DO NOT LET JUSTICE BE ABSENT: ENLIGHTENMENT FROM CANADA FOR CHINA IN DETERMINING SELF-DEFENCE CASES

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Abstract

This research analyzes the current situation and challenges of determining self-defence cases in China, and it indicates that the future direction shall focus on reasonableness and circumstances. The article proposes detailed measures for the Chinese decision-makers from the perspectives of Canadian laws and courts in conjunction with the realities of China. The Chinese decision-makers can employ reasonableness and circumstance assessment to evaluate the accused's belief and the primary purpose of the response. They can also determine the cause and the timing of self-defence with imminence and necessity, breaking the fixed mindset of assessing the commencement and termination of the unlawful force.

Keywords: self-defence, China, Canada, criminal justice, determination

I. INTRODUCTION

The law of self-defence aims to protect reasonable acts of stopping unlawful force.[1] It tries not to impose undue blame on the accused[2] in a state of emergency. The law of self-defence is prevalent even in different countries under different legal systems.

In China, the law of self-defence can be found in Article 20 of the Criminal Law.[3] However, this article is broad and cannot provide detailed instructions for decision-makers.[4] In 2020, the Supreme People's Court of the People's Republic of China, the Supreme People's Procuratorate of the People's Republic of China, and the Ministry of Public Security of the People's Republic of China

[1] *See* Hamish Stewart, *The Constitution and the Right of Self-Defense*, 61 UNIV TOR LAW J. 899, 901 (2011).

[2] The accused/defender(s) in this article refers to actors who defend themselves or others against illegal attacks, as opposed to actors who carry out the illegal attacks as the aggressor(s).

[3] Xing Fa (刑法) [Criminal Law] (promulgated by the Nat'l People's Cong., Dec. 26, 2020, effective Mar. 1, 2021), art. 20 (Chinalawinfo). Criminal responsibility is not to be borne for an act of legitimate defense that is undertaken to stop present unlawful infringement of the state's and public interest or the rights of the person, property or other rights of the actor or of other people and that causes harm to the unlawful infringer.

[4] The decision-makers are persons that are delegated with the authority to make decisions that have consequences. Decision-makers described in this paper are mainly the persons making decisions in judicial process. They are required by law to do so fairly. In particular, individuals who make decisions in the context of the criminal law—judges, magistrates, procurators, and jurors—can be inundated with vast amounts of information they must consider in reaching the desired judgments, including complicated legal rules, ambiguous facts, and contradictory arguments about the application of the rules to the facts.

issued *Guiding Opinions on Applying the System of Justifiable Self-defence*[5] (hereinafter referred to as the Guiding Opinions). It is generally believed that the establishment of self-defence should satisfy requirements in five aspects: cause, time, subjective factors, objective factors, and the limit. In many aspects, this Guiding Opinions is of guiding and reference significance for grasping the conditions accurately. It sets out more factors on the determination and evaluation of self-defence and provides more explicit guidelines on the necessity and imminence of self-defence. It also emphasises that the specific circumstance of the accused should be considered in the determination.[6]

Beyond this, the Guiding Opinions also adds particular criteria for determining the objective belief of the accused. To differentiate these similar acts (defence, mutual fights, provocations, et cetera), the Guiding Opinions calls for careful consideration and evaluation of the factors of self-defence in the relevant circumstances of the accused person.[7] The Guiding Opinions currently provides some provisions for self-defence in China, designed to emphasise the importance of circumstances and reasonableness in determining self-defence. In judicial application, the decision-makers should pay attention to the specific case circumstances and accurately judge whether it is a defensive act in light of the general cognition of the public. However, due to the lack of targeted content and model cases in the Guiding Opinions, it is still quite difficult for Chinese decision-makers to implement the guidance requirements. The decision-makers still have difficulties determining the reasonableness of the accused's belief and act and the unlawful force's systemic or structural factors.[8] For instance, affected by the concept of "respect for the deceased" and "making concessions to avoid troubles" in the handling of a case involving casualty caused by a defence act, the decision-makers often face external pressure and mental stress so that it may determine a defensive act that should be successful self-defence as an excessive defence in practice, even not thinking over the systemic or structural factors. The inertia will lead them to focus more on the case's consequences rather than the circumstances and conditions of the accused. Such thinking may pose some obstacles to the fair trials of self-defence cases. It hampers safeguarding the dignity of the law and establishing the correct direction for the public, and it is also unfair to the defender.

[5] It was jointly issued by the Supreme People's Court, the Supreme People's Procuratorate, Instrumentalities of the State Council, All Ministries, Ministry of Public Security of the People's Republic of China on August 28, 2020.

[6] Guanyu Yifa Shiyong Zhengdang Fangwei Zhidu de Zhidao Yijian (关于依法适用正当防卫制度的指导意见) [The Guiding Opinions on Applying the System of Justifiable Self-Defense] (promulgated by Sup. People's Ct. & Sup. People's Proc. & Ministry of Public Security, Aug. 28, 2020) Section II Subsection 6 (Chinalawinfo). The stress and anxiety of the victim facing an unlawful attack shall be taken into account so as not to put the victim under normal circumstances afterwards as if he or she could act in a calm, reasonable, objective and precise manner at that moment.

[7] *Id.* at Section II Subsection 9.

[8] *See* Ouyang Benqi (欧阳本祺), *Zhengdang Fangwei Rending Biaozhun de Kunjing yu Chulu* (正当防卫认定标准的困境与出路) [*The dilemma and the way out of the criteria for determining legitimate defense*], 5 FASHANG YANJIU (法商研究) [STUDIES IN LAW AND BUSINESS] 123, 119–127 (2013).

Building on the Guiding Opinions, many Chinese scholars have delved into the evaluation of self-defence and developed many new ideas. For example, the nature of unlawful force has been reconsidered. Scholars argue that the accused can react with greater forces according to the degree of unlawful forces in self-defence cases.[9] There are discussions and academic papers about the nature of unlawful force and the limit of self-defence. The issues they explored do need attention. However, these studies have not yet considered how to apply the assessment of reasonableness in practice to solve the difficulties and problems faced by Chinese decision-makers today. As the assessment of reasonableness and circumstance has rarely been mentioned in China to some extent, the Chinese courts also have limited experience in this area. To better implement this theory, the experience of other countries should be thoroughly studied. However, we should admit that there are significant differences between the legal systems of China and Canada.[10] Traditional Chinese criminal law thinking has an incriminating style. There have been some reforms to this mindset in academia, but it hasn't changed much in judicial practice. Before evaluating the self-defence factors, the decision-makers in China will first consider whether the accused's act constitutes a crime. Based on the traditional theory in China, self-defence has nothing to do with the constitution of crime. Acts that are harmless to society will be considered "acts that are criminal in appearance, but not harmful in essence." Without the criminality, the act will not be criminalized. Because with the social hazards removed, Criminal illegality is also excluded, and the constitution of the crime does not exist. This view is widely accepted in judicial practice. That is, self-defence does not conform to the constitution of the crime, and correspondingly, the act that conforms to the constitution of the crime cannot be self-defence [11]

On the other hand, the process of determining self-defence in Canada is quite different. Canadian courts will consider whether there is self-defence and whether it constitutes a crime simultaneously. There is no order of priority in this process. The core of self-defence law in Canada lies in "reasonableness," i.e., whether the act can be considered reasonable from the perspective of a hypothetical "reasonable person" under specific circumstances. The laws and provisions in Canada have required decision-makers to evaluate the relevant circumstance and the reasonableness of the accused person's actions for a long time.[12] In particular, the Criminal Code of Canada takes the necessity, the

[9] Li Jinming (李金明), *Lun Zhengdang Fangwei zhong Bufa Qinhai de Weixian Xingzhi* (论正当防卫中不法侵害的危险性质) [*On the dangerous nature of illegal infringement in justifiable defense*], 25 BEIJING LIGONG DAXUE XUEBAO SHEHUI KEXUE BAN (北京理工大学学报社会科学版) [JOURNAL OF BEIJING INSTITUTE OF TECHNOLOGY (SOCIAL SCIENCES EDITION)] 81, 88 (2022).

[10] The Chinese criminal law system and adjudication are closer to the civil law system. The Canadian legal system and adjudication, on the other hand, lean heavily towards the Anglo-American legal system.

[11] Wang Zhengxun（王政勋）Zhengdang Fangwei Tixixing de Zaisikao正当防卫体系性地位的再思考[Rethinking the Systematic Position of Justifiable Defense], 6 Falv Kexue (法律科学西北政法大学学报）[Science of Law(Journal of Northwest University of Political Science and Law)], 124(2022).

