Abstract

Within the flow of achieve peace in Korean Peninsula, considering current ceasefire system, it is important to know where the use of force is laid in the international law, as well as in Korean Constitutional Law. The interpretation within the Korean Constitutional Law is either to be standardized or to be accorded with. Therefore, when it comes to North Korea, it is wise for South Korea to provide for a rainy day in the point of contact between the International Law and the Korean Constitutional Law. If, the use of force is allowed according to the International law, for the purpose of conservation of Korean national land, and for the purpose of world peace and staying safe, supposing, “any member of the united nations which is not a member of the security council may participate, without vote, in the discussion of any question brought before the security council whenever the latter considers that the interests of that member are specially affected. “, under the UN Charter, article 31, “The secretary-general may bring to the attention of the security council any matter which in his opinion may threaten the maintenance of international peace and security.” to use of force within the international law, actively invoking the 99th article to our stance is required. And because the armed force is operated within the international law, it is important to interpret the Korean Constitutional Law systematically to avoid any conflicts and yet harmonious. Constitutional limitations are needed to verify the constitutionality of the national interests and the suffering of the people by comparing and punishing the national interests and the public interest through the exercise of the armed force.


1. Use of Force under International Law

Due to the Treaty regarding the renunciation of war, also called as Kellogg-Briand Treaty, and UN Charter, use of Force is generally prohibited. The right of self-defense would have been an unfamiliar concept back in the Imperialist Era where indiscriminate warfare was prevalent, and International Law failed to control the war. However, in these days where the use of force is generally prohibited under the constitutional military enforcement, self-defense rights are emerging as an important concept in International Law.

Article 2-4 of the UN Charter states that the threat of military force or the exercise of the military force is prohibited in any circumstance that is incompatible with the purposes of the United Nations. Exceptions on permitted force exercises are followed by Chapter 7 of the UN Security Council Charter which specifies the threats and destruction of peace and aggression; Article 51

Let’s look at Article 51 of UN Charter; first, self-defense right is only understood when an armed attack occurs to UN member country. This is considered as situational control. Attack of armed force must primarily be judged by each country. Even in times that the attack can be expected, in the literal description, each case cannot be met the requirements; in this case, recognizing the self-defense right is only preventive. Also, since UN Charter is recognized as International Law as well, it also applies to non-UN member countries. Since the UN delegation of a country generally reports the self-defense act in official documents, or very rarely in verbal, reporting in official document satisfies Article 51 in a consistency and transparency. Fourth, even though it is not literally noted, by saying "...only measures which are proportional to the armed attack and necessary to respond to it...", ICJ ruled that the exercise of self-defense should be the only way to proportionally take action against the attack. The key notion of self-defense in the International Law is necessity and proportionality.

On the other hand, according to the Chapter 7 of UN Charter, legitimate use of force in Korea War related to the UN troops stationed in South Korea today and it is the first collective security system of United Nation’s history. The 82nd of UN Security Council resolution on June 25, 1950, it criticized the North’s armed attack of South’s legitimate government and demanded the authorities of North Korea to immediately withdraw its troops from South. Also, on June 27th, 1950, the 83rd resolution, UN has asked all the member countries to support the South Korean government in every way to repulse invader and find peace in the Korean peninsula. On the 84th resolution on July 7th, 1950, it includes; member country have to send their troops to the integrated headquarters in the United States, the US will appoint the commander, the combatant nation can use their flag as well as UN’s, and the US will report the conduct of operations to UN Security Council. There are two different views towards above historical events; first is to consider as collective self-defense and second, as military enforcement. Because UN intervened throughout Korean War, it is reasonable to consider troops as the UN forces, to follow the resolution and Chapter 7, to exercise military force under the control of the US according to the 84th resolution.

