

The U.S. Constitution and Anticipatory Self-Defense Under Article 51 of the U.N. Charter

Ever since the U.N. Charter entered into force in 1945 a debate has ensued about the meaning and scope of the right of self-defense under article 51 of the Charter.¹ Two schools of thought have arisen.² One school claims that the term "armed attack" must be taken literally and that members of the U.N. have fore-sworn acts of self-defense even in the face of dire danger or severe provocation. Only when the other side has actually engaged in hostilities by initiating an "armed attack" can the first side resort to the use of force in self-defense.³ The second school maintains that the provision was not meant to establish new limitations on the traditional right of self-defense, even in the absence of an armed attack. It is noted that the term "self-defense" in article 51 is qualified by the word "inherent," meaning that the natural right of a state to protect itself against threats to its security was left unimpaired. The term "when an armed attack occurs" is held to be merely illustrative.⁴ An anticipatory strike against an enemy massing troops or making other signs of preparation for imminent

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¹Article 51 reads: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

²For succinct summaries of these two schools, see J.L. BRIERLY, *THE LAW OF NATIONS* (ed. Sir Humphrey Waldock) (6th ed.; Oxford: Oxford University Press, 1963), pp. 413-32; and K. Skubiszewski, *Use of Force by States, Collective Security, Law of War and Neutrality*, in Max Sorenson (ed.), *MANUAL OF PUBLIC INTERNATIONAL LAW* (London: MacMillan, 1968), pp. 765-68. See also LELAND M. GOODRICH, EDVARD HAMBRO, AND ANNE P. SIMONS, *CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS* (N.Y.: Columbia University Press, 1969), pp. 344-48; and MARJORIE M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* (Washington: Gov't. Printing Office, 1965), vol. 5, pp. 971-91.

³This interpretation is endorsed by such writers as Skubiszewski, *op. cit.*; HANS Kelsen, *LAW OF THE UNITED NATIONS* (London: Stevens, 1950), pp. 269, 791; Quincy Wright, *The Cuban Quarantine*, *AMERICAN JOURNAL OF INTERNATIONAL LAW*, vol. 57 (1963), pp. 546-63; and IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* (Oxford: Clarendon Press, 1963), pp. 264-80.

⁴Supporters of this interpretation include Waldock, *op. cit.*; JULIUS STONE, *AGGRESSION AND WORLD ORDER* (London: Stevens, 1958), pp. 44, 92-104; and D. BOWETT, *SELF DEFENCE IN INTERNATIONAL LAW* (Manchester: Manchester University Press, 1958), pp. 24, 188-89.

war would be barred by the first interpretation but permitted by the second.

A little-noticed provision of the U.S. Constitution would seem to have a direct bearing on this debate, at least in so far as the United States is concerned. Article 1, section 10, clause 3 of the U.S. Constitution provides: "No State shall, without the Consent of Congress . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." Irrespective of whether the constitutional phrase "unless actually invaded" is equivalent to the Charter condition "if an armed attack occurs," clearly the right of a state to engage in war when it is "in such imminent danger as will not admit of delay" goes beyond the Charter condition; it implies action which is pre-emptive. A state, according to this provision, is given the right to initiate war *in advance* of actual hostilities and is not compelled to wait until after it has been attacked.

The question may be asked: does the word "danger" refer back to the term "invaded" found earlier in the sentence, or does it stand alone—*i.e.*, is a state's right to engage in war limited to danger of "actual invasion" or does it cover any danger of whatever sort? The Records of the Constitutional Convention offer no guidance. The source for this constitutional clause is to be found in article VI of the Articles of Confederation, which provided: "No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nations of Indians to invade such States, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted." In the Constitutional Convention, the report of the Committee of Detail closely followed this terminology (except for the reference to the Indians) and prohibited a state to engage in war "unless it shall be actually invaded by enemies, or the danger of invasion be so imminent as not to admit of delay until the Legislature of the United States can be consulted."⁵ This formula was retained throughout, even through the report of the Committee of Style on September 12.⁶ However, in the final discussions, two days before the Convention adjourned, the provision was refashioned: the word "invasion" in the latter part of the sentence was omitted as was the reference to the legislature, and the provision now read: "or in such imminent danger as will not admit of delay."⁷ Since there was no debate on the subject, it is not clear whether the intention was merely to improve the style or actually to broaden the freedom of action with reference to *any* danger—of invasion or otherwise. But in either case, the provision clearly authorizes a state to take action while the danger remains imminent.

The existence of the foregoing constitutional provision would seem to confirm

⁵MAX FARRAND, *THE RECORDS OF THE CONSTITUTIONAL CONVENTION* (4 vols. Rev. ed. New Haven: Yale University Press, 1937), vol. 2, pp. 187, 442 n. 26.

⁶*Ibid.*, p. 597.