[12] *See* Hamish Stewart, *supra* note 1 at 910.

imminence and the proportionality into account and has a systemic standard for preventing improper self-defence.[13] The main concern of the Canadian decision-makers is the reasonableness of the accused's belief and act. Self-defence could be available if the accused person reasonably believes the force used was necessary, even if the force used in self-defence outstripped the force being defended against. We contend that the Guiding Opinions shows that the future direction of determining self-defence in China will focus on the circumstances and reasonableness. The exact provisions of Canadian criminal law and the process of reasoning and concluding in Canadian judicial practice can thus provide essential guidance and reference for Chinese decision-makers. Chinese decision-makers can learn from Canada's experience and adopt proper standards, such as employing reasonableness and circumstance assessment to evaluate the accused's belief and determining the cause and the timing of self-defence with the imminence and necessity.

To further explore these questions, this research will start with sample case studies of China and Canada in Section II. The case studies reveal the success rate of being considered self-defence differs between the two countries. After studying the courts' decisions in these sample cases, this research provides an empirical basis for figuring out the difficulties encountered in practice in China. Section III reviews the weaknesses and challenges faced in determining self-defence cases in China, including the determination of the accused's belief, the cause of self-defence and a fixed duration for self-defence. Section IV elaborates on Canada's approach and experience in evaluating reasonableness, unlawfulness, and circumstances. This section concentrates on the self-defence provisions in the Canadian criminal code and the Canadian decision-makers' assessments and evaluations, explaining why the Canadian approach can be used as a reference for China. Section V illustrates the future direction of determining self-defence cases in China. It also summarizes the enlightenment from Canada combined with the realities of China to shed light on enhancing judicial practice in the future. The final section, Section VI, draws out the ideas and opinions in the article and provides directions for subsequent research.

II. SAMPLE CASES STUDIES

There are many similarities and differences between the self-defence laws in China (including the Guiding Opinions) and Canada. Under Article 20 of the Criminal Law, criminal responsibility is not to be borne for an act of legitimate defence that is undertaken to stop present unlawful infringement of the state's and public interest or the rights of the person, property or other rights of the actor or other people and that causes harm to the unlawful infringer. The Guiding Opinions, however, prescribes that the stress and anxiety of the victim facing an unlawful attack shall be taken into account so as not to put the victim under normal circumstances afterwards as if they could act in a calm,

[13] Canada Criminal Code, R.S.C., 1985, c. C-46, §34 (1).

reasonable, objective and precise manner at that moment. However, the current cases in China show that there is a tendency for decision-makers to impose additional restrictive conditions on defenders. Once it is found that a previous act of the person has provoked the unlawful assault of the other person, the court often finds that the defender's counter-attack act is not a proper defence on the grounds that the two parties are purely "fighting". Instead, the accused persons are mainly convicted of crimes such as intentional homicide, intentional injury, picking quarrels and provoking trouble. The feeling is more like this: since the aggressor is responsible for the consequence of the assault, as long as the defender is prepared to face the battle, then the defender is not entirely innocent, nor are they worthy of giving sympathy. Thus, the decision-makers of the two countries may have different perspectives on evaluation and determination. These differences also lead to other court decisions in self-defence cases. To better analyze the determination process of the two countries in judicial practices, relevant cases in the last decade from China and Canada were randomly collected, and the decisions of the cases were summarized. The systematic random sample[14] was adopted in this study, and the sample size for each country is 100 cases. Due to the large number of judicial cases in the two countries, adopting this statistical method can help us obtain representative findings on a massive group of cases without reaching out to each one.

A. Brief Introduction of Sample Cases in China

The sample cases in China were randomly selected from 34 provincial-level divisions, classified as 23 provinces, five autonomous regions, four municipalities, and two special administrative regions. According to the screening criteria,[15] the search results showed 375 relevant cases. Based on the caseload and relevance of the sample, a sample size of 100 cases is selected from the representative provinces and territories: 15 cases from Henan Province, 14 cases from Guangdong Province, 11 cases from Hunan Province, 10 cases from Shandong Province, 10 cases from Zhejiang Province, 9 cases from Guangxi Zhuang Autonomous Region, 8 cases from Jiangsu Province, 6 cases from Hebei Province, 5 cases from Shanghai, 5 cases from Sichuan Province, 4 cases from Beijing municipality, and 2 cases from Liaoning Province and 1 case from Anhui Province.

TABLE 1. STATISTICAL RESULT OF SELF-DEFENCE CASES IN CHINA

[14] It is a type of probability sampling method in which sample members from a larger population are selected according to a random starting point but with a sampling interval. This interval is calculated by dividing the population size by the desired sample size.

[15] Database: China Judicial Documents Website, Peking University Center for Legal Information, Faxin; Lawbank; Case Type: Criminal Cases; Type of Dispute: Criminal - Infringing Citizens' Personal & Democratic Rights; Procedural Status: Trial at First Instance & Trial at Second Instance; Instrument Type: Judgment; Keyword: Self-Defence, Personal Rights; Arrangement: Correlation Sorted; Method: Systematic Random Sample.

Type of cases	Number of cases	Percentage
Courts decisions	100	100%
Self-defence	2	2%
Non-self-defence	98	98%
Crimes among the non-self-defence cases	98	100%
Intentional injury	57	58.16%
Intentional homicide	15	15.30%
Picking quarrels and provoking troubles	11	11.22%
Affray	9	9.18%
Others	6	6.12%

According to the statistics (shown in Table 1) on the sample cases, the majority (98 out of 100 cases) of the judgments show that the accused's actions were not decided to be self-defence. Only 2 cases were considered successful self-defence, and the accused was acquitted. The statistics indicate that among the non-self-defence judgments, the accused persons were mainly convicted of the following crimes: the crimes of intentional injury (57 cases), the crimes of intentional homicide (15 cases), picking quarrels and provoking troubles (11 cases) and affray (9 cases).

B. Brief Introduction of Sample Cases in Canada

The sample cases in Canada were randomly selected from 10 provinces and one territory.[16] The search results showed 6994 relevant cases, 6884 in English and 110 in French. The French cases are mainly from Quebec, Canada, The Supreme Court of Canada/Privy Council and New Brunswick. The results, filtered by chronological order and the number of cases, are as follows: Ontario 2712 cases, British Columbia 1295 cases, Alberta 879 cases, Nova Scotia 390 cases, Saskatchewan 356 cases, Saskatchewan 356 cases, Newfoundland and Labrador 221 cases, Quebec 220 cases, Manitoba 216 cases, New Brunswick 161 cases, Yukon Territory 92 cases. Based on the proportion and relevance of the sample, a sample size of 100 cases was selected from the representative provinces and territories: Ontario 38 cases, British Columbia 18 cases, Alberta 11 cases, Nova Scotia 8 cases, Saskatchewan 6 cases, Newfoundland and Labrador 5 cases, Quebec 5 cases, Manitoba 5 cases, New Brunswick 3 cases, Yukon 1 case. According to the statistics (shown in Figure 2) on the sample cases, 10 cases were successful self-defence cases. In contrast, accused persons in the remaining 90 cases were convicted of offences. There is a wide variety of

[16] Database: Westlaw (Canada); Keyword: Defences: Self Defence or Defence of Another; Primary Sources: Cases and Decisions; Subject Area: Criminal; Sort by: Relevance; Method: Systematic Random Sample.

offences among the remaining cases: from offences against the person to offences against property.

TABLE 2. STATISTICAL RESULT OF SELF-DEFENCE CASES IN CANADA

Type of cases	Number of cases	Percentage
Courts decisions	**100**	**100%**
Self-defence	10	10%
Non-self-defence	90	90%
Crimes among the non-self-defence cases	90	100%
Manslaughter	24	26.67%
Second degree murder	19	21.11%
Aggravated assaults	13	14.44%
Assault with weapon or causing bodily harm	9	10%
Common assault	7	7.78%
Others	18	20%

These offences are as follows: Manslaughter in 24 cases; Second Degree Murder in 19 cases; Aggravated Assault in 13 cases; Assault with Weapon or Causing Bodily Harm in 9 cases; Common Assault in 7 cases; Dangerous Driving Causing Death in 5 cases; Possession of Weapon for Dangerous Purpose or for the purpose of Committing Crime Dangerous Purpose or for the purpose of Committing Offence in 5 cases; First Degree Murder in 3 cases; Criminal Negligence Causing Death in 3 cases; Discharging Firearm with Intent or Recklessness in 1 case; The Offence of Robbery in 1 case.

C. The Conclusion of the Case Studies

Based on the statistical results of sample cases, the success rate of being considered self-defence among Canadian cases is much higher than in China. In addition to the statistics on the caseloads and the crimes of these sample cases, this study also analyzed the courts' holding and opinions in each case. The primary purpose of this analysis was to find out the reasons for the significant differences in judicial decisions between China and Canada and show the connections with the reasonableness of these court decisions.

