

Attributes of the Right of National Self-Defence in International Law

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I . Introduction

The right of national self-defence is the inherent right enjoyed by states in international law to unilaterally use force against foreign armed invasion or other illegal armed attacks, in order to safeguard their territorial integrity or political independence, or national security or essential interests. This right is especially important in the United Nations Charter-based international system in that it provides the sole exception for the legitimate use of force by individual states at their discretions, all other military conducts not authorized by the UN Security Council are rendered illegal by the Charter. Article 51 of the Charter explicitly reads that:

Nothing in the present Charter shall impair the inherent right of

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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.

However there remain a number of controversies surrounding exercising the right of self-defence by states. Whenever involving whether it is lawful to unilaterally use force against a traditional attack or in particular a non-traditional attack (e.g. computer network attack) or threat (e.g. proliferation of nuclear weapons) or not, states and commentators usually dispute whether the right of self-defence is the customary one or the Charter one, and whether the exercise of this right is free from external assessment or governed by law. The root of such controversies is that if the inherent right of self-defence is the customary one not regulated by law, a state shall be in a position to do so without the permission of the Security Council or international community when exercising this right. On the contrary, the Security Council or international community shall have more powers and responsibilities in supervising the exercise of this right if it is a right provided by the Charter. Some states and commentators, who resist the external assessment and allege to have right to use force against the non-traditional attacks or threats, emphasize the customary or non-normative nature of the right of self-defence, while others take Article 51 as a criterion to define this right. Besides, controversies also arise in such questions as whether the right of self-defence is enjoyed by UN members or by all states, whether it is a right or a duty, to use force, whether it is exercised only in time of peace, and whether Article 51 is necessary to be reformed so as to keep up with the changes of international security situation. Therefore, this article mainly consists of five parts to analyze those aspects of the attributes of the right of self-defence in order to promote the legalization of using force in self-defence.

II. Natural Right or Positive Right

The right of self-defence is the natural or inherent right of states. The idea of the inherent right is typically reflected in the statement made by former United States Secretary of State Kellogg during the period when he negotiated the 1928 Treaty Providing for the Renunciation of War as an Instrument of National Policy (well-known as Pact of Paris for the Renunciation of War). He said that “[T]here is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defence. That right is inherent in every sovereign state and is implicit in every treaty.”¹⁾ This view was agreed by Germany, Great Britain and Japan at that time. At the Nuremberg Trials, the defence counsel Jahrreiss stated that “war in self-defence is permitted as an inalienable right to all states; without that right, sovereignty does not exist.”²⁾ The British Prosecutor similarly pointed out that neither the Pact of Paris nor any other treaty was intended to, or could, take away the right of self-defence.³⁾ Article 51 of the Charter in both English version and Chinese version uses the terms “inherent right” and “自然权利”.

The concept of self-defence as an inherent right is rooted in two distinct schools of thought. One is traditional naturalist doctrine, the other is the doctrine of the subordination of law to power (or theory of power politics). In Grotius’s words for the former, “the right of self-defence ... has its origin

1) Note of June 23rd, 1928, quoted from D. W. Bowett, *Self-Defense in International Law* (Manchester University Press, 1958), p.133

2) *Trial of Major War Criminals Before The International Military Tribunal*, Vol. XVII(Nuremberg, Germany, 1948), p.469.

3) See Bowett, *supra* note 1, pp.140–1.

directly, and chiefly, in the fact that nature commits to each his own protection.”⁴⁾ Preservation of the self was regarded as a natural right of the state, as of individuals, that could not be abrogated or limited by positive law.⁵⁾ Jessup recognized that the U.S. position of acceptance of the Pact of Paris demonstrated that the right of self-defence is not governed by law in nature.⁶⁾ The theory of the subordination of law to power thinks that self-defence is the right inherent in sovereignty of states, the preservation of the state has precedence over positive law, and it must be left to each state to decide what is necessary for its own self-defense. This position is most appropriately expressed by the U.S. It declared that a state claiming self-defense “alone is competent to decide whether circumstances require recourse to war in self-defense”, when it acceded to the Pact of Paris.⁷⁾

During the debate of the legal propriety of the U.S. “quarantine” in the Cuban missile crisis of 1962, former Secretary of State Dean Acheson stated that the action taken by the U.S. was “essential to the continuation of its pre-eminent power.” Law “simply does not deal with such questions of ultimate power ... The survival of states is not a matter of law”⁸⁾ In other words, self-defense could not be governed by law when a state perceived a grave threat to its power.⁹⁾ Abram Chayes, then Legal Adviser to the State Department, addressed the same meaning in the following words:

4) H. Grotius, *De Jure Belli ac Pacis* Vol. II (Carnegie Endowment Trans., 1925), p.172.

5) See Oscar Schachter, “Self-Defense and the Rule of Law”, 83 *American Journal International Law* 259(1989).

6) See Philip Jessup, *A Modern Law of Nations* (Macmillan Co., 1948), p.163.

7) See Oscar Schachter, *supra* note 5, p.261.

8) Dean Acheson, Remarks, 57 *American Society of International Law Proceedings* 13, 14(1963).

9) See Oscar Schachter, *Supra* note 5, p.260.

Whenever a nation believed that interests, which in the heat and pressure of a crisis it is prepared to characterize as vital, were threatened, its use of force in response would become permissible ... In this sense, ... an Article 51 defence would have signalled that the United States did not take the legal issues involved very seriously, ... the situation was to be governed by national discretion, not international¹⁰⁾ law.

