International Humanitarian Law on Cyberwarfare and Pakistan's Legal Framework

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The current world security situation and ongoing conflicts raise unique challenges for the Government, key stakeholders, and ordinary citizens and will continue to do so for years to come. In view of this condition it was deemed necessary to provide continuity in research through the establishment of a dedicated research centre focusing on the law of conflict as understood in domestic law and under IHL. The Centre’s research hopes to assist not only the legal community but also the judiciary and other stakeholders which are faced with a myriad of legal questions arising out of these operations.

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EXECUTIVE SUMMARY

It is well-established that existing International Humanitarian Law (IHL) is applicable to cyberwarfare, however there are certain difficulties that need to be addressed. The initial issue is the classification of malicious cyber activity as 'attack' for the purposes of IHL, and then 'attribution' for such acts in cyberspace is also problematic. Inherently linked to the identification of the perpetrator is the challenge of categorizing the nature of the armed conflict. Moreover, once an act is recognized as an 'attack', it remains to be ascertained how the fundamental principles of IHL would be practically replicated in cyberspace. These challenges may be addressed either through classic treaty interpretation or by analogically applying existing corpus of law to cyberwarfare. To tackle the unique issues posited thereby, sometimes a new treaty regime is suggested, however the same would not receive ratifications as rapidly as the threat of cyberwarfare grows. Therefore, the only logical way to uphold and protect the intransgressible principles of humanity and dictates of public conscience is through universal consensus and evolving State practice. Though, cyberwarfare has not yet had dramatic humanitarian consequences, but our growing dependency on cyber infrastructure to sustain our daily lives increases that risk. Therefore, States must be made aware of their legal duty to comply with IHL while adopting new means and methods of warfare and to establish internal mechanisms of reviewing such weapons and techniques prior to their adoption or development.

The State of Pakistan has been victim to cyber espionage and hacking on multiple occasions, yet lacks an effective system to defend against such acts and even less so against cyber-attacks. Therefore, it must actively seek to address the cyber threats it faces and establish a cyber defense mechanism by firstly identifying cybersecurity loopholes. Pakistan is bound by existing IHL with regards to cyberwarfare and must adhere to those rules in the establishment of such a mechanism. However, where such rules are insufficient domestic cyber laws are relevant to determine State practice and may be built upon.
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<td>Asian-African Legal Consultative Organization</td>
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<td>AP</td>
<td>Additional Protocol</td>
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<td>APT</td>
<td>Advanced Persistent Threat</td>
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<td>CIHL</td>
<td>Customary International Humanitarian Law</td>
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<td>CNN</td>
<td>Cable News Network</td>
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<td>Distributed Denial of Service</td>
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<td>ETO</td>
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<td>Federal Bureau of Investigation</td>
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<td>Pakistan Telecommunication Authority</td>
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<td>UNGA</td>
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SECTION 1
IDENTIFYING THE PROBLEM

Cyber technology has witnessed unbridled growth in recent years becoming the primary tool to manage global infrastructure for economic, social, political and subsequently military activity. Though aiding rapid development, cyberspace has simultaneously given rise to new means and methods of warfare. It puts the security of all States at risk, raising internal and external concerns. Such threats can lead to cyberwarfare which, as generally understood, materializes when hostilities in situations of armed conflict between States or between organized armed groups are conducted in cyberspace. The ends of cyberwarfare are the same as those attributed to kinetic use of force, i.e. for weakening the military might of another State, or to press one's own advantage. Moreover, like kinetic warfare, cyberwarfare is governed under the law of nations or ‘Public International Law’.

Public International Law constitutes both jus ad bellum and jus in bello. Jus ad bellum regulates the legality of resorting to threat or use of force. Thus, it governs situations among States prior to the engagement in hostilities. On the other hand, jus in bello, commonly referred to as International Humanitarian Law (IHL), is that branch of law which comes into effect once an armed conflict has been initiated. It focuses on minimizing the humanitarian cost of attacks, thereby protecting those individuals and objects that do not offer any military advantage to any of the parties to the conflict. Although both these branches of international law raise fundamental questions in respect to cyberwarfare, for the purposes of this study, jus in bello, i.e. IHL shall be the main point of concern with a special focus on Pakistan.

1. The existence of an armed conflict is the essential prerequisite for the triggering the application of IHL. This aspect is further elaborated in Section 3
2. “An international armed conflict exists whenever there are hostilities, which may include or be limited to cyber operations, occurring between two or more States.” Rule 22 of the Michael N. Schmitt (gen. ed.), Tallinn Manual on the International Law Applicable to Cyber Warfare (Cambridge University Press 2013) [hereinafter “the Tallinn Manual”]
3. “A non-international armed conflict exists whenever there is protracted armed violence, which may include or be limited to cyber operations, occurring between governmental armed forces and the forces of one or more armed groups, or between such groups. The confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum degree of organization” Rule 23 of the Tallinn Manual
5. Meaning e.g., dropping bombs, shooting missiles or bullets
6. Latin for “law to war”
7. Latin for “law in waging war”
Next in this section, the scope of study is outlined and then a brief background to cyberwarfare is provided. This section ends with an understanding of cyberwarfare while differentiating it from 'cybercrimes' and 'cyberterrorism'. Section 2 focuses on how IHL is applicable to this unconventional form of warfare. Section 3 highlights the legal challenges posed by cyberwarfare. Section 4 continues the examination of the issue, in light of the fundamental principles of IHL and how these principles cannot be applied ad verbatim in the cyberspace. Section 5 constitutes the concluding remarks, summarizing the preceding arguments and recommendations.

1.1. Scope of Study
The issue central to the present work is to determine what acts in cyberspace would amount to an 'attack', thus triggering an 'armed conflict' and application of IHL. Furthermore, it is sought to understand whether the fundamental principles of distinction, proportionality and precautions in attack can be fully observed in cyberspace.

Another major concern in cyberwarfare is 'attribution'. It is vital to ascertain where the attack originated from and who initiated it, in order to determine the nature of the armed conflict. This determination is comparatively easy in case of nuclear weapons for instance, which fall in the government’s domain and cannot be used anonymously nor can their point of origin be disguised. On the other hand, the internet is much more complicated. Thus, the question arises whether IHL, in its current form, becomes redundant for the governance of warfare in cyberspace.

As the corpus of IHL is made up of customary practices and treaties, another issue surfaces, as to whether existing IHL treaties are applicable analogically to modern means of warfare, or are new instruments required to fill the lacunae? This would depend on whether IHL instruments in their current form are sufficient to confine cyberwarfare or not.

Lastly, a main objective of this article is to provide an understanding of the Pakistani legal framework vis-à-vis cyberwarfare. Therefore, domestic legislation, i.e. the Prevention of Electronic Crimes Act 2016 (the PEC Act), which deals with cybercrimes is analysed in order to determine whether it can qualify as State practice under international law and consequently provide certain guidelines with regard to developing a national military strategy for understanding and dealing with the threat of cyberwarfare.

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10. Latin for "corresponding word to word; using the same words"
1.2. Background

The first noted incident of malicious use of cyber technology between States is from 2007 when riots enabled through social media by provoking ethnic Russians were led in the streets of Estonia. The Russian government was also allegedly involved in this incitement. This social media campaign took the shape of organized cyber-attacks that originated from over 150 countries hitting Estonia’s private and government systems and shutting them for ten days, along with making fire and ambulance services unavailable for over an hour.

Estonia as a member of NATO could claim ‘collective defense’ under Art. 5 of the NATO Treaty, but that option could not be availed because the aggressor could not be identified. Though, this issue did not fall under IHL owing to the absence of an armed conflict, it nevertheless captured the world's attention with regards to threats posed by cyber technology.

It was reported that by 2007 between 120 to 140 States were engaged in developing cyber-attack technology. This number has been expected to rise greatly as well as to trigger a race among nations in the coming decades, as States seek to ascertain the potential advantages and challenges of such

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15. “The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area…”
16. Rather it could be categorized under jus ad bellum. i.e., whether there was use of force against Estonia and whether it triggered her right of self-defense.
assaults. The hostile events of 2008, between Russia and Georgia focused global attention on the emerging, inevitable and real threat of cyberwarfare.

The Assistant Director of the United States' (US) Federal Bureau of Investigation (FBI) cyber division observed that cyber-attacks posed as big a threat as weapons of mass destruction (WMDs). NATO’s Cyber Defense Chief similarly asserted that “cyberterrorism [and] cyber-attacks pose as great a threat to national security as a missile attack.” Moreover, as noted by a study on cybercrime laws, “in the networked world, no island is an island”, therefore cyberspace must be protected.

