https://ccdcoe.org/uploads/2018/10/Italian-Position-Paper-on-International-Law-and-Cyberspace.pdf> ('Italy's position paper 2021'); Japan's position paper on International Law Applicable to Cyber Operations from 28 May 2021 <https://ccdcoe.org/uploads/2018/10/Japan_Basic-Position-of-the-Government-of-Japan-on-International-Law-Applicable-to-Cyber-Operations_2021_English.pdf> ('Japan's position paper 2021'); Netherlands' letter from the Minister of Foreign Affairs to the President of the House of Representatives on the International Legal Order in Cyberspace from 5 July 2019 with the appendix: International law in cyberspace <https://cyberlaw.ccdcoe.org/wiki/National_position_of_the_Netherlands_(2019)> ('Netherlands' letter 2019'); New Zealand's statement by on the Application of International Law to State Activity in Cyberspace, 1 December 2020 <https://dpmc.govt.nz/sites/default/files/2020-12/The%20Application%20of%20International%20Law%20to%20State%20Activity%20in%20Cyberspace.pdf> ('New Zealand's statement 2020'); Slovenia's statement on international law in cyberspace at the UN GGE from February 2020 <https://ccdcoe.org/uploads/2018/10/Slovenia_Statement-on-International-Law-at-OEWG-Feb-2020_English.pdf> ('Slovenia's position 2020'); Speech on the UK's position on Cyber and International Law by Attorney General Suella Braverman at Chatham House from 19 May 2022 <https://www.ukpol.co.uk/suella-braverman-2022-speech-at-chatham-house/> ('UK's position 2022'); Speech on the UK's position on Cyber and International Law in the 21st Century by Attorney General Jeremy Wright at Chatham House from 23 May 2018 <www.gov.uk/government/speeches/cyber-and-international-law-in-the-21st-century> ('UK's position 2018'); UK's statement on the application of international law to states' conduct in cyberspace before the UN GGE from 2018 <https://ccdcoe.org/uploads/2018/10/UK_application-of-international-law-to-states-conduct-in-cyberspace-uk-statement.pdf> ('UK's statement 2018'); UK's Cyber Primer from 2016 (Ministry of Defence, 2nd ed, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/549291/20160720-Cyber_Primer_ed_2_secured.pdf> ('UK's Cyber Primer 2016); Remarks on the US position by Harold H Koh, Legal Adviser to the U.S. Department of State, from 18 September 2012 <https://2009-2017.state.gov/s/l/releases/remarks/197924.htm> ('US position 2012'); Remarks on the US position by Brian J Egan, Legal Adviser to the U.S. Department of State, from 10 November 2016 <https://2009-2017.state.gov/s/l/releases/remarks/264303.htm> ('US position 2016'). See also Australia's, Brazil's, Estonia's, Germany's, Japan's, Kazakhstan's, Kenya's, Netherlands', Norway's, Romania's, Russia's, Singapore's, Switzerland's, UK's, and US contributions on the subject of how international law applies to the use of ICTs by State, published in A/76/136 (2021) <https://ccdcoe.org/uploads/2018/10/UN_-Official-compendium-of-national-contributions-on-how-international-law-applies-to-use-of-ICT-by-States_A-76-136-EN.pdf> ('contributions 2021'). See the overview of the NATO Cooperative Cyber Defence Centre of Excellence <https://ccdcoe.org/library/strategy-and-governance/>.

30. Examples of (relatively) comprehensive statements are: Australia's contribution 2021 (n 29) 4–6; Brazil's contribution 2021 (n 29) 19–20; Estonia's contribution 2021 (n 29) 25–26 and 30; Germany's position 2015 (n 29) 6, 15–16; Germany's contribution 2021 (n 29) 35–36 and 43; Netherlands' letter 2019 (annex) (n 29) 3–4 and 8–9; Netherlands' contribution (n 29) 57–58 and 64–65; US position 2012 (n 29); US position 2016 (n 29); US contribution 2021 (n 29) 137; France's position paper 2019 (n 29) 5–10; New Zealand's statement 2020 (n 29); UK's

force (Article 2(4)) and self-defence in cyberspace (Article 51).[31] However, some States continue to question whether the UN Charter provides a sufficient regulatory framework and whether Article 51 UN Charter (self-defence) also applies in cyberspace – despite the rather clear formulation in the 2013 and 2021 reports of the UN GGE that the UN Charter 'applies in its entirety'.[32] For example, Russia, China and Cuba reportedly opposed an explicit reference to the right to self-defence in the 2017 UN GGE report,[33] which seems to have been a principal reason for the group's failure to deliver a consensus report.[34] Russia, while acknowledging that the UN Charter law applies in cyberspace,[35] has repeatedly argued that 'contemporary international law has virtually no means of regulating the development and application of [information] weapons',[36] that existing inter-

position 2018 (n 29) 3; Finland's position 2020 (n 29); Germany's position paper 2021 (n 29); Italy's position paper 2021 (n 29) 8–9; Norway's contribution 2021 (n 29) 69–70; Singapore's contribution 2021 (n 29) 83–84; Switzerland's contribution 2021 (n 29) 88.

31. See eg the following statements: Australia's comments on the initial 'pre-draft' of the report of the UN OEWG <https://front.un-arm.org/wp-content/uploads/2020/04/final-australia-comments-on-oewg-pre-draft-report-16-april.pdf> ('Australia's comments 2020') 2–3; Israel's position 2020 (n 29); Austria's comments on the initial 'pre-draft' of the report of the UN OEWG <https://front.un-arm.org/wp-content/uploads/2020/04/comments-by-austria.pdf> ('Austria's comments 2020') [1]; Italy's comments on the initial 'pre-draft' of the report of the UN OEWG <https://front.un-arm.org/wp-content/uploads/2020/04/2020-04-16-italy-comments-on-the-oewg-pre-draft.pdf> ('Italy's comments 2020') 2; Japan's comments on the initial 'pre-draft' of the report of the UN OEWG <https://front.un-arm.org/wp-content/uploads/2020/04/japan-comments-on-oewg-pre-draft.pdf> ('Japan's comments 2020'); Netherlands' comments on the initial 'pre-draft' of the report of the UN OEWG <https://front.un-arm.org/wp-content/uploads/2020/04/kingdom-of-the-netherlands-response-pre-draft-oewg.pdf> ('Netherlands' comments 2020') [17]–[23]; Norway's comments on the initial 'pre-draft' of the report of the UN OEWG <https://front.un-arm.org/wp-content/uploads/2020/04/comments-by-norwegian-delegation-to-oewg-pre-draft-report.pdf> ('Norway's comments 2020'); Singapore's comments on the initial 'pre-draft' of the report of the UN OEWG <https://front.un-arm.org/wp-content/uploads/2020/04/singapore-written-comment-on-pre-draft-oewg-report.pdf> ('Singapore's comments 2020'); Sweden's comments on the initial 'pre-draft' of the report of the UN OEWG <https://front.un-arm.org/wp-content/uploads/2020/04/200416-comments-sweden-on-oewg-pre-draft-report.pdf> ('Sweden's comments 2020') 2; Switzerland's comments on the initial 'pre-draft' of the report of the UN OEWG <https://front.un-arm.org/wp-content/uploads/2020/04/20200409-switzerland-remarks-oewg-pre-draft.pdf> ('Switzerland's comments 2020'); US comments on the initial 'pre-draft' of the report of the UN OEWG <https://front.un-arm.org/wp-content/uploads/2020/04/oewg-pre-draft-usg-comments-4-6-2020.pdf> ('US comments 2020'), US position 2016 (n 29) and US position 2012 (n 29); Joint comments from the EU and its Member States on the initial 'pre-draft' of the report of the UN OEWG <https://front.un-arm.org/wp-content/uploads/2020/05/eu-contribution-alignments-oewg.pdf> ('Joint comments EU and Member States 2020') [10]; Estonia's position 2019 (n 29); Colombia's comments on the initial 'pre-draft' of the report of the UN OEWG <https://front.un-arm.org/wp-content/uploads/2020/04/colombia-general-comments-pre-draft-oewg-16-04-2020.pdf> ('Colombia's comments 2020').
32. A/Res/70/174 (2015) and A/76/135, [71(d)] (2021).
33. Liis Vihul and Michael N Schmitt, 'International Cyber Law Politicized: The UN GGE's Failure to Advance Cyber Norms' (*Just Security*, 30 June 2017) <www.justsecurity.org/42768/international-cyber-law-politicized-gges-failureadvance-cyber-norms/>; Elaine Korzak, 'UN GGE on Cybersecurity: The End of an Era?' (*The Diplomat*, 31 July 2017) <https://thediplomat.com/2017/07/un-gge-on-cybersecurity-have-china-and-russia-just-made-cyberspace-less-safe/>. In particular, Cuba has repeatedly spoken out against the applicability of self-defence in cyberspace, cf eg Cuba's comments on the initial 'pre-draft' of the report of the UN OEWG <https://front.un-arm.org/wp-content/uploads/2020/04/considerations-on-the-initial-pre-draft-of-the-oewg-cybersecurity-cuba-15-april.pdf> ('Cuba's comments 2020').
34. Henriksen (n 12) 3.
35. Russia's contribution 2021 (n 29). See also Nicaragua's comments on the initial 'pre-draft' of the report of the UN OEWG <https://front.un-arm.org/wp-content/uploads/2020/04/minic-mis-143-04-2020-permanent-mission-of-switzerland.pdf>; Venezuela's comments on the initial 'pre-draft' of the report of the UN OEWG <https://front.un-arm.org/wp-content/uploads/2020/04/nv-00069-annex.pdf>; Zimbabwe's comments on the initial 'pre-draft' of the report of the UN OEWG <https://front.un-arm.org/wp-content/uploads/2020/04/zimbabwe-position-on-pre-draft-of-oweg-final-report.pdf>; Cuba's comments 2020 (n 33).
36. Russia's contribution 2021 (n 29).

national law leaves a de facto 'legal vacuum',[37] and that there is no clarity over how it applies.[38] As such, Russia is a fierce advocate of a new international legal regime for cyber-warfare.[39]

2.3 The limited success of the UN GGE and UN OEWG

The UN GGE's process has hitherto failed to contribute much to the clarification of 'how' *jus contra bellum* applies in cyberspace beyond the acknowledgment that the UN Charter applies 'in its entirety'.[40] Good arguments speak in favour of assuming that this failure is – at least to a certain extent – a consequence of the remaining unwillingness of many States to clarify their interpretative positions.

