Armed attack and self-defence

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Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.
“...if an armed attack occurs...”

• Not all force is equal – 2(4) (vs aggression) vs armed attack
• Cascading relationship – “the most grave forms of the use of force (those constituting an armed attack) [and] other less grave forms" (ICJ 1986)
• Threshold or delineation
  • “Scale and effects”
  • Nicaragua vs State practice
• Means and methods vs effect – ICJ Nuclear Advisory Opinion
• Target – territory/jurisdiction or organs of the State
Doctrine of Self-defence

• Art 2(4) with two exceptions – 42 and 51
• Customary right, codified by Art 51 “inherent right of individual or collective self-defence if an armed attack occurs against a Member of the UN.”
• An extraordinary countermeasure and limited exception to the wide prohibition in 2(4)
• Procedural requirement
• Temporal limit
Necessity and Proportionality

• Customary requirements

• Necessity
  • “must not merely be such as tend to protect the essential security interests of the party taking them, but must be 'necessary' for that purpose” (Nicaragua)

• Proportionality
  • **Not limited** to quantitative equivalence to the attack
  • *Rather proportionate to the objective*: restore legal and factual relationship between the States.
  • Non-forcible measures are an option
Collective Self-defence

• Jurisprudence and State practice from the 1980s and 1990s indicates collective self-defence might be permitted on three criteria
  • Must declare being target of an armed attack
  • Must issue request for assistance of the third States
  • State under attack must be party to the self-defence actions
Pre-emptive or Anticipatory Self-defence

- Strict letter of the law: “if an armed attack occurs”
- 2005 ICJ “Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down.”
- New technologies, new methods and enhanced capabilities, increasing speed of delivery
- Anticipatory, pre-emptive or preventive self-defence
- “Imminent threats are fully covered by Article 51” 2005, In larger freedom: towards development, security and human rights for all
Article 51 and Multilateral Processes

• UN Charter applies in the ICT domain

• GGE 2021 “the inherent right of States to take measures consistent with international law and as recognized in the Charter”

• Way ahead – 2022 OEWG Annual Progress Report
  • calling for “focused discussions” on “how international law applies”, first and foremost, the UN Charter. No automatism.
  • Outstanding issues (2021)

• 2021 Chair’s summary – necessary discussion on what kind of ICT operations might give States right to invoke UN Charter Art 51.
Armed Attack in the ICT Context

- Warnings against automatic application
- Methods (“armed attack” involves use of a weapon) vs consequences
- Threshold
  - Pre-dating interpretative divergences
  - A majority of States distinguish between lesser and more serious use of force
  - Equivalence to a “conventional” armed attack
  - Scale and effect prominent. E.g. “death, injury or substantial material damage”; “considerable physical or economic damage”.
- Perpetrators – non-State actors, quasi State or only force attributable to States?
Self-defence in the ICT context

• Methods – cyber or kinetic
• Strictly necessary
• Proportionality – comparable in “scope, scale, duration”?
• Actual or **imminent** armed attack through/in cyberspace
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