After analyzing the courts' holding and opinions in each case, the study indicates that the decision-makers in China tend to be more rigorous in the evaluation, especially in determining the belief of the accused and the

proportionality of the accused's response.[17] The analysis of the cases concluded that in 79.5 per cent of the non-self-defence cases, the courts believed that the accused were aggressive and the forces they used exceeded the forces from the aggressors. They did not give much thought to the accused's circumstances and whether it was reasonable for the accused person to think and act like this.[18] However, the law allows a person to defend, not because the defender is in a position of inferiority and embarrassment compared with the aggressor, nor because the defender can evoke public sympathy; It is because, in this conflict, the aggressor has been unworthy of enjoying the complete protection of the law, Or it is said that the defender defends the effectiveness of the legal order by fighting against illegal infringements. Thus, the condition of the cause of self-defence should be accurately grasped to prevent improper narrowing of the scope of unlawful infringements and erroneous identification of illegal conduct that is a defence in name but an unlawful infringement, in fact, as a defensive act. Suppose the defender is over-restricted in the face of an unlawful act. In that case, it is not only inconsistent with the true legislative intent but also fails to produce the effect of preventing crimes and safeguarding citizens' personal rights. What is more, when both the aggressor and the accused are involved in a fight, and the accused has intentions other than defence (such as to fight back, retaliate and injure), the court will consider the accused person's act the "injury to another person" especially when the accused severely hurts or kills the aggressor.[19]

In evaluating the factors, it will be easier to focus only on the consequences of the act than to delve into the specific circumstances of the accused persons and the reasonableness of their actions. Chinese criminal law also does not explicitly instruct the decision-makers to evaluate every factor carefully. The judges have more discretion over this issue. Therefore, when it comes to judging, the stricter the requirement for the accused in the determination process, the fewer factors the decision-maker needs to consider. The traditional belief that someone should be held responsible for the aftermath of a death or injury still prevails. The need to maintain social stability has created great pressure on the decision-makers. Over time, this has become inertial thinking. Under such circumstances, when a fight or brawling happens, the case will more likely be regarded as a mutual brawling, a provocation, or a mobbing rather than self-defence.

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[17] *See* Li Shiyang (李世阳), *Zhengdang Fangwei zhong Fayi Qinhai Jipoxing de Cunli Genju yu Sifa Rending* (正当防卫中法益侵害急迫性的存立根据与司法认定) [*The existence and judicial determination of the urgency of the infringement of legal interests in self-defense*], 33 ZHONGWAI FAXUE (中外法学) [PEKING UNIVERSITY L. J.] 223, 228 (2021).

[18] *See* Chen Xingliang (陈兴良), *Zhengdang Fangwei de Sifa Piancha ji qi Jiuzheng* (正当防卫的司法偏差及其纠正) [*Judicial errors in deciding self-defense and their rectification*], 8 ZHENGZHI YU FALÜ (政治与法律) [POLITICAL SCIENCE AND LAW] 41, 55 (2019).

[19] *See* Wang Zhixiang (王志祥), *Lun Zhengdang Fangwei Zhidu Sifa Shiyong de Jiupian* (论正当防卫制度司法适用的纠偏) [*On rectifying the judicial application of the system of justifiable defense*], 6 FAXUE LUNTAN (法学论坛) [LEGAL FORUM] 135, 140 (2019).

The study also indicates that the decision-makers in Canada attach particular importance to the precedents of the provincial courts and the Supreme Court of Canada other than the detailed provisions in the criminal code. The courts of appeal will also consider the reasoning and conclusions of previous cases and refer to them in their decisions. Hence, requirements in determining self-defence cases' factors will be more detailed (from both statute and precedent) and have more previous cases for reference. What is more, it is clear from the reasoning and conclusions of the sample cases that the decision-makers in Canada place a high value on reasonableness in assessing self-defence claims. If accused persons believe their actions were necessary, reasonable, and proportionate in the circumstances, they can often claim self-defence successfully. Canadian decision-makers have focused more on the specific circumstances of each case and why the accused persons think and act like this (rather than focusing solely on the consequences). The more factors the decision-makers consider, the higher the probability of claiming self-defence successfully will be. That is because the decision-makers will put themselves in specific circumstances to determine the reasonableness rather than making decisions depending on the consequences of acts.[20]

By analyzing and summarizing the reasoning and conclusions in the sample cases, this research tentatively identifies the difference between China and Canada in determining self-defence. This difference is not only due to the significant differences in the legal systems and specific regulations of the two countries but also due to the disparity of long-standing legal thinking of the decision-makers in both countries.

The newly issued Guiding Opinions in China reflects that the Chinese judiciary is now aware of the importance of circumstances and reasonableness in determining self-defence. The Guiding Opinions specifically provide the general requirements for the application of self-defence, calling for an accurate understanding and grasp of the legal provisions and legislative purpose of self-defence. Any wrongful act such as "The crying baby gets the milk" or "The dying or injured party is on the right side" shall be prevented, and the principle of "law cannot yield to illegality" shall be firmly safeguarded. The specific circumstance of the accused should be considered in the determination. However, due to the lack of detailed instructions in the self-defence laws in China, the exact provisions of Canadian criminal law and the reasoning and conclusion in Canadian courts may help build future cases for self-defence and provide guidance on identifying the factors of self-defence.

As these assessing factors cannot correspond one by one, it may seem that comparing the factors of Canadian self-defence with the factors of the Chinese is a mission impossible. However, the nature of the factors is very similar. Therefore, we may try to achieve the goal by adopting a typological comparison, i.e., we could summarize the substantive meaning and compare their

[20] Fehr Colton, *Self-defence and the Constitution*, 43 QUEEN'S L. J. 85, 87 (2017).

intrinsic purposes and specific requirements to a certain extent. Although there are significant differences in the legal systems and adjudication between China and Canada, the essence of the self-defence law is almost the same.[21] The reasoning and determination can also be compared. We can summarize the Canadian experience and methods that China can refer to in determining self-defence cases and try to conclude some suitable ways for China.

III. PROBLEMS ENCOUNTERED IN THE DETERMINATION OF SELF-DEFENCE CASES IN CHINA

A. Ignoring Relevant Circumstance and Reasonableness in the Accused's Belief

Theoretically, the objective belief of the accused in self-defence is to defend against unlawful force after the accused perceives the unlawful force or the threat of force.[22] The accused's belief consists of two kinds of thoughts. One is the awareness that an unlawful force or threat is happening, and the other is the thought of responding to such force or threat.[23]

The current dilemma in the accused's belief in Chinese self-defence cases focuses on determining the intention of responding. Should the accused persons be allowed to defend themselves and harm the aggressors simultaneously? If so, how specifically will the decision-makers assess the accused's beliefs? The Chinese criminal law does not provide instructions on this.[24] However, the decision-makers in China tend to believe that the defender cannot intend to harm the aggressor. If the defender intends to attack, then the defensive act is possible to be considered as "fighting" or "mutual fighting". They believe the accused

[21] It is widely accepted on principle that a person may protect themselves from harm under appropriate circumstances, even when that behavior would normally amount to a crime. In basic types of legal systems in the world, almost every country allows a defendant to claim self-defence when accused of a violent crime. In general, killing is not a criminal act when the killers reasonably believes that they are in imminent danger of losing their lives from assailants or of suffering serious bodily injuries and that killing the assailants are necessary to avoid the peril.

[22] *See* ZHANG MINGKAI (张明楷), XINGFA XUE (刑法学) [CRIMINAL LAW] 208 (2021). For this, there are two main theories: the necessity and the non-necessity of objective belief. Accordingly, the theory of non-necessity believes that so-called objective belief is not the factor that affects illegality. Therefore, the establishment of self-defence does not take the defender's belief as the premise; the theory of non-necessity argues it is necessary to consider whether the defender has the objective belief. *See* LI HONG (黎宏), XINGFA ZONGLUN WENTI SIKAO (刑法总论问题思考) [THINKING ON THE GENERAL THEORY OF CRIMINAL LAW] 324–325 (2016).

[23] Some scholars suggested that the objective belief here is the mens rea. The authors had reservations about this. Mens rea generally refers to the intention or knowledge of wrongdoing that constitutes part of a crime. It is a criminal intent. It refers to the state of mind statutorily required in order to convict a particular defendant of a particular crime. But the belief here is the thoughts that the accused is aware of the wrongdoing and wants to respond. When the accused persons are defending themselves, they might not possess a guilty state of mind and be aware of their misconduct, because they will consider their conduct is reasonable in self-defence.