In order to contain the threat posed by cyber operations, an initial discourse on whether such activity is governed by existing legal frameworks or not is of prime importance. In this regard, it may be noted that even though ‘cyber operations’ qualify as new technologies, such qualification does not suggest that there are no restrictions on their use in an armed conflict. Cyber technology is covered within the ambit of Art. 36 of Additional Protocol I, 1977 (AP I). Art. 36 is applicable to all 'new weapons' as envisaged by the

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21. “When Georgia attacked South Ossetia and tried to take this territory back, issues of compliance with IHL during cyber operations were raised. During this period, Russian peacekeepers were already stationed in South Ossetia and eventually an IAC broke out between Russia and Georgia. Simultaneously with the launch of military operations, a list of targets and malware was uploaded on a Russian website. This website gave easy and quick access to anyone who was interested in attacking any of the Georgian official websites – listed there – by just downloading the malware and attacking that particular Internet Protocol (IP). These attacks led to six hours of DDoS, and targeted government websites like the Ministry of Defense, banks and Internet Service Providers (ISPs).” See generally Michael N. Schmitt, ‘PILAC Lecture on Cyber Operations and IHL: Fault Lines and Vectors’ (April 2015) Lecture at Harvard Law School <http://pilac.law.harvard.edu/events/cyber-operations-and-international-humanitarian-law-fault-lines-and-vectors> accessed 20 January 2016; See also Commentary to Rule 2 of the Tallinn Manual [28][68]
23. See Introduction to the Tallinn Manual [16]–[17]
28. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978)
provision, regardless of whether such technology existed at the time of its drafting; however, the military potential of cyberspace is yet to be completely understood.29

In Pakistan, there is a fundamental lack of the urgency to develop cyber capabilities and strategies,30 and a general unawareness of its peculiarities.31 In the absence of these, Pakistan remains vulnerable to cyber targeting of all kinds: hacking, espionage, malware uploads etc. or outright cyber-attacks.32 The Foreign Office (FO) of Pakistan experienced three major cyber operations against its information infrastructure between January 2015 and May 2016.33 These incidents highlighted a serious security vacuum in the country and the inability of State functionaries to protect critical data34 and/or infrastructure.35

While previously domestic legislation36 existed to curtail cybercrimes, its ineffectiveness and/or limited scope led to the adoption of the PEC Act. The PEC Act, though a step in the right direction,37 is insufficient to deal with the complex nature of cyberspace and the multitude of challenges posited thereby. This is primarily because the wording of the PEC Act is too generic,38 thus making implementation quite problematic along with giving broad

29. See Section 2.1. below
34. Prevention of Electronic Crimes Act 2016 s 2 (x) and (xi) [hereinafter referred to as ‘the PEC Act’]
powers to the enforcement agencies. Furthermore, it fails to make a distinction between 'cybercrime', 'cyberterrorism' and 'cyberwarfare', thereby adding to the confusion. Nevertheless, it must be borne in mind, that although the PEC Act does not directly deal with cyberwarfare, it can be understood as providing a basic framework which would amount to State practice under customary international humanitarian law (CIHL).

1.3. Cyber Operations: Definitions and Classification

In this subsection, various forms of cyber threats are briefly explained to differentiate them from cyberwarfare. This distinction is important because cyberwarfare is often confused with cybercrimes and cyberterrorism due to some shared features between them; owing primarily to the common domain through which these are conducted, i.e., cyberspace. Moreover, as it is sought to evaluate the subject at hand in the context of Pakistan, domestic legislation and/or jurisprudence shall be referred to as available.

1.3.1. Cybercrimes

'Cybercrime' is a crime committed in the cyber domain, i.e. over the internet. While “commission of cybercrime was not imaginable three decades ago”, in today’s world, crimes such as theft, fraud, harassment, and extortion are easily comprehensible and committed in such ways. Such activity is so common nowadays that every three seconds someone's identity is stolen over the internet, while 594 million people worldwide were victims of online crime in

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40. Raza Khan, ‘Cyber Crime Bill Passed by NA: 13 Reasons Pakistanis should be Worried’ Dawn (Islamabad, 11 August 2016) <http://www.dawn.com/news/1276662> accessed 21 November 2016; see also Sections 1.2.2. and 1.2.3. hereinbelow
41. See Sections 3 and 4 hereinbelow
42. See, for example, Rule 1 of ICRC CIHL Study, “The Principle of Distinction between Combatants and Civilians” <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_couv_rule1> accessed 21 November 2016, wherein the Army Act, 1952 is taken as reflective of State practice on the matter.
44. “The environment formed by physical and non-physical components, characterized by the use of computers and the electro-magnetic spectrum, to store, modify, and exchange data using computer networks.” See the Tallinn Manual
45. “A crime involving the use of a computer, such as, sabotaging or stealing electronically stored data” in Bryan A. Garner, Black’s Law Dictionary (9th edn, West Publications 2009) 443
In this sense, cybercrimes can be categorized as the commission of age-old crimes in a novel way.\(^{50}\)

However, there are also those emerging crimes that are only committed through cyber means and have increased with the evolution of such infrastructure. An example of such crimes is a distributed denial of service (DDoS) attack which “makes a computer resource [such as a website] unavailable to its intended users.”\(^{51}\) DDoS attacks were seen in force in February 2000;\(^{52}\) when major web portals like CNN,\(^{53}\) Yahoo!, and eBay were targeted by a 15-year old Canadian hacker, and resulted in their complete shutdown.\(^{54}\) More recently, popular websites such as Twitter and Netflix were brought down through such attacks.\(^{55}\) Some of these crimes are covered by the PEC Act, for example 'spamming' that is defined as occurring when harmful, fraudulent, misleading, illegal or unsolicited information is transmitted to any person without his prior consent.\(^{56}\)

Therefore, whether new crimes or traditional ones committed in a modern way, the distinguishing feature of cybercrime is that it threatens the internal order of a State, independent of where it originates in the world.\(^{57}\) The difficulty in the enforcement of most definitions of cybercrime has been that they do not address those activities which though threaten internal order, were not previously conceived and thus require new legislation.\(^{58}\) In the Pakistani context, it may be observed that the PEC Act addresses this problem,
giving a detailed list\textsuperscript{59} of cybercrimes as well as providing for means of enforcement.\textsuperscript{60} However, as mentioned hereinbefore, it has been criticised for being broadly and vaguely worded, leaving room for abuse of power.\textsuperscript{61}

1.3.2. Cyberterrorism

UN Security Council Resolution 1566 calls upon all States to prevent the following acts and further provides that these shall not be justified on political, philosophical, ideological, racial, ethnic or religious considerations:

“…Criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act…”\textsuperscript{62}

The purpose of terrorism 'to provoke a state of terror in the general public' is also reflected in the definition of cyberterrorism under the PEC Act. It is defined as any person interfering with\textsuperscript{63} or without authority copying or transmitting\textsuperscript{64} critical infrastructure data\textsuperscript{65} with the intent to create a sense of fear, panic in the Government or the public or to advance sectarianism.\textsuperscript{66} However, the PEC Act by classifying cyberterrorism as a cybercrime fails to appreciate the distinction between them.\textsuperscript{67} Nevertheless, it may be deemed to be a positive development as this definition also criminalizes interference with data for the advancement of objectives of terrorist networks.\textsuperscript{68} This is crucial as cyberterrorists till date have used cyberspace to garner support, recruit or spread propaganda.

Like cybercrime, cyberterrorism also consists of using computer technology\textsuperscript{69}

\textsuperscript{59} The PEC Act chapter II s 3 – 28
\textsuperscript{60} The PEC Act chapter III s 29 – 41
\textsuperscript{63} The PEC Act s 8
\textsuperscript{64} The PEC Act s 7
\textsuperscript{65} The PEC Act s 2 (xi)
\textsuperscript{66} The PEC Act s 10
\textsuperscript{67} The PEC Act chapter II dealing with 'Offences and Punishments'
\textsuperscript{68} The PEC Act s 10(c)
for committing acts in unconventional ways, in this case for spreading terror among the citizens. Another similarity between the two is that both serve to undermine internal order. However, these are two distinct acts in their objective as well as result and are thus treated differently.70

Where cybercrimes are based on acquiring personal, wrongful gain by causing physical or psychological injury to another individual;71 cyberterrorism is geared more towards political goals as part of its agenda.72 Cyberterrorists, operating upon a political, religious or sectarian ideology, in addition to undermining internal order, also seek to shake the peoples' trust in the State's ability to protect them73 by targeting civilians.74 This may be differentiated from cyberwarfare which theoretically does not allow75 civilians to be made the object of attack.