After the failure of the first UN GGE (15 members) to deliver a final report, it was commonly agreed that the topic required further discussion. The second group of experts (again 15 members)[41] eventually managed to reach an agreement on a short 2010 consensus report.[42] However, this report only contained a few rudimentary findings and recommendations. It acknowledged the problem of attribution of cyberoperations and risk of potential threats, the 'absence of a common understanding regarding acceptable State behaviour', and more generally, the 'lack of shared understanding regarding international norms pertaining to State use of ICTs'.[43] Furthermore, it noted that '[e]xisting agreements include norms relevant to the use of ICTs by States', that 'additional norms could be developed over time', and that the dialogue should continue.[44]

In 2011, a third group of experts (again 15 members) was set up.[45] This time the mandate of the group specifically asked not only for a discussion of 'international concepts aimed at

37. Russia's comment on the second 'pre-draft' of the report of the UN OEWG <https://front.un-arm.org/wp-content/uploads/2020/09/oewg-informal-virtual-meetings-statement-by-the-russian-federation-15-june-2020.pdf> ('Russia's comments 2020-2'). See also Russia's comment on the initial 'pre-draft' of the report of the UN OEWG <https://front.un-arm.org/wp-content/uploads/2020/04/russian-commentary-on-oweg-zero-draft-report-eng.pdf> ('Russia's comments 2020-1') 1.
38. Russia's comments 2020-1 (n 37).
39. Russia's comments 2020-2 (n 37). Already in its first proposal submitted to the UN First Committee, Russia pushed for a ban on information weapons and an international agreement, cf Russia's letter to the UN Secretary-General from 23 September 1998, A/C.1/53/3 (1998), and Russia's contribution in Developments in the Field of Information and Telecommunications in the Context of International Security, A/54/213 (1999) 8. China also seems to be open to developing new norms, cf China's comments on the initial 'pre-draft' of the report of the UN OEWG <https://front.un-arm.org/wp-content/uploads/2020/04/china-contribution-to-oewg-pre-draft-report-final.pdf> ('China's comments 2020') 5. Opposing new legislation, see eg Australia's intervention at the OEWG Virtual Meeting, 2 July 2020 <https://front.un-arm.org/wp-content/uploads/2020/09/oewg-informal-virtual-meetings-statement-by-australia-2-july-2020.pdf> ('Australia's Intervention 2020') and Australia's comments 2020 (n 31) 2–3; US comments 2020 (n 31); Colombia's comments 2020 (n 31) 1–2; Denmark's comments on the initial 'pre-draft' of the report of the UN OEWG <https://front.un-arm.org/wp-content/uploads/2020/04/nv-dk-comments-oewg-pre-draft-report.pdf> ('Denmark's comments') [9]; Estonia's comments on the initial 'pre-draft' of the report of the UN OEWG <https://front.un-arm.org/wp-content/uploads/2020/04/comments-to-the-oewg-pre-draft-report-estonia.pdf> ('Estonia's comments 2020') 9, 11-12; France's comments on the initial 'pre-draft' of the report of the UN OEWG <https://front.un-arm.org/wp-content/uploads/2020/04/contribution-fr-oewg-eng-vf.pdf> ('France's comments 2020'); Germany's comments on the initial 'pre-draft' of the report of the UN OEWG <https://front.un-arm.org/wp-content/uploads/2020/04/20200401-oewg-german-written-contribution-to-pre-draft-report-1.pdf> ('Germany's comments 2020); Italy's comments 2020 (n 31) 2; Japan's comments 2020 (n 31); Sweden's comments 2020 (n 31); Joint comments EU and Member States 2020 (n 31) [14].
40. A/Res/70/174 (2015) and A/76/135, [71(d)] (2021).
41. A/Res/60/45 (2005).
42. A/Res/65/201 (2010).
43. ibid.
44. ibid [16]–[18].
45. A/Res/66/24 (2011).

strengthening the security of global information and telecommunications systems' but also of 'norms, rules or principles of responsible behaviour of States'.[46] The third group submitted in 2013 a consensus report reemphasising the findings of the previous report.[47] Importantly, the report noted for the first time explicitly that international law and in particular the UN Charter apply in cyberspace.[48]

In December 2013, a fourth group of governmental experts was established, with their number increased to 20 members.[49] The mandate of the fourth group included now specifically the question of 'how' international law applies in cyberspace.[50] In 2015, the fourth group elaborated on some of the findings of the two previous UN GGE reports in a new consensus report.[51] The group went further than the previous report by not only affirming in general terms that the UN Charter applies, but by explicitly noting that it 'applies in its entirety' and that States have an 'inherent right …to take measures consistent with international law and as recognized in the Charter'.[52] Moreover, it included explicit references to 'the principles of humanity, necessity, proportionality and distinction' and the obligation on States not to 'use proxies to commit internationally wrongful acts using ICTs' and to 'ensure that their territory is not used by non-State actors to commit such acts'.[53] Again, however, the report did not go into further detail and noted that there was a 'need for further study on this matter'.[54] In addition, the report included 'recommendations for consideration by States for voluntary, non-binding norms, rules or principles of responsible behaviour of States aimed at promoting an open, secure, stable, accessible and peaceful ICT environment'.[55] Many of these non-binding norms simply resemble what is already codified in international law as binding norms. As such, the report did not add much to the clarification of 'how' *jus contra bellum* applies in cyberspace.[56]

In 2015, a fifth group of experts was established, again with an increased number of members (now 25).[57] This time, however, the discussions proved even more difficult than in the previous rounds. In June 2017, the experts failed to agree on a draft for a consensus report.[58] As previously mentioned, one explanation is that Cuba, China and Russia opposed the inclusion of references to the application of the right to self-defence (and the general international law principles of countermeasures and international humanitarian law).[59]

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46. ibid.
47. A/Res/68/98 (2013).
48. ibid. The report also noted that human rights and fundamental freedoms apply in cyberspace.
49. A/Res/68/243 (2013).
50. ibid.
51. A/Res/70/174 (2015).
52. ibid.
53. ibid.
54. ibid.
55. ibid.
56. See the critique by Elaine Korzak, 'The 2015 UN GGE Report: What Next for Norms in Cyberspace?' (*Lawfare*, 23 September 2015) <www.lawfareblog.com/2015-gge-report-what-next-norms-cyberspace>.
57. A/Res/70/237 (2015).
58. The comments in 2017 painted a rather pessimistic picture, see eg Henriksen (n 12) 1; Arun M Sukumar, 'The UN GGE Failed. Is International Law in Cyberspace Doomed As Well?' (*Lawfare*, 4 July 2017) <www.lawfareblog.com/un-gge-failed-international-law-cyberspace-doomed-well>; Fosca D'Incau and Stefan Soesanto, 'The UN GGE is Dead: Time to Fall Forward' (*European Council of Foreign Relations*, 15 August 2017) <https://ecfr.eu/article/commentary_time_to_fall_forward_on_cyber_governance/>; Vihul and Schmitt (n 33); Robert McLaughlin and Michael N Schmitt, 'The Need for Clarity in International Cyber Law: International law Implications of the Lack of Consensus' (*Policy Forum*, 18 September 2017) <https://www.policyforum.net/the-need-for-clarity-in-international-cyber-law/>.
59. Henriksen (n 12) 3.

In 2019, the sixth group (again 25 members) was established to continue the work of its predecessors.[60] The group delivered a report in 2021 and thus broke through the stalemate of the previous round.[61] However, it did not add much in terms of substance to the clarification of the law. The report reaffirmed that international law, in particular the UN Charter 'in its entirety', applies in cyberspace (explicitly including the prohibition on the use of force) and noted again 'the inherent right of States to take measures consistent with international law and as recognized in the Charter'.[62]

Whether the UN OEWG, as a more inclusive platform, will be more successful in clarifying the law remains to be seen. So far, the outcomes of the UN OEWG process have been rather limited. They do not go beyond the findings of the UN GGE.[63] In its initial pre-draft from April 2020[64] and in its final substantive report from 10 March 2021,[65] the UN OEWG noted that States reaffirmed the application of international law, and in particular UN Charter law, to cyberspace.

It would go too far to claim that the unwillingness of some States to publish their interpretations and to stay silent is the only reason for the failure of the UN GGE and the UN OEWG to provide more interpretative clarity. Interpretative activity may also lead to disagreement. However, interpretative engagement could have at least paved the way for finding common ground. This is also supported by the recommendations of the UN OEWG pre-draft and final reports, which emphasise the need for further information on the views and practice of States in relation to 'how' international law applies in cyberspace.[66]

3. The (legal) politics of silence

How can we explain the reluctance of States to refrain from submitting their legal positions on the interpretation of the *jus contra bellum* in cyberspace and the preference of some to foster new law-making instead of clarifying existing law? As States rarely explain the reasons for their silence, we can only speculate on their motives. A convincing explanation is that their choice for inactivity is driven by a preference for legal ambiguity, which finds its legal rationale in the traditional 'freedom of State' paradigm.

