

**INHERENT RIGHT OF SELF-DEFENSE
THROUGH THE LENS OF THE 2010 CHEONAN ATTACK**

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I. Introduction

A Republic of Korea (ROK) Navy ship (*Cheonan*), with 104 crew members on board, sank near the western maritime border with North Korea after a mysterious explosion on March 26, 2010.¹ Forty-six Korean Navy sailors were killed in this unprecedented tragedy, the cause of which could not be immediately identified. After a long and thorough investigation on the cause of the explosion, a ROK-led multinational investigation team—composed of international experts from ROK, United States, United Kingdom, Canada, Australia, and Sweden—concluded that the warship had been sunk by a North Korean torpedo fired by a submarine.² Immediately after the investigation report was completed, the President of the ROK vowed to exercise the right of self-defense if North Korea attempted military provocation again.³

Academic controversy exists over whether the ROK had a right of self-defense once it determined that North Korea had perpetrated the attack. Understandably, due to the gravity and seriousness of the

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¹ MINISTRY OF NAT'L DEF., REPUBLIC OF KOREA, JOINT INVESTIGATION REPORT ON THE ATTACK AGAINST ROK SHIP CHEONAN (2010).

² On May 20, 2010, the team presented a summary of their investigation. On September 13, 2010, the ROK government released the final report, reaffirming that it was a North Korean attack. *See id.*

³ So-hyun Kim, *Lee Says South Will Invoke Right of Self-Defense*, KOREA HERALD, May 24, 2010, <http://www.koreaherald.com/national/Detail.jsp?newsMLId=20100524000740>.

incident, the ROK government wanted to conduct a thorough and objective investigation before assigning a cause. This took considerable time (fifty-five days), thereby raising the issue of whether immediacy is a requirement in exercising the right of self-defense.⁴ In other words, if immediacy of a military response is required, the right of self-defense would be difficult to exercise where the aggressor in an attack is not identified until after a significant period of time has elapsed.

Traditionally, necessity and proportionality are considered to be the most important criteria comprising the right of self-defense under international law.⁵ In addition to these two criteria, some commentators have argued that immediacy is a separate requirement when exercising the right of self-defense.⁶ According to this argument, a response may not be undertaken in self-defense after a period of time has elapsed since the armed attack.⁷ Rather than emphasizing immediacy as a separate requirement to the exercise of the right of self-defense, timeliness of a response should only be one of many factors when considering the necessity of exercising the right of self-defense.

This article explores how the concept of the right of self-defense has evolved in the field of international law, and also provides the legal analysis of the criteria of the right of self-defense, traditionally referred to as necessity and proportionality in Part II. Part III examines the role of time in the exercise of the right of self-defense. This section focuses on when the right of self-defense is justified after an armed attack by analyzing the immediacy issue, concluding that immediacy is not a separate requirement, but merely one factor in interpreting the necessity criterion. Part IV then applies that conclusion to the *Cheonan* incident, ultimately concluding that the ROK government had the right of self-defense once it identified the cause of the incident and the aggressor. In

⁴ In fact, an academic seminar took place in Seoul on 31 May, addressing the legal issues regarding the *Cheonan* incident. At this event, Sukhyoen Kim, an international law professor at Dankook University, argued that it was impossible to exercise the right of self-defense when considerable time had passed after the armed attack occurred. As part of his reasoning, he mentions the immediacy principle, arguing that the use of military force as an exercise of the right of self-defense should occur immediately after the armed attack. Hongsuk Ahn, *It Is Necessary to Fulfill Immediacy and Necessity Criteria to Exercise the Right of Self-Defense*, YONHAPNEWS, May 31, 2010, at A1.

⁵ YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 208 (4th ed. 2005).

⁶ *See id.* at 242.

⁷ Even though Professor Yoram Dinstein mentions immediacy as one of the requirements in the exercise of the right of self-defense, he acknowledges two exceptions in the immediacy principle. *See infra* note 79.

order to reach this conclusion, the article applies the concept of “a justifiable delay” to the *Cheonan* incident in dealing with the lapse of time occurring as a result of the investigation into the cause.⁸ Finally, Part V summarizes the arguments, finding that the ROK government had the right of self-defense in the *Cheonan* attack after it identified the perpetrator.

II. The Right of Self-Defense in International Law

A. History of the Right of Self-Defense

The right of self-defense developed as international law advanced towards the prohibition of war and, eventually, of the use of force.⁹ Until the beginning of the twentieth century, the right of self-defense had little meaning. International law permitted states to wage war freely, so that no justification for doing so was required. However, at the beginning of the twentieth century, when the freedom to wage war became more restricted, the right of self-defense gained more significance as an exception to the use of force. Now, the right of self-defense is cited with regard to almost every use of military force.¹⁰

Today, the law governing a State’s use of force is incorporated in the United Nations (UN) Charter.¹¹ Article 2(3) of the UN Charter mandates that “[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered;”¹² Article 2(4) requires that “[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”¹³ This ban on aggression is considered to be the core of the

⁸ See *infra* note 82.