⁷*Ibid.*, p. 626.

that for the United States, at least, the broader interpretation of article 51 of the Charter, which leaves unimpaired the traditional right of recourse to force in the face of imminent danger, is to be preferred. It might be argued, however, that the federal government of the United States is bound by the Charter, including article 51 in its narrow interpretation, regardless of any rights, including that of self-defense, which the Constitution reserves for the individual states composing the United States. This, however, would produce the rather anomalous state of affairs, whereby the United States would not be permitted to launch anticipatory strikes to ward off a threat of imminent danger, while one of the state governments would be allowed to do so because such a right is preserved for it under the Constitution. Thus, if Florida, for instance, was threatened by action from Cuba, the United States Air-Force could not move, but the Florida Coast-Guard or Air-Patrol would be free to act.

Against this it might be argued that the international commitment of the United States would be equally binding on each of the state governments by virtue of article VI of the Constitution, the Supremacy Clause, which provides that “. . . all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land. . . .” This argument, however, raises the very interesting question whether the federal government is indeed empowered, by means of a treaty, to affect any of the rights reserved by the Constitution to the individual states. Justice Holmes, in his famous comment on the treaty power of the United States, stated: “Acts of Congress are the supreme law of the land when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention.”⁸ If this sweeping interpretation of the federal treaty power is law, then the federal government’s authority to bind the states would be unaffected by any right which might be reserved to them by virtue of the Constitution. But, as Professor Henkin has written: “Arguments, based on the language of the Supremacy Clause, that treaties are not subject to constitutional prohibitions are now well at rest.”⁹ The matter was settled by the 1957 Supreme Court decision of *Reid v. Covert* in which Justice Black declared:¹⁰

It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V.

⁸*Missouri v. Holland*, 252 U.S. 416, 433 (1920).

⁹LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* (Mineola, N.Y.: Foundation Press, 1972), pp. 253-54; see also pp. 137-40.

¹⁰354 U.S. 1, at 17.

The right of self-defense inhering in a state, is, of course, not a civil liberty such as those guaranteed individual citizens under the Bill of Rights or the Fourteenth Amendment. Nonetheless, it is an essential assurance regarding the state's very existence, and it is not to be presumed that, if such a right is preserved under the Constitution, the federal government is empowered to nullify it by treaty or otherwise. In the case of *Geofrey v. Riggs*, Justice Field stated (albeit as dictum):¹¹ "It would not be contended that it [the treaty power] extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent." In accordance with this pronouncement it is generally assumed that the treaty-makers could not modify the republican form of government of the states, or even completely abolish all state militia in the event, for instance, of a treaty prescribing general and complete disarmament.¹²

By the same token, if the terminology of article 1, section 10, clause 3, assures every state in the union the right to engage in war in the face of "such imminent danger as will not admit of delay," it is difficult to see how this right could be abrogated by treaty. Consequently, if such right inheres in each of the state governments, it must be presumed to inhere no less in the federal government. This is particularly so since, according to article 4, section 4 of the Constitution, the United States is committed to "protect each of them [the States] against Invasion." Thus, the right of self-defense reserved to a state under article 1, section 10, clause 3 must be covered by, and is indeed subsumed under, the general protection to which the United States, by virtue of article 4, section 4, is committed.

If this is the case, then of necessity it must be assumed that for the United States, the broader interpretation of article 51 of the Charter is the correct one, and the traditional concept of self-defense as it existed prior to the Charter, including the right to exercise anticipatory force in certain circumstances, continues to apply.¹³

¹¹133 U.S. 258 at 267 (1890).

¹²See the discussion in HENKIN, *op. cit.*, pp. 147-48. Also see LOUIS HENKIN, *ARMS CONTROL AND INSPECTION IN AMERICAN LAW* (N.Y.: Columbia University Press, 1958), pp. 33-36.

¹³It might be noted, in passing, that if article 1, section 10, clause 3 of the Constitution sums up the nature of self-defense for the United States, then the definition enunciated by Secretary of State Webster in the case of the *Caroline* would seem to be too narrow. In his correspondence with British Foreign Minister Ashburton in this case, Webster maintained that the right to exercise self-defense by one state against the territory of another was limited to cases in which the "necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation." Cited in JOHN BASSETT MOORE, *A DIGEST OF INTERNATIONAL LAW* (Washington, D.C.: Gov't. Printing Office, 1906), vol. 2, p. 412; see also discussion in WILLIAM W. BISHOP JR., *INTERNATIONAL LAW: CASES AND MATERIALS* (2nd ed.: Boston, Little Brown, 1962), p. 777. It does not appear that Webster took note of the foregoing constitutional provision under whose terms it would be sufficient for a State to be confronted by "imminent danger as will not admit of delay" alone, without anything more, for it to be free to exercise the right of self-defense.