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Cyberspace: A new branch of international customary law?

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A B S T R A C T

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International relations between countries increasingly take place in cyberspace. From concerns about cyber security and Internet surveillance to privacy to harmful speech – state and non-state actors developed practices and normative conceptions that could be regarded as international customary law *in statu nascendi*. The aim of this contribution is to present arguments supporting the thesis that research concerning international law should be broadened to include cyberspace. Due to lack of treaty law in this area, one shall resort to a second source of international law, namely custom especially, as one eminent researcher has noted: ‘there are still numerous branches of international law regulated by customary law, and still more important, new rules of that law are raising’. The article presents the theory of custom as a source of international law and methods of evidencing it in the context of cyberspace and then outlines areas where such norms could have developed and therefore could be used to settle disputes between states.

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1. Introduction

We live in the era of global, technological revolutions. Almost 200 countries are these days connected through a truly global, ubiquitous computer network that has enabled unparalleled in history mass interaction more than a half of all inhabitants of the planet Earth.¹ These revolutions have transformed not only the lives of ordinary people, but have also affected the functioning of organizations of any size and complexity, including states. These shifts have taken place very quickly, have been impossible to forecast and have had a global effect.

Information technology has accelerated the pace of societal communication in a way that clearly sets it apart from societal

revolts of the past. For instance, the rapid exchange of messages via mobile phones and social networks, such as Twitter turned out to be the key differentiating factor in the Arab Spring that led to the collapse of *ancien regimes* in North Africa. The Wikileaks scandal that revealed diplomatic cables of the US government has created tensions between many allies of the United States and sparked long lasting controversies between the advocates of the freedom of speech and the supporters of the right of privacy and secrecy. The impact of using public mailboxes for private affairs was a key argument in the recent presidential election in the US. The last example has only confirmed that the Internet and technologies that underlie its day-to-day operations are not bullet-proof and one can expect many other scandals of that type to take place in the not too distant future.

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¹ In June 2016 3,675,824,813 people had access to the Internet (50.1% of all people on our planet) according <http://www.internetworldstats.com/stats.htm>, last access: 28.10.2016.
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All these unforeseeable events have taken place in a virtual reality that has had a direct and long-lasting impact in the real world. Due to its inherently global nature one might have expected that cyberspace would be of importance to the doctrine of international law. Sadly, this is still not the case. International law has not yet developed to embrace this new phenomenon. Jurisprudence of the ICJ has been dominated by traditional topics, such as interpretation of treaties, territorial disputes between states or the use of force in international relations. It is not hard to understand the reasons for it. Despite efforts concerning establishment of the Internet governance, an international community has failed to develop a working international framework for the administration of the Internet, which continues to be under the control of the US government. There is a paucity of international treaties concerning cyberspace. Those that have entered into force, such as the Council of Europe Convention on Cybercrime, the UN Convention on the Use of Electronic Communications in International Contracting or the WIPO Treaties related to international protection of copyright have a very limited scope of application, few signatory states and their subject matter is rather vague and unappealing to international lawyers. Consequently, international customary law doctrine has not been yet developed in this field.

It is not hard though to imagine that international customs pertaining to cyberspace have already been formed but are yet to be uncovered.² Let us take the example of spam. Do states have the obligation to fight spam sent from its territories and refrain from sending it to other states? Nearly all states seem to fight the influx of unsolicited communication, which is sent without users' consent, contains "junk" content, is very hard to block and is often used in cyberattacks to undermine the security of the target information system. It should not be particularly demanding to find evidence suggesting a consistent states' practice with respect to blocking spam content and or to prove conviction of states representatives that blocking such messages reflects the consensus or *opinio juris* of the international community. If this hypothesis is true, one could speak of an example of international customary norm concerning cyberspace.

The aim of this paper is to put forward arguments supporting the thesis that research concerning international customary law shall be broadened to include cyberspace. As Wolfke noted, "there are still numerous branches of international law regulated by customary law, and still more important, new rules of that law are raising".³ It is argued that the Internet such distinct branch of international law where new rules of customary law are raising, and where international relations between states, international organizations and individuals could be observed and learnt from a new perspective. As Hardy rightly stated in 1994: "Customs are developing in cyberspace as they might in any community, and rapid growth in computer communications suggests that there may be a great many such customs before long."⁴

² See author's own work in this area: P. Polański, Customary law of the Internet, T.M.C Asser Press, the Hague 2007.

³ K. Wolfke, Custom in Present International Law, Prace Wrocławskiego Towarzystwa Naukowego, Wrocław 1964, p. 10.

⁴ Hardy, I.T. (Summer 1994), The Proper Legal Regime For Cyberspace, p. 1010.

2. The contentious nature of international custom

Before investigating potential cyberspace customs, the paper will examine the nature of international custom. It is widely regarded to be one of the oldest and most difficult problems in international law: "Their difficulty lies the intangibility of custom, in the numerous factors coming into play, in the great number of various views, spread over the centuries, and in the resulting ambiguity of the terms involved."⁵ This observation has not lost its accuracy in modern times.

Despite its debatable nature custom remains a prominent source of international law, which could be easily proved thanks to the jurisprudence of both the new and old International Court of Justice. Even the latest judgments of the ICJ are filled with states' argumentation referencing customary international law, be it with respect to such diverse subject matters as interpretation of international treaties, maritime disputes or the use of force in international relations. For the sake of illustration let us briefly touch upon the latest judgment in the case of 17 March 2016 *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*. Here the ICJ reaffirmed that articles 31–33 of the Vienna Convention on Treaties reflect norms of international customary law.⁶ In addition, both states made their substantive arguments with reference to specific norms of international customs. In this very dispute, Colombia claimed that it was entitled to a maritime zone, which is governed by customary international law and Nicaragua maintained that Columbia had breached its obligation not to use or threaten to use force under Article 2, paragraph 4, of the Charter of the United Nations and customary international law.⁷ Clearly, customary international law continues to thrive in the 21st century, despite some authors declaring it to be dead or at least in a mortal crisis.⁸

Unlike in domestic legal systems where customary norms have been almost entirely eradicated by acts of sovereigns' representatives, international custom continues to play a crucial role in international law. The term itself has been defined in the Statute of the International Court of Justice in a manner that continues to divide scholars: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (. . .) international

⁵ K. Wolfke, Custom in Present International Law, Prace Wrocławskiego Towarzystwa Naukowego, Wrocław 1964, p. 9.

⁶ Citing earlier judgments, such as: *Avena and other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004 (I), p. 48, para. 83; *LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001, p. 502, para. 101; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996 (II), p. 812, para. 23; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, p. 21, para. 41; *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, I.C.J. Reports 1991, p. 70, para. 48.

⁷ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, para. 35 and 75.

⁸ G.J. Postema, *Custom in international law: a normative practice account* [in:] *The Nature of Customary law* [eds] A. Perreau-Saussine, J.B. Murphy, Cambridge 2007, p. 279.

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