[24] Xingfa (刑法) [Criminal Law] (promulgated by Nat'l People's Cong., Dec. 26, 2020, effective Mar. 1, 2021), art. 20 (Chinalawinfo).

should intend to eliminate the unlawful force to claim self-defence successfully. If the accused wants to hurt or even kill the aggressor when defending themselves, the decision-makers will be likely to decide this case to be a mutual fight.[25] In these cases, the accused will be convicted of picking quarrels and provoking troubles or affrays. When evaluating the beliefs, Chinese decision-makers will require high purity. No. 5 of Seven Model Cases Involving Justifiable Defense Published by the Supreme People's Court: Case of Intentional Injury by Liu Jinsheng[26] held that whether a violent fightback directly committed against a minor, unlawful infringement can be determined as a justifiable defence should be decided in light of the specific facts of the case. Huang and Li each gave defendant Liu a slap in the face, which was noticeably slight violence in a quarrel. In this situation, Liu directly chopped others on the head several times, which should not be determined as a defensive act.

This evaluation process makes it more challenging to claim self-defence successfully in China. The decision-maker does not give much thought to the accused's circumstances and whether it is reasonable for the accused to think like this to some extent. This way of thinking also makes it challenging to fulfil the requirement of the Guiding Opinions to consider the circumstances of the accused and the reasonableness of the belief. Such thinking may affect the integrity of the defensive right. It might also confuse self-defence with excessive self-defence. What is worse, it might confuse self-defence with assaultive crime or manslaughter, especially when the accused severely hurts or kills the aggressor.

B. The Misguided Way of Assessing the Causes of Self-defence

In China, determining the cause of self-defence is the judgment of what kind of force can be fought against. That is to say, the law of self-defence does not apply if the force or the threat of force is authorized by law and is legal under the circumstance. Usually, the cause of self-defence is an unlawful force or threatened use of force (on a person or property) from another person.[27] During the evaluation, the decision-makers pay attention to the nature and features of the force or threat, as well as how the accused considers the force or threat. In Canada, the cause of self-defence is connected with evaluating the objective belief on unlawfulness. In China, the cause of self-defence is mainly about the

[25] *See* Ouyang Benqi (欧阳本祺), *Zhengdang Fangwei Biaozhun de Kunjing yu Chulu* (正当防卫认定标准的困境与出路) [*The Dilemma and the Way out of the Criteria for Determining Legitimate Defence*], 3 FASHANG YANJIU (法商研究) [STUDIES IN LAW AND BUSINESS] 119, 121 (2013).

[26] Zuigao Renmin Fayuan Fabu Qiqi she Zhengdang Fangwei Dianxing Anli (最高人民法院发布7起涉正当防卫典型案例) [Seven Model Cases Involving Justifiable Defense Published by the Supreme People's Court—Determination of an act of abusing the defense right] (promulgated by Sup. People's Ct., Sept. 3, 2020, effective Sept. 3, 2020) (Chinalawinfo).

[27] Self-defence is justified in repelling an unlawful force. Unlawful forces include not only offences against the right to life and health, but also violations of personal freedom, public and private properties, among other rights; and include not only criminal acts, but also illegal acts. Unlawful forces shall not be constrained to violent forces or criminal acts only.

specific force or threat that makes the accused defend or fight back. These forces and threats usually come from the aggressors. The decision-makers in both China and Canada contend that the cause of self-defence is a precondition for claiming self-defence successfully. In this regard, the decision-makers in China believe the causes must be wrongful, aggressive and actual.[28] On the other hand, the decision-makers in Canada focus on the nature, the imminence, and the history[29] of the cause of defence.[30]

The decision-makers in China usually won't have difficulties determining the usual causes of self-defence cases. But when causes are flawed, their way of assessment will be controversial sometimes. In this context, a flaw in the cause refers to the cause that triggered the dispute (before the self-defence case) between the parties was wrongful, such as a gambling debt (instead of a legal debt). A dispute arose between the two parties about this gambling debt. This dispute caused the aggressor to use force or threats against the accused, who then chose to fight back. The force or threat the aggressor uses is also the cause of self-defence. The decision-makers in China will see the cause as a flawed one because a gambling debt triggers all of the above. When the cause of self-defence is faulty, the decision-maker will question the belief of the accused and the necessity of the act. It will affect the determination of self-defence. Take the case of He and Zeng as an example.[31] In this case, the cause of defence is a dispute over a gambling debt.[32] The court stated that since the gambling debt was not legal, the defence against the dispute would not be a legal defence but just a mutual fight.

Regarding this case, the line of reasoning is as follows: the cause of the defence was a dispute over a gambling debt. Since the gambling debt was illegal, the dispute over the debt was not an unlawful attack that could be defended against. It was just a mutual fight. Thus, self-defence was not available under that circumstance.[33]

Apart from illogicality, such thinking is unfair. In this way, the decision-makers in China are extending the scope of the causes of self-defence

[28] ZHANG, *supra* note 21, at 201–202.

[29] Generally speaking, the courts recognize that evidence about the relationship and history between the parties is crucial for putting the conflict in its proper context. Criminal Code Canada Paragraph 34(2)(f) makes clear that the history of the relationship, and any abuse within it, are relevant to assessing the reasonableness of the accused's defensive actions, and thereby signals that courts should continue to apply the principles from Lavallee under the framework of the new law. While the 34(2)(f.1) speaks to any history of interaction or communication between the parties to the incident.

[30] Criminal Code Canada (R.S.C., 1985, c. C-46) Sub-section 34(2)(a); (b); (f.1).

[31] *See* CHINA COURT NET, https://www.chinacourt.org/article/detail/2012/04/id/478306.shtml, (last visited on June 20, 2023).

[32] Chen Xingliang (陈兴良), *Huou yu Fangwei: Anjian Tezheng he Jiexian Qufen* (互殴与防卫：案件特征和界限区分) [Brawl or Self-defence: The Characterization of the Case and the Distinction between the Boundaries], 13 RENMIN FAYUAN BAO (人民法院报) [PEOPLE'S COURT DAILY] 1, 1–4 (2012).

[33] Li Yong (李勇), *Jieguo Wujiazhi Lun Xia de Zhengdang Fangwei* (结果无价值论视野下的正当防卫——以"常熟聚众斗殴案"为例) [*Legitimate Defence in the Perspective of the Erfolgsunwert-A Case of The Brawl Case in Changshu*], 1 XINGSHI FA PANJIE (刑事法判解) [CRIMINAL PRECEDENTS AND INTERPRETATION] 43, 43-53 (2014).

inappropriately, confusing the cause of defence with the event that triggered the cause of defence. This will mislead the assessment of self-defence and prevent a fair evaluation of the factors. This mindset seems like following the "Fruit of the Poisonous Tree" doctrine.[34] But applying the "Fruit of the Poisonous Tree" in assessing the cause of self-defence is not logical. Even if the event that triggered the cause (unlawful force) is illegal, it does not mean the accused cannot legally defend against the criminal attack. The unlawful force or threat comes from the aggressor, not the event that triggered it. The event is only a trigger but not a determining factor. The misguided way of assessing the causes of self-defence reflects poor judgement concerning the unlawfulness of unlawful force or threat.

C. A Set Period for the Accused to Respond

The timing of self-defence is mainly about the beginning of the unlawful force and the time to start or end the self-defence. In China, the decision-makers believe that self-defence must be conducted within a specific time frame. The accused may fail to claim self-defence if the defence is not conducted within such a time frame. But a set period for the accused to respond would impose limitations on self-defence. A set period would make decision-making focus more on whether the accused acted within a specific time frame and ignore the reasonableness of the accused's act. In particular, self-defence usually occurs in emergencies, and setting a fixed period in such situations makes the standard a bit too harsh to follow. The set period facilitates decision-making but can also bring injustice into the judgment.

The Criminal Code of Canada does not have explicit regulations about the time to start or end self-defence. The most relevant requirement is to assess the imminence and necessity of the evaluation process. The code addresses the imminence of the apprehended force and hence the necessity of responding.[35]

The decision-makers in China tend to believe that the accused can only act in self-defence within the period that the unlawful force has begun but has not yet ended. In this regard, the decision-makers are concerned with the unlawful force's beginning and end in determining the timing of the self-defence. The commencement of unlawful force determines when the accused can use force in self-defence.[36] Moreover, the decision-makers in China will probably not consider a force as a force that can be defended unless the unlawful force begins or there is an actual and imminent threat. Therefore, it is less likely for the accused to use force to defend against a force (or a threat) that was only predicted by the accused but has not yet happened. When the accused uses force to defend

[34] "Fruit of the poisonous tree" is a legal metaphor used to describe evidence that is obtained illegally. The logic of the terminology is that if the source (the "tree") of the evidence or evidence itself is tainted, then anything gained (the "fruit") from it is tainted as well.

[35] Criminal Code Canada (R.S.C., 1985, c. C-46), Sub-section 34(2)(f), (f.1).