In the Case of Nicaragua suing U.S. for military and paramilitary activities in and against Nicaragua (hereafter the Nicaragua case), U.S. counsel had argued to the International Court of Justice (ICJ) in 1984 that the U.S. alone was in a position to determine the necessity of the “defense” measures it had taken against Nicaragua in the particular circumstances of that case, an argument approved by Judge Schwebel in his dissenting opinion to the 1986 ICJ Judgment in the Nicaragua case.¹¹⁾ After the ICJ ruled against the U.S. on the jurisdictional issues, the latter withdrew its acceptance of compulsory jurisdiction of the former. In explaining why the U.S. would not and should not submit to the ICJ’s jurisdiction in regard to its use of force in self-defense in congressional hearings, the Legal Adviser of the Department of State asserted that the exercise of self-defense could not be subject to the decision of the ICJ inasmuch as the national security of the U.S. was involved. “Such matters are the ultimate responsibility assigned by our Constitution to the President and the Congress.”¹²⁾

10) Abram Chayes, *The Cuban Missile Crisis: International crises and the role of law* (London: Oxford University Press, 1974), p.63.

11) See Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), I.C.J. Reports 1986, Dissenting Opinion of Judge Schwebel, paras. 69–76.

12) U.S. Decision to Withdraw from the International Court of Justice: Hearing Before the Sub commission on Human Rights and International Organization

The notion that self-defence is not regulated by law, is however objected by the doctrine of positive law, which is of opinion that the right of self-defence exists only if it is prescribed by the positive law and the legal systems.¹³⁾ Positivists are clearly conscious of the danger of according exclusive competence to the state claiming self-defense. Hersch Lauterpacht pointed out that, in his monograph published not long after the conclusion of the Pact of Paris, a claim that self-defence was not subject to objective evaluation could not be accepted in law. He wrote that “Such a claim is self-contradictory inasmuch as it purports to be based on legal right and at the same time, it dissociates itself from regulation and evaluation of the law.”¹⁴⁾ Comparing self-defense in international law to the corresponding right in municipal law, he further said, the right was “absolute” in the sense that no law could disregard it. But the right is “relative” inasmuch as it is presumably regulated by law.¹⁵⁾ Chinese scholars generally express the similar point of view, which maintains that the exercise of the right of self-defence by states must comply with the Charter’s provisions.¹⁶⁾

The Charter’s text in other language versions, equally authentic, in addition to the terms the natural right or inherent right used in the self-defence provision in both Chinese and English versions, adopts the same or similar expressions as well, such as *droit naturel* in French, *derecho*

of the House Commission on Foreign Affairs, 99th Congress, 1st Session 27-28(1985).

13) See Yoram Dinstein, *War, Aggression And Self-Defence* (Grotius Publications Limited, 1988), pp.170-71.

14) Hersch Lauterpacht, *The Function of Law in the International Community* (The Clarendon Press, 1933), pp.179-80.

15) Id., pp.180-81.

16) e.g. BAI Guimei, *International Law* 2nd ed.(Beijing: Peking University Press, 2010), pp.137-9.

inmanente in Spanish, and неотъемлемого права (indefeasible right) in Russian. These phrases all reflect the natural law source of the right of self-defence, in particular those in both Chinese and French versions. In the Caroline incident of 1837 shaping the customary right of self-defence, Lord Ashburton, special minister to the U.S., said that “[s]elf defence is the first law of our nature.”¹⁷⁾ The fact that Article 51 of the Charter adds words “[n]othing in the present Charter shall impair” before the term “inherent right”, illustrates that the right of self-defence is acknowledged by the Charter, rather than conferred. But it obviously goes to an extreme that the right of self-defence is accordingly thought as one not to be regulated by law, which is not different from anarchism or power politics. That the right of self-defence is one recognized rather than created by the Charter does not mean the Charter only maintains its primary form without any further limitations. The term “right” in the concept of the right of self-defence in the Charter itself implies compliance with law. In almost all European languages, for example, individual rights and law itself are expressed by the same one word. Le droit in French refers to both law in the rule of law and the right to do something. Such double meaning implies that a person acting in accordance with some right should comply with the order of law. The right of self-defence itself is one for a victim state to fight an aggressor and one expression of law that permits to resist foreign aggressions and restore its original appearance. In other word, if the legitimate autonomy of the defender has been damaged by an attack, the use of defensive force is a way to confirm its autonomy and restore the

17) Letter from Lord Ashburton to Mr. Webster, Washington 28 July 1842, available at http://avalon.law.yale.edu/19th_century/br-1842d.asp#ash1 (visited on 3 January 2013).

supremacy of law.¹⁸⁾

Actually, recognizing the inherent right of self-defence, Article 51 of the Charter provides the limitations on the exercise of this right by using such phrases as “armed attack”, “until the Security Council has taken measures necessary...” and “[M]easures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council”. In many international human rights instruments of a similar kind, the words “inherent”, “inalienable” and “born” are commonly used to qualify fundamental human rights. For instance, the Preambles of the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights all declare that everyone has “the inherent dignity ... and inalienable rights ...”. However, those words does not merely mean that the basic rights and freedoms of individuals are only acknowledged rather than conferred by international human rights instruments, because the instruments also provide that the exercise of individual rights and freedoms “shall be subject only to such limitations as are determined by law” as well as shall meet “the just requirements of morality, public order and the general welfare”.¹⁹⁾ Therefore the inherent human rights are human rights regulate by law. In the same vein, the inherent right of self-defence is also the right of self-defence governed by positive law.

While acknowledging that the concept of “inherent right” has natural law origin, many international legal scholars reject the idea that the right of self-defense exists independently of positive law and cannot be altered

18) See George P. Fletcher / Jens David Ohlin, *Defending Humanity: When Force is Justified and Why* (Oxford University Press, 2008), p.45.

