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A Study on Application of SELF-DEFENSE in Outer Space

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Abstract

In the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies(OST) Article 4 states that the moon and other bodies should be used solely for peaceful purposes. Since there is no definition of peaceful purposes in this treaty, opinions are opposed in the interpretation of Article 4.

Apart from the conflicting views on these interpretations, countries have been using the outer space for military and security purposes, and no country strongly opposes the practices of these countries.

In particular, the Draft International Code of Conduct for Outer Space(ICOC) prepared by the EU has made explicit reference to the military use of outer space, and has also referred to the right to self-defense. Although the draft was not even addressed by the conflicting opinions of the different countries, it would have been an international document formulating the military and self-defense use of outer space if adopted.

Based on this situation, this paper will focus on the international legal basis for the applicability of the right to self-defense in outer space.

[Keywords] *Military, Self-Defense in Outer Space, Space Security, Draft International Code of Conduct for Outer Space Activities, International Law of Outer Space*

1. Introduction

Currently, the space activities of individual countries are rapidly increasing.

In the Cold War era, the United States and the Soviet Union have been developing space as a part of the arms race. Today, many nations, including China, European countries, Japan and India launch satellites for commercial and scientific purposes and the activities of those countries are increasing more than ever. In other words, space development is moving away from a US-Soviet centric focus and is spreading to various countries that can access direct and indirect space technology.

Article 4 of the OST, which governs the activities of nations, states that outer space should be used solely for peaceful purposes. There are conflicting opinions about whether

it means a complete prohibition of military use of space or non-invasive(non-aggressive) military activities are possible. Regardless of the conflicting interpretations of this provision, countries are increasingly using space for their own security, space developing countries are using to conduct surveillance and reconnaissance satellites and the degree of dependence and utilization of space assets is increasing[1]. On the other hand, In December 2006, the UN adopted a resolution requesting member states to implement on transparency and confidence building measures as a means of preventing arms competition and international cooperation in space(UN GA Resolution 61/75). In order to implement this resolution the EU has been actively engaged in the drafting of the ICOC since 2008. Particularly, in July 2015, 109 nations attended the UN headquarters in New

York to promote international cooperation on space security[2].

The conference procedural legitimacy and transparency of the contents, were controversial as well as the fact that it included content to acknowledge military activities in space and exercise of self-defense right. The discussion on adopting the draft was not able to start because of the controversy and it was not possible to discuss the draft in earnest, but it was necessary to study the application of self-defense in outer space, which was the center of the controversy in the international cooperation process.

The purpose of this study is to examine whether the military use of space is permitted under international law and whether self-defense is applicable in outer space.

2. The Right to Self-Defense

2.1. Definition of self-defense and its requirements

The right to self-defense is the right of the state to resort to certain power in order to rule out imminent and present harm[3]. According to this definition, the right to self-defense implies a right to actively take measures in order to escape from a situation that is an imminent and present harm.

The origins of the right to self-defense can be found in the theory of 'just war' (*bellum justum*) in ancient and medieval times[4]. In the international community before World War I, there was no need to claim self-defense, as various acts of armed force, especially war, were generally recognized as a means of realizing the policies of nations. At that time, the right to self-defense was not a legal concept but a political excuse[5].

After World War I, the League of Nations was established and in 1928 the Kellogg-Briand Pact was concluded, which led to the declaration of the war as a national policy instrument as illegal. The right of self-defense was recognized as a legal matter from then on.

In addition, since World War II, the United

Nations was established and the threat and use of force were prohibited by the Charter. Only the exercise of self-defense or the use of force was permitted under the collective provisions of Chapter VII. Therefore, it is only after the enactment of the UN charter that the right to self-defense is accepted as a fundamental right of the state in positive law.

On the other hand, the requirements for the exercise of self-defense were materialized in the Caroline case. In 1837, the Britain attacked the US cargo ship Caroline, causing Americans to be missed. The Britain claimed that their attack was necessary for self-defense. US Secretary of Defense, Webster stated that the use of force that can claim to be self-defense is only "instant, overwhelming, leaving no choice of means, and no moment for deliberation" through an official letter.

After this event, the necessity and proportionality became valid as an inherent requirement in the exercise of the right to self-defense under the Charter of the United Nations and these interpretation criteria were subsequently recognized by various countries' claims, international court decisions or international law scholars[6].

The right to self-defense has been formulated in the UN Charter Article 51 and many International Court of Justice judgments, but it has not been formulated in international instruments such as UN resolutions or the International Law Commission.

2.2. Self-defense right under UN charter article 51

Article 51 of the UN Charter states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under

the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

In Article 2(3) of the UN Charter, “Peaceful settlement of international disputes” and Article 2(4), “The principle of prohibition on threat or use of armed forces” were introduced. In particular, Chapter 7 defines political, economic, and military actions to regulate aggression. However, Articles 51 and 53 stipulate that States are allowed to exercise individual and collective self-defense and that regional agreements or bodies allow compulsory action by the Security Council.