⁹ THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 789 (Bruno Simma ed., Oxford Univ. Press 2d ed., 2002) [hereinafter COMMENTARY].

¹⁰ See *id.*

¹¹ INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, LAW OF ARMED CONFLICT DESKBOOK 29 (Jan. 2013) [hereinafter LOAC DESKBOOK] (“The UN Charter provides two bases for a State’s choice to resort to the use of force: Chapter VII enforcement actions under the auspices of the UN Security Council, and self-defense pursuant to Article 51 . . .”).

¹² U.N. Charter art. 2, para. 3.

¹³ *Id.* para. 4.

UN Charter and the fundamental rule of contemporary international law.¹⁴

However, there are two exceptions that justify a State's recourse to the use of force: (1) actions authorized by the UN Security Council under Chapter VII of the UN Charter, and (2) actions that constitute a legitimate act of individual or collective self-defense pursuant to Article 51 of the UN Charter.¹⁵ Specifically, Article 51 of the UN Charter codifies the right of self-defense, stipulating that "[n]othing in the present Chapter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the UN until the Security Council has taken measures necessary to maintain international peace and security"¹⁶ The right of self-defense contemplated in Article 51 of the UN Charter has become the pivotal point upon which disputes concerning the lawfulness of the use of force in inter-state relations usually concentrate.¹⁷

Even though Article 51 of the UN Charter stipulates the right of self-defense, the right of all nations to defend themselves has frequently been exercised in customary international law before the adoption of the UN Charter.¹⁸ In other words, the right of self-defense is not a concept created by the UN Charter, but is a time-honored custom inherent to a State's sovereignty. This inherent right of self-defense is even clear in the language of Article 51 of the UN Charter. It stipulates that self-defense of a State is *inherent*, and that nothing in that Chapter will impair the right of self-defense.¹⁹

The customary right of self-defense is well expressed in the 1837 *Caroline* case,²⁰ which is generally regarded as the reference point for any discussion of anticipatory self-defense, as well as for the criteria

¹⁴ LOAC DESKBOOK, *supra* note 11, at 30.

¹⁵ COMMENTARY, *supra* note 9, at 789.

¹⁶ U.N. Charter art. 51.

¹⁷ COMMENTARY, *supra* note 9, at 790.

¹⁸ LOAC DESKBOOK, *supra* note 11, at 34 ("The right of all nations to defend themselves was well-established in [customary international law] prior to adoption of the UN Charter.").

¹⁹ U.N. Charter art. 51.

²⁰ LOAC DESKBOOK, *supra* note 11, at 37 (noting that anticipatory self-defense dates back to 1837, beginning with the *Caroline* case).

governing the use of force in self-defense.²¹ In this incident, the British and U.S. governments both accepted the principle that self-defense in anticipation of a threatened armed attack must be “instant, overwhelming, leaving no choice of means and no moment for deliberation.”²² This is one example of many specific incidents incorporating the customary right of self-defense.

Here arises the fundamental question regarding the relationship between customary international law and Article 51 of the UN Charter pertaining to the interpretations of the right of self-defense. Some in the international community advocate a restrictive approach based on a purely textual analysis of Article 51.²³ Others argue that Article 51 of the UN Charter does not extinguish the customary right of self-defense.²⁴ The restrictive approach is intended to encourage a peaceful resolution of disputes and to achieve protection of international order. However, the right of self-defense has been firmly established in customary international law before the inception of the UN Charter; customary international law should be considered as an indispensable method to defend a State’s sovereignty. Moreover, the restrictive approach does not fully reflect the reality of the change of paradigm in warfare due to the advent of weapons of mass destruction (WMD), which could result in the total destruction of a State with just one attack.²⁵ Therefore, rather than using the UN Charter to artificially limit a State’s right of self-defense, it is better to conform to historically accepted criteria for the lawful use of force.²⁶

B. Armed Attack as a Prerequisite

Article 51 of the UN Charter requires *an armed attack* when exercising the right of self-defense.²⁷ The notion of an armed attack

²¹ Terry D. Gill, *The Temporal Dimension of Self-Defense: Anticipation, Pre-emption, Prevention and Immediacy*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 113, 125 (Michael Schmitt & Jelena Pejic eds., 2007).

²² *Id.*

²³ COMMENTARY, *supra* note 9, at 803.

²⁴ See Gill, *supra* note 21, at 117.

²⁵ MINISTRY OF NAT’L DEF., REPUBLIC OF KOREA, LAW OF ARMED CONFLICT 82 (2007).

