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The Implementation of a Nation's Right to Self-defense

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Abstract. The right to self-defense is a fundamental right enjoyed by the State, which is entitled to implement urgent military action against external armed attacks to ensure survival and state security. Since the right of self-defense is also recognized as exceptional to the prohibition of the use of force enshrined in the Charter of the United Nations(UN), and therefore, besides the authorization from the USA, a nation's implementation of the right to self-defense may also be the basis for its armed attack. However, in the international system, whose core is the prohibition of the use of force, the exercise of the right to self-defense is subject to the following limitations: First, it must be invaded by external force; Second, Member States should immediately report to the Security Council(UINSC) when exercising their right to self-defense. Any improper use of a nation's right to defend itself constitutes an infringement of international law. Nevertheless, However, as terrorist activities have become more prevalent in modern international society, and as some states, such as the USA, have adopted pre-emptive self-defense measures, the scope of the substantive and procedural requirements for the exercise of the right to self-defense has expanded. Additionally, the criteria established in Provision 51 of the Charter of the United Nations for exercising the right to self-protection are excessively permissive. This leniency could result in the potential misuse of self-defense claims, jeopardizing international peace and security.

Keywords: right to self-defense, state security, armed attack

1. Introduction

1.1. Research background

Following the conclusion of the Iraq War and the capture of Saddam Hussein, it seemed that the United States had achieved a comprehensive victory with its "pre-emption" strategy. However, this is not the case. While the United States has effectively ended its military operations in Iraq, it is noteworthy that the justification for the invasion - namely, the alleged presence of weapons of mass destruction - has not been substantiated by credible evidence. The international community has scrutinized the legitimacy of the U.S. intervention, prompting a thorough examination and raising questions regarding the alignment of its "pre-emptive" strategy with the prevailing norms of contemporary international law [1].

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1.2. Purpose of research

Within the realm of international law, various disputes have arisen regarding the implementation of a nation's right to self-defense [2].

For example, In what specific circumstances is a state permitted to invoke its right to self-protection? What are the subjects of exercising the right to self-protection? Who is the object of the right of self-defense? Who possesses the authority to judge the timing and necessity of self-defense, as well as the manner in which they should be implemented [3]?

The purpose of this study is to explore how countries legally exercise the right of self-defense, with particular emphasis on the increasingly concerned concept of "preventive self-defense". This issue has gained heightened attention, especially following the "9-11" incident, which has complicated the application of self-defense rights. As the international landscape evolves continually, terrorist attacks have emerged as a new form of armed attack, posing significant challenges for victim countries in exercising their right to self-defense. By addressing these pertinent international law issues, this study can not only clarify the principles and the essence of Article 51 of the Charter of the United Nations but also underscore the critical importance of modern international law in promoting global peace and development [4].

1.3. Research method

This paper employs both the literature research method and the case study method to analyze the time and limit of a country's response-triggered self-defense armed aggression and terrorist attacks from other countries.

2. Thesis and road map

The topic discussed in this paper is how to correctly regulate the utilization of a nation's right to national self-defense and whether prior defense is legitimate.

2.1. Thesis

The UN General Assembly needs to be reformed. In the event of armed aggression or terrorist attacks, decisions concerning a nation's right to self-defense should be made collaboratively by the P5 of the UNSC, in conjunction with the affected State.

Formal acknowledgment of preventive self-protection's justifiability and integration into the UN Charter necessitates the convening of a UN General Assembly session by the P5, culminating in the adoption of a resolution on preventive self-defense through a vote [5].

2.2. Road map

This paper is composed of four parts. The first part is a literature review. By analyzing the literature, this paper sums up the control of the exercise of national defense and the supervision of national defense. The second part is a statement of hypothesis. This part aims to put forward some arguments about national defense and make reasonable assumptions for them to prepare for the subsequent case analysis. The following part is a case study analysis. In this part, the hypotheses proposed above are demonstrated one by one in the form of case analysis, and the final conclusion is drawn. The next part provides some recommendations to solve the questions mentioned above. The

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last section is the conclusion. I mainly summarize the whole thesis and give my own views on the core of these theories.

3. Literature review

3.1. Control over the defense of the state

In the first category, Marko Divac Öberg has noted that a significant portion of the deliberation on international legal matters regarding the regulation of force and self-protection unfolds along a substantive aspect, concentrating on the degree of force prohibitions and exceptions. In contrast, this article emphasizes the doctrinal framework, specifically the analytical methods and argumentative strategies employed to evaluate facts within the context of legal norms. The objective is to determine how numerous the assumptions related to substantive policy goals and risks are frequently intertwined with other presumptions concerning the operation of international law in this domain.