The 82nd and 83rd resolution recognizing the North’s attack as peace breaker and asked member country to help and support conform to Article 39 and 40 of UN charter. The 84th resolution is to follow Article 7-2 and Article 29 of UN Charter that as a subsidiary organ, help to form an integrated headquarters managed by the US and battle as a deputy of UN. According to Article 2-6, the exercise of the armed force of UN can be applied even towards non-member countries and based on Article 39 and 40, it defines world peace and its threat, action to maintain peace. Also, Article 42 states enforcement measures toward maintaining or recovery of peace. Article 51 prescribes that the UN Security Council does not violate the right of collective self-defense until the Security Council takes the necessary measures to maintain international peace and security, and clearly distinguishes between the necessary measures and the right to collective self-defense. Back then, it was impossible to carry out the full military enforcement action under Article 42 that even though Chapter 7 was incomplete, it was fulfilled for the first time.

2. Issue of Marching North by the Right of Self-Defense

In Article 51, even though activating self-defense is allowed when the attack occurs, whether to fight back towards entire North Korea or not is stated in the resolution 387th on October 7th, 1950. In detail, the resolution states, The General Assembly, “Recommends that (a)All
appropriate steps be taken to ensure conditions of stability throughout Korea; (b) All constituent acts be taken, including the holding of elections, under the auspices of the United Nations, for the establishment of a unified, independent and democratic government in the sovereign State of Korea; (d) United Nations forces should not remain in any part of Korea otherwise than so far as necessary for achieving the objectives specified in sub-paragraphs (a) and (b) above... viii.

When UN Commission for the Unification and Rehabilitation of Korea broke in 1973, some have said the resolution lost its effect to back the evidence of UN troops intervention and yet, their goal to establish a united, independent and democratic government was not completed and is still continued today. Which means, it did not lose its effect and furthermore, it allows the use of armed force for self-defense. However, from the teleological point of view, it is possible to exercise self-defense towards entire North without the resolution of UN Security Council considering Korea’s division process, stationed UN troops, ceasefire distinctiveness, the relationship between two Koreas. Also, there is no action of null and void towards resolution 376(v) and there is no difference before and after of North and South Korea registering to UN.

Resolution 377th (Unity resolution for peace) on November 3rd, 1950 was to announce to member countries when UN Security Council fail to perform its mission, it does not mean maintaining peace is broken but to keep it regardlessvi. The UN Charter Article 10, 11, 12 explains the responsibility and jurisdiction of the UN General Assembly; when UN Security Council cannot complete its mission, General Assembly can advise maintaining the world peace and its security. When there is a crisis on the Korean peninsula where it needs help from UN Security Council, if China vetoes, it is impossible to act on military enforcement from Chapter 7. In this case, the United Nations can recommend Member States to enforce measures based on the UN Charter and the resolution to maintain international peace and security through the stability of the Korean peninsula. This is in response to the functional paralysis of the Security Council, which is primarily responsible for international peace and security, and for the purposes of the UN Charter.

Therefore, 1) because UN’s mission during the Korean War is still valid, resolution for reconfirming UN’s mission until security in Korea is assured is needed, 2) if resolution fails, reconfirming resolution 376 and 377 will get rid of controversy over the effectiveness and gain legality to evoke public opinion towards unification of Korean peninsula. Especially regarding #1, emphasize Article 31 (“Any member, other than the member of the Security Council, may participate without a vote in any discussion of any matter referred to the Security Council at any time, if the Security Council considers that it specifically affects its interests”), it is very necessary to make efforts to reflect our position as much as possible in consideration of the regulations.