²⁶ LOAC DESKBOOK, *supra* note 11, at 34 (juxtaposing the restrictive approach with the expansive interpretation of the UN Charter).

²⁷ Article 51 of the UN Charter clearly mentions that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense *if an armed attack occurs . . .*” U.N. Charter art. 51.

matters because it is closely related to the justifiable scope of the exercise of self-defense. However, there is no specific definition of an armed attack in the UN Charter. The international community has made considerable efforts to reach a consensus on the concept of an armed attack, but a generally recognized definition of armed attack has yet to be determined.²⁸

The UN has been striving to find a consensus on the definition of an armed attack, even arriving at a *Definition of Aggression* in the General Assembly Resolution 3314 (XXIX) on December 14, 1974.²⁹ Although the notions of *armed attack* and *act of aggression* do not exactly coincide,³⁰ the *Definition of Aggression* could be a worthwhile reference for the understanding of the scope of armed attack. According to the Resolution, acts of aggression include:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

²⁸ COMMENTARY, *supra* note 9, at 796.

²⁹ Definition of Aggression, G.A. Res. 3314 (XXIX) (Dec. 14, 1974) [hereinafter Definition of Aggression].

³⁰ COMMENTARY, *supra* note 9, at 795.

- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.³¹

In addition, there is a noteworthy judgment by the International Court of Justice (ICJ) on the scope of an armed attack, which could give rise to the self-defense issue. In the *Oil Platforms Case* in 2003,³² the ICJ discussed armed attack, ultimately deciding that “[t]he Court does not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the inherent right of self-defense.”³³ In other words, the court confirmed that just a single mine attack to a military vessel of another State constituted an armed attack which could trigger the exercise of the right of self-defense under the Article 51 of the UN Charter.

The ICJ formulated another meaningful principle in the same case. The ICJ decided that the burden of proof was on the State justifying its own use of force as self-defense to show the existence of an armed attack.³⁴ This means that if a State wants to exercise the right of self-defense, the State must prove that an armed attack has occurred against its sovereignty. This principle leaves open the possibility that it may take some time for a State to prove the occurrence of an armed attack by another State, thus justifying a delay of military response within a reasonable time, which then raises the question of what a responsible amount of time is.

C. Necessity and Proportionality

The ICJ confirmed in its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*,³⁵ that “[t]he submission of the

³¹ Definition of Aggression, *supra* note 29. These seven paragraphs do not purport to encompass the entire spectrum of aggression, and the Security Council may determine what other acts are tantamount to aggression. See DINSTEIN, *supra* note 5, at 129.

³² *Oil Platforms (Iran v. U.S.)*, Judgment (Nov. 6, 2003), available at <http://www.icj-cij.org/docket/files/90/9715.pdf>.

³³ *Id.*

³⁴ *Id.*

³⁵ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (July 8, 1996), available at <http://www.icj-cij.org/docket/files/95/7495.pdf>.

exercise of the right of self-defense to the conditions of necessity and proportionality is a rule of customary international law.”³⁶ Indeed, the two requirements of necessity and proportionality have been considered as traditional criteria of the right of self-defense.

In terms of the necessity requirement, force should not be considered necessary until peaceful measures have been found inadequate or clearly futile.³⁷ If efforts to resolve the problem amicably are made, they should be carried out in good faith.³⁸ In short, force should be viewed as a “last resort” to meet the necessity requirement.³⁹

The necessity requirement usually does not become an issue when the right of self-defense is triggered by an all-out invasion. However, necessity becomes an issue when conflict continues following an isolated armed attack. In such a case, the State seeking to exercise the right of self-defense has an obligation to verify that peaceful settlement of the conflict is not available before full-scale exercise of the right of self-defense.⁴⁰

Proportionality, as a criterion of self-defense, means that the scale and effects of force and counter-force must be similar.⁴¹ In order to comply with the proportionality criterion, States must limit the magnitude, scope, and duration of any use of force to that level of force which is reasonably necessary to counter a threat or attack.⁴² This condition of proportionality is frequently considered to be the essence of self-defense.⁴³

Proportional response within the context of self-defense is different from proportionality in the targeting analysis.⁴⁴ The former requires a proportional relationship between an armed attack and the subsequent military response in the *jus ad bellum* aspect, whereas the latter requires

³⁶ *Id.*

³⁷ DINSTEIN, *supra* note 5, at 210 (discussing when force is appropriate in light of necessity).

³⁸ *Id.*

³⁹ LOAC DESKBOOK, *supra* note 11, at 35, 36.

⁴⁰ DINSTEIN, *supra* note 5, at 237.

⁴¹ *Id.* at 221.

⁴² LOAC DESKBOOK, *supra* note 11, at 35.

⁴³ DINSTEIN, *supra* note 5, at 210.