The findings indicate that the preference for flexible and adaptable criteria by certain states, scholars, and other international actors, juxtaposed with the rigid regulations and procedures favored by others, reflects not only divergent assessments of threats and the policy implications of employing force without prior authorization from the UNSC [6], but also reveals distinct sets of interconnected foundational assumptions about international law and the conditions necessary for its effectiveness.

These assumptions include variations in how the legal-doctrinal framework relates to external enforcement pressures and its role in fostering compliance among states. By elucidating and distinguishing the underlying assumptions that underpin doctrinal perspectives - often obscured in discussions that pit permissiveness against strictness - this article argues that it clears the way for reforming the legal structure that governs the employment of force and provides avenues for further exploration into the doctrinal underpinnings in this domain.

3.2. Overview of the right of national self-defense

Within the second category of scholarly opinion, Rao, P.S. [7], and Matthew C. Waxman [8] assert that the fifty-first article of the UN enumerates inherent within the realm of rights is the right of self-defense, a crucial aspect that safeguards individuals and entities as a derogation from the prohibitions delineated in Article 2(4) concerning the employment of force. However, the invocation of this right is bounded by the tenets of proportionality, and necessity holds significant importance in various contexts, as delineated in customary international law. This right remains viable solely until the UNSC undertakes measures in response to threats to peace, breaches of peace, or acts of aggression, as prescribed in Chapter VII of the Charter. The 1945 Charter of the United Nations primarily seeks to regulate the resort to force among states, yet its scope of applicability is not explicitly confined to such instances. Consequently, there exists substantial authority for the proposition that Article 2(4) prohibits the use of force by non-state entities on an equivalent footing with “armed attacks” perpetuated by regular armed forces. This interpretation accords states the entitlement to defend oneself against such actions by non-state actors is a crucial right, provided that the incidents transcend mere border disputes. In this regard, the present article scrutinizes pertinent cases from the International Court of Justice (ICJ), taking into account contemporary propositions and principles. Additionally, it investigates matters pertaining to state responsibility for the unlawful deeds perpetrated by non-state actors operating from their territory, particularly in respect to harm occasioned to third states.

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4. Statement of hypothesis

4.1. Hypothesis 1: the negative theory in preemptive self-defense is reasonable

Since 9/11, it has become a trend to advocate the legitimacy of preventive self-defense. It should be pointed out that there are very few international cases advocating the right to anticipatory self-protection to take action, which is strongly opposed by many developing countries. The theoretical space for the existence of anticipatory self-defense is excluded within the contemporary framework of international law, with the Charter of the United Nations serving as its foundational cornerstone. In similar situations, states can exempt the wrongfulness of acts of self-defense by invoking the "emergency situation" clause.

In September 2002, upon the release of the new U.S. National Security Strategy, the Bush administration elevated preemptive strikes against “rogue states” and terrorist organizations to an explicit principle of U.S. national security policy. Consequently, preemption became a crucial part of the Bush doctrine, which was depicted by the media as a revolutionary change in U.S. grand strategy since the formulation of the nuclear deterrence strategy in the 1950s.

However, Preventive war blocks the way to a peaceful solution and at the same time undermines diplomacy and international law. Throughout history, instances of preventive warfare have not been uncommon. One notable illustration is the scenario during which German leadership, perceiving Russia's growing strength and the inevitability of conflict, prioritized initiating hostilities against Russia at the earliest opportunity. Specifically, Germany's assault on neutral nations in the spring of 1940 during World War II stands as a frequently cited exemplar of premeditated preventive warfare, executed with the intention of forestalling Britain's potential occupation of these territories and securing a strategic advantage for Germany. In 1981, Israel ensured that Iraq's nuclear installations did not pose a lethal threat by bombing them.

It has been proven that some countries launch so-called advanced defense to wage war against other countries, claiming that they pose a threat to themselves. Therefore, the boundaries of advanced defense in today's international law are blurred, and some countries will use them as an excuse to attack and invade other countries.

4.2. Hypothesis 2: whether a forcible attack with arms is carried out by a foreign state or by a foreign terrorist organization, the attacked state possesses an inborn right to employ force in self-protection

Provision 39 of the UN Charter unequivocally stipulates the obligation of the United Nations Security Council to ascertain the existence of any threat to peace, violation of the peace, or act of aggression. Furthermore, it mandates the Council to propose recommendations or decide upon measures, in line with Articles 41 and 42, respectively, as means to maintain or restore international peace and security. Articles 41 and 42 of the Charter empower the United Nations Security Council to determine measures, excluding the use of force, for the enforcement of its decisions and to urge Member States to implement such measures. These may encompass the partial or complete interruption of economic relations, railways, shipping, air travel, postal communications, telegraphy, radio, and other means of communication, as well as the severance of diplomatic ties. If the UNSC considers that the methods stipulated in Article 41 are insufficient or have been proven to be so, it may take such actions by land, sea, or air as are required to uphold or reinstate international tranquility and safety. Such actions could comprise demonstrations, blockades, and other military operations by the land, sea, and air forces of Member States of the UN.