1.3.3. Cyberwarfare
The phrase ‘information war’ as defined76 by the Shanghai Cooperation Organization,77 may only be applied to those ‘cyber-conflicts’ and ‘cyber

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71. Ibid [387]
72. S. Ventkatesh, Cyber Terrorism (Authors Press, Delhi 2003) 24
73. Pippa Norris, Montague Kern and Marion Just (eds.), Framing Terrorism: The News Media, the Government, and the Public (Routledge 2003) 255
74. Reuven Young, ‘Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation’ [12 January 2006] 29(1) Boston College International and Comparative Law Review 86 <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1054&amp;context=iclr> accessed 18 December 2015 “…Acts done to advance an ideological, political, or religious cause and to induce terror in any population or to compel a government or international organization to act in a certain way are terrorism if they cause one of the following outcomes: death or serious injury; serious risk to public health or safety; destruction or serious damage to property of great value or importance; major economic loss or major environmental damage if it threatens injury, death, endangers life or the public health and safety; serious interference with infrastructural facilities likely to endanger life; and releasing disease-bearing organisms likely to devastate the national economy.”
75. Preamble to the Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight (adopted 11 December 1868, entered into force 11 December 1868) International Military Commission, St. Petersburg (hereinafter referred as “St. Petersburg Declaration, 1868”); Arts. 48, 50, 51 of AP I; Art. 13 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) (hereinafter “AP II”)
76. Defined as, “confrontation between two or more States in the information space aimed at damaging information systems, processes and resources, and undermining political, economic and social systems, mass brainwashing to destabilize society and State, as well as forcing the State to take decisions in the interest of an opposing party.”
77. Annexure to the Agreement between the Government of the Member States of the Shanghai Cooperation in the Field of International Information Security (16 June 2009) Shanghai Cooperation Organization (SCO) (based on an unofficial translation); Pakistan has been an Observer at SCO since 2005 and acquired full member status in June 2016
hostilities’ where they would qualify as an armed conflict within the meaning of IHL. The International Committee of the Red Cross (ICRC) understands ‘cyberwarfare’ to denote those “means and methods of warfare that consist of cyber operations amounting to, or conducted in the context of, an armed conflict, within the meaning of International Humanitarian Law.”⁷⁸ Moreover, a cyber-attack is a concern for IHL only where such an attack could be categorized as, “a cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects.”⁷⁹ Furthermore, where kinetic or physical attacks are launched against belligerent cyber facilities it would not amount to a cyber-attack, but physical damage or destruction may be caused from a cyber operation.⁸¹

Cyberwarfare, just like kinetic warfare, can be of different natures. However, where parties to the armed conflict, whether during an international (IAC), non-international (NIAC), or transboundary hostilities, remain easily identifiable in the physical world, cyberspace changes all that. In modern times, any number of individuals regardless of physical location or affiliation

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⁷⁹ Rule 30 of the Tallinn Manual
⁸³ GC I, II, III, IV common art 3; See also AP II art 1(1); The Prosecutor v Dusko Tadic (Judgment) ICTY-1997-IT-94-I-T [7 May 1997][Para 561] – [568]
may easily engage in activity that would qualify as cyberwarfare. These persons may use proxies to hide the origin of the cyber-attack and may also devise it in such a way to put blame on any other State – thus leading to the complexity in attribution of the act, as discussed later.

The PEC Act, incorrectly, blurs the distinction between cyberwarfare and cybercrime by criminalizing unauthorized access, copying, transmission or interference with critical infrastructure. Under this Act, critical infrastructure means.

Critical elements of infrastructure namely assets, facilities, systems, networks or processes the loss or compromise of which could result in: …

(b) significant impact on national security, national defense, or the functioning of the state …

It may be pointed out that interference or unauthorized access with such infrastructure impacting national security does not result in merely cybercrime, rather can be deemed to constitute 'use of force' under the Charter of the United Nations (UN Charter) raising cybersecurity issues.

Cyberwarfare is one of the contemporary technologies which raises problems of compliance with IHL. Hereinafter, the application and compatibility of IHL to cyberwarfare is deliberated upon, with simultaneous analysis of the subject at hand in the context of Pakistan.

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86. See Section 3.3; See also Rules 6, 7, and 8 of the Tallinn Manual
87. The PEC Act s 6
88. The PEC Act s 7
89. The PEC Act s 8
90. The PEC Act s 2 (1) (x)
91. UN Charter art 2(4)
SECTION 2

APPLICABILITY OF IHL TO CYBERWARFARE

As observed from the examples of Estonia\(^94\) and Georgia\(^95\) cyberwarfare raises certain legal questions regarding both branches of Public International Law, i.e., jus ad bellum and IHL. Regarding the former category, the prohibition under Art. 2(4) of the UN Charter applies in cyberspace just as it does in kinetic operations.\(^96\) Similarly, the only justification to engage in such activity would be founded on either Art. 42 or Art. 51 of the Charter.\(^97\) Furthermore, once hostilities are engaged into, IHL becomes applicable.\(^98\) This latter category comprises of numerous Conventions\(^99\) and their Protocols,\(^100\) as well as CIHL\(^101\) derived from State practice and opinio juris.\(^102\)

However, the law itself is not entirely sufficient because it causes certain complexities. Owing to the differing dynamics of cyberspace from that of physical geography, it makes some rules of IHL somewhat absurd in their application, as discussed later.\(^103\) Nevertheless, the Red Cross and Red

\(^{94}\) See Section 1.1.
\(^{95}\) Ibid
\(^{96}\) See Commentary to Rule 6 of the Tallinn Manual [Para 3]
\(^{102}\) “This is the psychological factor, the belief by a state that behaved in a certain way that it was under a legal obligation to act that way. It is known in legal terminology as opinio juris sive necessitatis and was first formulated by the French writer Francois Geny as an attempt to differentiate legal custom from mere social usage.” Malcolm N. Shaw, International Law (6th edn., CUP 2008) 75
\(^{103}\) See Sections 3 and 4
Crescent Movement (the Movement)\textsuperscript{104} opines\textsuperscript{105} that even though new technologies\textsuperscript{106} pose difficulties for IHL they are governed thereunder.

\section*{2.1. Rationale for the Applicability of Existing IHL}

As an initial point of deliberation, it may be examined whether IHL in its present form is applicable to cyber operations\textsuperscript{107} in an armed conflict or not. Those who question its applicability firstly argue that there is no provision in IHL that directly deals with cyber operations. Additionally, that international instruments constituting IHL were concluded at a time when cyber operations were not even comprehended, hence were not within the intention of the member States. Lastly, that it deals with those means and methods of warfare which are not cyber but kinetic in nature.\textsuperscript{108}

The first two criticisms are disqualified with reference to Martens Clause\textsuperscript{109} and the Advisory Opinion\textsuperscript{110} of the International Court of Justice (ICJ) in the Nuclear Weapons case.\textsuperscript{111} The Martens Clause which was first enshrined in the preamble to the Hague Convention, 1899,\textsuperscript{112} is later found incorporated within the Geneva Conventions of 1949,\textsuperscript{113} as well as the Additional Protocols

\begin{itemize}
\item 1. the cyberspace that potentially opens a new domain for military operations;
\item 2. remote-controlled weapons systems – such as drones which are used by the parties to armed conflicts in greater extent; and
\item 3. automated weapons systems – such as combat robots.
\end{itemize}

\textsuperscript{104} It is important to note that the 4-yearly International Conference of the Movement is not restricted to members of its delegations around the world, but States party to the Geneva Conventions of 1949 also attend this Conference and are active members of the deliberations and dialogue, see Standing Commission of the Red Cross and Red Crescent Movement, ‘About the International Conference’ <http://standcom.ch/about-the-international-conference/> accessed 4 December 2016


\textsuperscript{106} These technologies include:

\textsuperscript{107} Michael N. Schmitt, ‘Wired Warfare: Computer Network Attack and Jus in Bello’ [2002] 84(846) IRRC 368


\textsuperscript{109} Named so after its’ author: Fyodor Fyodorovich Martens (F. F. de Martens), an eminent Russian jurist and diplomat, international arbitrator, and historian of European colonial ventures in Asia and Africa

\textsuperscript{110} Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226 (hereinafter the ‘Nuclear Weapons case’)


\textsuperscript{113} GC I art 63; GC II art 62; GC III art 142; GC IV art 158
of 1977, and the Convention Prohibiting Certain Conventional Weapons, 1980. It lays down that:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of public conscience.

According to the ICRC commentary to AP I, the Martens Clause is dynamic in nature by “proclaiming the applicability of the principles mentioned regardless of subsequent developments of types of situation or technology.” Similarly, Shahabudeen J. in the ICJ Advisory Opinion observed that this clause should be interpreted as reflective of new concepts.

The opinion that a technology is not specifically addressed in the existing body of law does not conclude that it would remain – or in any way could operate – without restrictions. In relation to cyberspace, since most of IHL is designed to be an adaptive body of law – it is, thus, designed to include new weapons. This is deduced from Art. 36 of AP I, which reads that:

“In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all

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114. AP I art 1(2); AP II preamble para 4
118. “In effect, the Martens Clause provided authority for treating the principles of humanity and the dictates of public conscience as principles of international law, leaving the precise content of the standard implied by these principles of international law to be ascertained in the light of changing conditions, inclusive of changes in the means and methods of warfare and the outlook and tolerance levels of international community. The principles would remain constant, but their practical effect would vary from time to time: they could justify a method of warfare in one age and prohibit it in another.” Nuclear Weapons case [Para 406] (Shahabuddeeen J. dissenting)
119. Interview with Lloyd Gillett, Regional Delegate to the Armed and Security Forces, ICRC (Islamabad 19 November 2015)
circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.”