⁴⁴ See LOAC DESKBOOK, *supra* note 11, at 35 (“To comply with the proportionality criterion, States must limit the magnitude, scope, and duration of any use of force to that level of force which is reasonably necessary to counter a threat or attack.”).

balance between the civilian sufferings and the military advantage in the *jus in bello* aspect.⁴⁵ For this reason, the principle of proportionality in the targeting analysis is only applicable when an armed attack has the possibility of affecting civilians.⁴⁶

III. Imminence versus Immediacy

The UN Charter stipulates that the inherent right of self-defense can be exercised “if an armed attack occurs against a Member of the United Nations”⁴⁷ In light of this clear language, it is apparent that a State can exercise the right of self-defense after an armed attack happens. However, it is not clear in the UN Charter if a State may exercise the right of self-defense even before an armed attack occurs; thus, controversy exists on this point.

A. Before an Armed Attack: Imminence Issue

The controversy comes down to the issue of whether the anticipatory right of self-defense is acceptable under the UN Charter. Some argue that the right of self-defense under Article 51 of the UN Charter cannot be exercised before an armed attack occurs. They interpret Article 51 narrowly, concluding that an anticipatory right of self-defense would be contrary to the wording of Article 51 “if an armed attack occurs.”⁴⁸

However, advances in warfare technology, such as the advent of weapons of mass destruction (WMD), have resulted in the possibility that just one attack with WMD can cause the total destruction of a State, leaving no means and methods of self-defense. Moreover, the right of

⁴⁵ Proportionality in the targeting analysis is one of the four key principles of the law of war, which include: military necessity, distinction, proportionality, and avoidance of unnecessary suffering. *See id.* at 131.

⁴⁶ The principle of proportionality requires balance between civilian sufferings and the military advantage to be gained. Thus, if civilian casualties or damages are excessive in relation to the concrete and direct military advantage, such an attack violates the principle of proportionality. Therefore, proportionality requires the commander to weigh the expected death, injury, and destruction against the anticipated military advantage. However, the point is whether such death, injury, and destruction are excessive in relation to the military advantage; not whether any death, injury, or destruction will occur. *See id.* at 142.

⁴⁷ U.N. Charter art. 51.

⁴⁸ COMMENTARY, *supra* note 9, at 803.

self-defense is inherent in a State's sovereignty, and Article 51 of the UN Charter merely confirms the pre-existing customary right of self-defense. The UN Charter also reaffirms the inherency of the right, stipulating that "[n]othing in the present Charter shall impair the *inherent* right of individual or collective self-defense"⁴⁹ Therefore, anticipatory self-defense can be justified under the customary international law.⁵⁰

The core criterion of anticipatory self-defense is imminence. As to when an armed attack is imminent, Professor Michael Schmitt argued in 2003 that States may legally employ force in advance of an attack, at the point when (1) evidence shows that an aggressor has committed itself to an armed attack, and (2) delaying a response would hinder the defender's ability to mount a meaningful defense.⁵¹

B. After an Armed Attack: Immediacy Issue

When is the appropriate time to exercise the right of self-defense after an armed attack? It is clear that self-defense is justified shortly after an armed attack. Also, it is clear that a military response is prohibited long after an isolated armed attack.⁵² However, between these two extremes, it is not clear when the right of self-defense expires. For example, in the *Cheonan* incident, fifty-five days passed before the ROK government determined who was behind the attack. In this case, could the ROK government exercise the right of self-defense even though fifty-five days elapsed since the armed attack? This issue is closely related to whether immediacy—specifically, no undue time-lag between the armed attack and the exercise of self-defense—is a requirement to the exercise of the right of self-defense.⁵³

Some international law scholars argue that the ROK government could not exercise the right of self-defense at the time the cause of the incident was identified, because of the time that had passed in conducting

⁴⁹ U.N. Charter art. 51.

⁵⁰ Anticipatory self-defense was discussed in the 1837 *Caroline* case and subsequent correspondence between then-U.S. Secretary of State Daniel Webster and his British Foreign Office counterpart, Lord Ashburton. See LOAC DESKBOOK, *supra* note 11, at 37.

⁵¹ Michael Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT'L L. 513, 534 (2003).

⁵² A significantly delayed military response can be considered as an armed reprisal, not an exercise of the right of self-defense. See Gill, *supra* note 21, at 151.

⁵³ DINSTEIN, *supra* note 5, at 210.

the investigation.⁵⁴ According to this argument, immediacy is required to exercise the right of self-defense, and the *Cheonan* incident could not satisfy the immediacy requirement because such a long time (fifty-five days) had passed after the armed attack.

Professor Yoram Dinstein is a notable international law scholar who places immediacy on the same level as necessity and proportionality. While he acknowledges that the two conditions of necessity and proportionality have long been recognized as customary international law, he further argues that “[t]he two conditions of necessity and proportionality are accompanied by a third condition of immediacy,” and that “these three conditions are distilled from yardsticks set out by the American Secretary of State, D. Webster, more than 160 years ago.”⁵⁵ He also argues that “[w]ar may not be undertaken in self-defense long after an isolated armed attack.”⁵⁶ According to this argument, it might be inferred that the ROK government had missed the opportunity to exercise the right of self-defense.