19) The Universal Declaration of Human Rights, article 29, paragraph 2.

by it. They consider that the natural right of self-defence is not “autonomous”, rather than is limited by legal rules, and states themselves cannot unilaterally decide what is the necessity of self-defence when claiming self-defence.²⁰⁾ Some scholars even disapprove the idea that self-defence is a right emerging from natural law. For instance, Bowett held that natural law concepts can, by themselves, afford no satisfactory answer to the question of the basis and character of self-defence.²¹⁾ Dinstein argued that it is unreasonable to consider self-defence as a “natural right” or a right emanating from the “natural law”. Self-defence as an international legal right exists in positive international law. It can be said that the right of self-defence is inherent not in the natural law, but in the sovereignty of states. No states can be the final judge of its own acts, the legality of claims of self-defence must be examined by a competent international organ.²²⁾

Self-defence not regulated by law is an enemy to the rule of law. As a matter of fact, self-defence is rule-oriented. The international judicial practice fully shows that the exercise of the right of self-defence is regulated by law. The Judgment of the International Military Tribunal in Nuremberg in 1946 accepted Lauterpacht’s position to refuse the argument made by the German defendants that Germany had acted in self-defense and that every state must be the judge of whether in a given case it has the right of self-defense. The Tribunal observed that “whether action taken under the claim of self-defense was in fact aggressive or defensive must ultimately be subject to investigation or adjudication if international law is ever to

20) See Oscar Schachter, *Supra* note 5, pp.259–60.

21) See D. W. Bowett, *supra* note 1, p.8.

22) See Yoram Dinstein, *War, Aggression And Self-Defence* 3rd ed. (Cambridge University Press, 2001), p.163.

be enforced.”²³⁾ The ICJ noted, in its 1984 Judgment in the Nicaragua Case, that the fact that the inherent right of self-defence is referred to in the Charter as a “right” is indicative of a legal dimension, that the claims of self-defence is justiciable, and the questions of their legality are not merely within the functions of the Security Council.²⁴⁾ It reaffirmed in its 1986 Judgment in the Nicaragua Case that “[t]here can be no doubt that the issues of the use of force and collective self-defence raised in the present proceedings are issues which are regulated both by customary international law and by treaties, in particular the United Nations Charter.” “[T]he issues raised of collective self-defence are issues which it has competence, and is equipped, to determine.”²⁵⁾

Furthermore, the lawfulness of the use of force claimed in self-defence is usually subject to a variety of nonjudicial assessments, which could be made by the Security Council, by the UN General Assembly, or by governments of other states, as well as by international lawyers, by organs of opinion, by political parties or by nongovernmental organizations. Although they vary in their quality, their objectivity and their impact on the conduct of the state concerned, the processes and the results are also uneven, it is clear that no state can successfully escape from the judgments of the third-parties so as to become actually the sole judge of its claim of self-defence.²⁶⁾ Take the U.S. for example. It opposed the ICJ’s jurisdiction in the Nicaragua Case, but did not exclude other “external”

23) *Trial Of German Major War Criminals Before The International Military Tribunal*, Vol. I(Nuremberg, Germany, 1947), p.208.

24) See Case concerning Military and Paramilitary Activities in and against Nicaragua(Nicaraguav. United States of America), I.C.J.Reports 1984, para. 98.

25) Supra note 11, paras. 34, 35.

26) See Oscar Schachter, Supra note 5, p.264.

authority to evaluate the legitimacy of its alleged self-defence measures, because it recognized the competence of the Security Council to judge claims of self-defence.²⁷⁾ To say that claiming states of self-defence can exclusively determine the necessity and legitimacy of their self-defence actions is obviously detrimental to the Charter regime, inasmuch as states would not be responsible for its use of force, and the legal restraints on unilateral recourse to force would virtually disappear. This risk has been long predicted by the International Law Commission, who commented in its report to the General Assembly in 1980 that the selfish interpretation, given by a sovereign, of what are the defensive actions could undermine the entire framework aiming at regulating armed conflicts.²⁸⁾

III. Customary Right or Charter Right

Since the right of self-defence is a right in positive law, whether is it a customary right or Charter right? Or whether does there exist a right of self-defence different from that in Article 51 of the Charter?

Those who interpret Article 51 in a wide sense tend to consider the right of self-defence as a customary one, the Charter as just recognizing rather than restricting it. This view generally is aiming at treating the so-called anticipatory self-defence or preemptive self-defence as a right recognized under customary law. For instance, many scholars agree that the right of self-defence is the right based on customary international law,

27) See *supra* note 24, para.93.

28) See Report of the Commission to the General Assembly on the Work of its Thirty-Second Session, 1980, U.N. Doc. A/CN.4/SER.A/1980/Add. 1(Part 2).

existing independently of the Charter and not the subject of an express grant of authority.²⁹⁾ Other scholars argue that the right of self-defence is not only the customary right, but also the right regulated by the Charter. The majority of scholars advocate that there is no other inherent right apart from that stated by and developed under Article 51 of the Charter.³⁰⁾ However, Some scholars assert that the Nicaragua Case shows that there exists a parallel customary norm bound the litigants when the Charter could not be applied, which may open a door to developing principles opposing Charter norms and possibly outweighing Charter principles.³¹⁾

The right of self-defence is one in customary international law. The Caroline Formula established in the 19th century, namely a necessity of self-defence must be instant, overwhelming, leaving no choice of means, and no moment for deliberation, and the act justified by the necessity of self-defence must be limited to that necessity and kept clearly within it,³²⁾ has been cited as the classic expression of the right of self-defence.³³⁾ That the right of self-defence existed prior to the Charter is indisputable, and

29) See Ian Patrick Barry, "The Right of Visit, Search and Seizure of Foreign Flagged Vessels on the High Seas pursuant to Customary International Law: a Defense of the Proliferation Security Initiative", 33 *Hofstra Law Review* 319(2004).

30) See J.B. Brierly, *The Law of Nations*, Humphrey Waldock ed., 6th ed.(1963), p.417.

31) See George K. Walker, "Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said", 31 *Cornell International Law Journal* 352(1998).