In addition, in the case of marching North, intervention by the right of collective self-defense by China can be possible. North Korea and China have a military automatic intervention clause that provides military aid when one side is attacked through the Treaty of Friendship Cooperation and Mutual Assistance in 1961. The alliance between North Korea and China has weakened as a result of diplomatic relations between South Korea and China, and the interests that China has brought to North Korea due to North Korea’s nuclear issue have changed radically and strategically. Yet, such optimism can be misleading as long as the treaty is not amended or abolished by the North Korea accord and China has vital and significant interests in North Korea. If South Korea exercise self-defense toward North Korea, if South Korea alone or intervenes with the United States, it is likely that China will exercise the right to collective self-defense under the above treaty. The exercise of collective self-defense does not necessarily have to be concluded with an alliance treaty, but can also be done at the request of North Korea. The boundaries between the separation of intervention by the ex-
exercise of collective self-defense rights and the intervention by request are blurry, but the legality of intervention is easier if there is an alliance treaty. South Korea have to strongly suggest to abide by the Article 2-4, any use of armed force is prohibited unless it in accordance with Article 2-4 of UN Charter, non-intervention of domestic issue(Article 2-7) and resolution 2131[Declaration on the Prohibition of Interference on the Domestic Problems of the State and Protection of Independence and Sovereignty]\(^5\). Also, if South Korean intervention in the North Korean region is by UN resolution or by North Korea’s request, it would not be considered that the exercise of collective self-defense rights in China is sculptured by the UN Charter or self-consent.

3. Exercise of the Right of Self-Defense and Norm-Harmonious Interpretation of the Constitution

3.1. Article 3 of Constitution(Territory Clause)

The territorial clause "The territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands" shall be regarded as the nucleus of the Constitution that has existed since the Constitution. Although there are some opinions that the territorial clause should be revised in accordance with the reality of Article 4 of the peaceful unification clause and the constitutional reality, the territorial clause is intended to overcome the division not belonging to our doctors and to aim for unified Korea, It is the limit of the amendment of the Constitution because it is the constitutional spirit. It is the expression of the sovereignty of the Republic of Korea to the international community that the Constitution of the Supreme Corporate Law of the domestic law states that it cannot give up the territory of the North Korean region. The denial of the North Korean nationality based on the territorial clauses and accordingly the North Korean citizenship as the nationality of the Republic of Korea will assure the international legitimacy of the exercise of the right to self-defense and the clear role of the international community in the military intervention of the Security Council will be a very important factor that must be accepted. The territorial clause is the strongest and most rational basis against many of the arguments that could be challenged if the exercise of force on the Korean Peninsula is allowed, but the Articles 4 and 5(International Peace) of the Constitution to ensure the uniformity and normative power of the Constitution It is necessary to examine carefully the constitutional regulations that can be grounds for the application such as the attention.

3.2. Article 4 of constitution(peaceful unification clause) and article 5 of construction(denying aggressive war)

Since the use of force is prohibited under the International Law, unless the unification is followed by international law, forceful unification is not allowed. It means that self-defenses and intervention of UN Security Council is not an aggressive war and does not violate the world peace treaty but only to follow UN’s goal to maintain world peace. Article 4 of the Constitution says " The Republic of Korea shall seek unification and shall formulate and carry out a policy of peaceful unification based on the basic free and democratic order". It is necessary to examine whether the method of unification based on the free democratic basic order is the standard of peaceful unification. The fulfillment of the liberal democratic basic order is based on the principle of exclusion of all violence and arbitrary rule, self-rule of the people by the majority doctors, rule of law based on the principle of freedom and equality, respect for basic human rights, separation of powers, parliamentary system, economic order based on private property and market economy, and independence of jurisdiction\(^6\). "Whether or not the exercise of force in Korea is in conformity with the free democratic basic order is, among other things, the elimination of all violent and arbitrary rulings, Separation of powers will be particularly problematic. International law is not violent or arbitrary, and
there is a fear that the rule of law will be threatened due to the necessity of rapid crisis measures in the crisis situation on the Korean peninsula. Since the due date measures are premised on the principle of separation of powers, the constitutional control can be realized as it is in the exercise of force under international law.

In particular, it should be presumed that the case of North Korea being defended by the right to self-defense can be regarded as the scope of the exercise of the right to self-defense or as an aggression war prohibited in Article 5-1 of the Constitution. It is very difficult to find a description of this area in the discussions of constitutional scholars. It is the constitutional amendment that the North Korean aggression should be started first and the defense war to defend the existence of the Republic of Korea against it. It is an out-of-limit act allowed by the Constitution, and there is an opinion that it should be avoided, terminated and terminated in all possible ways at the stage of the war of war.