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For example, the United States initiated a war with Iraq after the September 11 attacks, which was allegedly in line with the rights granted to all countries under the UN Charter. However, this assertion is highly contentious as the war may not have been a legitimate exercise of the rights under the Charter.

4.3. Hypothesis 3: it is legitimate to activate the right of self-defense to fight terrorism by force

The above argument shows that if a victim of international terrorist activities wants to resort to Provision 51 of the UN Charter in self-defense after suffering terrorist activities, even if force is used to strike, there is no legitimate reason to prevent it from doing so from the source of international law. This also lays a solid foundation for States to activate Article 51 of the UN Charter.

Thus, since cross-border terrorist attacks can be regarded as "force attacks" in accordance with international law, and the utilization of force by a nation invoking the right to self-defense does not violate the "principle of prohibiting the utilization of armed power", it may be concluded that even under the current international law system, although there are many restrictions on the procedure and proportionality of the exercise of the right of self-defense by a State, It does not affect the recognition of the fight against terrorist attacks as a right of self-defense can be invoked.

5. Case study analysis

5.1. Case 1

The Iraq crisis spanning from 2002 to 2003 emerged as a momentous juncture in the relationship between the USA and the UN. Defying the UN and the norms of international law, the Bush administration initiated a preventive war against Iraq on March 19, 2003, which Bush dubbed a "preemptive strike". The Bush administration sought to justify its actions to fellow members of the UNSC by invoking the purported accumulation of weapons of mass destruction by Iraq, as well as its alleged support for terrorist networks, including al Qaeda and others, as the underlying rationales for its course of action. Failing to attain this objective, US officials asserted that due to Iraq's grave breaches of several prior Security Council resolutions, the USA and its "alliance of the willing" possessed the implied right to wage war. They even launched cruise missile attacks in an endeavor to eliminate the Iraqi head of state, notwithstanding the fact that this operation itself contravened international law. Although American officials were unable to present a valid and compelling case for invasion in the Security Council, they spent a significant portion of the year belittling France and other opponents of their “pre-emptive” war and lamenting the impotence of the UN.

The United Nations prohibits preemptive attacks by individual countries or groups of countries without authorization from the UNSC. The introduction to the United Nations Charter highlights the organization's formation with the intent of shielding future generations from the ravages of war. Article 2, specifically paragraphs 3 and 4, within the Charter, lays down its bedrock principles, compelling member states to address international conflicts by peaceful means and to refrain from utilizing or threatening force against the territorial integrity or political independence of any state, as well as abstaining from any actions that are contrary to the objectives of the United Nations [9].

Instead of upholding the traditional right of one nation to wield force against another, the Charter introduces a collective security system under Article 39, empowering the United Nations Security Council to assess the presence of any threat to peace, breach of peace, or aggression, and to decide upon the measures required to uphold international peace and security. Meanwhile, while the

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Charter aims to curtail the use of force among nations, it acknowledges the inherent right of self-defense for member states, as outlined in Article 51. Nonetheless, the right to self-defense is applicable solely in the event that an armed attack has already occurred and the UNSC has not acted to prevent it. Hence, Article 51 explicitly prohibits individual nations or coalitions from employing preemptive force, reserving the authority to use military action exclusively for the UNSC. In such a scenario, self-defense measures are deemed legitimate only following the occurrence of an armed attack.

5.2. Case 2

In the context of contemporary political violence, it is by no means always the case that either the attackers or the defenders are the state. A relevant example is the terrorist attacks that took place in New York and Washington, D.C., in 2001. Similarly, the “open brutality and indoctrination” carried out by the Islamic State in Syria and Iraq demonstrates the continued capacity of non-state actors to perpetrate intense violence. [10].

If defending itself against a military assault carried out by a non-state entity is considered legitimate, then the next question is: Who is the legitimate target of such a coercive response? In Afghanistan, the military operations of the so-called “coalition of the willing” were directed not only at al-Qaeda but also at the Taliban, the then (unrecognized) Afghan government, for providing a haven for terrorists. In international law, offering a safe haven for terrorist activities originating from its territory constitutes a direct internationally wrongful act attributable to that state. However, it is not certain that a country has the entitlement to defend itself just because it harbors terrorists. In the Nicaragua case, the ICJ demanded that a state must exercise “effective control” over a non-state group so as to be held accountable for its actions[3]. Syrian President Bashar al-Assad cannot be regarded as “harboring” the Islamic State, nor, of course, exercising “effective control” over territory occupied by ISIS forces. He has been involved in Syria's civil war since 2007. Nonetheless, as mentioned previously, the USA has asserted that its bombing of ISIS bases in Syria represents a matter of both individual and collective self-defense on the grounds that Syria is unable or unwilling to control ISIS[10]. It blurs the notions of domestic conflict, consent, individual and collective self-protection. Moreover, it transcends national borders to rationalize extensive military action in the war on terror [11].