The discussion on the regulation of cyberwarfare is not only about the correct interpretation of the law but it 'is as much about strategy, politics and ideological differences'.[67] The interpretative approaches chosen by States often reflect their broader strategical interests, which coincide with their economic, military and technical capacities.[68] Historically this has always been the case; the new reality of cyberwarfare has not changed this. How States interpret *jus contra bellum* in cyberspace is not independent of their respective ICT strengths and

60. A/RES/73/266 (2019).
61. A/76/135 (2021).
62. ibid [69] and [71(d)].
63. UN OEWG pre-draft (n 17) and Final substantive report of the UN OEWG A/AC.290/2021/CRP.2 (2021) <https://front.un-arm.org/wp-content/uploads/2021/03/Final-report-A-AC.290-2021-CRP.2.pdf> ('*UN OEWG final report*').
64. UN OEWG pre-draft (n 17).
65. UN OEWG final report (n 63).
66. UN OEWG pre-draft (n 17) and UN OEWG final report (n 63).
67. Henriksen (n 12) 1 and 4; Anders Henriksen, 'Politics and the Development of Legal Norms in Cyberspace' in Karsten Friis and Jens Ringsmose (eds), *Conflict in Cyber Space: Theoretical, Strategic and Legal Perspectives* (Routledge 2016) 151–164.
68. Henriksen (n 12) 4–5.

weaknesses.[69] Moreover, States' interpretations are influenced by their more fundamental ideological perspective on the openness of the internet.[70]

Yet, how does the choice for staying silent fit in this picture? One possible explanation is that States wait for further technical developments before they formulate their own interpretative approaches. The speed and unpredictability of the development of new digital technologies create enormous strategic uncertainties.[71] While economical resources and technical capacities are also of great importance in the context of cyberwarfare, the open structure of cyberspace seems to have re-shuffled many of the old certainties. Small States with a limited budget and little conventional military power can conduct military measures which have a large-scale effect in almost every corner of the world. Despite their strong conventional military powers, traditional strong military and economic powers feel increasingly vulnerable due to their strong digital connectedness. Against the background of these strategic uncertainties, it seems to be – at least at first glance – a rational choice for States to aim at paralysing legal clarification and perpetuating legal uncertainty, as they cannot sufficiently predict the long-term consequences of their own legal interpretation.[72]

From a legal-theoretical perspective, this choice of strategic ambiguity can only be explained by the traditional so-called 'freedom of State' paradigm. This state-oriented and subjective perspective paradigm considers the freedom and the will of States paramount. It found its most famous manifestation in the Lotus dictum of the Permanent Court of International Justice in 1927. The court held that

> international law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usage generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions on the independence of States cannot therefore presumed.[73]

From this perspective, States are only bound by the extent to which they have consented to the rule of international law. Not only the formation of rules, but also their interpretation, follows this paradigm. In an earlier judgment, the PCIJ stated in relation to the interpretation of international law that 'it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it'.[74] From this point of view, the freedom of State remains the residual rule. Indeterminacy plays into the hand of States. Ambigu-

69. ibid 5; Matthew C Waxman, 'Cyber-attacks and the Use of Force: Back to the Future of Article 2(4)' (2011) 36 *Yale Journal of International Law* 421.
70. Henriksen (n 12) 5.
71. On the difficulties of international law making catching up with the fast and unpredictable cyberrevolution, see Anne Verhelst and Jan Wouters, 'Filling Global Governance Gaps in Cybersecurity: International and European Legal Perspectives' (2020) 15 *International Organisations Research Journal* 105, 107 <https://doi.org/10.17323/1996-7845-2020-02-07>.
72. See eg on the Chinese 'wait and see' approach, Chaoyi Jiang, 'Decoding China's Perspectives on Cyber Warfare' (2021) 20 *Chinese Journal of International Law* 257, 302 <https://doi.org/10.1093/chinesejil/jmab022>.
73. *The Case of the S.S. "Lotus"* (France v Turkey) [1927] PCIJ Ser A, no 10, 18.
74. *Delimitation of the Polish-Czechoslovakian Frontier* (Question of Jaworzina) (Advisory Opinion) [1923] PCIJ Ser B, no 8, 37 [80].

ity means freedom and flexibility. If States remain silent, they remain free to do what they want.[75]

Alternative explanations for interpretative silence do not convince. Disinterest in the topic seems a rather unlikely explanation, given the great relevance of cyber security in contemporary politics. Disagreement among different branches of the government is another possible explanation.[76] However, this author is not aware of any such conflicts between different branches of the government within silent States. Coercion of less powerful States to remain silent due to certain power structures and dependencies in international politics (eg of military or economic nature) may also explain their silence. However, the author is not aware of any concrete cases. A final explanation could be that some States have voiced scepticism against the UN GGE. For example, Russia has referred to the UN GGE as 'a narrow' and 'elitist' expert platform and criticised the report of the UN OEWG for its linkage to the findings of the UN GGE.[77] However, this attitude does not explain a general reluctance of States to position themselves outside of the UN GGE context, for example in the more inclusive forum of the UN OEWG.

4. The (legal) consequence of interpretative silence

4.1 States' interpretation as 'subsequent practice'

To start with the obvious: no State alone can determine the law with a binding effect for itself or for others by positively interpreting it or by not interpreting it. As Weiler and Haltern have argued, 'autointerpretation, by *each state individually*, is mostly accepted as a practical inevitability with little, if any, normative value'.[78] While States are usually the first and often also the last interpreters of the law (in the absence of delegation of interpretative authority, for example to an international court), it is wrong to claim that 'each State establishes for itself its legal situation vis-à-vis other States'.[79] To state otherwise would go against one of the cornerstones of the international legal order: the equality of States.[80] Just as a single State

75. Cf Henriksen (n 12) 5; McLaughlin and Schmitt (n 58); Elisabeth Schweiger, 'The Risks of Remaining Silent: International Law Formation and the EU Silence on Drone Killings' (2015) 1 *Global Affairs* 269, 273–274 <https://doi.org/10.1080/23340460.2015.1080036>. See also the critique of this approach by Michael Schmitt, 'The United Kingdom on International Law in Cyberspace' (*EJILTalk*, 24 May 2022) <https://www.ejiltalk.org/the-united-kingdom-on-international-law-in-cyberspace/>.
76. Henriksen (n 12) 5; Martha Finnemore and Duncan B Hollis, 'Constructing Norms for Global Cybersecurity' (2016) 110 *American Journal of International Law* 425. Generally, see Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2004) 5 (arguing that the modern nation State has become disaggregated) and Rosalyn Higgins, *Themes and Theories* (OUP 2009) 140 (arguing that we must look behind the 'monolithic face' of the State). See also First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation by Special Rapporteur Georg Nolte, A/CN4/660 (2013) draft conclusion 4, 79 [144] ('Subsequent practice can consist of conduct of all State organs which can be attributed to a State for the purpose of treaty interpretation').
77. Russia's comments 2020-1 (n 37) 2.
78. Joseph H H Weiler and Ulrich R Haltern, 'Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz' in Anne-Marie Slaughter, Alec Stone Sweet and Joseph H H Weiler (eds), *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in its Social Context* (Hart 1998) 331. See also Leo Gross's ground-breaking article on 'International Law and the Problem of Autointerpretation' in *Essays on International Law and Organization* (vol 1, Springer 1984) 367–398.
79. *Air Services Agreement of 27 March 1946* (United States v France) [1978] 18 RIAA 417, 443 [81]. See also Prosper Weil, 'The Court Cannot Conclude Definitively… Non Liquet Revisited' (1998) 36 *Columbia Journal of Transnational Law* 109, 119.
80. Article 2(1) UN Charter. See also Jan Wouters, Cedric Ryngaert, Tom Ruys and Geert De Baere, *International Law: A European Perspective* (Hart 2009) 97.

may not create law by itself – with the exception of unilateral declarations – and may not unilaterally release itself from treaty obligations outside the narrow conditions circumscribed in Articles 46–53 VCLT (invalidation, termination, or suspension),[81] it may not interpret the law with binding force either.[82]

This is confirmed by Articles 31–32 VCLT (and their customary equivalents).[83] These rules also apply to the UN Charter which was concluded before the VCLT entered into force.[84] The formulation of Article 31(3) VCLT indicates that an agreement between all the parties to a treaty is required as it speaks of a 'subsequent agreement between the parties' (lit a) or a 'subsequent practice …which establishes the agreement of the parties' (lit b).[85] Only an 'agreement' constitutes the 'authentic' interpretation of the parties to a treaty, which 'constitutes objective evidence of the understanding of the parties as to the meaning of the treaty'.[86] Subsequent interpretation by one or few parties or conflicting interpretations of different parties do not establish an 'agreement'.[87] It may only be relevant as 'supplementary' means of interpretation even if not all conditions of Article 31(3)(a) or (b) are fulfilled (cf Article 32 VLCT).[88] However, such practice carries considerably less weight.[89] It only serves as a supporting argument for an interpretation that has been reached by other means.[90]

4.2 Silence as acquiescence

Against this background, what is the legal consequence of State's interpretative silence? Does it matter that some States publish statements on the interpretation of the *jus contra bellum* in cyberspace whereas others refrain from doing so? Does the strategic inactivity leave the law in limbo?

