Introduction

United Nations General Assembly resolution 73/27 of 11 December 2018, which establishes the Open-Ended Working Group (OEWG), echoes previous reports by calling on member States to *inter alia* “continue to study, with a view to promoting common understandings (…) how international law applies to the use of information and communications technologies by States.”

During the first substantive session of the OEWG, delegates broadly affirmed that the work of the OEWG should build upon the recommendations of the three consensus reports of the UN Groups of Governmental Experts (GGEs), including those recommendations pertaining to international law.

International law in the work of the GGEs

Discussion on international law have been a component of the work of the UN GGEs alongside discussions on existing and emerging threats, norms, rules and principles, confidence building measures and capacity building.

The main areas of international law discussed by the GGEs in relation to State uses of information and communications technologies (ICTs) include UN Charter provisions on sovereignty and non-intervention, the peaceful settlement of disputes and self-defence. The Groups have also discussed international humanitarian law, international human rights law, as well as other principles deriving from sovereignty such as due diligence and elements of the customary international law of responsibility of States for internationally wrongful acts, related questions of attribution, and self-help measures (retorsion and countermeasures).

The following provides an account of the international law-related matters pertaining to State uses of ICTs discussed in the five GGEs, focusing predominantly on the elements agreed in the three consensus reports.

**The 2004–2005 GGE**

The 2004–2005 GGE did not produce a consensus report.

**The 2009–2010 GGE**

Established through General Assembly resolution 60/45, the 2009–2010 GGE sought to identify common concepts and understandings relating to State uses of ICTs. The GGE report (A/65/201) acknowledges, *inter alia*, that “uncertainty regarding attribution and the absence of common understanding regarding acceptable State behaviour may create the risk of instability and misperception.” (para. 7) The report notes that “[n]on-criminal areas of transnational concern should receive appropriate attention”, including “[t]he risk of misperception resulting from a lack of shared understanding regarding international norms pertaining to State use of ICTs, which could affect crisis management in the event of major incidents.” In addition to an acknowledgement of the role of confidence and cooperative measures, the report also notes that “[e]xisting agreements include norms relevant to the use of ICTs by States” and that “[g]iven
the unique attributes of ICTs, additional norms could be developed over time.” (para. 16) Amongst its conclusions, the report recommends “[f]urther dialogue among States to discuss norms pertaining to State use of ICTs” (para. 18(i)) in addition to other measures. However, international law per se is not mentioned specifically in the report nor identified as one of the tasks for future work.

**The 2012–2013 GGE**

The 2012–2013 GGE report (A/68/98*) also notes how “[t]he absence of common understandings on acceptable State behaviour with regard to the use of ICTs increases the risk to international peace and security.” (para. 6). It highlights the importance of “cooperative measures that could enhance international peace, stability and security” including “common understandings on the application of relevant international law and derived norms, rules and principles of responsible behaviour of States.” (para. 11)

The Group reached agreement around a number of international law elements. The report acknowledges that “[t]he application of norms derived from existing international law relevant to the use of ICTs by States is an essential measure to reduce risks to international peace, security and stability.” It also notes that “[c]ommon understandings on how such norms shall apply to State behaviour and the use of ICTs by States requires further study”, and that given the “unique attributes of ICTs, additional norms could be developed over time.” (para. 16)

More specifically, with regard to existing international law the report states that:

“International law, and in particular the Charter of the United Nations, is applicable and is essential to maintaining peace and stability and promoting an open, secure, peaceful and accessible ICT environment. (para. 19)

State sovereignty and international norms and principles that flow from sovereignty apply to State conduct of ICT-related activities, and to their jurisdiction over ICT infrastructure within their territory. (para. 20)

State efforts to address the security of ICTs must go hand-in-hand with respect for human rights and fundamental freedoms set forth in the Universal Declaration of Human Rights and other international instruments. (para. 21)

States should intensify cooperation against criminal or terrorist use of ICTs, harmonize legal approaches as appropriate and strengthen practical collaboration between respective law enforcement and prosecutorial agencies. (para. 22)

States must meet their international obligations regarding internationally wrongful acts attributable to them. States must not use proxies to commit internationally wrongful acts. States should seek to ensure that their territories are not used by non-State actors for unlawful use of ICTs.” (para. 23)

The report also noted that States should consider how best to cooperate in implementing these recommendations, “including the role that may be played by private sector and civil society organizations,” and that “[t]hese norms and recommendations complement the work of the United Nations and regional groups and are the basis for further work to build confidence and trust.” (para. 25)