Therefore, under the authorities cited above, it may be inferred that new and emerging technologies are bound by existing laws regardless of whether they are directly addressed thereunder or not.

As for the third assertion that IHL deals with attacks that are physical in nature, it may be dispensed with by a simple understanding of an “armed conflict”, i.e., the act which triggers the application of IHL. An armed attack is not merely limited to kinetic use of force, rather any attack constituting violence, against the adversary, whether in the offensive or the defensive. Moreover, the whole of IHL attempts to protect persons not directly engaged in the conflict and to minimize the effects thereof. Thus, exclusion of attacks that are not physical in nature would defeat the purposes of IHL. This logic may also be derived from the ban on biological and chemical weapons, which though not physical means of attacks, fall within the ambit of IHL.

2.2. Tallinn Manual on the International Law Applicable to Cyberwarfare

The Tallinn Manual126, a NATO CCD COE project, led by Professor Michael N. Schmitt127 is an attempt to define the rules of war applicable to cyberwarfare, as they existed in June 2012. It is pertinent to note here, that the International Group of Experts (IGE)130 endeavoured to compile these

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120. See Section 3.1. hereinbelow
121. AP I art 49
123. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (adoption 16 December 1971, entered into force 26 March 1975) 1015 UNTS
126. In 2009, an independent IGE was invited by NATO to produce the Tallinn Manual, which was then published by the Cambridge University Press in 2013
127. The NATO Cooperative Cyber Defense Centre of Excellence, an international military organization based in Tallinn, Estonia.
128. Michael N. Schmitt is Charles H. Stockton Professor and Director of the Stockton Center for the Study of International Law, United States Naval War College; Professor of Public International Law at Exeter University; and Senior Fellow at the NATO CCD COE
129. The date of the meeting at which the IGE adopted the final draft
130. The IGE consisted of 16 renowned international law practitioners who had or were then serving as senior legal advisers for their governments. A panel of 4 technical advisers assisted and observed the experts from NATO, the US Cyber Command and the ICRC. The work thus compiled was subsequently peer reviewed by 13 international law specialists; For example, Professor Michael Schmitt (US Naval War College); Air Commodore (Retired) William H Boothby (Formerly Deputy Director of Legal Services, Royal Air Force (United Kingdom)); Bruno Demeyere (Catholic University of Leuven); Professor Wolff Heintschel von Heinegg (Europa-Universität Viadrina) among others
rules reflective of de lege lata\textsuperscript{131} at that time, as opposed to de lege ferenda.\textsuperscript{132}

The Tallinn Manual, consisting of ninety-five rules, is a non-binding text in that it does not comprise an official document. However, it still carries importance as it is a pioneer document in this field, wherein all the sixteen members of the IGE unanimously\textsuperscript{133} agreed that the existing body of IHL is rather robust and can be applied to cyberwarfare in a way that is very logical and meaningful.\textsuperscript{134} It also carries persuasive value, as it consolidates State practice as it existed with regards to cyberwarfare in June 2012. Just as the CIHL database\textsuperscript{135} compiled by the ICRC (ICRC CIHL Study) though not a binding text, is accepted by States, the same could be concluded for the Tallinn Manual.\textsuperscript{136}

Each of the ninety-five rules of the Tallinn Manual, addressing both IAC and NIAC, are accompanied by a comprehensive commentary,\textsuperscript{137} detailing the position and acceptance of each rule by the IGE, and the debate preceding their acceptance. Thus, clarifying their position in minute detail, as to which view was accepted by the majority and the minority position, if any, and what ultimately led to unanimous agreement.\textsuperscript{138}

There has been some criticism on the way the Tallinn Manual was compiled as it lacks global representation, however it does have validity as it is the first tangible source on cyberwarfare.\textsuperscript{139} The following sections deal with the

\begin{footnotesize}
\textsuperscript{131} “The principle that a Court should decide based on actual law and not how it thinks the law ought to be.” Bryan A. Garner, Black’s Law Dictionary (9th edn, West Publications 2009) 491
\textsuperscript{132} “A proposed principle that might be applied to a given situation instead or in absence of a legal principle that is in force.” Bryan A. Garner, Black’s Law Dictionary (9th edn, West Publications 2009) 491
\textsuperscript{133} See Rule 20 of the Tallinn Manual, “Cyber operations executed in the context of an armed conflict are subject to the law of armed conflict.”; See also Commentary to Rule 20 of the Tallinn Manual (Para 1); Rules 22 and 23 of the Tallinn Manual
\end{footnotesize}
compatibility of IHL with cyberwarfare and the legal challenges consequently posed. For that discussion, the Tallinn Manual, in light of existing IHL, is extensively referred to as it provides a modern and comprehensive analysis of the issue at hand. Furthermore, as mentioned above, it is reflective of what law is on these points. Therefore, it serves as a reliable source for understanding the accepted principles of IHL in the context of cyberwarfare.

2.3. Pakistan Cyber Laws and the IHL Paradigm

Studying and analysing cyberwarfare in the context of Pakistan poses a greater conundrum as compared to other countries. While some explicit legislation⁴⁰ and State practice⁴¹ is witnessed by other States at the international level concerning issues in cyberspace, the same is almost non-existent in Pakistan.

At the domestic level, the Electronic Transactions Ordinance, 2002, (ETO) which is still in force, primarily deals with cyber activity. The ETO remains limited in scope as it concerns issues related to economic commerce.⁴² The emergence of novel cybercrimes emphasised the need for a more comprehensive framework leading to the adoption of the PEC Act. However, it is mostly silent on cyberwarfare, and provides only a rudimentary framework even for the issues it does address, leaving a lot to be resolved.


Be that as it may, it would still be an amateur suggestion that Pakistan is not bound by international norms when it comes to developing cyber offence and defense capabilities. Though, the State lacks substantial domestic framework on the matter, and is not a party to the Additional Protocols of 1977, it must adhere to existing IHL as this responsibility arises from Art. 1 of the Hague Convention, 1907 and Common Art. 1 of Geneva Conventions, 1949 to which Pakistan is party. Moreover, these provisions, like most of IHL are derived from customs, and have attained the status of customary IHL themselves – most prominent amongst which is the Martens Clause – therefore their importance and applicability to the State of Pakistan cannot be denied.

Furthermore, the ICRC CIHL Study makes it evident that 'domestic legislation' falls among constituent elements of verbal acts for discerning a State's practice with regard to any rule thereunder. Therefore, ETO and the PEC Act are vital in understanding the Pakistani practice on issues within cyberspace and accordingly shall be used for guidance hereinafter.


147. See Section 2.1.

148. “... Both physical and verbal acts of States constitute practice that contributes to the creation of customary international law. Physical acts include, for example, battlefield behavior, the use of certain weapons and the treatment provided to different categories of persons. Verbal acts include military manuals, national legislation, national case-law, instructions to armed and security forces, military communiques during war, diplomatic protests, opinions of official legal advisers, comments by governments on draft treaties, executive decisions and regulations, pleadings before international tribunals, statements in international organizations and at international conferences and government positions taken with respect to resolutions of international organizations.” Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law Volume I: Rules (CUP 2005) [xxxviii] – [xlv]
LEGAL CHALLENGES TO THE APPLICATION OF IHL IN THE CYBERSPACE

As alluded hereinbefore, cyber-attacks raise several fundamental legal challenges to the application of IHL. First among these is the qualification of a violent act as an 'attack' and then identification and attribution of that attack to the aggressor. This is inherently linked to the complexity of determining the nature of an armed conflict which would thus trigger the application of IHL. Each of these challenges are analysed in this section in light of the applicable law.

3.1. Cyber Operations as 'Attacks'

Though, cyberwarfare poses certain challenges for compatibility with IHL, the first and foremost issue is to categorize how cyber operations would amount to an 'attack'. Previously, the two approaches to the triggering of an armed conflict have been 'permissive' and 'restrictive'. The former focuses on actual physical destruction and damage caused as the result of a cyber operation, thus impliedly allowing such operations which do not result in physical destruction. The latter focuses on the military advantage that is gained consequently, therefore, restricting cyber operations as a matter of law.