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81. Another option is revocation if the treaty explicitly provides it: see eg Article 50 of the Consolidated Version of the Treaty of the European Union, 26 October 2012, OJ C 326/13 (TEU). On modes of disengagement with international law, see Andreas L Paulus and Johann R Leiss, 'Constitutionalism and the Mechanics of Global Law Transfers' (2018) 9 *Goettingen Journal of International Law* 35, 54.
82. To suggest otherwise would conflict with the established principle of international law (and domestic legal systems): *nemo judex in causa sua* ['no one should be a judge in their own cause']. See the PCIJ in *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne (Frontier between Turkey and Iraq)* (Advisory Opinion) [1925] PCIJ Ser B, no 12, 32 (that 'no one can be judge in his own suit' is a 'well-known rule' that 'holds good'). See also ILC's first report on subsequent practice (n 76) 73 [107].
83. On the customary status of these provisions, see eg *Case Concerning Sovereignty Over Pulau Ligitan and Pulau Sipadan* (Indonesia v Malaysia) (Judgment) [2002] ICJ Rep 625 ('*Pulau Ligitan and Pulau Sipadan*') 645 [37], with further references; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) ('*Wall Opinion*') [2004] ICJ Rep 136, 174 [94]; ILC's first report on subsequent practice (n 76) 56 [9]–59 [28], and ibid draft conclusion 1. See also Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009), Article 31–33, 439–440 [37]–[39] (on Article 31), 448 [13] (on Article 32), and 461 [16] (on Article 16), with further references.
84. ILC's first report on subsequent practice (n 76) 56 [9]–59 [28]; Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester UP 1984) 153; *Wall Opinion* (n 83) 174 [94]; *Avena and Other Mexican Nationals* (Mexico v United States of America) (Judgment) [2004] ICJ Rep 12, 48 [83]; *LaGrand* (Germany v United States of America) (Judgment) [2001] ICJ Rep 466, 501 [99]. On the application of the VLCT rules on interpretation to the UN Charter, see Stefan Kadelbach, 'Interpretation' in Simma and others (n 23) 71, 75 [7].
85. Cf ILC's second report on subsequent practice (n 25) 24 [49].
86. ILC Draft Articles on the Law of Treaties with Commentaries (1966) II *Yearbook of the International Law Commission* 177, A/6309/Rev.1 ('ILC draft articles on the law of treaties'), 221 [15] of the commentary to Article 27 in section 3.
87. ILC's second report on subsequent practice (n 25) 24 [50]; Starski (n 21) 21; Oliver Dörr, 'Article 31' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties. A Commentary* (2nd ed, Springer 2018) 599 [84].
88. Cf ILC's first report on subsequent practice (n 76) 66 [65], 69 [80]–[82], 73 [107].
89. ibid 71 [93]–[95], 73 [107] and ILC's second report on subsequent practice (n 25) 32 [75].
90. Cf ILC's first report on subsequent practice (n 76) 71 [95] and 73 [107].

Absence of interpretation of some States does not necessarily stall the establishment of the authentic interpretation of the treaty provision in question. As a general rule, an 'agreement' in the sense of Article 31(3)(a) or (b) must be 'established' and therefore it must be positively identifiable.[91] A 'subsequent agreement' (lit a) must be clearly manifested (though not necessarily in written form) and *ipso facto* constitutes an 'authentic interpretation'.[92] For 'subsequent practice' (lit b), it must be shown that the understanding is common to the parties of the treaties by evincing a 'particular conduct or circumstances' through which an agreement can be identified indirectly.[93] Therefore, 'a subsequent agreement' is typically easier to prove than a 'subsequent practice'.[94]

A strict threshold of how many States must actively engage in a subsequent practice under lit b is difficult to establish.[95] As a general rule, the value of the subsequent practice 'depends on the extent to which it is concordant, common and consistent'.[96] Here we can draw a parallel to the requirements of customary international law. 'Subsequent practice' under Article 31(3)(b) VCLT in essences equals practice under Article 38(1)(b) of the Statute of the International Court of Justice (ICJ Statute)[97].[98] The main difference is that, in the context of treaty interpretation, a 'specific' practice of the parties to the treaty rather than a 'general' practice is required.[99] The ICJ made clear that the practice of States (accompanied by the required *opinio juris*) needs to be sufficiently general for formation of a rule of customary international law.[100] It must be 'extensive',[101] 'sufficiently widespread'[102] and 'broadly representative',[103] in particular by those States whose interests are 'specially affected'.[104] This means that it is not required to prove a positive practice of all parties at all times.[105] There is no strict standard on the exact number of States' practices that must be positively proven.[106]

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91. ILC's second report on subsequent practice (n 25) 29 [58]–33 [70].
92. ILC's first report on subsequent practice (n 76) 67 [67], 68 [74], footnotes omitted, draft conclusion 3, 75 [118]; ILC's second report on subsequent practice (n 25) 26 [54].
93. ILC's first report on subsequent practice (n 76) 68 [74], footnotes omitted. As such, subsequent practice can take a variety of forms, cf ibid 74 [111] and 74 [113], draft conclusion 3, 75 [118].
94. ILC's first report on subsequent practice (n 76) 67 [70]–68 [75]; see also James Crawford, 'A Consensualist Interpretation of Article 31(3) of the Vienna Convention on the Law of Treaties' in Georg Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013) 29, 30.
95. ILC's second report on subsequent practice (n 25) draft conclusion 9, 32 [75].
96. ibid draft conclusion 8, 24 [48].
97. Statute of the International Court of Justice, annexed to the Charter of the United Nations (opened for signature 26 June 1945, entered into force 24 October 1945) 3 Bevans 1153.
98. Richard Gardiner, *Treaty Interpretation* (2nd ed, OUP 2015) 227.
99. ibid 227.
100. On the ICJ's approach, see Second Report on Identification of Customary International Law by Special Rapporteur Michael Wood, A/CN4/672 (2014), 34 [52] ('ILC's second report on customary international law') 34–37 [52]–[54], with references.
101. *North Sea Continental Shelf Cases* (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) [1969] ICJ Rep 3 ('*North Sea Continental Shelf*') 43 [74]. See also ILC's second report on customary international law (n 100) 34 [52].
102. See *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* (Qatar v Bahrain) (Merits) [2001] ICJ Rep 40 ('*Qatar and Bahrain*'), 102 [205] ('widespread State practice'); *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada v United States of America) (Judgment) [1984] ICJ Rep 246 ('*Gulf of Maine*'), 299 [111] ('sufficiently extensive and convincing practice'). See also ILC's second report on customary international law (n 100) 34 [52].
103. See *North Sea Continental Shelf* (n 101) 42 [73] ('a very widespread and representative participation'). See further ILC's second report on customary international law (n 100) 34-35 [52].
104. *North Sea Continental Shelf* (n 101) 42 [73]; ILC's second report on customary international law (n 100) 34–35 [52] and 36–37 [54], with further references.
105. ILC's second report on customary international law (n 100) 35–36 [53], with further references.
106. ibid 35–36 [53], with further references.

As the ICJ held in the case concerning the Temple of Preah Vihear, 'where it is clear that the circumstances were such as called for some reaction, within a reasonable period', the State that is confronted with a certain subsequent practice by another party and does not react 'must be held to have acquiesced'.[107] It can be sufficient to show that '[s]ome States actively create a practice, some by initiating it, some by imitating it, and others by acquiescing in it. Other States may have done nothing, but find themselves bound by the emerging rule'.[108]

From this follows that relevant silence may be considered a confirmation of the developing interpretative 'agreement'.[109] Under what circumstance it does so, however, remains a much-contested issue in international legal practice and scholarship.[110]

The first question is: what kind of behaviour qualifies as silence? A clear case of silence is given if a State does not express itself at all in relation to the interpretation of a treaty and any of its provisions. Such behaviour qualifies as a verbal omission and therefore silence.[111] Generally, statements on the non-application of a treaty or a rule may qualify as relevant 'subsequent practice' and do not constitute silence.[112] A sufficient detailedness of the interpretative statement is not required. Inconsistent subsequent practice can be precluded from having a normative effect under the principle of estoppel.[113] Hence, claims by some States that Article 51 UN Charter does not apply in cyberspace are devoid of normative effect, if these States have earlier acknowledged that the UN Charter applies in cyberspace.

The second question is whether the State's intention to confirm a certain interpretation through its silence is decisive or whether we should apply objective criteria and rely on the recipient's perspective.[114] In a nutshell, voluntarists argue that States' silence only has the legal effect that conforms to the will of the silent State.[115] For those who support an objective

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107. *Case concerning the Temple of Preah Vihear* (Cambodia v Thailand) (Merits) [1962] ICJ Rep 6 ('*Preah Vihear*') 23. See also *Oil Platforms* (Islamic Republic of Iran v United States of America) (Preliminary Objection) [1996] ICJ Rep 803 ('*Oil Platforms*') 815 [30]; *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) (Jurisdiction and Admissibility) [1984] ICJ Rep 392 ('*Nicaragua jurisdiction and admissibility*') 410 [39]. Note that this article presumes congruence between acquiescence in relation to custom and treaty interpretation. On acquiescence as an element of interpretation, see already Ian C MacGibbon, 'The Scope of Acquiescence in International Law' (1954) 31 *British Year Book International Law* 143, 146.

108. See Philip M Moremen, 'National Court Decisions As State Practice: A Transnational Judicial Dialogue?' (2006) 32 *North Carolina Journal of International Law and Commercial Regulation* 259, 273 [fn 67], discussing customary international law and citing the Statement of Principles Applicable to the Formation of General Customary International Law, with commentary Final Report of the Committee on Formation of Customary (General) International Law, Report of the Sixty-Ninth Conference, London (2000) 39.

109. ILC's first report on subsequent practice (n 76) 74 [111]; ILC's draft articles on the law of treaties (n 86) 221–222, [15] of the commentary to Article 27; ILC's agreements and subsequent practice in relation to the interpretation of treaties, in Report of the International Law Commission, A/73/10, 70th Session, Supp. No. 10, 2018, 79 [12]–[13] ('ILC's draft conclusions on subsequent agreements and practice'); *Preah Vihear* (n 107) 23; *Nicaragua jurisdiction and admissibility* (n 107) 410 [39]; *Dispute between Argentina and Chile concerning the Beagle Channel* (1977) 21 UNRIAA 53, 187 [169]; Wouters and others (n 80) 101–102; Gardiner (n 98) 267; Villiger (n 83) 431 [22]; Dörr (n 87) 559, 599–600 and 601–602 [84] and [87].

110. The topic has recently become the subject of increasing academic attention, see eg the ongoing ERC State Silence project led by Danae Azaria <www.statesilence.org/>.

