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Research on the Right of Self-Defence from the Perspective of International Law

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Abstract: The right of self-defence is an indispensable concept in international law, especially in the UN charter. States can protect their legitimate rights and interests from other states' infringement by exercising different types of the right of self-defence. However, with the rapid advancement of technology, economy, and politics, the right of self-defense faces new challenges. The collective self-defence, the anti-terrorism self-defence and the preventive self-defence are not perfect, and the specific content of the armed attack is not clear. Although there is no clear solution system in international law at present, it can be thought of and tried from the aspects of perfecting restrictive provisions, reasonably interpreting relevant terms, and strengthening the compelling force of international law.

Keywords: the right of self-defence, international law, the collective self-defence, cyber attack

1. Introduction

Article 51 of the United Nations Charter (hereinafter: the UN Charter) formalizes the concept of the right of self-defence. The details are as follows. 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. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary to maintain or restore international peace and security. This article formally confirms the right to self-defence as an inherent right of a state to safeguard its security and legitimate interests [1]. In addition to the UN Charter, other institutions have also issued relevant laws and judicial interpretations. All of them further enrich and develop the connotation of the right of self-defence.

Admittedly, the enactment of Article 51 has indeed played an irreplaceable role in maintaining peace and stability among states after World War II. Taking China as an example, the Sino-Vietnamese War in 1979 was the self-defence after the Vietnamese army invaded the territory of China, which was a typical act of protecting national interests by exercising the right of self-defence. What is more, according to the provisions of the UN Charter, the International Court of Justice has upheld the rights and interests of some injured states. One of the most typical cases is the Israeli wall

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case in the early 2000s. In this case, the territory where the attack came from was controlled by Israel itself instead of another state [2]. Besides, the building of the wall resulted in consequences that were disproportionate to the level of the attack. Therefore, it was ruled that Israel's actions did not fall within the right of self-defence. Finally, the Israeli Supreme Court ordered the demolition.

However, at the same time, some states try to use force illegally in the name of self-defence. This is one of the adverse results of fuzzy restrictions on various types of the right of self-defence. The types include collective self-defence, anti-terrorism self-defence and preventive self-defence. Besides, the interpretation of the "armed attack" in relevant legislation cannot meet the requirements of technological progress and national development nowadays. For example, the current interpretation of the term is limited to realistic attacks. Nonetheless, cyber attack, a new type of war weapon has not been considered. Therefore, the main content of this paper is to further find and analyze these defects in the right of self-defence and put forward some solutions based on the research results of other scholars. All these solutions are conducive to the right of self-defence further playing its role in society to safeguard the sovereignty and legitimate rights of all states nowadays.

2. Literature Review and Methodology

2.1. Literature Review

At present, numerous scholars in China have studied the defects existing in the right of self-defence.

In the definition of the right of self-defence, Li Hui's *On the Right of Self-defence in International Law* has laid a solid theoretical foundation for the writing of this paper. Starting from the premise, object, time and degree, he made a comprehensive exposition of the legal concept of this right.

In terms of different types of right of self-defence, the main focus of the academic circles is collective self-defence, anti-terrorism self-defence and preventive self-defence. In terms of the collective self-defence, one of the most cited problems is the change in Japan's attitude towards collective self-defence. From 2013 to 2014, many Chinese scholars discussed this issue. For example, professor Luo Guoqiang analyzed in detail its illegality and responsibility in the article *Analysis of the International Illegality of Japan's Lifting of the Right to Collective Self-Defence*, which was published in 2014. There is more research on anti-terrorism self-defence and preventive self-defence. In May 2019, Zhu Junjie's *The Feasibility of States Invoking the Right of Self-defense to Combat Terrorism* theoretically discussed the importance and necessity of invoking the right of self-defence to combat terrorism. In May 2020, Wang Wei discussed the Gulf War and the use of force against Syrian chemical weapons related to these two self-defence rights in the *Study on Exceptions of Non-use of Force Principle Under International Law*. In May 2021, Xi Chaoli's article *On the Exceptions of Non-use of Force Principle Under International Law* explored the relationship between preventive self-defence, humanitarian intervention, and the use of force. In June of the same year, Wu Hongsheng introduced the concept, conditions, and historical development stages of preventive self-defence in his paper *Research on Legal Issues of Preventive Self-defense*.