The Tallinn Manual gives another approach to understand 'attacks', that of 'functionality'. Rule 30 incorporating this approach provides a definition of

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149. HL is consequence-based; in that it prohibits those attacks which denote physical force, and result in damage, loss or injury to their targets. Therefore, when applied in the cyber context, would it imply that cyber-attacks not resulting in death or injury to civilians, or destruction or damage of objects, are not prohibited? This implication leads to the conundrum posed by the term 'attacks' when applied to cyber operations. See Michael N. Schmitt, 'Wired Warfare: Computer Network Attack and Jus in Bello' [2002] 84(846) IRRC [365]; See also ICRC AP Commentary [Para 1880]


151. See Rule 30 of the Tallinn Manual [91]
cyber-attacks; “a cyber-attack is a cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects.” Under this approach, cyber operations which damage the functionality of a system rendering it inoperative constitute an ‘attack’ under IHL. However, global consensus has not been achieved on whether such damage to functionality must always be permanent or whether temporary damage will also suffice to constitute an attack. The functionality approach is supported by the Movement however it calls for a somewhat liberal understanding of this notion as the disabling of objects by means of cyber operations should constitute an attack because such a position is compatible with Art. 52 of AP I that refers to 'neutralization' of objects.

To date, the only incident which could be classified as cyber-attack under the functionality approach, is the cyber sabotage campaign against Iran in September 2010. The US in collusion with Israel launched ‘Operation Olympic Games’ whereby a computer worm 'Stuxnet' was aimed at causing malfunctions at Iran’s Natanz uranium enrichment facility. Resultantly, a thousand centrifuges were decommissioned and replaced.

The above classification of a cyber-attack and the approach of functionality

152. As the Tallinn Manual is reflective of de lege lata thus Rule 30 itself is unanimous; however, the commentary shows some disagreement among the IGE upon what ‘functionality’ signifies. In the majority view, where functionality is damaged in such a way to require replacement of the systems’ component parts it would qualify as an attack. While in the view of the minority, complete destruction of the computer system that leads to loss of functionality would only qualify. Among the majority, opinion was again split on where functionality was restored by re-installing of operating system would that still be an attack or not. It was decided that it would not qualify as an attack. See Michael N. Schmitt, ‘Rewired Warfare: Rethinking the Law of Cyber Attack’ [2014] 96(893)IRRC 189 [198].– [201]; See also Commentary to Rule 30 of the Tallinn Manual[92] – [95]

153. ‘An overly restrictive understanding of the notion of attack would be difficult to reconcile with the object and purpose of the rules on the conduct of hostilities, which is to ensure the protection of the civilian population and civilian objects against the effects of hostilities. Indeed, under such a restrictive understanding, a cyber operation that is directed at making a civilian network (electricity, banking, communications or other network) dysfunctional, or risks causing this incidentally, might not be covered by the IHL prohibition of directing attacks against civilian objects, the prohibitions of indiscriminate or disproportionate attacks and the principle of precautions in attack, despite the potentially severe consequences of such operations for the civilian population.’ See 32nd International Conference of the Red Cross and Red Crescent Report, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’ (Report) (December 2015) Doc. 32IC/15/11 [41] <http://rrccconference.org/wp-content/uploads/sites/3/2015/10/32IC-Report-on-IHL-and-challenges-of-armed-conflicts.pdf> accessed 17 April 2016


require further refinement and deliberation which would be seen through future State practice.\footnote{Jean-Marie Henckaerts, Cordula Droge, Laurent Gisel, Knut Dorman et al (contributors), Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (2nd edn, ICRC 2016) [256] <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D00368518#94_B> accessed 13 December 2016} This is because standing as it does presently, all acts of violence in cyberspace which do not result in long-term damage to a systems’ component parts fall outside the domain of ‘cyber-attacks’.

### 3.1.1. ‘Data’ as an ‘Object’

Another category of malicious activity that does not qualify as attack under the functionality approach is which results in loss of data stored on a computer system. This is because ‘data’ is not considered as an object, thereby incapable of protection even if it is civilian in nature.

Protection afforded to civilian objects is found in Rule 37 of the Tallinn Manual, while Rule 38 lays down the criteria for ascertaining objects as ‘military’. Thus,

**Figure:** Classification of Objects as ‘Military Objectives’
in that way defining civilian objects as being all those that do not qualify as military objects. These Rules are reflective of Art. 52(2) of AP I as well as Rules 7, 8, and 9 of CIHL.¹⁵⁷

Art. 52(2) of AP I provides a framework for the classification of objects as military objectives. The criteria for ascertaining an object as military in nature, is when:

1. it effectively contributes through its nature, location, purpose or use to the military might of the adversary; and
2. its destruction, capture or neutralization affords definite military advantage to the aggressor.

Under Art. 52(1) only those objects are legitimate targets of attack that qualify as military objectives. While those that do not qualify as such, are to be deemed civilian in nature and thus protected from attacks and reprisals. Although this is seemingly convenient criteria to gauge in respect of cyber infrastructure or computers, problems arise with regards to 'data'.

The question whether data could be treated as an object or not attracted differing opinions among the IGE.¹⁵⁸ In view of the ordinary meaning¹⁵⁹ of the word 'object' as well as that given to it by the ICRC commentary to the Additional Protocols, an object is something tangible and visible.¹⁶⁰ Therefore, the majority of IGE opined that data does not qualify as an object.¹⁶¹ Furthermore, it is not protected from attack because as it is not an 'object' thus its nature too cannot be ascertained under the criteria of Rule 38.¹⁶²

The majority approach leads to the problematic conclusion that even if vital data is corrupted or lost due to cyber operations, such acts would not qualify as attacks while functionality is intact. Furthermore, because data is not an object it is not afforded any protection under existing IHL. However, in the Movement's opinion, such a conclusion would be incompatible with the

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¹⁵⁷. ICRC CIHL Study
¹⁵⁹. “A thing that can be seen and touched, but is not alive” A. S. Hornby, Oxford Advanced Learner’s Dictionary (6th edn, OUP 2005) 872
¹⁶⁰. ICRC AP Commentary [Para 2021]
¹⁶¹. See Commentary to Rule 38 of the Tallinn Manual [Para 5]
¹⁶². Ibid
norms and object of IHL since corruption of or tampering with data has the potential to have greater detrimental impact \(^{163}\) on civilian life than the loss of functionality of an information system.

The approach argued by the minority \(^{164}\) is a more appropriate position, but was not accepted as there was no State practice to establish the same. \(^{165}\) This approach rests on the idea that data is the most vital component of cyber technology. Therefore, if it is rendered useless or corrupted, regardless of whether the computer network itself is functioning, that should be regarded as an attack and data be afforded protection if determined to be civilian in nature. \(^{166}\)

The position in Pakistan could be taken as more in accordance with the minority view above. Though the PEC Act does not define data per se, it does afford protection to certain kinds \(^{167}\) of data and criminalizes unauthorized access, \(^{168}\) transmission \(^{169}\) and interference \(^{170}\) with such data. Out of these, the third, i.e. 'interference with data' is the most important to gauge State practice regarding its protection. The relevant provisions are quoted herein below:

“Section 5 – Interference \(^{171}\) with information system \(^{172}\) or data: Whoever with dishonest intention interferes with or damages \(^{173}\) or

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163. “Deleting or tampering with such data [i.e., social security data, tax records, bank accounts, companies’ client files or election lists or records] could quickly bring government services and private businesses to a complete standstill, and could cause more harm to civilians than the destruction of physical objects. The conclusion that this type of operation would not be prohibited by IHL in today's ever more cyber-reliant world – either because deleting or tampering with such data would not constitute an attack in the sense of IHL or because such data would not be seen as an object that would bring into operation the prohibition of attacks on civilian.” See 32nd International Conference of the Red and Red Crescent Report, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (December 2015) Doc. 32IC/15/11 [43]<http://rcrcconference.org/wp-content/uploads/sites/3/2015/10/32IC-Report-on-IHL-and-challenges-of-armed-conflicts.pdf> accessed 17 April 2016


165. See Commentary to Rule 38 of the Tallinn Manual [Para 5]


167. Content data, critical infrastructure data and traffic data, see The PEC Act s 2(1)(viii), 2(1)(xi), 2(1)(xxx) respectively

168. The PEC Act s 6

169. The PEC Act s 7

170. The PEC Act s 5, 8

171. The PEC Act s 2(1)(xxi) “interference with information system or data” means and includes an unauthorized act in relation to an information system or data that may disturb its normal working or form with or without causing any actual damage to such system or data

172. The PEC Act s 2(1)(xx)

173. The PEC Act s 2(1)(xii) “damage to an information system means any unauthorized change in the ordinary working of an information system that impairs its performance, access, output or change in location whether temporary or permanent and with or without causing any change in the system”
causes to be interfered with or damages any part or whole of an information system or data shall be punished...”

“Section 8 – Interference with critical infrastructure information system” or data: Whoever with dishonest intention interferes with or damages, or causes to be interfered with or damaged, any part or whole of a critical information system, or data, shall be punished...