32) Mr. Webster To Lord Ashburton, Department Of State, Washington, 27th July, 1842, (http://avalon.law.yale.edu/19th_century/br-1842d.asp#ash1) (visited on 3 January 2013).

33) R. Y. Jennings, "The Caroline and McLeod Cases", in 32 *American Journal International Law* 92(1938).

states at that time often regarded the provisions relating to restrict or prohibit war as implicitly containing the right for them to self defense. This idea continues in states' mind until such time that the preparation was made for the creation of the UN. During the Dumbarton Oaks Conference in 1944, participants agreed with the U.S. idea that the right of self-defence was implicitly contained in the clause of the principle of the non-use of force, so the final draft of the conference did not have a provision regarding self-defence. At the San Francisco Charter Conference, most states admitted that self-defence was the right of sovereign states, such consensus, which was rare to see at that time, did not bring about a serious discussion on whether it needed to separately draft a self-defence provision. Actually, those amendments that required to insert a self-defence clause either stressed that the right of self-defence could not be abolished by the Charter, or added certain conditions upon the exercise of the right of self-defence. These common views expressed by states demonstrate that they regarded self-defence as their fundamental right, hoping that the exercise of this right could be confirmed in the event of emergency or when the newly-emerging international organization was not be in a position to play an appropriate role in safeguarding their security.³⁴⁾ Therefore states still retain the customary law right enjoyed prior to the Charter, except insofar as they have specifically surrendered.

Moreover, the right of self-defence can not be interpreted only under Article 51 of the Charter. It obviously has preference to apply when clearly defining what the right of self-defence should be exercised, such as the precondition of an armed attack and the Security Council as the final judge

34) See Beomchul Shin, *International Law and the Use of Force: Shaping the UN's Regime and its Evolution* (Seoul: KIDAPress, 2008), pp.79–80.

of assessing the necessity of continuing to exercise self-defence. But as regards those aspects that Article 51 does not provide, such as what constitutes an armed attack, when an attack starts, the exercise of the right of self-defence should be interpreted under customary law. Here customary law refers to that both prior to and after the Charter, unless there exists the absolute evidence that such customary law has been abrogated or in conflict with the Charter. There is no clear evidence at present that the old customary rule has already been replaced by a new one, customary law regarding self-defence prior to the Charter is therefore still a legal tool to explain the Charter.³⁵⁾ Article 51 refers to “inherent right” or “natural right”, whatever this term defines, general agreement in theory and practice has been reached that self-defence is a pre-existing right of customary international law, and the Charter does not create but explicitly recognize this right states possess. At the Nuremberg trials, the Tribunal cited the Caroline Formula to reject defense claims that Germany had invaded Norway in self-defence.³⁶⁾ The ICJ in its 1986 Judgment in the Nicaragua Case, noting that Article 51 of the Charter referring to “inherent right” contains pre-existing customary international law, made clear that “[a]rticle 51 of the Charter is only meaningful on the basis that there is a ‘natural’ or ‘inherent’ right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter.”³⁷⁾ The Court further reasoned that the

35) See Terry D. Gill, *The Temporal Dimension of Self-Defense: Anticipation, Pre-emption, Prevention and Immediacy*, in *International Law and Armed Conflict: Exploring the Faultlines: Essays in Honour of Yoram Dinstein*, edited by Michael Schmitt and Jelena Pejic(Martinus Nijhoff Publishers, 2007), p.117.

36) See *supra* note 23, p.207.

Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. Therefore Article 51 is not a provision which “subsumes and supervenes” customary international law. Customary international law continues to exist along side treaty law. The areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content.³⁸⁾

However the Charter recognizing the validity of customary law of self-defence absolutely does not mean that a right of self-defence independently exists from or prevails over that provided by the Charter. The implications of the recognition by the Charter are two aspects: first is to illustrate that the right of self-defence does not stem from the Charter; second is to show that customary law plays a role in those aspects that Article 51 does not regulate, such as necessity or proportionality of self-defence. The ICJ said in the Nicaragua Case that the Charter “does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.”³⁹⁾ The Court reaffirmed in the Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons in 1996 that “the submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law.”⁴⁰⁾ This position is repeated in the Judgment of 2003 in the Case Concerning Oil Platforms.⁴¹⁾ The

37) *Supra* note 11, p.94, para. 176.

38) *Id.*

39) *Id.*

40) See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I. C. J. Reports(1996), p.23, para.41.

41) See *Case Concerning Oil Platforms*(Islamic Republic of Iran v. United States

expansionist view absolutizes the concept of the natural right so as to interrupt the organic unity between customary law of self-defence and treaty law of the Charter, and exaggerate the opposition between them. It is hard to imagine that there exists a customary right of self-defence different from or even excessive over the Charter right of self-defence in a Charter-based mansion of international law. The ICJ emphasized in its Judgment of 2005 in the Case concerning Armed Activities on the Territory of the Congo that “[a]rticle 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down.”⁴²⁾

In addition, the expansionist view departs from the UN collective security system. Pursuant to the layout of the framers of the Charter, the exercise of the right of self-defence does not drift outside the collective security system, but forms its part. First, Article 51 itself is one clause in Chapter VII of the Charter pertaining to the collective security. Next, actions taken in the exercise of the right of self-defence shall not in any way affect the authority and responsibility of the Security Council to take at any time such action as it deems necessary in order to maintain or restore international peace and security. If the Security Council does so, the defensive actions taken must be stopped. Finally, states shall immediately report the Security Council their measures taken in self-defence. Therefore Article 51 of the Charter not only recognizes the right of self-defence, but also regulates the exercise of it. Such normativity has further been proven by states usually invoking the relevant limited conditions in Article 51 when they judge claims

of America), Judgment of 6 November 2003, I. C. J. Reports 2003, p.198, para.76.