[36] ZHANG MINGKAI (张明楷), WAIGUO XINGFA GANGYAO (外国刑法纲要) [FOREIGN CRIMINAL LAW] 163 (2007).

against an unlawful force that is not actual or imminent, the decision-makers may probably believe that this defence is a putative defence[37] rather than legal self-defence. The accused will not claim self-defence successfully under this circumstance. Beyond this point, the ending time of the unlawful force is more complex since there is no clear way to determine the ending of an unlawful force. The decision-makers contend that when the aggressor stops attacking the accused, the accused should stop using force. But it is difficult to answer whether the accused can keep defending after the aggressor's attack stops, but the threat of attack exists.[38] For example, can the accused continue to defend when the aggressor stops attacking but turns around to get a weapon from the car behind him? The accused is still in danger of being harmed.

Overall, when the accused can begin to defend and when the accused should stop has always been a tricky problem in China. This difficulty lies in the decision-maker's over-emphasis on the set period of self-defence while ignoring the factors of reasonableness. The Guiding Opinions requires the Chinese decision-makers to combine imminence and necessity with reasonableness to a greater extent. If it is reasonable for the accused to defend or to keep defending under specific circumstances, then the decision-makers should not deny a claim of self-defence. However, it currently remains a challenge about how to put it into practice.

IV. CANADIAN APPROACH AND EXPERIENCE IN THE DETERMINATION OF SELF-DEFENCE CASES

The concepts of necessity, imminence, and proportionality play a central part in regulating the use of force against an imminent or actual attack by actors. All three requirements must be considered in the law of self-defence, and there is also a systemic standard for this determination.[39] The code asks the decision-makers to evaluate the reasonableness of the accused's belief and act in the judgment. Therefore, the decision-makers in Canada place a higher value on reasonableness in assessing self-defence claims. If the accused persons believe that their actions were necessary, reasonable, and proportionate in the circumstances, they are likely to claim self-defence successfully.

A. The Evaluation of Reasonable Belief in the Force or Threat of Force in Canada

The decision-makers in Canada will not deny a self-defence claim merely on the grounds that the accused intends to attack or harm, and neither does the criminal code require the courts to determine whether the accused had

[37] *See* Francisco Muñoz Conde, *Putative Self-defence: A Borderline Case Between Justification and Excuse*, 11 NEW CRIMINAL LAW REVIEW 590, 591 (2008).

[38] *See* CHEN XINGLIANG (陈兴良), ZHENGDANG FANGWEI LUN (正当防卫论) [THEORY ON JUSTIFIABLE DEFENCE] 29 (2006).

[39] Canada Criminal Code, R.S.C. 1985, c C-46 art 34.1.

reasonable beliefs.[40] Therefore, the primary concern of decision-makers is to evaluate the reasonableness of the accused's subjective belief. The decision-makers are concerned with whether the accused reasonably believes that "the use of force is necessary for self-protection or the protection of a third party from the assault" and that the "degree of force used was reasonable."[41] Moreover, the criminal code does not even require an actual assault or threat of assault.[42] The focus of the evaluation is not on the factual circumstances but on those circumstances that the accused reasonably believes to exist.[43] These are the most significant differences between China and Canada regarding the assessment of the accused's beliefs.

Although the accused persons are allowed to hurt the aggressor in self-defence, they must meet the reasonableness standard under the circumstances.[44] First, the accused persons must reasonably believe that the aggressors were using or threatening to use force. Secondly, the accused persons must think their forces against the aggressors are reasonable.[45] The accused's "reasonable belief" is crucial in assessing the belief in Canada. Self-defence will be available, even if the aggressor is not threatening to use or use force, as long as the accused believes this "on reasonable grounds."[46] Beyond this, the accused can use force to defend or attack as long as the accused thinks the force is reasonable for self-defence under the circumstances.

In Canada, the above factors are a part of the trial of facts. The Trier of Fact[47] decides it. The trier of fact will evaluate the accused's belief, focusing on two main aspects. First, the accused must believe on reasonable grounds that force, or a threat of force, is being used.[48] The trier of fact will not be concerned with the aggression in the accused's mind but will pay more attention to the state of mind inferred from the circumstances.[49] The circumstances refer to the surroundings at that time and the parties' personal conditions and history. Therefore, the assessment of reasonableness is multidimensional instead of one-dimensional. Assessing reasonableness should break the boundaries of space and time. It means that all factors affecting reasonableness will be

[40] Canada Criminal Code, R.S.C. 1985, c C-46 art 34.2 (in determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act).

[41] LYNN RATUSHNY, CAN. DEP'T. OF JUST., SELF DEFENCE REVIEW (FINAL REPORT) 197 (1997).

[42] Canada Criminal Code, R.S.C. 1985, c C-46 art 34.

[43] R. v M. (M.A.) [1998] S.C.R. 123 (Can. Sup. Ct.) 207.

[44] Elaine Freer, *Driving Force: Self-defence and Dangerous Driving*, 77 CAMBRIDGE L.J. 9, 9–12 (2018).

[45] Kent Roach, *A Preliminary Assessment of the New Self-Defence and Defence of Property Provisions*, 16 CAN. CRIM. L. REV. 276, 276–294 (2011).

[46] David M. Paciocco, *The New defence Against Force*, 18 CAN. CRIM. L. REV. 269, 287 (2014).

[47] The Trier of Fact, also known as the Finder of fact, is a person or group of persons who examine and decide on the facts of a case in a legal proceeding, usually at trial. In a jury trial, the jury is the trier of fact. If there is no jury then the judge is the professional trier of fact. China does not have a Trier of Fact. The facts examination and decision, however, are in the Handling Results of each judgment. Judges in China are responsible for both fact-finding and reasoning.

[48] Canada Criminal Code, R.S.C. 1985, c C-46 art 34.1(a)(b).

[49] R. v. Khill, [2021] S.C.C. 37 (Can.LII).

considered in the evaluation, including the prior use of force and the history of the relationship between the parties. It is also crucial to evaluate the specific situation of the accused and the aggressor. Other situations, such as the relevant biographical condition, will also be taken into account by the decision-makers.[50]

In assessing the objective belief on "the force, or a threat of force that is being made," the actual assault or threat of assault is unnecessary because beliefs are invisible and intangible. How to evaluate them as fairly as possible remains a significant concern for Canadian decision-makers. Finding the fact about the state of belief might not be easy. But whether a specific state of mind exists is still an objective truth that must be shown in the same manner that other objective facts are demonstrated. The accused's subjective belief can be inferred from the circumstances, such as the history and relationships of the parties, including any past use of force, contact and communication.[51] The personal information of the parties is also essential to reveal the truth. For instance, the parties' emotional status, physical function, body type, health condition, or other conditions will primarily affect the perception and judgment of the accused.[52] However, not all situations will be taken into account. Some of the accused's personality, such as bad temper and irritability, are insufficient to interfere with the defendant's judgment. They would not be considered acceptable excuses. Extending the scope of factors unscrupulously will subvert the logic and purpose of the evaluation. [53]The parties' existing information and experiences can help the decision-makers "read" the accused's mind, and it is not difficult for them to access this information. After evaluating all these factors, the decision-makers can determine whether the accused's perception of the unlawful force is reasonable under that circumstance to a large extent.[54] The accused person's vulnerability and the predictability of the impending threat will affect the legitimacy and reasonableness of their beliefs. In addition, the influence of the circumstances on their beliefs will not be ignored. If all of these requirements are met, the accused can be considered to have a reasonable belief

[50] *See* Canada Criminal Code, R.S.C. 1985, c C-46 art 34. Canada Criminal Code lists some but not all the factors in Article 34 that are relevant in determining the accused's belief. (1) the nature of the threat (including whether the threat is imminent and whether there are other reasonable ways to avoid it); (2) whether the aggressor is armed and has a significant advantage in ability over the defender; and (3) the relationship between the parties themselves and the existence of a history of violence.

[51] R. v Mulligan, [1974] S.C.R. 612 (Can. Sup. Ct.).

[52] *See* David M. Paciocco, *Applying the Law of Self-Defence*, 12 CAN. CRIM. L. REV. 25, 25–94 (2007).

[53] Briefly, the threat perception is assessed on a combined subjective/objective basis. Mistakes as to the nature or existence of the threat are permitted, but only where such mistakes are reasonable ones. The new law introduces an explicit "defensive purpose" requirement, which is judged on a purely subjective basis: is there some evidence on which a jury could conclude that the accused had a defensive purpose when he or she did the actions that form the subject-matter of the charge? This purpose is not subject to objective confirmation. It is a rough equivalent to the requirement under the old law that the accused believed that they needed to take the action they did. *See* Can. Dep't of Just., REFORMS TO SELF-DEFENCE AND DEFENCE OF PROPERTY: TECHNICAL GUIDE FOR PRACTITIONERS, Bill C-26 (S.C. 2012 c. 9).