In the definition of "armed attack", the main academic point of view is that a virtual attack, such as "cyber attack" should be included in its scope of it. In May 2018, Wang Minghui's *Research on the Exercise of National Self-Defense Right in Cyber Attack* demonstrated the necessity of the state's exercise of using the right of self-defence to respond to cyber attack from both theoretical and practical aspects. In September 2020, Zhao Jingbo further defined the issue in his paper *On the Network Attacks as being "Use of Force" from the Perspective of the Tallinn Manuals*. In December of the same year, Yin Danyang proposed in the article *Reflections on Computer Network Attacks from the Perspective of International Law* that the new combat platform of network platform had brought a great impact on the international law system and must be reasonably defined.

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In terms of the abuse of extreme personal sanctions, there is no specific article to describe them in detail.

In terms of solutions, Fang Xianfeng's article *A Study on the International Compulsion of the Norm of Prohibition of Force: the Legal Interpretation of the US Practices and Chinese Responses* has important reference value.

2.2. Methodology

This paper mainly adopts the literature research method, normative interpretation method, and comparative research method.

In terms of the literature research method, this paper finds out the defects in the right of self-defence in international law by reading relevant papers, books, and international classic cases. After that, the author puts forward corresponding solutions. In terms of standardizing the interpretation of the law, the ultimate goal of this paper is to promote the improvement of relevant laws, so it will always be based on the law itself, to further discuss how to reasonably expand or restrict its interpretation. In the aspect of the comparative research method, this paper compares the different coping mechanisms of the United States, China, and other states, to extract some relatively reasonable solutions.

3. Deficiencies on the Right of Self-defence

Based on the regulations of the UN Chart and other regulations of international law, there are some principles about the right of self-defence. Firstly, the precondition for the exercise of the right of self-defence is that the sovereign state is under armed attack from another state. In addition, the International Court of Justice affirmed that armed attack should be defined as the most grave forms of the use of force in the Nicaragua case [3]. Besides, the key problem is the armed attack must come from other states instead of persons. Secondly, Self-defence must be exercised and declared by the state under armed attack. In other words, the collective self-defence could be exercised by other related states only at the request of the state under armed attack. Thirdly, this right has to be necessary and proportionate. This means that a force counterattack is the only solution, and the counterattack must be sufficient to effectively curb the other state's armed attack and achieve the purpose of protecting national security [1]. For a while, the injured state has the right to exercise the right of self-defence, which can neither be denied nor authorized by the United Nations Security Council [4].

However, it cannot be denied that there exist some deficiencies that have not been addressed. Therefore, in that paper, the author will discuss several main problems, which include the controversy over different kinds of self-defence and the inappropriate interpretation of the premise of the right of self-defence.

3.1. The Controversy of Different Types of the Right of Self-defence

From different perspectives, the right of self-defence can be divided into various types. On the one hand, such a division facilitates the precise analysis of different kinds of problems. On the other hand, at present, the specific regulations of different types of this right in international law are ambiguous and ill-considered, which will bring difficulties to the trial. The three most typical types are collective self-defence, anti-terrorism self-defence, and preventive self-defence.

3.1.1. The Collective Self-defence

The right of self-defence is divided into two types by the UN Charter, which includes individual and collective self-defence. The collective self-defence means that when a state is under armed attack

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which came from another state, other states who closely related to it have the right to use force to attack and intervene regardless of whether it is attacked [5]. The most typical international practice of collective self-defence is NATO. It is clearly stated in NATO's articles that an armed attack on any State party shall be considered an attack on all. Compared with individual self-defence, collective self-defence is a traditional mode of security defence between Allies. The preservation of the collective security of several states is an overriding feature of that right [6].

The collective self-defence does play a positive role to some extent. But unfortunately, international law acquiesces that all countries have the freedom to use the right of collective self-defence and ignores that some countries are not qualified to have the right because of various factors. For example, there is plenty of evidence that Japan has been looking to exercise collective self-defence to build up its military strength for years. And this will undoubtedly have a serious impact on world security.