111. Cf Starski (n 21) 22.

112. Dörr (n 87) 598 [82]; Gardiner (n 98) 262–264.

113. On the difference between the concept of acquiescence and estoppel, see the ICJ in *Gulf of Maine* (n 102) 305 [130].

114. On the difference between voluntarist and objective approaches to acquiescence, see Sophia Kopela, 'The Legal Value of Silence as State Conduct in the Jurisprudence of International Tribunals' (2010) 29 *Australian Year Book of International Law* 87, 88, and Starski (n 21) 27–30.

115. For a voluntarist conception, see Gennady M Danilenko, 'The Theory of International Customary Law' (1988) 31 *German Yearbook of International Law* 33; Gerald Fitzmaurice, 'The Law and Procedure of the ICJ, 1951-54:

approach,[116] silence is first and foremost a fact and the legal effect follows from 'legitimate expectations of other actors' which can be inferred from the context.[117] For example, Starski argues that 'silence will never reveal the true beliefs of an actor: "belief" will necessarily be constructed merely from the contextual setting'.[118] In addition, she suggests that international law imposes on States a 'legislative responsibility' to engage in active interpretation if the circumstances have called for some reaction to ensure international law's effectivity and legal certainty.[119] This 'legislative responsibility' is only a soft obligation (in German '*Obliegenheit*', which can be translated into 'incumbency')[120] that is not enforceable and sanctionable. Attaching legal effect to States' silence is a compensation for the 'soft' character of this 'legislative responsibility'.[121] In Starski's view, such responsibility follows *inter alia* from a 'constitutionalist' reading of international law.[122] In her view, the 'eminent' role of States in the process of law creation and evolution 'endows states with a specific responsibility towards the effectivity of the international legal system' which depends on a clarification of the law.[123] Only determinacy makes norms operational and allows us to distinguish law from non-law.[124]

Starski's argument has merits for several reasons. To start with, the principle of good faith reflected in Article 31(1) VCLT requires States to fulfil their obligation as parties to a treaty, not to impede the effect of the treaty by perpetuating indeterminacy (under certain circumstances, as discussed below).[125]

While a 'constitutionalist' reading of international law invoked by Starski comes with challenges,[126] the 'legislative responsibility takes account of the shift from a purely State-oriented international legal order of co-existence towards a legal order of cooperation that does not only serve States' interests but also interests of an alleged 'international commu-

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General Principles and Sources of Law' (1953) 30 *British Year Book of International Law* 1, 68; Jacques Bentz, 'Le silence comme manifestation de volonté en Droit international public' (1963) 67 *Revue Général de Droit International Public* 44, 45.

116. See Starski (n 21) 26–30. Kopela (n 114) has shown that this is also the approach largely taken by international courts and tribunals (without, however, entirely abandoning voluntarist considerations).
117. Starski (n 21) 27–30.
118. ibid 28. See also Herbert Günther, *Zur Entstehung von Völkergewohnheitsrecht* (Duncker & Humblot 1970) 134, and Schweiger (n 75) 270.
119. Starski (n 21) 28–30. See also Kolb, *The Law of Treaties* (n 26) 195 ('a duty to speak out').
120. Starski (n 21) 29. See also Etienne Henry, 'Alleged Acquiescence of the International Community to Revisionist Claims of International Customary Law (With Special Reference to the Jus Contra Bellum Regime)' (2017) 18 *Melbourne Journal of International Law* 260, 270, who assumes such an '*Obliegenheit*' for States directly affected by a violation of customary international law.
121. Starski (n 21) 30.
122. ibid 28–30. Constitutionalism as an approach to international law can be traced back to inter-war years and has found much support in the German-speaking world. Contributions include eg Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (J Springer 1926); Christian Tomuschat, 'Obligations Arising for States Without or Against Their Will' (1993) 241 *Recueil des Cours*, 195; Bardo Fassbender, 'The United Nations Charter as the Constitution of the International Community' (Martinus Nijhoff 2009). For an overview, see Thomas Kleinlein, *Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente einer idealistischen Völkerrechtslehre* (Springer 2012).
123. Starski (n 21) 28 (footnotes omitted).
124. ibid 29–30.
125. On effectiveness as part of the *bona fide* obligations of States, see Charles M de Visscher, *Les effectivites en droit international public* (Pédone 1967) 156–157; Kadelbach (n 84) 76 [9]. On good faith, see *Case Concerning Border and Transborder Armed Actions* (Nicaragua v Honduras) [1988] ICJ Rep 69, 105 [94].
126. See Paulus and Leiss (n 81) 39, 42–43. See also Georg Nolte, 'Zur Zukunft der Völkerrechtswissenschaft in Deutschland' (2007 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 657, and Andreas L Paulus, 'Zusammenspiel der Rechtsquellen aus völkerrechtlicher Perspektive' (2014) 46 *Berichte der Deutschen Gesellschaft für Internationales Recht* 13.

nity', individuals and humanity at large.[127] This means that States have a responsibility to make treaties function, in particular if they protect 'community interests', such as the UN Charter does in its *jus contra bellum*.[128]

This is not, however, to suggest that acquiescence is always presumed if States remain silent. As the ILC noted, 'acceptance of a practice by one or more parties by way of silence or inaction is not easily established'.[129] In order to find a fair balance between the objectification of silence and consensualist concerns, a close scrutiny of the context and setting of the silence is required.[130] The important qualification is that we can infer consent from silence only – independent of the real intention of the State – if the 'circumstances were such as called for some reaction'.[131] Only if she must and can speak (*si loqui debuisset ac potuisset*), the neutral maxim that 'she who keeps silent is held neither to deny nor to accept' (*qui tacit neque negat, neque utique fatetur*) yields to the maxim that 'she who keeps silent is held to consent' (*qui tacit consentire videtur*).[132]

The ILC has pointed to two factors that must be considered to establish whether the circumstances 'called for some reaction': 'the legal situation to which the subsequent practice by the other party relates and the claim thereby expressed'.[133] If we break down these two broad criteria into more specific sub-criteria, we can identify nine factors that should be taken into account.[134]

The first factor that should be considered is the nature of the State practice itself.[135] It is relevant whether the interpretative action was a singular event or whether it occurred frequently.[136] Moreover, it is relevant whether the interpretative action is consistent and whether it has become commonplace.[137] In this context, the element of time must also be considered: the longer States engage in a certain action, the higher the expectation is that other States react.[138]

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127. Andreas L Paulus, 'International Adjudication' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 209, 210–211; Philipp Allot, *Eunomia: New Order for a New World* (2nd ed, OUP 2001). On community interests, see Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Rec des Cours* 217, 230.
128. On international peace and security as community interests, see Simma (n 127) 236.
129. ILC's draft conclusions on subsequent agreements and practice (n 109) 80 [18]. See also the comments of States on early submissions of the ILC on this question (cited in <https://pilac.law.harvard.edu/quantum-of-silence-paper-and-annex//part-ii-what-we-mean-by-silence#_ftnref65>. This is especially the case in relation to treaties delimiting a boundary, cf eg *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v Nigeria: Equatorial Guinea intervening) (Judgment) [2002] ICJ Rep 303, 352 [67]. See, however, Karol Wolfke 'Controversies Regarding International Customary Law' (1993) 24 *Netherlands Yearbook of International Law* 1, 8–9, who argues that inferring consent from silence is increasingly justified.
130. ILC's draft conclusions on subsequent agreements and practice (n 109) 79 [14]–80 [18]; Fitzmaurice (n 115) 68.
131. *Preah Vihear* (n 107) 23; ILC's second report on subsequent practice (n 25) draft conclusion 9, 32 [75]; ILC's draft conclusions on subsequent agreements and practice (n 109) 79 [14]; Starski (n 21) 30; Karol Wolfke, *Custom in Present International Law* (2nd ed, Brill 1993) 62; Danilenko (n 115) 40; Fitzmaurice (n 115) 33. See also *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia v Singapore) [2008] ICJ Rep 51 [121] ('*Pedra Branca/Pulau Batu Puteh*'): '[S]ilence may also speak, but only if the conduct of the other state calls for a response'.
132. Cf Nuno Sérgio Marques Antunes, 'Acquiescence' in Anne Peters (ed), *Max Planck Encyclopaedia of International Law* (online edition, OUP 2017) <www.mpepil.com>.
133. ILC's draft conclusions on subsequent agreements and practice (n 109) 80 [16].
134. These factors are taken from the excellent article of Starski (n 21) 31–45.
135. Starski (n 21) 31–32; Kopela (n 114) 107.
136. Starski (n 21) 31–32.
137. ibid 31–32; Andrea Bianchi, 'The International Regulation of the Use of Force: The Politics of the Interpretive Method' (2009) 22(4) *Leiden Journal of International Law* 651, 664–665 <https://doi.org/10.1017/S092215650999015X>; Alexander Orakhelashvili, 'Changing Jus Cogens through State Practice' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 157, 160161.
138. Starski (n 21) 31–32; Marques Antunes (n 132) 21; Kolb, *The Law of Treaties* (n 26), 17.