**The 2014–2015 GGE**

The fourth GGE reached agreement around a number of international law elements. The report (A/70/174) confirmed the consensus in the 2013 report that "international law, in particular the
Charter of the United Nations, is applicable and is essential to maintaining peace and stability and promoting an open, secure, stable, accessible and peaceful ICT environment.” (para. 24) In accordance with its mandate (General Assembly resolution 68/243), the Group “considered how international law applies to the use of ICTs by States.” (para. 24) Despite difficult negotiations, the report made further progress in the study of international law. Unlike previous reports, the 2015 report makes a differentiation between binding international law on the one hand, and voluntary, non-binding norms on the other, presenting related recommendations in two separate sections.

The report notes that the “adherence by States to international law, in particular their Charter obligations, is an essential framework for their actions in their use of ICTs and to promote an open, secure, stable, accessible and peaceful ICT environment.” It also stresses the centrality of “these obligations to the examination of the application of international law to the use of ICTs by States.” (para. 25)

In considering the application of international law to State uses of ICTs, the report identifies “as of central importance the commitment of States to the following principles of the Charter and other international law:

- sovereign equality;
- the settlement of international disputes by peaceful means in such a manner that international peace and security and justice are not endangered;
- refraining 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;
- respect for human rights and fundamental freedoms;
- and non-intervention in the internal affairs of other States.” (para. 26)

The report also notes that “State sovereignty and international norms and principles that flow from sovereignty apply to the conduct by States of ICT-related activities and to their jurisdiction over ICT infrastructure within their territory.” (para. 27)

Building on the work of previous Groups and guided by the Charter and its mandate, the 2014–2015 Group also offered the following “non-exhaustive views on how international law applies to the uses of ICTs by States:

- States have jurisdiction over the ICT infrastructure located within their territory (para. 28, a)

- In their use of ICTs, States must observe, among other principles of international law, State sovereignty, sovereign equality, the settlement of disputes by peaceful means and non-intervention in the internal affairs of other States. Existing obligations under international law are applicable to State use of ICTs. States must comply with their obligations under international law to respect and protect human rights and fundamental freedoms; (28, b)

- Underscoring the aspirations of the international community to the peaceful use of ICTs for the common good of mankind, and recalling that the Charter applies in its entirety, the Group noted the inherent right of States to take measures consistent with international law and as recognized in the Charter. The Group recognized the need for further study of this matter; (28, c)

- The Group noted established legal principles, including, where applicable, the principles of humanity, necessity, proportionality and distinction (28, d);
States must not use proxies to commit internationally wrongful acts using ICTs and States should seek to ensure their territory is not used by non-State actors to commit such acts (28, e); and

States must meet their international obligations regarding internationally wrongful acts attributable to them under international law. However, the Group also noted that the indication that an ICT activity was launched or otherwise originates from the territory or the ICT infrastructure of a State may be insufficient in itself to attribute the activity to that State. In this regard, the Group noted that the accusations of organizing and implementing wrongful acts brought against States should be substantiated.” (28, f)

Like earlier reports, this one too stressed that “common understandings on how international law applies to State uses of ICTs are important for promoting an open, secure, stable, accessible and peaceful ICT environment.” (para. 29)

Finally, in addition to recommending a new GGE to continue to study, *inter alia*, “how international law applies to use of ICTs by States,” (para. 34) the Group also noted that the United Nations “should play a leading role in promoting dialogue on the security of ICTs in their use by States and developing common understandings on the application of international law and norms, rules and principles for responsible State behaviour.” (para.33)

**The 2016–2017 GGE**

Pursuant to its mandate (A/70/237), the 2016–2017 GGE continued to study how international law applies to the use of ICTs by States. There was no consensus for a final report. In discussions on how some of the rules and principles of international law discussed in earlier reports apply to State uses of ICTs, and echoing some of the challenges already evident in the 2015 discussions on international law, differences were reportedly evident around questions relating to sovereignty; the law of State responsibility and the use of countermeasures to respond to internationally wrongful acts and related questions of attribution; self-defence; and international humanitarian law.

Since the 2015 consensus report, a number of States and organizations have reaffirmed the acknowledgement in the 2013 and 2015 reports that international law applies to the use of ICTs by States. As noted, both the resolutions establishing the OEWG and the GGE call for further study on how international law applies.