The original source of the idea regarding immediacy as an independent criterion for the exercise of the right of self-defense is not clear. However, Professor T.D. Gill explains the background of this thought, stating that

the contention that self-defense is subject to a requirement of immediate exercise can be traced to two sources. The first is a common association of the international law of self-defense with the concept of personal self-defense against illegal assault under domestic criminal law. The second is the understandable desire to distinguish between the right of self-defense under the Charter and customary international law from the concept of armed reprisal, which has no legal basis under contemporary international law.⁵⁷

⁵⁴ One of the scholars of this opinion is Professor Sukhyoen Kim, international law professor at Dankook University, ROK. Professor Kim attended an international law seminar as a panel member on May 31, 2010, arguing the issue of immediacy in the *Cheonan* incident. *See supra* note 4.

⁵⁵ DINSTEIN, *supra* note 5, at 209.

⁵⁶ *Id.* at 242.

⁵⁷ Gill, *supra* note 21, at 151. However, this idea can be criticized with two reasons. First, the right of states to exercise self-defense under international law is totally different from

On the contrary, other scholars argue that the timeliness of the response should only be one of many factors when considering the necessity criterion in the exercise of the right of self-defense.⁵⁸ The idea that views “timeliness of a State’s response as a factor in determining whether that response is truly necessary” is in line with this opinion.⁵⁹ According to these arguments, it is not necessary to use the concept of immediacy as a separate factor when determining whether the delayed military response might be regarded as the exercise of the right of self-defense. In this way, the legitimacy of an isolated military response is determined through the necessity perspective.

There is little difference between the two opposite positions regarding the immediacy issue in that a significantly delayed military response should not be justified as self-defense. Such action constitutes a mere armed reprisal, which is considered illegal under contemporary international law.⁶⁰ The only difference is how to explain the logical process of the consequence. The former position concludes that an isolated military response long after an armed attack is illegal because it lacks immediacy as an exercise of self-defense, whereas the latter position may conclude that military response is not justified because it may not be considered to be necessary.⁶¹ Professor Terry D. Gill also admits that there is no significant difference between the two positions.

Whether one sees immediacy used in this sense as an independent criterion alongside necessity and proportionality, or as forming part of the criterion of necessity is immaterial; the point is that a State exercising self-defense should do so within a reasonable period, on the basis of persuasive evidence and with a

the domestic rights of individuals. Second, illegal armed reprisal can be suppressed effectively through the lens of necessity criterion. Moreover, the language of immediacy might lead to the misconception that the right of self-defense should be exercised immediately after an armed attack. This idea does not reflect the nature of military response.

⁵⁸ Chankyu Kim, *Legal Analysis on Cheonan Incident*, 308 KOREAN B. ASS’N NEWS (Seoul), June 14, 2010, at 6.

⁵⁹ LOAC DESKBOOK, *supra* note 11, at 35, n.60.

⁶⁰ Gill, *supra* note 21, at 151.

⁶¹ Additionally, the possibility of not allowing a significantly delayed military response is much higher in the former perspective than the latter perspective. That is because the former regards the immediacy requirement as a separate criterion, whereas the latter considers the timeliness as just one of many factors in analyzing the necessity requirement.

view towards thwarting or, where necessity, overcoming the attack and removing the threat of future attack.⁶²

In spite of the minor difference between the two opposite positions, it would seem more appropriate to consider the timeliness of a State's response as a factor in deciding whether that response is really necessary.⁶³ In other words, rather than emphasizing the importance of immediate military response by considering immediacy as a separate requirement, it is enough to simply consider the timeliness of military response in analyzing the necessity requirement. Three main reasons exist why this position makes more sense. First, customary international law supports this view. Second, the UN Charter has no requirement for immediacy. Third, the decision-making process that States go through in order to take military action is lengthy in nature and further delays response to an armed attack.

1. *The Customary International Law Perspective*

Unlike imminence, no requirement for immediacy exists in customary international law when exercising the right of self-defense. Under the conditions set up by Webster in the *Caroline* case in 1837, the right of self-defense is justifiable if the circumstances leading to the use of force are "instantaneous, overwhelming and leaving no choice of means and no moment for deliberation."⁶⁴ In the customary international law area, the *Caroline* case is often referred to as a prototype describing the conditions under which a military response can be justified as the exercise of the right of self-defense.⁶⁵ However, there is no comment about immediacy as a requirement to the exercise of the right of self-defense in the *Caroline* case.⁶⁶ Apparently, this case deals with the *imminent* circumstances, introducing the concept of the right of anticipatory self-defense.⁶⁷

⁶² Gill, *supra* note 21, at 154.