The second factor concerns the claim made by the acting State.[139] Only if the State claims that its conduct is in conformity with the law can a reaction by other States be legitimately expected.[140] However, this is often difficult to establish in practice.[141]

The third factor is whether the silent State was aware (which would be difficult to prove) or 'ought to have been aware' of the conduct of the other State.[142] Moreover, the State must have had the capacity to act.[143]

The fourth factor that needs to be included in the assessment is the context in which the relevant claim was made.[144] The more internationally significant a context is, the more it can be expected that States react to claims made in this context.[145] For example, UN organs constitute a highly significant context for claims made in relation to the interpretation of the UN Charter.[146] The more volatile a rule is (either due to ongoing discourses over its meaning, or due to its generally vague character), the more it is expected that States react to claims made by other States.[147] Power relations between States (eg of military or economic nature) must only be considered under certain exceptional circumstances (such as fraud, corruption or threat or coercion by the threat or use of force).[148]

The fifth factor concerns the reactions of other actors.[149] If we find ourselves in a situation of accelerating interpretative discourse (indicating increased normative volatility), there can be a higher expectation that 'bystanders' react.[150]

The sixth factor to be considered is the impact of the proposed interpretation on rights and interests of States.[151] The more the rights and interests of the State are affected, the more a reaction can be expected.[152] Good arguments, however, speak in favour of not automatically inferring acquiescence in relation to the interpretation of *jus contra bellum*, even though as *erga omnes* obligations the *jus contra bellum* rules embody the interests of the whole international community, which includes every State.[153] It would be problematic if

139. Starski (n 21) 32–35.
140. ibid 32–35. See also Henry (n 120) 279–283.
141. ibid 281–282.
142. See eg *EC — Chicken Cuts* (WTO Appellate Body Report) WT/DS269/AB/R and Corr.1, WT/DS286/AB/R and Corr.1, adopted 27 September 2005, [272] (footnote omitted): 'has become or has been made aware of the practice of other parties'; *Anglo-Norwegian Fisheries Case* (Merits) [1951] ICJ Rep 116 ('*Anglo-Norwegian Fisheries*') (Separate Opinion Judge Alvarez) 152 [14]. See also Starski (n 21) 35–36; ILC Third Report on Identification of Customary International Law by Special Rapporteur Michael Wood, A/CN4/682 (2015) ('ILC's third report on customary international law') 13 [24]; Wolfram Karl, *Vertrag und spätere Praxis* (Springer, 1983) 279; David H N Johnson, 'Acquisitive Prescription in International Law' (1950) 27 *British Yearbook of International Law* 347; Kopela (n 114) 113; Marques Antunes (n 132) 21.
143. Starski (n 21) 35–36.
144. ibid 35–38; ILC's draft conclusions on subsequent agreements and practice (n 109) 79 [14].
145. *Application of the Interim Accord of 13 September 1995* (the former Yugoslav Republic of Macedonia v Greece) (Judgment) [2011] ICJ Rep 644, 675–676 [99]–[101].
146. Starski (n 21) 35–38.
147. ibid 36–37.
148. Kopela (n 114) 121. See also the reasons mentioned in Articles 49-52 VCLT which States may legitimately invoke to invalidate their consent to be bound by a treaty.
149. Starski (n 21) 38–39.
150. ibid 38–39; Anthea Roberts, 'Legality vs. Legitimacy: Can Uses of Force be Illegal but Justified?' in Philip Alston and Euan MacDonald (eds), *Human Rights, Intervention, and the Use of Force* (OUP 2008) 179.
151. Starski (n 21) 39–42; Marques Antunes (n 132) 21; Kopela (n 114) 105–106.
152. *Anglo-Norwegian Fisheries* (n 142) 138–139; *Legal Status of Eastern Greenland* (Norway v Denmark) [1933] PCIJ, Ser A/B No. 53, 92; *North Sea Continental Shelf* (n 101) 42 [73]; Henry (n 120) 13–14; ILC's second report on customary international law (n 100) 34–35 [52] and 36–37 [54], with further references.
153. See, however, Kopela (n 114) 107, who seems to imply this. On *erga omnes* obligations, see *Case Concerning the Barcelona Traction, Light and Power Company, Limited* (New Application: 1964) (Belgium v Spain) (Judgment) ('*Barcelona Traction*') [1970] ICJ Rep 3, 32 [32]–[34]; ILC, Draft Articles on State Responsibility for Internationally Wrongful Acts, with Commentaries (2001) II *Yearbook of the International Law Commission* 31, 126–127

the qualification of a norm as *erga omnes* would lead to a higher expectation that States positively react. As Starski convincingly argues,

> [t]he very purpose of *erga omnes* norms would appear to be undermined if the non-protest of bystander states in light of their violation might more easily have a law-altering effect than in the case of 'ordinary' rules. … The *erga omnes* dimension of norms creates a – rather fictitious – *locus standi*, but only to the benefit of a norm's enforceability and not in order to enhance its alterability.[154]

The eighth factor to be considered is 'timeliness'.[155] The greater the impact of the proposed interpretation is on interests and rights of a State, the more it is to be expected that it responds in a timely manner.[156]

The ninth and final factor concerns the nature of the affected rules in question.[157] If the rule in question enjoys a *jus cogens* or *erga omnes* status, the threshold for modification is set high. *Jus cogens* norms require a near-universal State practice and can only by substituted by a norm of the same nature (Article 53 VCLT). As such, silence 'can only under very limited circumstances issue law formative effects in cases in which peremptory norms are at stake if the very concept of *jus cogens* is to be kept doctrinally intact'.[158]

If we apply these standards to the practice of States to the discourse on *jus contra bellum* in cyberspace, it seems premature to conclude that the silence of States that have not engaged with interpretative proposals made by other States amounts to acquiescence in all contexts.

To give one illustrative example: many of those States that have published interpretative statements have endorsed the so-called 'scale and effects' test (or a version thereof)[159] that is based on the Nicaragua judgment of the ICJ.[160] Under the 'scale and effects' test, a cyberoperation constitutes a 'use of force' if its scale and effects are comparable to the scale and effects of a 'traditional' use of kinetic force.[161]

Does the silence of some States on whether they agree with this interpretation of the law amount to legally relevant acquiescence? Were the circumstances such that they called for some reaction according to the aforementioned standards?

Several of those standards are met. Mere verbal and written statements may constitute relevant 'subsequent practice'. Article 31(3)(b) VCLT does not require a physical action as

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(commentaries on Articles 48(1)(a) and 48(1)(b)). On the *erga omnes* status of the prohibition of the use of force, see *Barcelona Traction* (n 153) 32 [34]; Kopela (n 114) 107; Danilenko (n 115) 40.

154. Starski (n 21) 40. See also Marques Antunes (n 132) 21, and Henry (n 120) 18.
155. Starski (n 21) 42. See also Ian Sinclair, 'Estoppel and acquiescence' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in honour of Sir Robert Jennings* (CUP 1996) 112; Fitzmaurice (n 115) 30; Kopela (n 114) 125–126; *Land, Island and Maritime Frontier Dispute Case* (El Salvador/Honduras) (Merits) [1992] ICJ Rep 351, 577 [364]; ILC's third report on customary international law (n 142) 14 [25].
156. *Anglo-Norwegian Fisheries* (n 142) 139; Kopela (n 114) 126; 48; Zdenek J Slouka, *International Custom and the Continental Shelf* (Nijhoff, 1969) 14, 172.
157. Starski (n 21) 42–45.
158. ibid 42–45.
159. See eg Australia's submission 2021 (n 29); Finland's position paper 2020 (n 29); Netherlands' letter 2019 (n 29); New Zealand's statement 2020 (n 29); Israel position 2020 (n 29); France's position paper 2019 (n 29); Germany's position paper 2021 (n 29); Estonia's position 2019 (n 29); UK's position 2018 (n 29); US position 2012 (n 29). See also Przemysław Roguski, 'Application of International Law to Cyber Operations: A Comparative Analysis of States' Views' (*The Hague Program For Cyber Norms Policy Brief*, 2020) <https://ruj.uj.edu.pl/xmlui/bitstream/handle/item/153989/roguski_application_of_international_law_to_cyber_operations_2020.pdf?sequence=1>.
160. *Nicaragua merits* (n 21) 103 [195].
161. Roguski (n 159) 9. See also *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (2nd ed, Michael N Schmitt (ed), CUP 2017) 330 (rule 69).

'subsequent practice'.[162] The claims relating to the 'scale' and 'effect' are meant to provide an interpretation of the law and not an explanation of unlawful behaviour (second factor). The silent States had the capacity to act and were (or at least ought to be) aware of these interpretative statements (third factor). The statements were made in internationally significant contexts, such as before the UN GGE and UN OEWG, or through official channels, including homepages of ministries of foreign affairs, or other public fora (fourth factor). The *jus contra bellum* also consists of rules that are by their very nature volatile (fifth factor).

However, if we look at the other relevant factors, it seems doubtful that the circumstances were already such that they called for some reaction. Arguably, the interpretative statements in relation to the 'scale' and 'effect' test are not sufficiently consistent and widespread (first factor). While there seems to be an agreement on the overall contours of this test and its applicability in cyberspace, there still seems disagreement on its precise scope, for example in relation to the question of whether cyber-operations causing severe non-physical consequences, such as an attack on the nation's economic system, may also reach the threshold of a use of force. Several States seem to be in favour of this interpretation.[163] Others, however, seem to be sceptical or leave this question open.[164] It also seems doubtful that a sufficient number of States have publicly subscribed to an application of this test. The subsequent practice must be 'extensive'[165] and 'sufficiently widespread'[166] and 'broadly representative'[167] among States, in particular those whose interests are 'specially affected'.[168] While the number of States supporting this test is relatively large and seems to be growing, it does not comprise the majority of UN Member States yet. However, it is not unlikely that the relevant threshold will be met in the future, which would increase the expectation of reactions of bystanders.

Moreover, most States who have begun to position themselves in favour of an application of the 'scale' and 'effect' in cyberspace test have done so only quite recently (first and eighth factor). The UN OEWG process, in whose context many States have made their statements, has also been only established relatively recently. However, the longer the UN OEWG process is ongoing, the higher the expectation is that other States react to interpretative proposals.