[54] *See* Paciocco, *supra* note 45.

in perceiving the danger, whether or not the threat was real. The claim of self-defence will be denied if the prosecution disproves this beyond a reasonable doubt. Therefore, the accused's subjective belief can be assessed by examining various objective factors during the evaluation. In this way, it can ensure the objectivity of the process. It can also avoid a miscarriage of justice by imitating precedents indiscriminately and ignoring the specific circumstances of the parties.[55]

Assessing the belief is common in determining self-defence against domestic violence. An accused with long-suffering violence and considerable pressure from a relationship will be more sensitive to the aggressor's every move than others.[56] That is to say, suffering from long-lasting domestic violence, the victims can defend themselves in advance, even before the aggressors use force. In these cases, the range of the reasonable beliefs of the victims will be more extensive because the long-term abuse has impaired the victims' cognitive function and willpower.[57] In R. *v.* Elle Ejigu,[58] Ejigu (the accused) was charged with attempted murder, aggravated assault, and wounding with a weapon for stabbing her husband while he was asleep. In the evaluation process, the decision-makers found that the accused had been beaten and abused by her husband (the victim) for a long time. The husband was suspected of having an affair, so the accused had also been isolated in the relationship. Three days before the incident, the husband threatened to kill the accused and commit suicide. The decision-makers believed that the accused was under severe stress and had a history of being beaten and abused by her husband. Hence, she had every reason to believe that her husband would put the threat into practice and eventually kill her if she did not defend herself in advance. After assessing the history and the specific circumstances, the decision-makers found that the accused had reasonable grounds to believe that her conduct was to protect herself from a future threat to her life. Reasonable apprehension of harm is not what an outsider would have reasonably perceived but what the accused reasonably perceived, given the situation and experience. The case showed that the accused could have an aggressive belief and use force before an immediate and imminent threat. It also indicates that assessing reasonableness is essential in determining the accused's objective belief.[59]

[55] R v Rasberry, [2017] A.B.C.A. 135 (CanLII)

[56] *See* ELIZABETH A. SHEEHY, DEFENDING BATTERED WOMEN ON TRIAL: LESSONS FROM THE TRANSCRIPTS (2014).

[57] *See* Isabel Grant & Debra Parkes, *Contextualizing Criminal defences: Exploring the Contribution of Justice Bertha Wilson*, JUSTICE BERTHA WILSON: ONE WOMAN S DIFFERENCE 153–55 (Kim Brooks ed., 2009).

[58] R. v Ejigu, BCSC [1674] Carswell BC 3511[2012] B.C.W.L.D. 518 [2013] 104 W.C.B. (2d) 267, 98 C.R. (6th) 370 (Can.). Supreme Court of Canada Opinion (S.C.C. Opinion): Battered spouse (woman) syndrome is not a defence per se and a battered woman may kill her spouse for some reason and still have to satisfy the element of self (justifiable) defence. "Battered woman syndrome" is not itself a defence-battered women might kill their spouses for reasons and the elements of self-defence still have to be met.

[59] R. v Thibert, [1996]1 S.C.R. 37 (Can.).

In assessing the objective belief on "whether the accused believes the force used against the aggressor was reasonable," the imaginary "reasonable person" is crucial to the solution. Canadian decision-makers will conjure a hypothetical "reasonable person" and put this "person" into the same event, in addition to which, the "reasonable person" should have the same conditions and prior experiences as the accused, such as the history and connection of the parties.[60] Therefore, this "person" is not absolutely rational but an ordinary "reasonable person" with vulnerabilities and experiences in the context. In this assessment process, the "reasonable person" will replace the accused, and the decision-makers will evaluate how the "reasonable person" would have thought and responded, depending on the nature of the problem. If this "reasonable person" would hold the same belief as the accused under the same circumstances, the decision-makers will accept the reasonableness of the accused's belief. The self-defence claim may be denied if the "reasonable person" goes the opposite. The belief of this "reasonable person" will significantly influence the decision-maker's judgment of the accused's belief. Therefore, ensuring the impartiality of this standard is a vital topic. The Canadian Criminal Code does not set the standard for the "reasonable person" and how they think. However, according to judicial practice, decision-makers have a set of criteria to assess. In addition to aligning the "reasonable person" with the accused as much as possible, the "reasonable person" is required to consider the accused's conduct comprehensively. The "reasonable person" must think whether the counter-attack is necessary and proportional, given the same conditions as the accused, and whether other options are available. But the other available choices do not mean that the accused can only choose to escape or retreat under that circumstance. Passive avoidance is not encouraged by the criminal code and Canadian judicial practice.

B. The Evaluation of Unlawfulness and Reasonableness in the Determination of the Force or Threat of Force in Canada

In Canada, the cause of self-defence is connected with assessing the accused's objective belief in the unlawfulness. Self-defence will not be claimed successfully if the force used or threatened to be used by another person is authorized by law unless the accused reasonably believes that the other person's conduct is unlawful.[61] The accused can fight against an unlawful force or a threat of force they reasonably believe is unlawful. The decision-makers in Canada use a series of criteria to determine the details of the unlawful force or threat. There is a clear distinction between unlawful force/threat against the person and that against the property. Regarding the unlawful force/threat against the person, the Criminal Code of Canada amendment extends the scope of

[60] R. v. Pétel, [1994] 1 S.C.R. 3 (Can.).
[61] Criminal Code (R.S.C., 1985, c. C-46) Sub-section 34(3) (Can.).

"aggression" from the old "Assault to Act that Constitutes the Offence."[62] In this context, unlawful force/threat refers to almost any form of assault/threat against the health and safety of persons. For instance, these include the involuntary use of force, the threat of force, the possession of weapons in situations such as accosting, approaching and begging, and any pattern of unlawfully authorized behaviour other than assault by force.[63] However, the event that triggered the unlawful force should not be legal. The accused can defend if the force/threat is not legally authorized. In comparison, unlawful force/threat against property primarily interferes with the immediate possession rights, which may not be found guilty in the criminal code. The infringement and interference are mainly the "Entrance without Being Entitled by Law," "Trespassing[64] within the accused's real property," the unlawful taking (Take), destruction (Destroy), or removal of the accused's property by another person (Remove).[65]

The self-defence law includes the unlawfulness of force or threat according to the accused's belief. However, if the accused simply mistakes the law, self-defence is unavailable under that circumstance. The self-defence law only allows the accused to mistake a series of facts, not the law. Ignorance of the law is no excuse,[66] so the accused cannot rely on mistakes of the law in self-defence.[67]

C. The Evaluation of the Imminence in the Determination of the Force or Threat of Force in Canada

Regarding this issue, the decision-makers in Canada mainly focus on assessing the imminence of unlawful force or threat and the necessity of responding.[68] There is no fixed timing requirement for the accused to start or end self-defence. If the accused has reasonable grounds to believe that the danger has occurred and has not terminated (regardless of the aggressor's actual conduct), the accused can defend against it. Likewise, the accused may defend against unlawful force if they reasonably believe it is necessary and there are no other options. Essential restrictions remain on this, though. If there is an absence of

[62] *Id.* Sub-section 34(1), 34(2), 37. Section 35 does not refer to assault, but does refer to conduct that could be so characterized - violent conduct that gives rise to the reasonable apprehension of death or grievous bodily harm.

[63] KENT ROACH, CRIMINAL LAW 279 (4th ed. 2009).

[64] *Supra* note 60, Sub-section 177. Unauthorised entry is not limited to the offence of trespassing under Canadian criminal law, which makes it a criminal offence only for trespassing at night. There is an offence labelled "Trespassing at Night", but this concerns loitering or prowling at night on the property of another person near a dwelling-house without lawful excuse. *See* The Petty Trespass Act and the Trespass to Premises Act (Can.). Trespassing is an offence under provincial legislation.

[65] *Supra* note 60, Sub-section 35.

[66] The legal principle of ignorantia juris non excusat (ignorance of the law excuses not) or ignorantia legis neminem excusat (ignorance of law excuses no one) is derived from Roman law. Essentially, it means that if someone breaks the law, he or she is still liable even if they had no knowledge of the law being broken.

[67] David M. Paciocco, *The New Defence Against Force*, 18 CAN. CRIM. L. REV. 269 (2014).

[68] *Supra* note 60. Sub-section 34 (2)(b).

actual imminence or the accused unreasonably perceives it, it may be unnecessary for the accused to use force to respond.

The decision-makers can determine whether the imminent danger is reasonably perceived through the presence or absence of an actual imminent threat. Take R. *v.* Michelle Jordan Casey as an example.[69] Casey (the accused) attacked Mireille (the aggressor) because he perceived real danger. Casey made this judgment through Mireille's prior boisterous and provocative behaviours in the bar and Mireille's aggressive attitude towards him outside the bar. Mireille's attitudes and behaviours include walking straight toward the accused, provocations, intimidation, and searching for a weapon in his pocket. Regardless of whether Mireille was indeed searching for a gun in his pocket or pulling out a weapon, the decision-makers found that the accused, Casey, reasonably perceived the threat and believed that Mireille threatened to use force in the first place. At that point, the accused acted in self-defence on reasonable grounds.

