COLLECTIVE SECURITY AND THE USE OF FORCE

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THE PROHIBITION OF THE USE OF FORCE

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations

(Art. 2 (4) UN Charter ICJ, Nicaragua, Legality of Nuclear Weapons, Oil Platforms)

- Not relevant within States
- “Threat” of force a dead letter?
MEASURES OUTSIDE SCOPE OF ART 2(4): INTERVENTION BY INVITATION

- Not in violation of Art. 2(4) UN Charter
- Not against a State
- Needs to be by recognized government
- What happens if government loses effective control?
- To what extent is the ‘invitation’ genuine?
RECENT EXAMPLES

• Mali invited France (2013)
• President of South Sudan invited Uganda (2014-2015)
• President Yanukovych claimed to have invited Russia to intervene in Crimea (2014)
• Iraq invited USA and allies (since 2014)
• Libya invited Egypt (2015) and US (since 2016) – also S/RES/2259 (2015)
• Yemen invited Saudi-led intervention (since 2015)
• Assad regime invited Russia in Syria (since 2015)
• Art 4 (j) AU Constitutive Act 2000 allows member State to request AU intervention to restore peace and security
KEY ISSUES (I)

• Definition:
  - ‘Direct military assistance by the sending of armed forces by one State to another State upon the latter’s request’ [IDI Resolution 2011, Art. 1]

• Relationship with Art 2(4) UN Charter:
  - Prohibition of force against territorial integrity and political independence of a State
  - Does consent based intervention fall beyond Art 2(4) or constitutes exception (like Chapter VII/ Art 51)?

• Who is the legitimate inviting authority?
  – Recognized government
KEY ISSUES (II)

• Impact on right to self-determination/ ‘political independence of a State’
  – Interventions in non-international armed conflict (NIAC) and self-determination
  – Exception for terrorism?

• May invitations be extended by governments involved in mass human rights violations?
  – Consequences for invited governments/ ‘complicity’

• Formal requirements applicable to intervention by invitation
  – Ext antel ad hoc?
  – Explicit/ implicit?
Nothing in the present Charter shall impair the inherent right of individual or collective self-defense 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.

(Art. 51 UN Charter)

Armed attack implies most grave forms of use of force by one State against another

Or State sending armed bands to attack another State

Arming and training of rebels by third State is violation of use of force, but not armed attack

Funding of rebels by third State is violation of sovereignty, but not of prohibition of use of force

Nicaragua v United States, ICJ 1986
Some contentious issues:

- **Duration of self-defence**
  - Afghanistan?

- **Threshold (scale of violence)**
  - Gravest forms of violence versus lower threshold (*Nicaragua* case; but disputed by some State practice)

- **Entities**
  - States versus non-State actors (*Wall in Occupied Territories* advisory opinion – separate opinion Bürgenthal)
Anticipatory (Pre-emptive) v Preventitive Self-Defence

Anticipatory:

Caroline incident 1814: ‘a necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation’

Preventitive:

"Saddam Hussein is harboring terrorists and the instruments of terror, the instruments of mass death and destruction. ... Knowing these realities, American must not ignore the threat gathering against us. Facing clear evidence of peril, we cannot wait for the final proof -- the smoking gun -- that could come in the form of a mushroom cloud."

(President Bush) 7 October 2002)
UNGA Resolution 3314 (XXIX) Definition of Aggression:

- Art 3(a) – 3(f) forms of direct aggression

- Art 3(g) indirect aggression:

  ‘The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein’
• Sending of armed bands and substantial involvement two sides of same coin
  – *Nicaragua* line of reasoning
  – Very restrictive – equals direct instruction (Art 8 ASR)

• Controversial in practice
  – Harbouring = substantial involvement = ‘unwilling’?
  – Violation of duty of care triggers self-defence?
  – New attribution doctrine regarding use of force
ART 1: …
The following shall constitute an act of aggression: …

(xi) the encouragement, support, harbouring or provision of any assistance for the commission of terrorist acts and other violent trans-national organized crimes against a Member State. …
ISIL and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the United States and our partners in the region and beyond. States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in Article 51 of the Charter of the United Nations, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks. ...”

SELF-DEFENCE AGAINST NON-STATE ACTORS (II)

- AU Non-Aggression and Common Defence Pact 2005: (20 Ratifications by 1.04.2016)

Art 1:
“Aggression” means the use, intentionally and knowingly, of armed force or any other hostile act by a State, a group of States, an organization of States or non-State actor(s) or by any foreign or external entity, against the sovereignty, political independence, territorial integrity and human security of the population of a State Party to this Pact...

- Self-defence is right as well as justification for using force on territory of third State.
SELF-DEFENCE AGAINST NON-STATE ACTORS (III)

- Kenyan military retaliation against Al-Shabaab:
- Is this a violation by Kenya of article 2(4) UN Charter?
  - was there consent by Somalia?
  - Could Kenya rely on the right to self defence?
    • Was their a prior inter-State armed attack by Somalia on Kenya?
    • Was their attribution to Somalia (due to sending of armed bands to attack Kenya or harbouring doctrine)?
    • Was there armed attack by non-State actor emanating from Somali territory against which Somalia was ‘unable’ to act?
    • Relevance of AU Non-Aggression and Common? Defence Pact?
‘…Determining that….. the Islamic State in Iraq and the Levant (ISIL, also known as Da’esh), constitutes a global and unprecedented threat to international peace and security, ….

5. **Calls upon** Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL also known as Da’esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL …., and to eradicate the safe haven they have established over significant parts of Iraq and Syria; […]’
RUSSIAN ANNEXATION OF CRIMEA (I)

- Unidentified soldiers block a road to Ukrainian military airport Belbek
  http://www.mirror.co.uk/news/world-news/ukraine-news-russia-invades-crimea-3194129#ixzz2wmcbcnc5L
• Illegal use of force in violation of Art. 2(4) of the Charter/arguable constituting aggression:

• UNGA Res 3314 (1974): Art 3 (e) Definition of Aggression:

‘The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;’
LEBANON = SELF DEFENCE?

• Hezbollah attack on Israeli boarder post 12 July 2006
• Regarded by Israel as “Act of War” by Lebanon
• War by proxy between USA/Israel versus Iran / Hezbollah
• Part of “war on terror” 

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South Ossetia – rebellious area within Georgia

Most inhabitants have Russian passports

After violence between Georgia and South Ossetia in August 2008, Russia sent troops to “protect” its citizens
On Friday night North Korea said it had entered a state of war against South Korea. American officials have responded. "North Korea has a long history of bellicose rhetoric and threats and today's announcement follows that familiar pattern," Caitlin Hayden, a spokeswoman for National Security Council (which advises the U.S. president on matters of war), told CNN.[...]

See http://www.businessinsider.com/north-korea-declares-war-on-south-2013-3#ixzz2QqdlyiB
QUESTIONS FOR DISCUSSION

• The right to self-defence

  – At what point in time does an ‘armed attack’ occur?

  – Who can commit an ‘armed attack’?

  – What type/level of armed force amounts to an armed attack?

  – Can you think of any examples since 1945 of an ‘armed attack’?