The PEC Act also criminalizes ‘electronic forgery’ which is caused by interference with information system or data by alteration, deletion or suppression of data thereby resulting in inauthentic data. Similarly, Section 37 of the ETO criminalizes alteration, modification, deletion or removal of any information through or on any information system.

Thus, from the above provisions it is observed that in Pakistan 'data' is regarded as a crucial component of an information system and detrimental interference with it leads to criminal liability. Therefore, the same inference may be drawn in instances of cyber-attacks and data protected from such attacks. Moreover, where an act of violence is directed to such data and results in interference, alteration, deletion, or modification, it would amount to an 'attack' for the purposes of Rule 30 of the Tallinn Manual and thereby trigger an armed conflict as far as the State of Pakistan is concerned.

However, it may be observed that in the opinion of a prominent scholar Marco Sassoli, “if deletion of data is included in the notion of attacks, then that is over-inclusive, but if you limit attacks to killing or injuring then that is too narrow because destruction is also a consequence of attack.” This view is also reflected in the updated Commentary to GC I, whereby the contributors opined that theft, deletion or destruction of data alone would not qualify as an attack because the requisite intensity of violence is not likely to be

174. The PEC Act s 2(1)(xi)
175. The PEC Act s 13
176. Electronic Transactions Ordinance 2002 s 2(o) [hereinafter referred to as 'ETO']
177. ETO s 2(p)
178. Marco Sassoli, Professor of International Law, University of Geneva Switzerland; Associate Professor at the Universities of Quebec and Laval, Canada; Chairman of the Board of Geneva Call
180. NIAC is distinguished from internal disturbances based on the two-pronged test, i.e. the 'intensity of violence' and the 'organization of the parties to the conflict', see The Prosecutor v Dusko Tadic (Judgment) ICTY-1997-IT-94-I-T[7 May 1997][Para 562]
reached.\textsuperscript{181} It is therefore stressed that States should find a middle ground by applying the standard of Art. 52(2) of AP I and subsequently protect essential civilian data.

\section*{3.2. Identification and Attribution}

Once it is determined that an act does amount to a cyber-attack, then questions arise as to the nature of the conflict. Ascertaining the nature of the armed conflict is inherently linked to the identification of the perpetrator, which in the cyber context remains excessively obscure.\textsuperscript{182} The cyber-attacks on the US Bureau of Industry and Security in October 2006 are a case in point which were traced back to Chinese ISPs, raising fundamental and complex questions. Since the attackers could not be identified,\textsuperscript{183} this instance highlights the role 'anonymity' plays in such attacks. Cyberspace makes it completely possible for attackers to hide their identity and to conceal\textsuperscript{184} the true place of origin of the attack. In such a scenario, the US had to consider whether it could legitimately hold China responsible.\textsuperscript{185} Moreover, aggressors may also leave ‘false flags’\textsuperscript{186} which further puts global security at risk.\textsuperscript{187}

According to a January 2017 Background Report\textsuperscript{188} to the US Joint Analysis Report (JAR)\textsuperscript{189} of December 2016, “the nature of cyberspace makes

\begin{itemize}
  \item \textsuperscript{182} S. Ventkatesh, Cyber Terrorism (AuthorsPress, Delhi 2003) [1] – [7], [22] – [26]
  \item \textsuperscript{183} Marco Roscini, Cyber Operations and the Use of Force in International Law (1st edn, Oxford University Press, London 2014) 33
  \item \textsuperscript{184} Scott J. Shackelford and Richard B. Andres, ‘State Responsibility for Cyber Attacks: Competing Standards for a Growing Problem’ [2001] GJIL 982, “The 1998 ‘Solar Sunrise’ attack that broke into the US Department of Defense system was for instance carried out by an Israeli teenager and Californian students through a computer based in the United Arab Emirates.”
  \item \textsuperscript{186} See generally Commentary Rule 8 of the Tallinn Manual, “The fact that a cyber operation has been routed via the cyber infrastructure located in a State is not sufficient evidence for attributing the operation to that State.”
\end{itemize}
attribution of cyber operations difficult but not impossible. Every kind of
cyber operation—malicious or not—leaves a trail. However, the report itself
gives little to no indication of this ‘trail’ and does not offer any proof thereby
adding to the scepticism surrounding the veracity of US allegations of Russian
hacking into Democratic National Committee’s (DNC) networks. ¹⁹⁰

3.3. Complexity in Attribution and Determining the Nature of Armed
Conflict
There are manifold reasons embedded within the architecture of the internet
that create complexity and perhaps even improbability of attribution.¹⁹¹
Summarized, they may be categorized into four layers ¹⁹² that provide
numerous opportunities for anonymity.

Figure 2: Internet Layers

<table>
<thead>
<tr>
<th>Layer</th>
<th>Function</th>
</tr>
</thead>
<tbody>
<tr>
<td>Data Link</td>
<td>Hardware to Access the Internet</td>
</tr>
<tr>
<td>Transport</td>
<td>Breaking up and Reassembling Data</td>
</tr>
<tr>
<td>Network</td>
<td>Rerouting Data to its Destination</td>
</tr>
<tr>
<td>Applications</td>
<td>Direct User Interaction with the Software</td>
</tr>
</tbody>
</table>

As illustrated above, the first is the ‘Data Link Layer’ comprised of hardware
used for internet access, e.g. Wi-Fi or broadband.¹⁹³ It may be noted that pre-
paid or wireless internet does not record user identity thus contributing to
anonymity.¹⁹⁴ However, more recently, domestic measures call for biometric

¹⁹⁰ Ronald Deibert, ‘The DHS/FBI Report on Russian Hacking was a Predictable Failure’ (4 January 2017) Just
January 2017; See also David E. Sanger, ‘Putin Ordered “Influence Campaign” Aimed at US Election, Report Says’
report.html> accessed 7 January 2017
¹⁹² ‘The shared rules for formatting and transmitting data, known as the Transmission Control Protocol/Internet
Protocol (TCP/IP), made the system work, and remain the foundation for today’s Internet’ Duncan B. Hollis, An e-
OSI Model’s Seven Layers Defined and Functions Explained’ (February 2002) <http://support.microsoft.com/kb/103884> accessed 10 March 2016

verification of broadband internet to record user data.\textsuperscript{195}

After the Data Link layer are the ‘Transport’ and ‘Network’ layers that are responsible for breaking up and reassembling data and then routing it to its destination. At these layers, as the first order of business, a victim would depend on the records of the ISPs to identify the perpetrator;\textsuperscript{196} but these are routinely emptied due to overload.\textsuperscript{197} In the context of Pakistan, it is pertinent to note that the PEC Act requires ISPs to retain specified traffic data\textsuperscript{198} for a minimum of one year.\textsuperscript{200} However, even if record is available with the ISP, it could lead to a public place, like a library or internet café,\textsuperscript{201} which provides users free access or to a corporation with a vast number of users hence virtually being useless data.\textsuperscript{202}

Lastly is the ‘Applications Layer’. At this layer the user is in direct interface with the software and most prone to cyber hostility. As clarified by a Pakistan Telecommunication Authority (PTA) spokesperson, “most cyber-attacks against government departments or other organizations were made possible ‘due to vulnerabilities in their web application layer and endpoint infrastructure’.”\textsuperscript{203} Moreover, at this point a victim could easily be led to ‘false flags’ or ‘stepping stones’ which the perpetrator had employed for the very purpose of hiding his identity.\textsuperscript{204}

\textsuperscript{196} David Chaikin, ‘Network Investigations of Cyber Attacks: The Limits of Digital Evidence’ [2006] 46 CLSC 239\textsuperscript{244} [245]
\textsuperscript{197} Ibid [245]
\textsuperscript{198} The PEC Act s 31, data which is required for a criminal investigation and there is risk of its being modified or lost, an authorized officer of the investigation agency may by written notice require the preservation of such data
\textsuperscript{199} The PEC Act s 2(1)(xxx)
\textsuperscript{200} The PEC Act s 32; see also ETO s 5, 6
\textsuperscript{201} “No law existed by which cyber cafes were required to keep record of persons using the computer of cafes” Qurban Ali v The State, 2007 PCrLJ 675 (Sindh)
Even if it may be assumed that the point of origin of attack could be identified in a given case, the question would still remain whether the same could be attributed to the State of origin or not. This is vital because an armed conflict is categorized either as an IAC or a NIAC. Where NIAC is recognized in the physical world, the same when analogically transported to cyberspace becomes very complex and difficult to establish. A third instance is that of transboundary warfare between States and terrorist networks. This is a hard case for IHL under traditional warfare itself, thus rules pertaining to the same could hardly be applied analogically to


206. “An assessment of attribution usually is not a simple statement of who conducted an operation, but rather a series of judgments that describe whether it was an isolated incident, who was the likely perpetrator, that perpetrator’s possible motivations, and whether a foreign government had a role in ordering or leading the operation” National Intelligence Council, ‘Background to Assessing Russian Activities and Intentions in Recent US Elections’: The Analytical Process and Cyber Incident Attribution (Report) (6 January 2017) [2] <https://assets.documentcloud.org/documents/3254237/Russia-Hack-Report.pdf> accessed 8 January 2017


208. GC, I, II, III, and IV common art 3; AP II art 1(1)


210. In the opinion of the Movement, this hostile conduct is incorrectly termed ‘war against terrorism’; in fact, it does not fall within the ambit of an ‘armed conflict’ thus IHL is not triggered in these circumstances. Rather it is a case of terrorism and counter-terrorism, which remains within the domain of domestic laws and human rights norms. See 32nd International Conference of the Red and Red Crescent Report, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’ (December 2015) Doc. 32IC/15/11 <http://rrcconference.org/wp-content/uploads/sites/3/2015/10/32IC-Report-on-IHL-and-challenges-of-armed-conflicts.pdf> accessed 17 April 2016

cyberwarfare. Therefore, it becomes practically impossible to ascertain the nature of the armed conflict in cyberspace; with the perpetrator remaining hard to identify.  