42) Case concerning Armed Activities on the Territory of the Congo(Democratic Republic of the Congo v. Uganda), 19 December 2005, I. C. J. Reports 2005, p.54, para.148.

by other states of the use of force in self-defence. In sum, to put it exactly, the right of self-defence is a right of international law both deriving from customary international law and expressly recognized and regulated by the Charter, and a right with the double base of custom and the Charter.

IV. Right, Duty or Fact

As the right of self-defence is a right based on custom and treaty, this right can not be treated differently among states whether they are UN member states or not. However two points of view express the contrary. According to one view, only UN member states enjoy the right of self-defence. In other words, non-member states do not have such right. Ghali once expressed this opinion. When arguing that the U.S. military intervention in Korean War in 1950 was not the exercise of the right of collective self-defence, he explained that South Korea was not beneficiary of collective self-defence because it was not a UN member state.⁴³⁾ The other view does not deny that non-memberstates enjoy the right of self-defence, but meanwhile holds that members and non-members have different scope in enjoying the right of self-defence. In this view, there is an apparent contradiction in Article 51: on the one hand, the article states, “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense,” while this “inherent right” is immediately qualified in the same sentence by the words, “if an armed attack occurs ...”. This may suggest that member states forfeited whatever inherent rights of self-defense

43) See B.Boutros-Ghali, *L'intervention Américaine en corée et le Droit des Nations-Unies*, pp.22-25, Caire, 1951.

that may exist under customary international law. But customary international law pertaining to the inherent right of self-defense contains no “armed attack” constraint. This inconsistency suggests that member states have less right to defend themselves than non-members do.⁴⁴⁾

The first point of view stated above is obviously inconsistent with the customary nature of the right of self-defence and the Charter principles. Article 51 refers to the UN member states in that they are also the subjects of the duty, set out in article 2(4) of the Charter, to refrain from the use of force. But this does not denote that the right of self-defence is the exclusive one of the member states. Because article 2(6) of the Charter requires non-member states comply with the principle of the prohibition of the use of force, this naturally demonstrates that they also enjoy the right of self-defence. Under customary international law, the right of self-defence is conferred on every state. Contemporary customary international law forbids all states (whether the member states or not) to use force in their relations,⁴⁵⁾ in the same vein, any state is entitled to the right of self-defence under existing customary international law. Both the general prohibition of the use of force and the exception to it a repart of customary international law, as well as law of the Charter.⁴⁶⁾ The ICJ demonstrated

44) See John Alan Cohan, “The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law”, 15 *Pace International Law Review* 315(2003).

45) Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly in 1974, has been regarded as evidence of customary international law. The obligatory subjects of the non-use of force principle laid down by it are “every State”, not “member states of the United Nations”.

46) See Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge

in the Nicaragua Case that the principle of the non-use of force and the right of self-defence as a whole exist in customary law and has been developed further by the Charter and treaty law.⁴⁷⁾ Sohn commented that “the basic rules of the Charter relating to individual and collective self-defence have been incorporated into the general corpus of international law and are binding not only on the States Members of the United Nations but also the few States which have not become members of that organization.”⁴⁸⁾

The mentioned above second thought severs links between Article 51 of the Charter and the customary right of self-defence, and denies the “constitutional” status of the Charter. States, whether members or not, are equal in enjoying the right of self-defence, and their exercise of this right are all constrained both by Article 51 and by customary law of self-defence. Most commentators agree that there is no other inherent right different from the right of self-defence enshrined in Article 51 and developed by it.⁴⁹⁾ Article 2(6) of the Charter explicitly provides that non-member states should comply with article 2(4) regarding the prohibition of the use of force, of which article 51 is integral part. Namely non-member states should also comply with Article 51 when exercising the right of self-defence.

Therefore the right of self-defence is a right for all states to equally possess, it is of course not a fact. However one point of view thinks that

University Press, 2005), pp.181–2.

47) See *supra* note 11, p.94, para. 176, and also see Separate Opinion of President Nagendra Singh, p.152, para.I(A); p.153, para. I(B).

48) Louis B. Sohn, “The International Court of Justice and the Scope of the Right of Self-Defense and the Duty of Non-Intervention”, in *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Yoram Dinstein, ed.(Nijhoff, 1989), p.871.

49) See *supra* note 30, p.417.

self-defence is not a real legal right in nature, but rather an established fact.⁵⁰⁾ Bowett once indicated that the judgment of what circumstances constitute an imminent attack is a factual question the state invoking the right of self-defence decides.⁵¹⁾ Gray also writes that the proportionate question of self-defence is a factual one, but not a legal one.⁵²⁾

To be sure, when judging whether the use of force by a state is the alleged self-defence, stakeholders concerned commonly turn to identify relevant facts. But this is to take self-defence as a right and a legal standard to measure relevant facts, rather than self-defence itself is a fact. Throughout the Caroline incident the U.S. and British did not have any disagreement as to the law involved, thus their main conflicting points turned essentially on the facts.⁵³⁾ It is self-defence being regarded as a legal right that the state exercising it is immune from the duty to refrain from the use of force against the aggressor, so that the debate regarding the legal or factual nature of self-defence is purely superfluous.⁵⁴⁾

The right of self-defence, as a legal right, naturally is not a duty. But from time to time self-defence is still treated as a duty. In the eyes of some early natural lawyers, the right of self-defence was not merely sanctioned but commanded, self-defence was a duty imposed upon the state by natural law and owned to the subjects of the state by virtue of the social contract.⁵⁵⁾

50) See R. Ago, "Addendum to Eighth Report on State Responsibility", II(1) *YearBook of International Law Commission* 53(1980).

51) See Bowett, *supra* note 1, p.193.

52) See Christine Gray, *International Law and the Use of Force* (Oxford University Press, 2000), pp.106, 107.