Since there is no fixed requirement for when self-defence may start, the decision-makers will allow for reasonable pre-emptive self-defence under specific circumstances.[70] The accused persons can use force to self-defence in advance as long as they have reasonable grounds to believe that they will be subjected to immediate attacks.[71] However, this pre-emptive self-defence cannot be used without limitations. The accused should not use force to defend before the unlawful force, or the threat could be predicted reasonably.[72] If the accused uses force prematurely, the decision-makers will believe the accused is motivated more by retaliation than fear or intent of self-protection. Furthermore, if there is a long time gap between the pre-emptive self-defence and the actual unlawful force, it will give the accused more options to choose from rather than using force.[73]

In addition, the Supreme Court of Canada believes that imminence is a factor when evaluating the degree of unlawful force's danger and how the accused should respond.[74] The Supreme Court has expressly noted that in R. *v.* Lavallee[75] (Battered Spouse Syndrome). In this case, there is a very high possibility of the upcoming unlawful force. The requirement of imminence will be relaxed. Under these specific circumstances, the accused can use force in self-defence at any time when the attack is foreseen without necessarily providing

[69] R. v Caissie [2019] Carswell NB 427 [2019] Carswell NB 428, [2019] NBPC 10, [2019] NBCP 10, 158 W.C.B. (Can.).

[70] Mark Campbell, *Pre-emptive Self-defence: When and Why*, 11 OXFORD U. COMMONWEALTH L.J. 79 (2011).

[71] R. v Kong [2005] ABCA 255, 371 A.R. 90 (Can.); *See* DON STUART, CANADIAN CRIMINAL LAW: A TREATISE 495 (5th ed. 2007).

[72] *See* Francisco Muñoz Conde, *Putative Self-Defence: A Borderline Case Between Justification and Excuse*, 11 NEW CRIM. L. REV. 590, 591–92 (2008).

[73] *See* Hamish Stewart, *The Constitution and the Right of Self-defence*, 61 U. OF TORONTO L.J. 899 (2011).

[74] R. c. P´etel, [1994] CarswellQue 3, [1994] CarswellQue 110, [1994] 1 S.C.R. 3,87 C.C.C. (3d) 97, 26 C.R. (4th) 145 (Can.).

[75] R. v Lavallee, [1990] 1 S.C.R. 852 (Can.).

a reasonable explanation for the foresight. This happens when violence towards the accused occurs regularly (which can be predicted). In these cases, the accused persons can tell from their prior experience whether the danger is imminent. Moreover, the accused is not expected to escape or retreat from the accused's residence in this situation.[76] The self-defence doctrine also does not require defenders to retreat from their homes instead of defending themselves. The availability of a reasonable alternative must be assessed according to the accused's perception at the time of the offence. The question is not whether she could have left at some earlier time. What the accused can choose under this circumstance is a direct defence.

V. THE FUTURE DIRECTION IN CHINA AND THE ENLIGHTENMENT FROM CANADA

There are apparent differences in the determination of self-defence between China and Canada. But the essences of the factors to evaluate in this process are similar. The decision-makers in China tend to be more rigorous in the evaluation, especially in determining the objective belief of the accused,[77] imminence, and unlawful force's unlawfulness. In comparison, the decision-makers in Canada place a higher value on reasonableness in assessing self-defence claims. They focus on the specific circumstances of each case and the reasons why the accused persons think and act like this (rather than focusing solely on the consequences).[78]

China is currently making improvements.[79] The Guiding Opinions in China argues for more attention to the relevant circumstances and reasonableness. Given the long history of reasonableness assessment, Canada's Criminal Code and judicial practice can be a good reference.[80]

A. Employ the Reasonableness and Circumstance Assessment in Evaluating the Belief of the Accused

The decision-makers in China tend to believe the accused should intend to get rid of the unlawful force. The decision-makers in Canada, on the other hand, focus on evaluating the reasonableness but not the content of the accused's

[76] The famous "Castle Doctrine" is invoked here. The initial requirement for claiming a Castle Doctrine Defence is you must be inside your home - not the front yard or the backyard, but inside the home.

[77] *See Mingkai Zhang* (张明楷), *Guyi Shanghai Zui Sifa Xianzhuang De Xingfaxue Fenxi* (故意伤害罪司法现状的刑法学分析) [*A Criminal Law Analysis of the Judicial Status of Intentional Injury*], QINGHUA FAXUE (清华法学) [TSINGHUA L. J.] 6, 10 (2013).

[78] *See* FRANZ VON LISZT, LEHRBUCH DES DEUTSCHEN STRAFRECHTS 200–205 (Wentworth Press, 2018).

[79] *See* Liqing Fu (付立庆), *Qingjie Jiaoqing De Rending Yingbu Kaolv Fading Congkuan Qingjie* (情节较轻的认定应不考虑法定从宽情节——以防卫过当故意杀人行为的量刑为切入) [*The Legal Circumstances for Lenient Sentencing should not be Considered when Identifying the Lighter Circumstance: through the Sentencing Criterion for Intentional Homicide Behavior which is Caused by Excessive Defence*], 35 FAXUE ZAZHI (法学杂志) [LAW SCIENCE MAGAZINE] 66, 72 (2014).

[80] *See* DON STUART, STEVE COUGHLAN AND RONALD J DELISLE, LEARNING CANADIAN CRIMINAL LAW 1010–1013 (Carswell, 12th ed. 2012).

subjective belief. They will assess whether the accused reasonably believe that "the use of force is necessary for self-defence from the assault" and that the "degree of force used was reasonable." That is to say, the decision-makers in Canada will not be concerned with the aggression in the accused's belief but will pay more attention to the state of mind that can be inferred from the circumstances.

Based on the above studies, this research contends that the objective belief of the accused in China can be a combination of defending and attacking as long as it is reasonable under that circumstance. Therefore, the key is to assess the "reasonableness" under the specific "circumstance." The accused's subjective belief can be inferred from the circumstances, such as the history and the relationships of the parties, including any previous use of force, the communication and the personal information of the parties because the accused person's vulnerability and the predictability of the impending threat will affect the legitimacy and reasonableness of the belief.

Assessing the specificity of relevant circumstances shows respect for and an understanding of individual differences. The accused's belief can be tinged with anger, frustration, or mixed purposes other than escape and retreat. The accused can act as they think as long as it can be considered a reasonable belief in the particular circumstances. The decision-makers should allow for defence and attack based on the accused's belief. In China's judicial practice, the decision-makers usually expect a passive defence belief. But the passive defence is merely an act of avoiding or even evading the unlawful attack but not an effective act of self-defence. The accused is a real person in a state of emergency but not an emotionless robot. We cannot ask the accused persons only to have the intention to retreat and defend passively when they are suffering aggression and attack from others. It would be too hasty to deny a self-defence claim simply because the accused intends to attack the aggressor. After all, we cannot require a person to always be rational and free from emotional fluctuations in any circumstance. Therefore, Chinese decision-makers can pay more attention to the relevant circumstances and conditions in determining self-defence claims in the future.

What is more, the "reasonable person" standard can be employed in the assessment. After aligning the "reasonable person" with the accused as much as possible, the "reasonable person" must consider the accused's conduct comprehensively. This "person" is not absolutely rational but an ordinary "reasonable person" with vulnerabilities and experiences in the context.[81] According to all these factors above, the decision-makers in China can switch to focus on the reasonableness assessment of the intent rather than the "impurities" of the intent. This way, it may help ensure the objectivity of evaluating the accused's

[81] *See* Victoria Nourse, *Passion's Progress: Modem Law Reform and the Provocation Defence*, 106 YALE L. J. 1331, 1384 (1997).

intent. It can also avoid a miscarriage of justice by ignoring the specific circumstances of the parties.

Employing the assessment of reasonableness and circumstance in China is a future direction. But we cannot ignore the particularities of the Chinese judicial practice. Reasonableness should be considered as far as possible without destroying the original evaluation system in China. The reasonableness of belief in China can be evaluated by properly assessing the accused's primary purpose in the act. If the accused's main purpose is to defend, the accused can be allowed to accompany the purpose of confrontation or even injury. But the aggressive intention should not be dominating.

However, it also depends on the nature of the case. If the accused is defending (or fighting back) against an unlawful force such as robbery or rape, the accused is more likely to be allowed to attack. It is mainly because these unlawful forces are somewhat unique. The accused cannot respond with forces that are the same or similar to these unlawful forces. Hence, in these cases, the accused can intend to fight back or attack the aggressor to stop the aggression. In cases of an intentional attack, assessing the accused's beliefs is more challenging.[82] If the aggression is an attack, the accused will probably act the same way or similar way to stop the aggression. The accused will also easily intend to harm the other party under this circumstance, making it difficult to distinguish it from a mutual fight. Therefore, the distinction between mutual brawling and self-defence cannot be solely based on assessing the accused's belief since both brawling and self-defence have two modes of behaviour: attacking the other party and protecting oneself. Although it is difficult to make decisions in that circumstance, the aggressive purpose still cannot be dominating. The behaviour should still be mainly used to protect rather than assault.