The provisions of self-defense in the UN Charter mean that the exercise of the right of self-defense is embraced as an inherent right of an individual country as an exception to the use of force. In other words, it is the only lawful force exercise permitted under the Charter of the UN[7].

3. International Space Law and Military Use of Outer Space

3.1. International space law

In 1957, when the Soviet Union initiated their space activities, two customary laws were formed. The first is that the territorial sovereignty of a state does not extend beyond the outer space and the second is that every nation has the right to explore and use the outer space. The reason for accepting these two propositions without any specific objection in the space activities at the time was that individual countries recognized space as a region where all countries could freely access and enjoy the benefits(*res communis omnium*). The United Nations General Assembly adopted “The Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space” in 1963. Based on the contents of these principles, the UN General Assembly adopted “The Treaty on Principles Governing the Activities of States in the exploration and Use of Outer

Space, including the Moon and Other Celestial Bodies” in 1967.

Multilateral Treaties for the Detailed Implementation of the OST, ‘Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space’, ‘Agreement Governing the Activities of the Moon and Other Celestial Bodies’, ‘Convention on Registration of Objects Launched into Outer Space Convention’, ‘Convention on International Liability for Damage Caused by Space Objects’, also form the basis of the International Space Law.

3.2. Military use of outer space

Article 4 of the OST provides: “State Parties to the Treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.

The Moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on celestial bodies shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the Moon and other celestial bodies shall also not be prohibited.”

Article 4 of the OST is interpreted as a provision on the peaceful use of outer space, as well as a restriction on military use in space[8].

There are three primary views that interpret the peaceful use of the universe in relation to the military use of space. The first is that the meaning of ‘peaceful’ should be understood as complete non-militarization.

Second, according to Article 51 of the UN Charter, the military use of the right to self-

defense is permitted but the invasive use is prohibited.

Third, 'peaceful' means only non-weaponization, and it is understood that military use of space should be compatible with maintaining or promoting peace[9].

The military use of outer space can be largely classified into the militarization and the weaponization of space. The militarization of space means strengthening the efficiency and effectiveness of conventional weapons, or using space - based assets for military purposes.

In the 1992 Gulf War, the 1999 Kosovo War, and the 2001 Afghan War, the United States used GPS to perform military activities such as troop movement and missile flight tracking and these are main examples of the militarization of outer space.

On the other hand, the term "weaponization of the space" refers to such thing as the introduction of a weapon system into space, disturbing the operation of the infrastructure of another country by jamming the GPS signal, or directly attacking satellites of other countries.

In short, the literal interpretation of Article 4 of the 1967 OST does make it clear that the peaceful use of outer space does not imply a complete ban on the military use of space.

In addition, Article 3 of the OST requires Parties to the Treaty to comply with international law, including the Charter of the United Nation. Thus, the military use of outer space is normatively recognized under international law as well as the OST, and the conclusion that the right of self-defense under the Charter of the UN can also be applied in outer space.

4. Application of Self-Defense in Outer Space

The problem of applying the right of self -

defense in space needs to be objectively recognized in consideration that the use of space-based technology is inseparable in the field of today's security environment. In order to apply the right of self-defense in space, it is related to the view differences in the interpretation of Article 4 of the OST in Chapter 3 above.

The first view argues that there cannot be applicable self-defense in outer space because it violates the principle of peaceful purposes on OST. Therefore, the peaceful purposes of Article 4 of the OST does not include the military use of space, so it is a logical conclusion that the right of self-defense based on military use cannot be applied.

The second view is that by Article 3 of the OST and Article 51 of the UN Charter, States have the inherent right to self-defense to protect their satellites in response to potential attacks, and thus applying the right of self-defense is possible. However, when applying the right of self-defense, the necessity and proportionality in *Jus ad bellum* and the general principles of *Jus in bello* should be followed[10].

The third point is that the state has the right to self-defense, so it is possible to apply the right to self-defense in space, but emphasizes the uncertainty of the scope and limitations of self-defense. This position focuses on the problem that it is difficult to specify the subject of the armed attack, whether a certain armed attack can trigger the right attack to exercise the self-defense right, and whether it is possible to apply the self-defense power to a threat that did not reach the level of an armed attack. In short, the application of the right to self-defense in outer space is considered to be valid under international law, but the requirements for exercising self-defense in space and the responsibility for actions such as armed aggression needs to be considered by the international community.

5. Conclusion

Nations are silent about the practices of their countries which are using outer space for security purposes. In addition, if we look at the normative discussion process of the military use of outer space at the UN General Assembly resolution and at the international conference, it can be seen that nations and scholars are already in a position not to deny the military use of outer space as a part of space security.

It acknowledges the inevitability of the military use of space for rapid and effective response for national security purposes. However, apart from the issue of application of self-defense in space, there is no international normative reference on matters related to the exercise of self-defense, so it is necessary to draw up the consensus of the state to set up guidelines and a legal-binding treaty governing national activities in space and confidence building measures for space security in outer space.

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