Due to the international pressure Japan faced after the World War II and the provisions of the Potsdam Proclamation, Article 9 of the Japanese Constitution has renounced the right to conduct war and stipulated the abandonment of the exercise of the right of collective self-defence and the preservation of armed forces, which are interrelated and indispensable [6]. However, in fact, in the process of formulating and revising the relevant Constitution and its interpretation, Japan has been consciously making use of the provisions of Article 51 of the UN Charter of the United Nations to break the shackles of its constitutional provisions and seek greater rights to use force [7]. Japan's 1992 UN Peacekeeping Cooperation Act allows Japan to send its Self-Defence Forces to different states such as Cambodia to join UN peacekeeping operations. On July 1, 2014, the interim Cabinet meeting of the Japanese government formally decided to amend the interpretation of the Constitution to lift the ban on the right of collective self-defence. Japan is obsessed with the issue of collective self-defence, and its real intention is to enhance its intervention ability and military influence in the Far East and East Asia by exercising the right of collective self-defence [6]. In severe cases, it can lead to a resurgence of Japanese militarism.

3.1.2. The Anti-terrorism Self-defence

Generally speaking, according to relevant provisions of international law, a sovereign state under armed attack should exercise self-defence against the state engaged in unlawful armed attacks. However, the scope of this interpretation has been expanded after the September 11 attacks. In Resolution 1377, the UN Security Council specifically reaffirmed the right of self-defence and included terrorist organizations in the objects of exercising the right of self-defence [1]. Anti-terrorism self-defence is also born.

However, the international community has been divided on what kind of terrorist attacks can be regarded as armed attacks for anti-terrorism self-defence. Some scholars believe that a country only needs to suffer a terrorist attack can trigger the right to invoke the right of self-defence to take military action [4]. However, other scholars believe that only when the target of terrorist attacks is an unspecified majority of people in a country, it can be identified as an armed attack with the significance of international law [8]. The absence of a unified standard enables some countries to equate any terrorist-related act with the armed attack, which will lead to abuse anti-terrorism self-defence and bring unnecessary turmoil and consumption to the world.

In addition, how to follow the proportionate principle in anti-terrorism self-defence is also a severe problem at present. For example, the United States launched a war in Afghanistan against terrorist groups. Despite the eventual elimination of al Qaeda, tens of thousands of civilians have been killed and countless more displaced in the 20-year war in Afghanistan. The American death toll and the cost of the war were enormous.

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3.1.3. The Preventive Self-defence

An armed attack means that an attack has taken place or an actual military attack, but where there is clear evidence of an attack or threat of military action, force may also be used in defence [9]. It's a way of pre-empting ourselves from the inevitable future aggression, which is called preventive self-defence. The Caroline case in 1837 is a classic case of preventive self-defence, which sets the standard for preventive self-defence. When faced with a very urgent and large-scale attack, there is no other option as the last line of defence, and there is no time to consult. The defence of force should also conform to the rules of necessity and proportionality [10]. The exigency of the situation requires a determination of the intent and capability of the party likely to launch the attack [11].

However, the problem is that the international community does not agree on the standard of justification for preventive self-defence. The main question among them is how to determine whether the danger is such that self-defence is necessary. In the Russia-Ukraine war, for example, some saw it as preventive self-defence in response to Ukraine's desire to join NATO. But others see it as a war of aggression. The United States launched a war against Syria to prevent criminals from using chemical weapons to harm the interests of the United States. But Syria's chemical weapons are not aimed at the United States per se, and Syria has not expressed any intention to attack the United States [12]. Therefore, there is a great dispute over whether the behavior of the United States to wage war can be classified as preventive self-defence.

Therefore, to prevent states from waging aggressive wars in the name of preventive self-defence, it is necessary to improve the provisions on preventive self-defence as soon as possible, especially the part concerning how to determine the necessity. At the same time, similar to the problems faced by anti-terrorism self-defence, preventive self-defence also needs to ensure that the right of self-defense must be used proportionate, to avoid unnecessary consumption of human and material resources.

3.2. The Inappropriate Interpretation of the Premise on the Right of Self-defence

In the previous article, some of the ambiguous provisions mentioned by the author lead to situations in which the right to self-defence can be abused. In addition, it must be admitted that some provisions on the right of self-defence are out of step with technology, especially the inappropriate interpretation of some terms. These problems are interpreted as adding unnecessary restrictions to the exercise of the right of self-defence, which will hinder the states safeguarding their legitimate rights and interests.

3.2.1. The Exclusion of Cyber Attack

According to the UN Charter and the case of Nicaragua v. United States of America, armed attack should be defined as the most grave forms of the use of force. However, in recent years, with the rapid development of information technology and the continuous improvement of the degree of informatization, cyber attack has gradually become one of the major threats to national security, especially against the national military or government departments of the cyber attack occurs frequently [13]. According to the Global Risks Report 2020, cyber attack is among the top 10 global threats, along with environmental issues and natural disasters [14]. There was a serious cyber attack in Ukraine in 2015. Qualitative analysis proved that the event is organized in a planned way with the network attack, a hacker, and USES a variety of means of attack to attack. Ukraine's state grid first power tripping caused by malicious software in the system, and then apply to the state power company for recovery, the company's call center overwhelmed to care for the grid should be tripped Emergency rescue, eventually leading to equipment paralysis disease [15].