For a cyber threat to be governed under the prohibitions\textsuperscript{213} and restrictions\textsuperscript{214} of jus in bello, it is essential that application of IHL be triggered through an armed conflict, which results from military operations, i.e., attacks. However, as the discussion in this section has shown, both the existence of attacks and the nature of an armed conflict are not easily inferable in the cyber domain. Therefore, compatibility of and adherence to IHL are mostly theoretical deliberations as long as these issues remain unresolved.


\textsuperscript{213} For example, AP I art 20, 37, 48

\textsuperscript{214} AP I art 28, 52, 57
SECTION 4

COMPATIBILITY OF CYBERWARFARE WITH IHL

Under the auspices of the UN General Assembly, the 2015 Group of Governmental Experts\(^\text{215}\) confirmed that, “the established legal principles, including ... the principles of humanity, necessity, proportionality and distinction”\(^\text{216}\) were applicable to the use of Information and Communications Technologies (ICTs). Thus, affirming that IHL is applicable to cyberwarfare. However, these fundamental principles of IHL are neither easily nor absolutely replicable in cyberspace due to its differing characteristics from the physical world. Each of these principles is explained hereinafter in light of the Tallinn Manual, which based on existing IHL and CIHL provide a set of rules applicable in cyberwarfare.

4.1. Cyber Means and Methods of Warfare

The existing corpus of IHL does not expressly refer to cyber operations; however as noted before,\(^\text{217}\) the ICJ observed that “the established principles and rules of humanitarian law... apply to all forms of warfare, and to all kinds of weapons, those of the past, those of the present and those of the future.”\(^\text{218}\) Accordingly, the IGE while determining rules for the legality of new cyber means and methods of warfare, adopted the same approach affirmed by the Court for legality of nuclear weapons.\(^\text{219}\)

Section 5 of the Tallinn Manual constituting Rules 41 to 48, deals with cyber means and methods of warfare. Rule 41\(^\text{220}\) defines the terms ‘means’ and ‘methods’. Simply understood, ‘means’ are weapons while ‘methods’ are the techniques or strategies adopted for conducting cyber operations.

Under Rule 48 of the Tallinn Manual, all States are under customary\(^\text{221}\) duty to ensure that any cyber means of warfare used or acquired by them are capable of compliance with IHL.\(^\text{222}\) Furthermore, the IGE unanimously agreed that Art.

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216. Ibid [Para 28(d)]
217. See Section 2.1.
218. Nuclear Weapons case [Para 86]
219. See Section 5 of the Tallinn Manual [118]
220. “For the purposes of this Manual:
   (a) ‘Means of cyber warfare’ are cyber weapons and their associated cyber systems; and
   (b) ‘Methods of cyber warfare’ are the cyber tactics, techniques, and procedures by which hostilities are conducted.”
221. By virtue of Hague Convention IV art 1, and GC I, II, III, IV common art 1
222. See Commentary to Rule 48 of the Tallinn Manual [Para 2]
36 of AP I applies to all new means and methods of warfare, whether within the intention of the Parties at the time of ratification of AP or not. Therefore, legal review of new weapons, means and methods while at the stage of "study, development, acquisition or adoption" remains an obligation on all States party to API.

Pakistan is not a State party to AP I, therefore under the Tallinn Manual approach it is not obligated to review new cyber means and methods of warfare, nevertheless, it is bound by customary law to ensure compliance of IHL during acquisition or use of such methods. Expressed succinctly, Pakistan is under an obligation to have in place internal processes for review of new methods of cyberwarfare.

4.2. ESSENTIAL PRINCIPLES OF IHL

4.2.1. Principle of Distinction

This is the cardinal principle of IHL, as the entire law of war is meant to reduce human suffering and protect non-combatants. Enshrined within Art. 48 of API, this principle calls for distinction between civilians and military personnel as well as civilian objects and military objectives. It requires that military operations only be targeted at military and military objectives. Practically this principle entails, for instance, that indiscriminate attacks may not be launched.

The principle of distinction applies to cyberwarfare under Rule 31 of the Tallinn Manual in any nature of an armed conflict, while indiscriminate attacks are prohibited under Rule 49. Though seemingly simple in traditional or kinetic warfare that occurs in a real, stable environment, this rule becomes quite complex to adhere to in the cyberspace. The primary reason is that the internet thrives on its interconnectedness. Therefore, military objectives are often run on inherently civilian infrastructure.

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223. See Section 5 of the Tallinn Manual [118]; See also Commentary to Rule 41 of the Tallinn Manual (Para 2); Rule 48 of the Tallinn Manual
224. Rule 48 of the Tallinn Manual
225. Derived from the St. Petersburg Declaration preamble; See also Nuclear Weapons case [Para 78][79]
227. See also Rule 1 of ICRC CIHL Study
228. AP I art 51(4)
229. See Commentary to Rule 31 of the Tallinn Manual (Para 2)
cyberspace are bound to be dual231 in nature, making distinction relatively challenging.

4.2.2. Principles of Military Necessity and Proportionality – Direct and Indirect Effects

Military necessity232 dictates that the military commander shall direct cyber-attacks solely against military objects and objectives,233 however, where such distinction is not possible then the principle of proportionality234 is invoked. Rule 51 of the Tallinn Manual is reflective of this principle which is embodied in Art. 51(5)(b) and Art. 57(2)(iii) of AP I, as well as in Rule 14 of CIHL.

Under proportionality an attack is prohibited where collateral damage to civilian life and/or objects would be in excess to the concrete and direct military advantage to be gained from it. While judging proportionality, a commander is further required to assess not only the direct235 effects an anticipated cyber-attack would have on civilian life or objects, but also any foreseeable indirect236 effects. For example, interfering with air traffic control would likely affect civilian aircrafts as well; therefore, it must be factored into proportionality. However, where for instance, malware directed at a secure military objective is unexpectedly transferred from its intended target by a portable device and thus leaked into civilian cyber infrastructure, it would not qualify as neither a foreseeable nor indirect effect.237

231. "In practice, almost any civilian object can be used for military purposes and can therefore be a military objective for the duration of such use. Objects simultaneously used for civilian and military purposes are particularly problematic. Typical examples of objects that might become "dual-use" objects are logistical infrastructure (roads, bridges, railways, ports and airports), power plants, and electricity and communication networks." Nils Melzer, International Humanitarian Law: A Comprehensive Introduction (ICRC Geneva, 2016) 92


233. For determination of objects as ‘military’ see Figure 1 above, Section 3.1.1.

234. "Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.” Rule 14, ICRC CIHL Study


236. Ibid "The delayed and/or displaced second-, third-, and higher-order consequences of action, created through intermediate events or mechanisms”

Furthermore, cyber-attacks against dual-nature objects are not prohibited because such objects are considered military objects under Rule 39 of the Tallinn Manual, unless excessive damage is anticipated to be caused to civilian life or objects.\textsuperscript{238} Moreover, such an assertion does not mean that the commander is precluded from taking precautions in attack.\textsuperscript{239}

4.2.3. Principle of Precautions in Attack
The principle of precautions in attack is divided into two categories under IHL. First is the responsibility to assess the ‘feasibility of attacks’ which fall under active precautions, while the other is the obligation of passive precautions 'against dangers resulting from attacks'.