B. Determine the Cause and the Timing of Self-defence with the Imminence and Necessity

Unlawful force is generally about the violation of legal interests (unlawfulness) and the occurrence of the force or threat (imminence). Unlawful aggression is violent and destructive. It poses an imminent threat to the state, public interest, one's own or others' property and other legal rights and interests.[83] The criminal code of Canada defines unlawful force as a range of patterns of acts that are not legally authorised, including physical assault and property invasion.[84] Usually, the force or threat should be unlawful and imminent. However, as discussed above, the accused can defend in advance in certain

[82] *See* Stanley Yeo, *Revisiting Excessive Self-defence*, 12 CURRENT ISSUES IN CRIMINAL JUSTICE 39, 46 (2000).

[83] *See* New Zealand Law Commission, *Battered Defendants: Victims of Domestic Violence Who Offend,* (Aug. 7, 2000), https://www.lawcom.govt.nz/sites/default/files/projectAvailable Formats/NZLC%20PP41.pdf.

[84] *See* Stanley Yeo, *Revisiting Excessive Self-defence*, 12 CURRENT ISSUES IN CRIMINAL JUSTICE 39, 45 (2000).

circumstances that the accused may preciously predict the aggressor's next attack through previous experience. This pre-emptive self-defence is also subject to restrictions. Using force in advance under such conditions is only authorised after attempts have been made to exhaust other options.[85]

There is no fixed timing requirement for the accused to start or end self-defence in Canada. If the accused has reasonable grounds to believe that the danger has occurred and has not ended and reasonably believes it is necessary to use force, self-defence can be claimed successfully. In addition to assessing the unlawfulness and aggressiveness of the causes, the Canadian decision-makers are more concerned with the accused's belief in the attack and aggression that caused the self-defence. They are not necessarily concerned with the lawfulness of the previous event. They will not deny a self-defence claim simply because the event that triggers this self-defence is illegal or wrongful. Moreover, if the accused reasonably believes in an "imaginary" unlawful force, self-defence will be claimed successfully. This is more flexible and targeted than determining from a fixed timing requirement. The decision-makers in China sometimes have difficulty differentiating the cause of defence from the event that triggered the cause of defence. It is also hard for them to determine the time to stop self-defence. The decision-makers in China will not allow for "imaginary" unlawful force. They are unlikely to accept pre-emptive self-defence.[86] In this regard, the decision-makers in China can focus on assessing the unlawful force rather than the previous event and evaluate the reasonableness of the accused's belief in the "imaginary" unlawful force. The time to start a defence is not necessarily the occurrence of the actual force or the actual threat. There are, however, some rules to follow. It requires the accused to perceive a real danger based on the abovementioned conditions and the particular circumstances.[87] A reasonable perception of the "imaginary" unlawful force must be foreseeable and pending rather than remote.

Although there is no fixed timing requirement in Canada, determining the end of self-defence is also crucial. The end of self-defence is also considered one of the evaluating factors for the reasonableness of the response. In R. *v.* Ryan Parker,[88] the accused, Ryan Parker, was controlled by his outrage and attacked the aggressor. Initially, the accused attacked the aggressor to defend himself. However, he continued to attack the aggressor after he knew the aggressor was unconscious. He was ultimately convicted of assault, causing

[85] *See* J.J. Thomson, *Self-Defence,* PHILOSOPHY AND PUBLIC AFFAIRS *283, 302* (1991).

[86] According to the Guiding Opinions para. 6: Whether an unlawful force has started or ended shall be judged in a reasonable manner based on the situation in which the victim defends him- or herself according to the general perception of the public, without requiring the victim to foresee the outcome. Self-defence of the victim who has a wrong understanding of whether an unlawful force has started or ended due to panic or anxiety shall be properly determined according to the principle of the unification of objectivity and subjectivity.

[87] *See* Hamish Stewart, *The Limits of Consent and the Law of Assault* , CANADIAN J. OF L. AND JURISPRUDENCE, 205, 205 (2011).

[88] R. v Parker [2013] O.J. No. 1755 (QL).

bodily harm. In the judgment, the court did not specify what constituted the timing of self-defence, but it did state that timing assessment is part of the reasonableness judgment. If it is clear that the aggressor could not assault, but the accused kept attacking the aggressor, then the court has reason to believe that the accused acted in retaliation rather than in defence.

In a nutshell, breaking the fixed mindset of assessing the commencement and termination of unlawful force is worth it. To evaluate whether self-defence can start is not necessarily according to when the unlawful force or the threat of force began. The assessment can be combined with the imminence and the relevant circumstances.[89] Considering the specific circumstances will help to make a comprehensive assessment. An unlawful force is terminated when the imminent danger no longer exists. It is essential to clarify when the unlawful force or unlawful threat of force no longer exists. Considering the necessity and imminence, we suggest that the following three approaches can be taken to determine whether the imminent danger no longer exists initially. Firstly, the unlawful force or threat of aggression has wholly ceased. The main emphasis is on the state of unlawful force. It may be that the defender or a third party has stopped the force, or it may be that the force is no longer harmful. Secondly, the aggressors have automatically and definitively discontinued their aggression. The main emphasis is the aggressor's personal choice. That is to say, the unlawful force could not be stopped at that time, but the aggressor chose to give up the infringement. Finally, the aggressors cannot attack because they are incapacitated (including subdued). The main emphasis is that the aggressor has lost his or her attacking ability. If any of these three situations arises, the accused should stop defending. Otherwise, the self-defence will no longer be reasonable and appropriate, and the decision-makers may probably deny the claim of self-defence.[90]

VI. CONCLUSION

On the whole, China is now improving the evaluation criteria for self-defence cases. As can be seen from the Guiding Opinions issued in 2020, the Chinese judiciary has increasingly focused on the relevant circumstances in self-defence cases rather than only on the consequences. The emphasis on reasonableness and the pertinent decision-making circumstances has become the future direction in self-defence cases. However, there are still difficulties in practice due to the lack of practical experience and the unclear and ambiguous measures from the Guiding Opinions. The decision-makers still have trouble dealing with the relevant circumstances and reasonableness in the accused's belief and assessing the causes and timing of the self-defence. The provisions of Canadian criminal law and the reasoning and conclusions in Canadian

[89] R. v Cinous [2002] S.C.C. 29 (Can.).

[90] *See* Isabel Grant and Debra Parkes, *Equality and the defence of Provocation: Irreconcilable Differences*, DALHOUSIE L. J. 455, 455 (2017).

judicial practice have been focusing on these issues for a long time. Since the laws of self-defence in both countries share many similarities in essence, Canada's experience can thus provide some essential expertise and references for the Chinese decision-makers.

In order to overcome the difficulties, there is a great need for the Chinese decision-makers to consider how to put the assessment of reasonableness into judicial practice. More details on future direction and measures mainly include the following key points:

The decision-makers in China should not simply deny a claim of self-defence when the accused intend to harm or attack or when the events before the unlawful forces are illegal and the accused choose to defend themselves in advance. They can carefully evaluate the parties' circumstances and relevant conditions to determine whether the accused has a reasonable belief. They can also analyze the primary purpose of the accused's response according to each specific case and can set up a "reasonable person" to help them think.

The decision-makers in China should not extend the scope of the cause of defence inappropriately, confusing the cause of defence with the event that triggered the defence. This will mislead the assessment of self-defence and prevent a fair evaluation of the factors. The decision-makers should give up their overemphasis on a set period of self-defence and focus on the necessity of the accused's act. If the accused has reasonable grounds to believe that the danger has occurred and has not yet ended and reasonably believes it is necessary to use force, self-defence can be claimed successfully.

Recently, China has begun to emphasize the assessment of reasonableness and the relevant circumstances, while Canada has a long history of evaluating these factors in judicial practice. The two countries also share similar inherent characteristics and details of imminence, specific circumstances and reasonableness.[91] The essence of the self-defence laws in these two countries includes a reasonable act requirement. The defender's response to the aggressor's threat must be reasonably necessary to avert and proportionate to that threat. Also, self-defence is crucially a matter of timing and circumstance. The self-defence laws in these two countries apply where defenders use necessary, reasonable and proportionate force to defend themselves or another from imminent attack. These experiences and approaches may help China rethink and improve its determination of self-defence. It can also help China figure out a more flexible and effective way to overcome the current difficulties in practice.

[91] *See supra* note 78, at 1012–1013.