As the interpretative proposals relate to the UN Charter and potentially impact rights and interests of all States, one could argue that a reaction can be expected (sixth factor). On the other hand, as has been discussed above, the fact that the UN Charter *jus contra bellum* rules constitute *erga omnes* obligations and *jus cogens*[169] speaks against inferring too easily

162. ILC's first report on subsequent practice (n 76) 74 [110]; Anthony Aust, *Modern Treaty Law and Practice* (2nd edn, CUP 2007) 239.
163. See eg Australia's submission 2021 (n 29); Finland's position paper 2020 (n 29); Netherlands' letter 2019 (n 29); New Zealand's statement 2020 (n 29); France's position paper 2019 (n 29).
164. See eg Israel position 2020 (n 29).
165. *North Sea Continental Shelf (n 101)* 43 [74]. See also ILC's second report on customary international law (n 100) 34 [52].
166. See *Qatar and Bahrain* (n 102) 102 [205] ('widespread State practice'); *Gulf of Maine* (n 102) 299 [111] ('sufficiently extensive and convincing practice'). See also ILC's second report on customary international law (n 100) 34 [52].
167. See *North Sea Continental Shelf (n 101)* 42 [73] ('a very widespread and representative participation'). See further ILC's second report on customary international law (n 100) 34–35 [52].
168. *North Sea Continental Shelf (n 101)* 42 [73]; ILC's second report on customary international law (n 100) 34–35 [52] and 36–37 [54], with further references.
169. On the *jus cogens* character of the prohibition of the use of force, see Delerue (n 1) 282 with further references. See also the ILC's draft articles on the law of treaties (n 86) 247, commentary to Article 50, [1]; *Nicaragua merits* (n 21) 100–101 [190]. For critique, see James A Green, 'Questioning the Peremptory Status of the Prohibition of the Use of Force' (2010–2011) 32 *Michigan Journal of International Law* 215, 243. In the view of the present author, self-defence also enjoys *jus cogens* status given the 'inextricable link between Article 2(4) and Article 51' (to quote Starski (n 21) 42–43).

acquiescence from silence. If the rule in question enjoys a *jus cogens* or *erga omnes* status, the threshold for a conclusive interpretation is set very high.

In conclusion, good arguments speak in favour of not (yet) qualifying the silence as acquiescence to interpretations that support the 'scale' and 'effect' test. However, these findings are only a snapshot of the current situation. The more a common position crystallises among a sufficient number of states on the interpretation of the *jus contra bellum* in cyberspace (or specific elements thereof), the more that silent States need to position themselves to avoid their silence being interpreted as acquiescence.

Moreover, as discussed in the next section, the lack of an interpretative agreement on the 'scale' and 'effect' test does not necessarily leave the law in limbo as objective interpretative factors must also be considered. International lawyers are justified in making an argument in favour of applying the 'scale' and 'effect' test to cyberspace on the basis of the wording, objective and purpose of the UN Charter, in light of ICJ jurisprudence (Article 38(1)(d) ICJ Statute).

4.3 The interplay between subjective and objective factors in UN Charter interpretation

Contrary to what the freedom of State paradigm implies, the subjective interpretation of the parties of 'how' the UN Charter *jus contra bellum* applies in cyberspace is not the sole factor at play. The subjective interpretation of States is complemented by objective factors, including the 'ordinary meaning' of the terms of the treaty (Article 31(1) VCLT), the treaty's 'context' and 'object and purpose' (Article 31(1) VCLT), agreements and instruments made with the conclusion of the treaty (Article 31(2) VCLT), and other 'relevant rules of international law applicable in relations between the parties' (Article 31(3)(c) VCLT). In treaty interpretation, subjective and objective factors do not stand in a hierarchical relationship with each other; their order merely represents the logical process of interpretation.[170] Subsequent practice is often used in interplay with the other means of interpretation in a 'single combined operation'.[171] At least, this observation holds true with regard to the practice of the ICJ.[172]

The complementary interplay of subjective and objective elements in the interpretation of treaties that follows from Article 31 VLCT takes account of the shift from a purely State-oriented international legal order of co-existence towards a legal order of cooperation that has been discussed above.[173] While the traditional bilateral structure remains the basis to avoid international law sliding into utopianism, treaties have a normative force that is independent from States' will.[174]

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170. ILC Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (2006) finalized by Martti Koskenniemi A/CN.4/L.682 ('Fragmentation Report') 216 [428]; *China–Publications and Audiovisual Products* (WTO Appellate Body) WT/DS363/AB/R (2009) [399]; Kadelbach (n 84) 76 [10]; Aust (n 162) 234; Dörr (n 87) 580 [38]; Gardiner (n 98) 222,
171. See eg *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 ('*Nuclear Weapons*') 248 [55]; ILC's first report on subsequent practice (n 76) 62 [42]–64 [53]; ILC's second report on subsequent practice (n 25) 11 [20] –15 [29], 59 [28], and draft conclusion 7; ILC's draft articles on the law of treaties (n 86) 219 [8] and 220 [9].
172. ILC's first report on subsequent practice (n 76) 62 [42]–64 [53]. See, however, Kadelbach (n 84) 78–79 [14], who observes that subsequent practice has gained increasing relevance in the interpretation of the UN Charter. In some international legal sub-regimes, such as international economic and human rights, it seems as if adjudicative bodies attach more importance to the object and purpose or the ordinary meaning of than on subsequent practice, cf ILC's first report on subsequent practice (n 76) 64 [53].
173. Paulus, 'International Adjudication' (n 127) 210–211.
174. ibid 210–211; Allot (n 127). On community interests, see Simma (n 128) 230.

Exclusive reliance on the will of States in treaty interpretation would easily lead to gaps in the law if States do not develop a common understanding. In such circumstances, a *non-liquet* would have to be declared.[175] It would not be possible to determine the meaning of a provision.

While it would go beyond the scope of the present paper to comprehensively discuss the possibility of gaps in the law, a few remarks should suffice. Although we find instances where courts have accepted a *non-liquet*,[176] judicial practice and scholarship are generally not willing to do so.[177] International rules are *per se* shrouded by uncertainty and indeterminacy (as any legal rules).[178] Allowing *non-liquet* would question the very functionality and effectiveness of international law. The judicial function of judges requires that they concretise norms and provide definite answers to legal questions.[179] The plurality of subjective and objective interpretative tools offered by Articles 31–32 VCLT strongly support the view that *non-liquet* should not be assumed. Important in this context is Article 31(3)(1) VCLT, which provides a pathway of general principles of international law into every interpretative exercise. General principles' main function is filling gaps in the law, that is, to avoid lacunae left by the (application of the) other sources of international law.[180]

While the strategic inactivity of many States to publish their practice undoubtedly has negative consequences for the clarification of the *jus contra bellum*, it does not leave the law in limbo. The law stands despite the relative lack of States' contribution to its clarification. Even if States establish a subsequent interpretative agreement in the sense of Article 31(1)(a) or (b) VCLT, such an agreement is only one factor among others that must be considered.

4.5 The role of courts, organs of international organisations and the ILC and the lack of centralised interpretative authority

Against this background, legal ambiguity in the present context is not the consequence of a gap in the law that follows from the interpretative silence of states; rather, it is a misnomer for the lack of centralised interpretative authority in international law. States are not the only relevant actors in the interpretation of international law. A number of institutional actors could potentially play an important role in the normative discourse on 'how' *jus contra bellum* applies in cyberspace, such as international courts and tribunals, organs of international organisations (most importantly UN organs), and the International Law Commission (ILC). However, none of these institutional actors has been equipped with the centralised authority to decide what the correct interpretation of the law is. As such, the clarification of the law is left to an open-ended discursive process.

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175. *Non liquet* transl. 'it is not clear'.
176. See eg *Nuclear Weapons* (n 171) 265–267 [105], operative paragraph 2 E.
177. Cf Daniel Bodansky, 'Non Liquet' in Anne Peters (ed), *Max Planck Encyclopaedia of International Law* (online edition, OUP 2017) <www.mpepil.com>; see eg the Administrative Tribunal of the International Labour Organization (ILO) in *Desgranges v International Labour Organization* 20 ILR 523, 530.
178. Cf Bodansky (n 177) [9].
179. See the critique by Judge Higgins who refused the possibility of *non liquet, Nuclear Weapons* (n 171) (Dissenting Opinion Judge Rosalyn Higgins) 592 [40].
180. On the 'gap filling' function of general principles, see for example: Hersch Lauterpacht, 'Some Observations on the Prohibition of "Non Liquet" and the Completeness of the Law' in Jan H W Verzijl (ed), *Symbolae Verzijl: Présentées au Prof jhw Verzijl, à l'occasion de son lxxième anniversaire* (Nijhoff 1958) 196; Georg Schwarzenberger, 'Foreword' in Bin Cheng (ed), *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons 1953) xi; Robert Kolb, 'Principles as Sources of International Law (With Special Reference to Good Faith)' 53 *Netherlands International Law Review* 1, 30–31; Emmanuel Voyiakis, 'Do General Principles Fill "Gaps" in International Law' (2013) 14 *Austrian Review of International and European Law* 239, 240–241.

International court and tribunals, in particular the ICJ, could potentially play an important role in clarifying the law through their judicial decisions as 'subsidiary means' under Article 38(1)(d) ICJ Statute.[181] However, in matters of *jus contra bellum* in cyberspace, international courts and tribunals often lack the jurisdiction to provide interpretative clarification. Even though the ICJ had for a while a considerable number of cases (directly or indirectly) concerning the use of force before it,[182] this trend has not continued, and most of the cases did not make it to the merits.[183] Importantly for us, the Court has not dealt with questions concerning *jus contra bellum* in cyberspace and it is not likely that it will do so in the near future; other courts or tribunals that may take up the issues are also not in sight.

While the UN GGE played a significant role as a facilitator of normative discourse, it has never been a platform that could have authoritatively determined the correct interpretation of the *jus contra bellum*. The UN GGE was not invested with the power to create new international law.[184] The reports of the UN GGE do not set legal norms themselves. Even if one supports the view that the practice of organs or sub-organs of international organisations may be directly relevant under Article 31–32 VCLT,[185] for example as relevant 'subsequent practice', good arguments speak against attaching significant weight to the practice of the UN GGE. The reports only represent the views of experts of a limited number of States (initially 15, now 25). What matters is the reception by all parties to the UN Charter and other international organs of the UN, such as the UN GA.