⁶³ LOAC DESKBOOK, *supra* note 11, at 35.

⁶⁴ *Id.* at 33.

⁶⁵ See Gill, *supra* note 21, at 125.

⁶⁶ The *Caroline* case deals with the concept of the imminent threat in support of the anticipatory right of self-defense. *Id.*

⁶⁷ Secretary Webster assessed that a State need not suffer an actual armed attack before taking defensive action, but may engage in anticipatory self-defense if circumstances leading to the use of force are "instantaneous, overwhelming, and leaving no choice of means and no moment for deliberation." Notably, these circumstances describe the imminent threat, not the condition of immediacy.

Furthermore, it is clear that *imminence* is totally different from *immediacy*. Imminent, by definition, describes the state or condition likely to occur at any moment, whereas immediate means the condition occurring or accomplished without delay.⁶⁸ The former is related to the “before an armed attack phase,” whereas the latter is discussed in the “after an armed attack phase.” It is necessary to distinguish these two concepts.⁶⁹

2. *The UN Charter Perspective*

Today the theory of the right of self-defense is incorporated within the UN Charter. Article 51 of the UN Charter discusses the right of self-defense, stipulating that “[n]othing 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”⁷⁰ However, there is no clear language indicating an immediacy requirement in the exercise of the right of self-defense in Article 51 or any other Articles of the UN Charter. The only condition regarding the right of self-defense expressed in Article 51 is “the occurrence of an armed attack.”

Because the right of self-defense has evolved in customary international law, it is almost impossible to understand the concept of the right only within the language of Article 51 of the UN Charter. Nevertheless, Article 51 provides the basic framework for the exercise of the right of self-defense. For example, it gives fundamental guidelines pertaining to the right of self-defense: inherency of the right, when to exercise the right, the time limit of the right, and the reporting process.

⁶⁸ RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY 956–57 (Stuart Berg Flexner et al. eds., 2d ed. 1998). It can be inferred from these definitions that imminence implies the possibility that something is highly likely to happen, whereas immediacy just describes the very short time frame. In other words, immediacy does not imply a sense of likelihood or possibility, which is different from imminence.

⁶⁹ Nevertheless, as described above, Professor Dinstein argues that “the condition of immediacy is also distilled from the yardsticks set out by Webster as well as necessity and proportionality.” See DINSTEIN, *supra* note 5, at 209. Also, Professor Terry D. Gill argues that “[i]mmediacy in the context of the *Caroline* criteria for anticipatory self-defense is synonymous with the existence of an imminent or immediate threat of an armed attack.” Gill, *supra* note 21, at 151. Professor Gill’s argument implies that he regards immediacy as synonymous with imminence.

⁷⁰ U.N. Charter art. 51.

However, it does not mention immediacy,⁷¹ an issue about which silence speaks loudly in this area of the law.

3. Timeliness of the Decision-Making Process Regarding Military Action

A military response as an exercise of the right of self-defense in Article 51 of the UN Charter is different from the on-the-spot reaction between soldiers on the frontline firing at each other.⁷² A military response in Article 51 should be, by nature, an action taken by a State. For a variety of reasons, a State needs time to properly respond to an armed attack. For example, it needs time to communicate through the military chain of command. If the right of self-defense is not allowed in these cases due to lack of immediacy, the scope of the right would be extremely narrowed, possibly resulting in the infringement of the sovereignty of the victim State because the State could not exercise the right of self-defense once time elapses after an armed attack.

Even though Professor Dinstein introduces the condition of immediacy, he acknowledges that “moving forward to a war of self-defense is a time-consuming process, especially in a democracy where the wheels of government grind slowly.”⁷³ He vividly describes the decision-making process.

A State under attack cannot be expected to shift gear from peace to war instantaneously. A description of a human being under attack as having ‘no moment for deliberation’ would be accurate. But when such an expression is applied to a State confronted with an armed attack, it is a hyperbolic statement. Frontline officers in the victim country must report to, and receive instructions from, headquarters. The high command is not inclined to embark upon full-scale hostilities, in response to an isolated armed attack, without some deliberation. When there is no military junta in power,

⁷¹ Also, it does not mention necessity and proportionality. But, as previously discussed, these two criteria of the right of self-defense have been well established as customary international law prior to the inception of the UN Charter. *See supra* note 36.

⁷² *See Kim, supra* note 58, at 6.

⁷³ DINSTEIN, *supra* note 5, at 243.

the civil government will have to give a green light to the armed forces.⁷⁴

Professor Dinstein also admits that the condition of immediacy ought not be construed too strictly. He mentions that the “[l]apse of time is almost unavoidable when a tedious process of information gathering or diplomatic negotiations evolves.”⁷⁵

In short, a military response as an exercise of self-defense under Article 51 is different from an on-the-spot reaction of ground troops; specifically, the State needs time to assess the situation and move through the decision-making process. Requiring immediacy in the exercise of self-defense by a State could result in the State feeling pressure to act quickly, but without the necessary information.

