

CYBER STABILITY CONFERENCE

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Armed attack and self-defence

Dr Andraz Kastelic
UNIDIR

UN Charter Article 51

*"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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