However, the peaceful unification clause is the practical constitutional one that seeks to discipline the exercise of specific legislative or public power within a reasonable range based on the interpretation of the purpose of the constitution and the constitutional system of the territorial clause and the purpose of the constitution. Constitutional Court once said, "It is the responsibility of the President and the National Assembly to decide whether the war in Iraq is an aggressive war against international norms or not. It would not be desirable for our Constitutional Court to judge". On the other hand, resolution 3314 on December 14, 1974 regarding definition of aggression, "invasion by one state of another, such as occurred when Iraq invaded Kuwait in August 1990" or "use of a state's military forces, who are deployed in a host state with its consent, in a manner that contravenes such consent" does not mean it fits the resolution. The necessity and proportionality required for the exercise of self-defense power cannot only repel the first armed attack, but also eliminate the future security threats, taking into account the purpose and characteristics pursued by the self-governing powers, the duration and scope of the exercise of self-defense rights can be determined in consideration of the situation necessary for ensuring safety against armed attacks and threats. Also, article 61 of ceasefire agreement states "Each provision of the Armistice Agreement shall remain in force until such time as either party is expressly superseded by the provisions of the appropriate agreement for amendment and supplementation or peaceful settlement at the political level of both parties.", in the case of the armed attack against North Korea's armistice agreement, abrogating the armistice agreement (the idea of North Korea based on the ceasefire is meaningless) and exercising its right to self-defense is not a violation of the armistice agreement but exercises the rights of the Second Hague Convention.

In conclusion, North Korea by its right to self-defense is not a war of aggression, which declares the territory of the Republic of Korea as a Korean peninsula, the strict and consistent domestic measures such as laws and unification provisions, and the international peacekeeping clause, The UN forces established by UN Security Council Resolution 84, and UN General Assembly resolution 376, that the UN forces could be stationed throughout the Korean Peninsula to achieve their mission, and that the UN Charter, Article 2, Or political independence "of the Constitution, it will not be a matter of either the Constitution or the international law, considering the fact that the Constitution is compatible with the Constitution.
4. Analysis of Standardized Interpretation of the Constitution and Use of Force upon International Law

Unbelievable scenes from the Inter-Korea Summit talks on April 27th seems like deadly war between the two Korea belongs to a different age. On top of that, the first meeting on June 12th between the president of world’s most powerful country – the United States and the poorest nation’s North Korean summit shows that North Korea wants to become an ordinary country in the international community. Within the flow of achieve peace in Korean Peninsula, considering current ceasefire system, it is important to know where the use of force is laid in international law, as well as in Korean Constitutional Law. The interpretation within the Korean Constitutional Law is either to be standardized or to be accorded with. Therefore, when it comes to North Korea, it is wise for South Korea to provide for a rainy day in the point of contact between the International Law and the Korean Constitutional Law. If, the use of force is allowed according to the International law, for the purpose of conservation of Korean national land, and for the purpose of world peace and staying safe, supposing, “any member of the united nations which is not a member of the security council may participate, without vote, in the discussion of any question brought before the security council whenever the latter considers that the interests of that member are specially affected.”, under the UN Charter, article 31, “The secretary-general may bring to the attention of the security council any matter which in his opinion may threaten the maintenance of international peace and security.” to use the armed force within international law, actively invoking the 99th clause to our stance is required. And because the armed force is operated within international law, it is important to interpret the Korean Constitutional Law systematically to avoid any conflicts and yet harmonious. Constitutional limitations are needed to verify the constitutionality of the national interests and the suffering of the people by comparing and punishing the national interests and the public interest through the exercise of the armed force.

5. References

5.1. Journal articles


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5.3. Additional references


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