A. Feasibility of Cyber-Attacks
The ‘feasibility’ criterion is not expressly defined in IHL, however, as a committee constituted by the International Criminal Tribunal for Yugoslavia (ICTY) observed:

\begin{quote}
The obligation to do everything ‘feasible’ is high but not absolute. A military commander must set up an effective intelligence gathering system to collect and evaluate information concerning potential targets... must also direct his forces to use available technical means to properly identify targets during operation.\textsuperscript{240}
\end{quote}

Rules 52 to 58 of the Tallinn Manual are reflective of IHL\textsuperscript{241} in this respect. These Rules require constant care\textsuperscript{242} to spare civilians from the effects of attacks and to verify targets\textsuperscript{243} as well as issue warnings.\textsuperscript{244} Among other things\textsuperscript{245} it also requires that in case the proportionality criteria is not met, the attack be cancelled or suspended.\textsuperscript{246}

B. Precautions against Dangers Resulting from Cyber-Attacks
Under Rule 59\textsuperscript{247} parties to a conflict are under an obligation to take all

\begin{itemize}
\item \textsuperscript{238} See Commentary to Rule 51 of the Tallinn Manual [Para 4]; See also Commentary to Rule 39 of the Tallinn Manual [Para 2]
\item \textsuperscript{239} See Commentary to Rule 39 of the Tallinn Manual [Para 4]
\item \textsuperscript{240} ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia (June 8, 2000) reprinted in 391 LM 1257 (2000) [Para 129]
\item \textsuperscript{241} AP I art 57
\item \textsuperscript{242} Rule 52 of the Tallinn Manual
\item \textsuperscript{243} Rule 53 of the Tallinn Manual; Rule 16 of ICRC CIHL Study
\item \textsuperscript{244} Rule 58 of the Tallinn Manual
\item \textsuperscript{245} See Rules 54 and 56 of the Tallinn Manual
\item \textsuperscript{246} Rule 57 of the Tallinn Manual
\item \textsuperscript{247} Based on AP I art 58(c) and Rule 22 of ICRC CIHL Study
\end{itemize}
feasible measures and to protect civilians under their control\textsuperscript{248} from the dangers resulting from a cyber-attack. It is also pertinent to note that though the passive protection obligations laid down in clauses (a)\textsuperscript{249} and (b)\textsuperscript{250} of Art. 58 of AP I are not expressly incorporated in the Tallinn Manual, they are implicit\textsuperscript{251} in Rule 59 as it is a ‘catch-all’ provision encompassing the entirety of passive protections.\textsuperscript{252}

According to the majority of IGE, ‘dangers’ would mean loss of civilian life, death or injury to civilians and damage to civilian objects. However, the minority asserted that such dangers should include major disruption of day to day life too, but not merely irritation or inconvenience.\textsuperscript{253} Like the previous principles, this principle also posits challenges because globally military systems rely on civilian infrastructure.\textsuperscript{254}

It is a particularly alarming situation for Pakistan, as “telecom companies control critical infrastructure in any nation, the impact of an attack against their networks could have far-reaching repercussions.”\textsuperscript{255} Moreover, for better cyber functionality the accepted practice within organizations is to run their cyber infrastructure on ‘shared networks’.\textsuperscript{256} This measure also weakens their security because even though particular ISPs may ensure security of their

\begin{footnotesize}
\begin{enumerate}
\setcounter{enumi}{247}
\item \textsuperscript{248} For the purposes of kinetic warfare, ‘control’ is understood as within the territory of the defending State. This approach adopted by the majority of the IGE for the purposes of cyber warfare including unoccupied territory as well as enemy occupied territory. However, a minority of IGE opined that this obligation could not be conceived territorially, as in the cyberspace it is possible to not be in control of a computer system which is located within a particular State’s territory. See ICRC AP Commentary [Para 2239]; See also Commentary to Rule 59 of the Tallinn Manual [Para 8]
\item \textsuperscript{249} To remove the civilian population, objects or individuals, from the vicinity of military objectives
\item \textsuperscript{250} To not locate military objectives in urban areas
\item \textsuperscript{251} See Commentary to Rule 59 of the Tallinn Manual [Para 10]
\item \textsuperscript{252} See Commentary to Rule 59 of the Tallinn Manual [Para 4]
\item \textsuperscript{253} See Commentary to Rule 59 of the Tallinn Manual [Para 9]
\item \textsuperscript{254} See for example News Desk, ‘NSA Spied on Pakistani Civil-Military Leadership’ Dawn News (Islamabad 21 August 2016) <http://tribune.com.pk/story/1166854/nsa-spied-pakistani-civil-military-leadership/> accessed 19 December 2016 “The United States’ National Security Agency (NSA) hacked Pakistan’s National Telecommunications Corporation (NTC) to spy on Pakistani civilian and military leadership, online publication The Intercept reported …”
\item \textsuperscript{256} “The same cyber functionality that enables great efficiency along the chain — from raw materials procurement to production to inventory and distribution — also introduces vulnerability at every link. A hack that brings down a vital piece of equipment, sometimes for only a few hours, can start a chain reaction. Disruptions in procurement impede production, which can deplete inventories and result in the inability to fulfil orders. As each link in the chain is impaired, financial losses mount.” Deloitte, ‘Focus On: The Board’s-Eye View of Cyber Crisis Management’ <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Risk/gx-ers-cm-focus-on-cyber-crisis-management.pdf> accessed 9 January 2017
\end{enumerate}
\end{footnotesize}
channel, it is still possible for an infected department to infect other systems on its networks because of shared infrastructure.\textsuperscript{257} Such practices make it difficult to distinguish between and to protect essential infrastructure from excessive incidental loss.

Means such as those considered or adopted during the conflicts in Iraq, Libya and Syria have brought cyber operations to the forefront of global attention. Furthermore, the cyber operations mounted during the Russia–Ukraine and Palestine–Israel conflicts of 2014 have demonstrated the continued necessity for clarification as to how international law is to be interpreted and applied with respect to activities in cyberspace.

It is expected that such means which are fast becoming the norm will...
ultimately serve as the primary offence tool because they are relatively cheaper to maintain and do not require as much manpower as kinetic warfare does.²⁶⁶ This makes it all the more urgent to bind them within the constraints of IHL²⁶⁷ as protecting humanity is the entire raison d’être²⁶⁸ of the law of war.²⁶⁹

It is well-accepted that new means and methods of warfare fall within the ambit of IHL,²⁷⁰ and must not be incapable of being used in accordance with the fundamental principles of the law of war. However, owing to the difficulties²⁷¹ that arise in interpretation of IHL to regulate cyberwarfare, some scholars believe that perhaps a new Convention would provide answers.²⁷² It is put forth that as with numerous conventions and treaties, they take many years to draft and even more to come in to force,²⁷³ while technology itself grows at rapid speed and poses a serious threat such that even nuclear facilities²⁷⁴ and other installations containing danger forces, such as dams, are rendered unsecure. Therefore, such a solution could be detrimental to the protection of vulnerable segments of the society essentially undermining the purposes of IHL. Thus, amendments or further clarifications, as required, in the existing international instruments are a more viable option.

Moreover, recent years have shown international organizations, publicists and academics playing a more active role in understanding and developing

²⁶⁸ Reason for being/existing
²⁷⁰ See Section 2
IHL in comparison to States. However, incidents such as the Sony hack, the APT28 Report on Russian phishing activities, the US-China agreement against corporate espionage and the alleged Russian hacking of the DNC servers have not just directed attention towards this growing problem but have also forced States to actively deliberate on how to deal with and ward off such situations. Though these are not incidents of cyber-attacks within the meaning of IHL but their handling does contribute towards evolving State practice. It is vital that these deliberations must be done while keeping the fundamental principles of IHL at their core, in order to build on them and strengthen them.


278. “This refers to illegal attempts to acquire sensitive information such as usernames, passwords, and credit card details often for malicious reasons, by masquerading as a trustworthy entity in an electronic communication, such as someone you know or regularly correspond with.”


Furthermore, the initial point to improved cyber security would be to separate military and civilian infrastructure as far as possible; and to afford protection to essential infrastructure. Another crucial step would be for military commanders to seek active advice from IHL experts for policy formulations. Many States over the years have established such Cyber Commands with news of Indian deliberations on the same.

It is proposed that the State of Pakistan instead of a reactive paradigm to cybersecurity should be more proactive and preventive in its approach. No State should wait till it is subjected to attacks for discovering the flaws in its security, rather it should actively identify these lacunae and seek to address them. This would be best achieved through a unified cyber command, whereby the military commanders of armed forces and more importantly cyber security experts and legal advisors through their shared resources, unique expertise and experience could tackle the challenges of cyberwarfare and minimize the threat posited by others in possession of offensive cyber capabilities.

286. Ibid
290. For example, in July 2016 Poland inaugurated such a centre whereby putting research, operational tasks, training and analytics under one roof in collaboration with all stakeholders including telecommunications and banking sectors. Daria Mamont, 'Poland Launched National Cybersecurity Centre' (6 July 2016) <http://wbj.pl/poland-launches-national-cybersecurity-center/> accessed 17 January 2017; See also Alexander Klimburg (ed.), National Cyber Security: Framework Manual (NATO CCD COE Tallinn, 2012)