53) See R. Y. Jennings, *supra* note 33, p.92.

54) See Dr. Dimitrios Delibasis, *The Right to National Self-Defence in Information Warfare Operations* (Arena Books, 2007), p.122.

55) See Bowett, *supra* note 1, p.5.

For example Vattel said that “self-defence against unjust attack is not only a right which every nation has, but it is a duty, and one of its most sacred duties.”⁵⁶⁾ This idea is also reflected in modern times. For example, then President of the U.S. Reagan addressed in 1986, announcing to launch Operation Golden Valley against Libya owing to West Berlin nightclub bombing which killed two and injured dozens of American soldiers, that: “[s]elf-defense is not only our right, it is our duty. ... the mission undertaken tonight ... fully consistent with Article 51 of the U.N. Charter.”⁵⁷⁾

Although the obligatory idea of self-defence may reflect morality or theology, it does not comport with international law.⁵⁸⁾ Article 51 of the Charter only defines self-defence as a right, but does not prescribe the exercise of this right is a duty. The concept of self-defence as a duty means that states must use counterforce in all circumstances, which is conflict with the principle of peaceful settlement of international disputes and international realities. A prudent state may decline to exercise the right of self-defence on the ground that a political compromise is preferable to an armed clash. The strong military supremacy of the adversary may dissuade it from avoiding steps that would turn a theoretical right into a practical disaster. Such weight, made by states, of realities and the risk of defeat is not conformable to the idea that self-defence is driven by a “sacred” duty.⁵⁹⁾

56) Emerich de Vattel, *The Law of Nations or the Principles of Natural Law*, Book III, §III, p.35, quoted from Yoram Dinstein, *supra* note 46, p.178.

57) President Ronald Reagan, Address to the Nation, April 14, 1986, in Department of State Bulletin, June 1986, pp.1–2, quoted from Stuart G. Baker, Comparing the 1993 U.S. Airstrike on Iraq to the 1986 Bombing of Libya: the New Interpretation of Article 51, 24 *Georgia Journal of International and Comparative Law* (1994), note 66.

58) See Yoram Dinstein, *Supra* note 46, p.179.

59) *Id.*

Only the concept of a right can provide states entitling to exercise the self-defence for options not to do so. Moreover in the long run, the idea of a duty of self-defence does not help to maintain international peace and security in that such idea adopted in international law probably drives states to walk on an uncertain way of military confrontation, so as to prevent them from utilizing peaceful means to solve any differences that may arise between them.⁶⁰⁾

The status of self-defence as a right does not impede the assumption by a state of a special obligation to exercise self-defence, should an armed attack occur. This exists in bilateral or limited multilateral security defence treaties, and points at a state to provide military assistance rather than a state subjected to an armed attack.⁶¹⁾ For instance, article 3, paragraph 1 of Inter-American Treaty of Reciprocal Assistance in 1947 provides that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter. Similar provisions appear in article 5 of North Atlantic Treaty in 1949 and article 2 of Joint Defence and Economic Cooperation Treaty between the States of the Arab League in 1950.

60) See Dr. Dimitrios Delibasis, *supra* note 54, p.125.

61) Dinstein thinks that there is another case where the duty of individual self-defence exists, if a state bind itself in a permanent neutrality regime. See Yoram Dinstein, *Supra* note 46, p.179.

V. Right Exercised in Peacetime or Wartime

The right of self-defence is one for states to lawfully use force on the international level, which actually refers to a justification for the non-performance of certain obligations other than that under article 2(4) of the Charter, provided that such non-performance is related to the breach of that provision. As traditional international law rigorously distinguishes between the state of peace and the state of war, the right of self-defence is regarded as law providing a justification for the transition from peace to war, so that such non-performance is addressed by law of war opposed to law of peace. Law of war defines the scope of belligerent rights and suspends most treaties in force between the belligerents on the outbreak of war. But in the Charter era, declarations of war are exceptional and military actions proclaimed as self-defence by one or both parties occur between states formally at “peace” with each other. Even if in state practice abounding with the use of force in self-defence in the nineteenth century, the state against which the force was directed chose to regard actions in self-defence as “pacific” in character.⁶²⁾ The plea of self-defence is also relevant to the discussion of responsibilities for the forcible measures taken by states in peaceful time.⁶³⁾ Therefore the measures of self-defence are usually the military actions short of war.

The advantages that the defensive actions are regarded as peaceful nature are that the normal system of international relations is not ruptured by a condition of war *de jure*, and third states, to whom the status of neutrals

62) See D.W.Bowett, *supra* note 1, p.117.

63) See Yoram Dinstein, *War, Aggression and Self-Defence* Second edition (Cambridge University Press, 1994), p.176.

might prove inconvenient, can easily bring pressure upon the participants in the conflict so as to contain the expansion of the conflict and its escalation.⁶⁴⁾ For instance in the Nicaragua Case, the U.S., asserting to exercise the right of collective self-defence, had conducted a number of attacks in the Nicaragua territory during 1983-1984, but Treaty of Friendship, Commerce and Navigation between them in 1956 was still in force. Only on 1 May 1985 did the U.S. give written notice to the Government of Nicaragua to terminate the Treaty.⁶⁵⁾ Similarly, both the U.S. and Iran did not deny in Oil Platform Case that Treaty of Amity, Economic Relations and Consular Rights of 1955 between them was still in force, although the U.S. naval forces had carried out several military actions against Iran.⁶⁶⁾ Both Parties in this case agreed that to the extent that self-defence could justify any such action, these actions should be lawful.⁶⁷⁾ Furthermore, the U.S. had engaged in anti-terrorism war in self-defence in Afghanistan under the state of peace with the latter in 2001. Article 14 of Draft articles on the effects of armed conflicts on treaties, completed by the International Law Commission in 2011, recognizes the peaceful nature of self-defence actions. It provides that a state does not need to suspend in whole or in part the operation of a treaty to which it is a Party insofar as that operation is not incompatible with the exercise of the inherent right of self-defence by it.