At present, the harm of cyber attack is becoming more and more serious. Therefore, some scholars have proposed that the right of self-defence should be taken as one of the ways to solve the cyber

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attack. That means bringing a special cyber attack into the realm of the armed attack. Unfortunately, international law normally defines the "use of force" as the "organized use of armed forces to attack the enemy". However, the object of cyber attack is the enemy's information system, rather than the physical damage, which is different from the traditional concept of "force" [16]. What is worse, due to the stealth nature of cyber attack, it is difficult for the state to judge the occurrence and attribution of illegal violations. In addition, cyber attack is often confrontational, which makes it difficult to determine who started the war [16].

3.2.2. The Abuse of Extreme Personal Sanctions

After the two world wars, people in the world generally have a great anti-war sentiment. At the same time, because war consumes too much manpower and material resources, most states try to avoid the use of force. But it has also led to a serious problem that some states abuse extreme personal sanctions as one of the methods to exercise the right to self-defence. The killing of Soleimani by the U.S. is a typical case in which extreme personal sanctions are used as a form of self-defence. Officially, the United States regards the killing of Soleimani as "exercising the right of self-defence under international law." On January 8, the US also sent a letter to the UN Security Council by Article 51 of the UN Charter, informing the UN of the operation and calling it "the exercise of the right of self-defence", which further confirms its characterization of the operation [17].

At the heart of the matter is whether a state can use extreme sanctions against individuals as a means of exercising its right of self-defence. If so, it is hard to say that the act of self-defence should be seen as a response to the actions of the individual or the state on behalf of the individual. Further, if extreme personal sanctions, especially the direct killing of others, can be considered a forced response, can they also be considered a new form of an armed attack? For example, if a country kills an important person of another country, such as the president or a member of the royal family, is it reasonable that the state where the person lives makes it a premise of using its right to self-defence?

4. Solutions for Perfecting the Right of Self-defence

In response to the questions raised above, there is no doubt that relevant measures must be taken immediately to perfect the provisions of the right of self-defence in international law. Otherwise, on the one hand, the right of self-defence may be abused. On the other hand, some states may not be able to defend their legitimate interests by exercising this right. After reading some relevant literature and books, the author proposes the following three solutions in this article.

4.1. Perfect Self-defence Resstrictive Provisions

According to the problems of anti-terrorism self-defence and preventive self-defence mentioned above, it is obvious that we must strictly limit the exercise of the right of self-defense to prevent the abuse of the right of self-defense and the breeding of hegemonism.

First of all, about anti-terrorism self-defence, the most critical issue is to determine to what kind of extent terrorist attacks can constitute the prerequisite for the exercise of anti-terrorism self-defence. The author believes that the criterion should be the degree of harm caused by the consequences of terrorist attacks. If a terrorist attack is as harmful as the armed forces of a state, international law should consider it an "armed attack" [18]. When assessing the harm degree of terrorist attacks, the number of terrorists, the methods used, property damage, death toll, public pressure, and other factors should be taken into consideration comprehensively, rather than focusing on one factor alone. In addition, the final assessment should be acceptable or supported by a majority of states, as well as the UN Security Council.

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Secondly, as an extension of the right to exercise or exceptions, preventive self-defence must be strictly limited to "urgent" and "force against an alternative", and that potential threat of harm and self-defence damage to clear comparison, only to ensure the defensive behavior is in proportion, the state's response can take a moderate amount of military operations [18]. It means that before exercising the right of preventive self-defence, a country should make clear the purpose of its actions and the objects it needs to strike, and immediately stop counterattacks after the purpose is achieved. If a state takes the opportunity to launch aggression in addition to self-defence, then its action is no longer the exercise of the right to preventive self-defence, but the use of force. In addition, there are many disputes in the implementation process of the right of preventive self-defense, and it is very important to stipulate the right of preventive self-defense within the scope of international law, which is not only an important way to guarantee the legitimacy of the right, but also a necessary means to clarify its justice [19].