There is no need to add another requirement—namely immediacy—to the exercise of the right of self-defense to suppress the use of force in the international community. Surely, there is no doubt that the use of force as an exercise of the right of self-defense should be the last resort, and the principle of the ban on aggression reflected in Article 2(4) of the UN Charter should be fully respected. However, suppression of the use of force can be achieved through the lens of the necessity criterion with this question: “is the military response really necessary?” Additionally, the term of immediacy could lead to the misconception that the right of self-defense must be exercised immediately after the armed attack, which is unrealistic considering the decision-making process of a State.

IV. The Right of Self-Defense in the Cheonan Incident

Based on the previous discussion, this part reviews the possibility of exercising the right of self-defense in the *Cheonan* incident. As mentioned above, the legitimate exercise of the right of self-defense requires an armed attack, necessity, and proportionality. Additionally, as this article argues, immediacy should be a factor in assessing the necessity criterion.

⁷⁴ *Id.*

⁷⁵ *Id.* at 210.

A. Armed Attack

Even though there is no specific definition of an armed attack in the UN Charter, it is clear that an attack on a State's warship constitutes an armed attack under Article 51 of the UN Charter, particularly in light of the ICJ judgment in the *Oil Platforms Case* in 2003.⁷⁶ Also, according to the *Definition of Aggression* in General Assembly Resolution 3314 (XXIX), "[a]n attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State" is an act of aggression.⁷⁷ Therefore, in the case of the *Cheonan* incident, North Korea's torpedo attack on the *Cheonan* warship clearly constituted an armed attack as a prerequisite for the exercise of the right of self-defense. Additionally, the ICJ pronounced that the State justifying a military response as an exercise of self-defense should bear the burden of proof of the armed attack.⁷⁸ In light of this principle, the ROK government proved the existence of an armed attack from North Korea after fifty-five days of thorough investigation. In short, North Korea engaged in an armed attack, and the ROK government proved it.

B. Immediacy

As previously discussed, immediacy is not a separate requirement to the exercise of the right of self-defense. Yet, even in the case that when immediacy might be recognized as another requirement, there must be some exceptions. Professor Dinstein, who is in support of the immediacy requirement, acknowledges two exceptions to the immediacy requirement.⁷⁹ Notably, he introduces the concept of "a justifiable delay." He argues that "even when the interval between an armed attack and a recourse to war of self-defense is longer than usual, the war may

⁷⁶ In the *Oil Platform Case* in 2003, ICJ also declared that "the mining of a single military vessel might be sufficient to bring into play the inherent right of self-defense." *Oil Platforms (Iran v. U.S.)*, Judgment (Nov. 6, 2003), available at <http://www.icj-cij.org/docket/files/90/9715.pdf>.

⁷⁷ *Definition of Aggression*, *supra* note 29.

⁷⁸ See *supra* *Oil Platforms (Iran v. U.S.)*, Judgment 8, available at <http://www.icj-cij.org/docket/files/90/9715.pdf>.

⁷⁹ First, he acknowledges that a State under attack needs some time to communicate and decide whether to exercise the right of self-defense. Second, he also agrees that a delayed military response can be justified and legitimate if the delay is warranted by circumstances, further introducing the concept of a justifiable delay. See DINSTEIN, *supra* note 5, at 242-43.

still be legitimate if the delay is warranted by circumstances.”⁸⁰ In the case of the *Cheonan* incident, the burden of proof rests with the ROK government.⁸¹ Therefore, fifty-five days of investigation into the cause of the incident might be a good example of “a justifiable delay.”⁸²

C. Necessity

In order to comply with the necessity criterion, states must consider the exhaustion or ineffectiveness of peaceful means of resolution, the nature of coercion applied by the aggressor State, the objectives of each party, and the likelihood of effective community intervention.⁸³ In other words, the State is obligated to verify that a reasonable resolution of the conflict in a peaceful manner is not available.⁸⁴

Generally, it is true that after an armed attack the necessity of a military response gradually reduces as time goes by. For example, a diplomatic approach or an economic sanction might be available rather than a military response long after an armed attack. For this reason, it is understandable, in light of the necessity requirement, that a victim State loses its right of self-defense when it does not exercise the right after a considerable amount of time—even if an armed attack really occurred and the aggressor could clearly be identified.