However the right of self-defence may also be exercised in wartime. Examples are the actions of war operated by the anti-fascist Alliance of states during the Second World War and the concept of war in self-defence.

64) See D. W. Bowett, *supra* note 1, p.117.

65) See *Supra* note 11, p.28, para. 36.

66) See *Oil Platforms*(Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I. C. J. Reports 1996, p.809, para. 15.

67) See *supra* note 41, p.181, para. 38.

But the application of the right of self-defence to wartime is the exceptional circumstance. In the circumstance of war in self-defence, the factual situations which the exercise of the right of self-defence brought about might well be indistinguishable from those in which war *de jure* existed.

VI. Right Susceptible to Adapt or Reform

The right of self-defence is a right recognized and regulated by Article 51 of the Charter, then whether it is still applicable to the new security challenges that are increasingly serious since the start of the 21 century so that whether it is necessary to reform or reinterpret Article 51, is also a much more controversial issue. These challenges faced by states in the new security environment come from the new threats caused by such non-state actors as international terrorist organizations, the proliferation of weapons of mass destruction (i.e. nuclear, chemical and biological weapons) and the development of information technology as well as concerns for human security and environmental security. International terrorism and the proliferation of WMD and the combination of them have become serious threats to international peace and security.⁶⁸⁾ Just as illustrated by the most serious international terrorist attacks against the U.S. on 11 September 2001, states have to rethink for the first time such a long-lasting idea that whether only states have ability to launch an armed attack triggering the right of self-defence. Followings have been become new issues to which the Charter-based right of self-defence applies: whether attacks by international

68) See S/RES/1540(2004), 28 April 2004.

terrorist organizations constitute an armed attack in Article 51; whether the victim state can exercise the right of self-defence against a terrorist group or its supporting state or harboring state; if yes, what extent the supporting state or harboring state must be involved in attacks can make it become the target of the defensive actions; whether a state can legitimately invade another state on the ground of non-proliferation or preemptively bomb the nuclear facilities in another state just for the reason of being threatened, like the U.S. invasion of Iraq in 2003 as well as the U.S. and Israel asserting to take military means to stop the Iranian nuclear weapons program in the current Iran's nuclear crisis.

Similar issues arise as computer network attack newly emerges with company of the advance of computer and network technologies, because computer networks have already become a nation's infrastructure of critical infrastructure, and computer network attack is essentially different from a conventional attack in that such new form of attack does not need for military forces in the traditional sense to cross the international boarder, and the weapons used are not the conventional kinetic ones (i.e. bombers or bombs), but data information (i.e. computer viruses or logic bombs). One of examples named is that Estonia had to cut off links with international internet owing to its major networks being attacked in 2007. The same issues also derive from whether the military force could be used to protect nationals abroad when their lives have been seriously threatened or injured (i.e. 13 Chinese sailors were killed in Mekong River in Thailand in 2011), or to prevent environmental degradation.

Some states and scholars believe that the Charter right of self-defence has no longer made states to be able to respond to the new security threats, because Article 51 limits attackers or victims to states, and the term armed

attack refers to attack of the use of kinetic weapons or actual or imminent attack. They accordingly stress the “inherent” nature of the right of self-defence, taking the customary right of self-defence or necessity as a justification for the lawful use of force, and advocating to reform Article 51 of the Charter.⁶⁹⁾ Typical in this regard is the U.S. claiming preemptive self-defence or stressing the inherent right of self-defence. The U.S. National Security Strategy of 2002 did not refer to Article 51, on the contrary just to the customary right of self-defence. The Strategy declares that: “[F]or centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack.” “[W]e will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against” terrorists attempting to acquire or use the WMD and their state sponsors. “We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries.”⁷⁰⁾ The U.S. National Security Strategy of 2006 reiterates that “[i]f necessary, ... , under long- standing principles of self defense, we do not rule out the use of force before attacks occur, even if uncertainty remains as to the time and place of the enemy’s attack.”⁷¹⁾ The U.S. National Security Strategy of 2010 repeats that “[T]he United States must reserve the right to act unilaterally if necessary to defend our nation and our interests.” The International Strategy for Cyberspace of 2011 issued by the U.S.⁷²⁾ also declares that “[w]hen warranted, the

69) See YU Minyou / SUN Liwen, etc., “Legitimate issues on military fight against international terrorism”, 6 *Chinese Journal of Law* 140(2003).

70) The National Security Strategy of the United States of America, September 2002.

71) The White House, The National Security Strategy of the United States of America, March 2006.

United States will respond to hostile acts in cyberspace as we would to any other threat to our country. All states possess an inherent right to self-defense. ...We reserve the right to use all necessary means-diplomatic, informational, military, and economic-as appropriate and consistent with applicable international law, in order to defend our Nation, our allies, our partners, and our interests.”⁷³⁾ The Strategy for Operating in Cyberspace, issued by the U.S. Department of Defense in the same year, further lays out the strategic initiatives to strengthen collective self-defence in order to meet cyberspace attacks.⁷⁴⁾

However, the Charter right of self-defence does not lose its validity and normativity. Article 51 is a “living” provision that is able to adapt to the changed security situations and meet the requirements that states respond timely to the new threats, because the framers of the Charter did not constrain the status of attackers or type of attacking weapons. Since more than 60 years of the foundation of the UN, it is the facts rather than the legal rules that have changed.⁷⁵⁾ Article 51 is able to “be interpreted and applied in light of present day circumstances, like a constitution.”⁷⁶⁾ The Security

72) The White House, National Security Strategy of the United States of America, May 2010.