5.3. Recommendation

5.3.1. Establish a standardized interpretation of the right to self-protection

Considering the over-broad provisions of Article 51 of the UN Charter, there is a lot of controversy over the implementation of the right to self-protection in academic circles and in practice. The significance lies in empowering both the UNSC and the ICJ to undertake the interpretation of pertinent issues, thereby facilitating the regulation of the exercise of the entitlement to protect itself in a manner that adheres to international law and norms[12].

The UNSC is primarily responsible for the maintenance of international peace and security and is the only body with the power to act. In the course of carrying out its duties, for example, when dealing with disputes concerning international peace and security that arise on a global scale, the Council has made specific interpretations of the provisions of the UN Charter relating to international security. Following the terrorist attacks on the United States on September 11, 2001, the UNSC adopted Resolutions 1368 and 1373 on September 14 and 28, respectively. Both

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resolutions recognized the 9/11 attacks as acts of terrorism. While Resolution 1368 reaffirms the inherent right of individual or collective self-defense, Resolution 1373 likewise reaffirms the need to use all means to combat acts of terrorism in accordance with the provisions of the Charter of the United Nations [13].

5.3.2. Set up a review mechanism for the right to self-defense by the UNSC

When it comes to the judgment and characterization of the entitlement to self-defense, the UNSC does not have a specialized body to exercise this right, and sometimes, it may be ignored or vaguely interpreted under the power of major powers. Therefore, this paper holds that the UNSC, based on its responsibilities, should set up a special committee to review the right to self-protection, which can elect representatives from non-belligerent countries to supervise and discuss the relevant situation of the right to self-protection, but should correspondingly cancel the voting rights of suspected violators. This would make it easier to judge the necessity and proportionality of self-defense and to make a fair and just decision. It would also further change the unsupervised privileged position of the great Powers [14].

5.3.3. Define the concept of preemptive self-defense

The UN and UNSC should clearly define the causes, timing, targets, subjects, and limits of advance defense, convene a vote by the General Assembly, and write the voting results into the Charter of the United Nations.

In case of difficult cases, representatives of the P5 of the UNSC should be organized to attend a meeting to discuss whether the advance defense can be taken and to make a judgment on the defense that has occurred [15].

6. Conclusion

World peace and development is the common goal pursued by the international community, but the two brutal world wars were caused by the conflict of interests between countries. To prevent such tragedies from happening again, the United Nations was established after World War II, and the concepts associated with war and the proscription against the use of force were incorporated into the UN Charter. However, the actual situation has not been as ideal as expected, and the war has not been effectively reduced, either for the security and interests of the affected countries or with a view to ensuring the peace of the whole international community [16].

In order to achieve peace and development, Article 51 of the Charter of the United Nations provides that all countries have the right to defense of themselves or collective defense for one's own group to protect their valid rights and interests. Of course, the provisions of Article 51 have a particular extent of arbitrariness and flexibility, which is inevitable in practice. The main reasons are: on the one hand, the substantive and procedural provisions of the Charter are not perfect. On the other hand, it is also related to the inadequacy of the collective security system and the decision-making machinery of the United Nations as a whole [17].

Since the beginning of the 21st century, the development of the right of self-defense has been faced with more and more problems, among which the most concerned issue in international law is preventive self-defense. Although preventive self-protection is not explicitly stipulated in the United Nations Charter, it is controversial among scholars from various countries. In addition, after the "9/11" incident, the United States first proposed the "preemptive" strategy, and many countries

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followed suit, which made the international situation more unstable. In particular, the exercise of the right of self-defense is also a new problem in the process of its development, so it is particularly important to regulate the new development and new problems of the right of self-defense. In the context of rampant terrorism, the continuous evolution of mass-destruction weapons, and the overall escalation of wars, although preventive self-defense is controversial and impractical in practice, under the current international law framework, preventive self-defense can prevent a country from being unable to exercise the entitlement to protect itself when it suffers a devastating blow, so it still has a certain legitimacy in practice [11].

In short, a country's right to self-defense safeguards national security and protects people's lives and property. To uphold international security and peace, all countries must strictly abide by the conditions for exercising the privilege of self-defense and must never use self-protection as an excuse to invade other countries and thus undermine the proper international order.

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