However, in the case of the *Cheonan* incident, the aggressor could not clearly be identified at the time of the attack. Moreover, the ROK government had the burden of proof.⁸⁵ For these reasons, the ROK Government launched a thorough investigation, trying to find out and prove the cause of the incident as well as the aggressor. The investigation took the ROK government fifty-five days. Here, it is reasonable to conclude that fifty-five days can be considered to be “a justifiable delay” in proving the cause of the incident.⁸⁶ During the investigation period, the ROK government could not exercise the right of self-defense, because there were still collecting information about the

⁸⁰ *Id.* at 243.

⁸¹ *See supra* note 34.

⁸² *See Kim, supra* note 58, at 6.

⁸³ LOAC DESKBOOK, *supra* note 11, at 35.

⁸⁴ DINSTEIN, *supra* note 5, at 237.

⁸⁵ *See supra* note 34.

⁸⁶ *See Kim, supra* note 58, at 6.

incident.⁸⁷ Therefore, it is appropriate to allow the ROK government the right of self-defense at the time when it finally identified both the cause of incident and the aggressor.

D. Proportionality

Proportionality requires a State to limit the magnitude, scope, and duration of any use of force to that level of force which is reasonably necessary to counter a threat or attack.⁸⁸ This rule is used when determining the legitimacy of exercising the right of self-defense. In the *Cheonan* incident, this rule does not matter because the ROK government resorted to a peaceful settlement instead of a military response by referring the incident to the UN Security Council.⁸⁹

To summarize the *Cheonan* incident, the ROK government had the right of self-defense once it identified the cause of the incident and the aggressor. Clearly, there was an armed attack, and the necessity requirement was met. But, the ROK government did not exercise the right of self-defense after considering the various aspects of the geopolitical situations in the Korean Peninsula. However, there is a clear difference between the inability to exercise the right, due to the lack of the right, and abstention from military response in support of the nonviolent solution. The ROK response to the *Cheonan* incident is the latter case.

V. Conclusion

To address the question of whether immediacy is a separate requirement in the exercise of self-defense, one must examine both the background of the right of self-defense in international law and the analysis of the arguments on immediacy as a requirement of the right. Three sub-parts in the law surrounding self-defense play pivotal roles: the history of the right of self-defense, armed attack as a prerequisite, and

⁸⁷ This is clearly different from the situation in which a victim State does not exercise the right of self-defense for a considerable time when the State could exercise the right.

⁸⁸ LOAC DESKBOOK, *supra* note 11, at 35.

⁸⁹ Instead of the military response, the ROK government decided to resort to the peaceful settlement, referring the incident to the UN Security Council. Ji-hyun Kim, *Seoul Asks U.N. to Discuss Cheonan*, KOREA HERALD, June 4, 2010, <http://www.koreahearl.com/national/Detail.jsp?newsMLId=20100604000472>.

necessity and proportionality as traditional criteria of the right of self-defense. The customary right of self-defense and Article 51 make clear the scope of the right of self-defense.

The right of self-defense requires an armed attack as a prerequisite. Of vital importance in that assessment is the meaning of armed attack, as introduced by the *Definition of Aggression* in the General Assembly Resolution 3314 (XXIX). After that, it analyzed the traditional criteria of the right of self-defense: necessity and proportionality. The paper especially looked into the significance of necessity in the exercise of the right of self-defense, providing the steppingstone for the conclusion of the paper.

This article emphasizes the analysis of justifiable time to exercise the right of self-defense. Referring to the controversy over the anticipatory right of self-defense, the question becomes: is immediacy a separate and independent requirement in the exercise of the right of self-defense? Some scholars argue that immediacy can be seen as a separate criterion for the right of self-defense. However, three counterarguments rebut this position: the customary international law perspective, the UN Charter perspective, and the time required for a State to move through the decision-making process. Thus, immediacy is not a separate requirement to the exercise of the right of self-defense, and timeliness of a response should only be one of many factors when considering the necessity of exercising the right of self-defense.

In the case of the *Cheonan* incident, the ROK government had the right of self-defense once it identified who had attacked the warship. The attack to the navy warship is clearly an armed attack stipulated in Article 51 of the UN Charter. The burden of proof was on the ROK government to show that an armed attack took place; the ROK spent fifty-five days in proving the cause of the warship sinking was an armed attack. In this case, fifty-five days is considered a justifiable delay in proving the cause of the incident. There is no need to apply the immediacy criterion to the *Cheonan* incident because it is not a separate prerequisite to the exercise of the right of self-defense. Rather, it is enough to review the incident through the lens of the necessity criterion. Ultimately, the ROK government had the legitimate right of self-defense

at the time it identified both the cause of the incident and the aggressor but selected a diplomatic path to resolution.⁹⁰

⁹⁰ Perhaps the only remaining issue is how to draw a clear line between a justifiable exercise of the right of self-defense and a significantly delayed military response which would not be justified under the label of self-defense. This is the area where another rule of customary international law should be developed, though it is outside the scope of this paper. It remains to be seen to what extent the law will dominate the realities of the international community, which is influenced mainly by political power.