Given the proportionate principle of the two rights of self-defence, the author believes that the corresponding sanction mechanism should be introduced into international law. The UN Security Council and the International Court of Justice should assume their corresponding responsibilities and make a fair and objective judgment on whether the consequences of using this right are commensurate with the armed attacks it has suffered. If a state is found to have abused the right of self-defence and caused serious consequences, it shall be condemned and ordered to stop its actions immediately and bear the corresponding liability for compensation.

4.2. Interpreting the Armed Attack Appropriately

The questions in this section mainly focus on what kind of cyber attack and personal sanctions can be included in the scope of armed attacks, thus becoming the premise for states to exercise the right of self-defence.

When it comes to what kind of cyber attack should be included in the scope of force attacks, the following factors should be taken into consideration comprehensively, including the attacker, the target, the consequences, and so on. The closer the link between the State and the action in the element of the aggressor, the more other States tend to characterize them as the use of force because of the serious threat to international stability [13]. In terms of targets, if there is clear evidence that the target of a cyber attack is state secrets or important energy sources, it should be considered an armed attack, regardless of the consequences of the final strike. If the host is in a state, it can be presumed to be preventive self-defence. If the perpetrator is a terrorist, it can be presumed to be anti-terrorism self-defence. In terms of the consequences of the attack, the severity generally refers to how many people are killed, how little property is damaged and lost, how little area is affected, and to what extent the damage and harm in the area are achieved [20].

As for extreme personal sanctions, the author does not believe that they should be considered into the scope of force attacks, nor can they be one of the means of exercising the right of self-defence. Once extreme personal sanctions are included in the relevant scope, they will cause tensions between states and even give rise to hegemonism and power politics. On the one hand, if extreme personal sanctions are considered armed attacks, there will be criminals who will try to assassinate important national figures to provoke a war between states. On the other hand, if states are allowed to defend themselves with extreme personal sanctions, it will not only bring disasters to individuals but also deal a major blow to the population of that state, leading to greater conflict.

4.3. Enhance the Compelling Force of the UN Charter

At present, in the implementation of international law, it must be acknowledged that some countries will deliberately circumvent the UN Security Council to wage war, or refuse to accept the

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International Court of Justice arbitration results. As a result, if these measures mentioned before are to be implemented, the most essential is to enhance the compelling force of international law, especially the UN charter. Otherwise, no matter how many provisions are added, a law that no country is willing to abide by will be no more than a pile of paper.

As for the right to collective self-defence mentioned above, the UN Security Council should intervene in the case of countries that are not allowed to exercise the right of collective self-defence due to special factors based on relevant laws. Only in this way can we effectively curb its intention to use the right of collective self-defence for military expansion, to maintain regional stability.

The international community needs to take corresponding measures to deal with the real dilemma facing the international compelling force of the UN Charter. Firstly, in the context of social solidarity, the negative consequences of the abuse of the right to self-defence should be reaffirmed to serve as a warning to certain countries. In addition, the states that support strengthening the compelling force of the UN Charter should unite with each other, which can serve as a counterweight to the disregard of the UN Charter by hegemonic powers [21]. Finally, the enormous pressure of public opinion has also, to a certain extent, promoted the enhancement of the coercive force of the UN Charter.

5. Conclusion

Since its birth, the right of self-defence in international law has occupied an extremely important position in the whole international law system and has made great contributions to maintaining world peace and stability for many years. Therefore, we must always pay attention to the exercise of the right of self-defence, to ensure that it can keep pace with the development of the international society and maintain a stable international order.

The main goal of this paper is to explore the contents of the right of self-defence in the current international law and put forward corresponding solutions. In addition to the issues of preventive self-defence and anti-terrorism self-defence that have been discussed for many years, this paper also focuses on analyzing the drawbacks of collective self-defence and hopes to solve this problem by strengthening the coercive force of relevant laws. In terms of the scope of military attacks, in addition to cyber attack, which has been a concern by many scholars, the author also pays attention to the issue of extreme personal sanctions and puts forward his views on it. The solution proposed by the author is professional academically and feasible in practice, which can promote the further development of the right of self-defence in the field of international law.

However, it must be admitted that the method proposed by the author has a certain reference value in theory, but to put it into practice, further researches are needed. Many of these solutions require the full cooperation of all states, but it is difficult to achieve in the face of real conflicts and contradictions. Therefore, the author needs to collect more data for analysis and comparison in the future, to continue to contribute to the development of the right of self-defence in international law.

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