The UN GA may take up issues on *jus contra bellum* in cyberspace and has done so, for example by 'taking note' of the assessments and recommendations of the two first UN GGE reports (2010 and 2013) and by 'welcoming' the 'conclusions' of the third UN GEE report (2015, without a vote, meaning by consensus).[186] However, rather than constituting a centralised form of interpretation, the UN GA practice reflects the cumulative practice of individual States.[187]

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181. On the role of 'judicial decisions' as 'subsidiary means, see Mads Andenas and Johann R Leiss, 'The Systemic Relevance of "Judicial Decisions" in International Law' (2017) *77 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 907, 934–935.
182. Cf Christine Gray, 'The Use and Abuse of the International Court of Justice: Cases concerning the Use of Force after Nicaragua' (2003) 14 *European Journal of International Law* 867. These cases included *inter alia*: *Nicaragua merits* (n 21); *Cases concerning Legality of Use of Force* (Yugoslavia v United States of America, the United Kingdom of Great Britain, France, Germany, Italy, Belgium, the Netherlands, Canada, Portugal and Spain) (Provisional Measures) [1999] ICJ Reports 124: *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda) [2005] ICJ Rep 168; *Armed Activities on the Territory of the Congo* (New Application: 2002) (Democratic Republic of the Congo v Rwanda) [2006] ICJ Rep 6; *Oil Platforms* (n 107); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v Serbia) [2008] ICJ Rep 412.
183. Cf Gray (n 182) 868.
184. Cf Tikk and Kerttunen (n 16) 15.
185. On this question, see Third Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation by Special Rapporteur Georg Nolte, A/CN.4/683 (2015 18–19 [51], draft conclusion 11, 19 [52], 28 [73], 29 [76]–[77], 33 [86]. See also Rosalyn Higgins, 'The Development of International Law by the Political Organs of the United Nations' (1965) 59 *ASIL Proceedings* 116.
186. A/RES/65/41 (2011); A/RES/68/243; A/RES/70/237 (2015). See Elaine Korzak, 'The 2015 GGE Report: What Next for Norms in Cyberspace?' (*Lawfare* 23 September 2015) <www.lawfareblog.com/2015-gge-report-what-next-norms-cyberspace>.
187. Both elements of customary international law can be deduced from indirect manifestations of State acts on the international level cf Jed Odermatt, 'The Development of Customary International Law by International Organizations' (2017) 66 *International and Comparative Law Quarterly* 491, 499; ILC's third report on customary international law (n 142) 51 [74]; Bruno Simma and Andreas L Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 *American Journal of international Law* 302, 307. See, however, the critique by Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (re-issued with Epilogue, CUP 2005) 310–311.

The UN Security Council may also contribute to the interpretation of the *jus contra bellum*.[188] However, to date the UN Security Council has not taken up the issue.[189] Moreover, UN Security Council resolutions do not represent an authoritative interpretation of the UN Charter that binds States beyond the individual case and often require further interpretation by the member States of the UN.[190]

The ILC is another institution that potentially plays a role in clarifying (and even developing) the *jus contra bellum* in cyberspace.[191] However, the suggestion to refer the issue to the ILC that was included in the initial pre-draft report of the OEWG[192] was met by scepticism of several States. They consider it premature to involve the ILC at this stage, since the practice of States is as yet too scarce for the ILC to carry out a meaningful analysis.[193]

For the future, however, it cannot be excluded that these actors will contribute to crystallisation of the 'correct' interpretation of the law. While their interpretation must (also) be grounded in the will of States, they will mainly process positive manifestations of those States that have actively made their position clear or, in the absence of a clearly identifiable common and consistent practice, have recourse to the objective means of interpretation.

5. Conclusion

This article has discussed the politics and legal rationale behind the reluctance of some States to help clarify 'how' *jus contra bellum* applies in cyberspace. It has shown that interpretative silence may backfire in the long run. States' silence may be interpreted – though only under strict conditions – as acquiescence to an emerging, widely accepted interpretation of the law. Moreover, objective factors beyond the subjective interpretation of States may come to the fore if too many States remain silent and thereby prevent the crystallisation of a sufficiently widely accepted interpretation of the law.

In light of these findings, initiatives that encourage States to make their positions publicly available are to be welcomed from a rule of law perspective.[194] They are also in States' own interests. The vital role of the *jus contra bellum* rules for the maintenance of peace and security requires interpretative clarity to ensure their efficiency and transparency. As the UK's Attorney General Suella Braverman stated in her speech at Chatham House in 2022: 'The law needs to be clear and well understood if it is to be part of a framework for governing

188. Cf Kadelbach (n 84) 89–90 [47]–[49], 93–96 [47]–[65].
189. Cf Tikk and Kerttunen (n 16) 30.
190. Kadelbach (n 84) 96 [66].
191. The ILC task includes 'the progressive development of international law and its codification': see Article 1 of the Statute of the International Law Commission (1947) UNGA Res 174 (II), as amended by UNGA Res 485 (V), 984 (X), 985 (X), and 36/39.
192. See the recommendation in UN OEWG pre-draft (n 17) [68a]. For critique, see eg Denmark's comments (n 39) [9]; Estonia's comments 2020 (n 39) 9, 11–12; Netherlands' comments 2020 (n 31) [17]–[23]; Russia's comments 2020-1 (n 37) 3; US comments 2020 (n 31); Canada's comments on the initial 'pre-draft' of the report of the UNOEWG<https://front.un-arm.org/wp-content/uploads/2020/04/letter-to-oewg-chair-canadian-comments-on-draft-oewg-report-april-6-final.pdf> 'Canada's comments 2020') [2].
193. See eg Estonia's comments 2020 (n 39) 9, 11–12; Russia's comments 2020-1 (n 37) 3; Canada's comments 2020 (n 192) [2]; Netherlands' comments 2020 (n 31) [17]–[23].
194. See the calls for more interpretative activity: Australia's comments 2020 (n 31) 2–3; Netherlands' comments 2020 (n 31) [17]–[23]; France's comments 2020 (n 39), Joint comments EU and Member States 2020 (n 31) [10]. See also the Joint Proposal of Argentina, Australia, Canada, Chile, Denmark, Estonia, France, Indonesia, Kenya, Mexico, the Netherlands, New Zealand, Pacific Island Forum member states, Poland, and South Africa to the UN OEWG<https://front.un-arm.org/wp-content/uploads/2020/04/final-joint-oewg-proposal-survey-of-national-implementation-16-april-2020.pdf>.

international relations and to rein in irresponsible cyber behaviour'.[195] If States do not pre-emptively clarify the law, the risk of unintended escalation of conflicts is heightened. Moreover, interpretation and development of the law would be left to military considerations that all too easily exclude other concerns.

Whether these calls for more interpretative activity will make the UN OEWG process more successful than the UN GGE remains to be seen. It is more inclusive than the UN GGE and allows more States to be heard. However, the first impression does not seem very promising. The UN OEWG's initial pre-draft and final report have not added anything substantive to the work of the UN GGE in matters of *jus contra bellum* in cyberspace.[196]

If the global dialogue on *jus contra bellum* in cyberspace remains unsuccessful, it seems likely that the path will steer away from global initiatives towards regional processes among like-minded states or even bilateral agreements.[197] The US has already indicated that they would consider focusing on 'likeminded partners' to tackle cybersecurity issues.[198] Likewise, Russia increasingly turns towards the Shanghai Cooperation Organization (SCO).[199] Other regional platforms are also becoming involved in cybersecurity issues, such as the Organization of American States, the Asia-Pacific Economic Cooperation Forum, the Association of Southeast Asian Nations Regional Forum, the Economic Community of West African States, the African Union, the European Union,[200] the Organization for Security and Cooperation in Europe,[201] and the Council of Europe.

While the greater involvement of regional processes in the normative discourse is not a bad thing *per se*, the universal character of the UN Charter requires universal solutions to avoid 'fragmentation of the international norms discourse'.[202]

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195. UK's position 2022 (n 29). See also Schmitt (n 75).
196. See UN OEWG pre-draft (n 17) and UN OEWG final report (n 63).
197. Delerue (n 1) 19–20; Henriksen (n 12) 1 and 7; Alex Grigsby, 'The Year in Review: The Death of the UN GGE Process?' (*Council on Foreign Relations*, 21 December 2017) <https://www.cfr.org/blog/year-review-death-un-gge-process>.
198. Remarks by Homeland Security Advisor Thomas P Bosser from 2017 <www.whitehouse.gov/briefings-statements/>. See also D'Incau and Soesanto (n 58).
199. See SCO Agreement between the Governments of the Member States of the Shanghai Cooperation Organization on Cooperation in the Field of International Information Security (June 2009), Concept Convention on International Information Security (Russian MFA, September 2011), International code of conduct for information security (A/66/359; A/69/723). See also the CIS Information Security Agreement that was signed by heads of CIS States in St. Petersburg on 20 November 2013, and the 'International code of conduct for information security', Annex to the letter dated 9 January 2015 from the Permanent Representatives of China, Kazakhstan, Kyrgyzstan, the Russian Federation, Tajikistan, and Uzbekistan addressed to the Secretary-General, A/69/ 723 (2015), and A/66/359 (2011).
200. On EU initiatives on cybersecurity, see Verhelst and Wouters (n 71) 113–114.
201. OSCE, Decision no 1202 OSCE Confidence-Building Measures to reduce the Risks of Conflict Stemming from the use of Information and Communication Technologies, 10 March 2016 <https://www.osce.org/files/f/documents/d/a/227281.pdf>.
202. Tikk and Kerttunen (n 16) 6; Delerue (n 1) 19–21. See also China's comments 2020 (n 39) 5.