73) The White House, International Strategy For Cyberspace: Prosperity, Security, and Openness in a Networked World, May 2011.

74) See Department of Defense of United States of America, Strategy for Operating in Cyberspace, July 2011.

75) See Carsten Stahn, “International Law Under Fire: Terrorist Acts as “Armed Attack”: The Right to Self-Defense, Article 51 (1/2) of the UN Charter, and International Terrorism”, 27 *Fletcher Forum of World Affairs Journal* 36(2003).

76) Gregory M. Travalio, “Terrorism, International Law, and the Use of Military Force”, 18 *Wisconsin International Law Journal* 155(2000).

Council Resolutions 1368 and 1373, passed after the September 11 terrorist attacks, “recognizing the inherent right of individual or collective self-defence in accordance with the Charter”, and the universal support from international community for the U.S. war against terrorists in Afghanistan have shown that terrorists can launch armed attack and a government supporting or harboring them is a lawful target of self-defence actions in the extraordinary circumstances. The Judgment of the Case concerning United States Diplomatic and Consular Staff in Tehran in 1980 indicated that the detention of the U.S. Embassy or Consular staff as hostage by the Iranian militia constituted an armed attack in Article 51.⁷⁷⁾ According to the Advisory Opinion of the Legality of the Threat or Use of Nuclear Weapons, Article 51 does not refer to specific weapons. It applies to any armed attack, regardless of the weapons employed.⁷⁸⁾ The ICJ’s findings in these two cases show that the right of self-defence in the Charter applies to the forcible protection of nationals abroad and counterattack against computer network attack.

But the fact that international community universally condemned and opposed Israel’s bombing of the Iraqi nuclear reactor at Osiraq in 1981 or the U.S. invasion of Iraq, as well as is collectively committed to diplomatically solve the Iranian nuclear issue and global environmental protection, demonstrates that a state cannot proclaim to have the so-called customary right of self-defence or necessity of the use of force, so as to use force against another state or bomb its nuclear facilities just on the ground of being threatened by terrorism, the proliferation of nuclear weapons

77) See United States Diplomatic and Consular Staff in Tehran, Judgment, 1, C. J. Reports 1980, pp.10–11, para. 14; p.29, para. 57; p.31, para. 64.

78) See *supra* note 40, pp.244, 245, paras. 39, 41.

or environmental damage, and preemption or the use of necessary and proportional force is not self-defence recognized by international law. Because under the Charter, responses to the threats to peace and security fall within the Security Council's functions, and the precondition that states respond in self-defence is not a threat, but an armed attack. The necessity in customary law itself is not a prerequisite for the exercise of the right of self-defence, but only a restricted condition on the use of force in self-defence. Furthermore, the Security Council continues to actively fulfill its Charter responsibilities to meet the threats, such as the adoption of, under Chapter VII of the Charter, Resolution 687 dismantling Iraq's WMD program in 1991, Resolution 1540 imposing binding obligations of non-proliferation of WMD upon all states in 2004, and Resolution 1874 imposing sanctions upon North Korea owing to the nuclear test in 2009.

Therefore just as the High-level Panel on Threats, Challenges and Change said, "the Charter of the United Nations, properly understood and applied, is equal to the task: Article 51 needs neither extension nor restriction of its long-understood scope. We do not favour the rewriting or reinterpretation of Article 51."⁷⁹⁾ The 2005 World Summit Outcome not only does not mention the issue of reforming Article 51, but also reaffirms that "the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security."⁸⁰⁾

79) The High-level Panel on Threats, Challenges and Change: A more secure world: Our shared responsibility, A/59/565, Synopsis, p.3; para. 192; Annex I, p.106, para. 53.

80) 2005 World Summit Outcome, A/RES/60/1, para. 79.

VII. Conclusion

The national right of self-defence is the inherent or natural right recognized and regulated by the Charter with the double base of custom and the Charter. The significance of the natural right firstly is that the Security Council's central control over the use of force does not deprive states of their right of self-defence, hence states' exercise of this right does not need the Security Council's prior consent or authorization. The second is that customary law of self-defence plays a role in those aspects that Article 51 does not provide for the exercise of the right of self-defence. The implication of the Charter-based right is that states must comply with conditions prescribed by the Charter in those aspects that the Charter lays down for the exercise of the right of self-defence, and accept the control of the UN collective security system or other possible external judgment. There is no the customary right of self-defence existing independently of the Charter. Therefore states' use of force in self-defence must be response to a foreign armed attack, only threats themselves cannot justify to legally use force in the so-called customary right of self-defence. There exists no the right of self-defence not judged and controlled by the outside world.

The right of self-defence is a right of all states, among them there are no differences in the scope of the right regardless of UN member states or not. Generally speaking, the right of self-defence is a right, but not a duty, to use force, let alone facts. It usually applies in peacetime, and the exercise of it refers to the military actions taken by states in the state of peace. Article 51 is able to adapt to the new change in the security situation so that it does not need to be reformed or reinterpreted.

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[국문초록]

국제법상 국가 자위권의 속성

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국가 자위권은 관습법과 유엔헌장에 근거를 두고 있으며, 유엔헌장 제51조에 의해 승인되고 규율되는 고유한 권리이다. 이 권리는 모든 국가가 향유하는 것으로서, 유엔 회원국으로서의 가입여부에 따른 권리의 범위에 대한 차이가 없다. 일반적으로 말해서 국가 자위권이 의무가 아닌, 권리라는 점은 분명하다. 이 점은 평시에는 일반적으로 적용된다. 제51조는 국제테러와 대량살상무기의 확산, 컴퓨터 네트워크 공격에 기인하는 안보환경의 변화에 적용할 수 있다. 따라서 이를 개정하거나 재해석할 필요가 없는 것이다.

주제어 : 국가자위, 자위권, 헌장 제51조, 국제테러행위, 대량살상무기

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