INDIVIDUAL AND COLLECTIVE SELF-DEFENSE IN ARTICLE 51 OF THE CHARTER OF THE UNITED NATIONS

Article 51 of the Charter of the United Nations [1] poses the problem of the meaning of the concept of "individual and collective self-defense," of its connection with other parts of the Charter, and of the range of its application.[2]

This article, not contained in the Dumbarton Oaks Proposals, was added at San Francisco. It was the notion of "collective self-defense" which was needed, and it was needed as a diplomatic step to solve the so-called "Latin-American crisis" at San Francisco. It was the means to save the relative independence of the Inter-American System and the continued validity of the Act of Chapultepec and of the proposed permanent Inter-American Defense Treaty, without endangering the universality of the jurisdiction of the Security Council. It was for purposes of fitting regional arrangements, and particularly the Inter-American System, into the general international organization. That this was so is clearly shown by the history of the San Francisco Conference, where what is now Article 51 was worked out by Committee III/4, dealing with regional arrangements. Latin Americans had originally feared that the Security Council might override the Act of Chapultepec, but soon became anxious rather for fear that action under this Act might be blocked through the inactivity of the Security Council, paralyzed by the exercise of the "veto." A great number of Latin American proposals were introduced between May 4 and 23, 1945, in Committee III/4, the Chairman of which was Alberto Lleras Camargo, then Foreign Minister of Colombia, now Director General of the Pan American Union. But only the United States proposal of what is now Article 51 solved the dilemma. Lleras Camargo, speaking for Colombia, declared [3] in the fourth meeting of Committee III/4 on May 23, 1945:

[1] 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 the measures necessary to maintain international peace and security. Measures taken by members in the exercise of the right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

[2] For a preliminary discussion of Art. 51 see: Leland M. Goodrich and Edvard Hambro, *Charter of the United Nations: Commentary and Documents,* Boston, 1946, pp. 174–181. For a more thorough discussion, but one written when the San Francisco documents were not yet available, see E. Albanell MacCall, *La legítima defensa en el articulo 51 de la Carta de las Naciones Unidas,* Montevideo, 1945. A synthesis of this Uruguayan study is given by A. Sehwerest Ferrer in *Revista de Derecho Internacional,* Vol. 51, number 101 (March 31, 1947), pp. 14–23. The Uruguayan study is primarily based on the excellent Hague lectures of Emile Giraud, *La théorie de la légitime défense* (*Recueil des Cours,* 1934, Vol. III, pp. 691–865).

[3] *United Nations Conference on International Organization. Documents, 1945.* Vol. XII, pp. 680–81.

> The Latin American countries understood, as Senator Vandenberg has said, that the origin of the term 'self-defense' is identified with the necessity of preserving regional systems like the Inter-American one. . . . It may be deduced that the approval of this article implies that Chapultepec is not in contravention of the Charter.

and again:[4]

> In the case of the American states, an aggression against one American state constitutes an aggression against all the other American states and all of them exercise their right of legitimate defense by giving support to the state attacked, in order to repel such aggression. *This is what is meant by the right of collective self-defense.*

All the Latin American representatives associated themselves with these declarations. When the Report of Committee III/4 was adopted[5] on June 13, 1945, at the second meeting of Commission III, the Mexican Castillo Nájera spoke in the same sense.[6]

The proposals of the Latin American governments for the Inter-American Defense Treaty to be considered at the Rio de Janiero conference and the report and draft treaty of the Committee of the Governing Board, presented[7] at the session of May 22, 1946, distinguish between acts and threats of aggression having the form of "armed attack," where full advantage is taken of Article 51, and other acts and threats of aggression.

Historically, therefore, the connection of Article 51 with the Inter-American System is clear. But this historical background is not necessarily decisive for the juridical interpretation of Article 51 as it stands. The Permanent Court of International Justice held that, where a text is clear and unambiguous, no resort should be had to *travaux préparatoires* for its interpretation. There are to be noted further the fact that Article 51 is not included in the chapter on regional arrangements, the fact that the Inter-American System—this question was debated at San Francisco and decided negatively—is not specifically mentioned, and the negotiations themselves. The representative of Egypt stated that Article 51 also extended to the Pan-Arab League, but he declared himself against the inclusion of alliances and mutual assistance pacts. But Paul-Boncour (France) emphatically stated that the formula of Article 51 "extends in general to cases of mutual assistance against aggression." Thus the "collective self-

[4] The same, p. 687.

[5] The same, Vol. XI, pp. 54–55.

[6] In the same sense also: *Report on the Action of the San Francisco Conference on Regional Arrangements, Submitted to the Governing Board by the Director General,* Washington, Pan-American Union, 1945. Congress and Conference Series 48 (mimeographed).

[7] *Inter-American Conference for the Maintenance of Continental Peace and Security, Rio de Janeiro,* Washington, 1946, pp. 143 (mimeographed).

defense" of Article 51 may play the same role for a new system of alliances as the *ententes régionales* of Article XXI of the Covenant.

This development, apart from the original wish of saving the relative autonomy of Pan-America, reflects the lack of complete faith in the ability of the United Nations to maintain international peace and security, a lack of faith brought about by the fact that Article 43, calling for the placing of armed forces at the disposal of the Security Council had not yet been implemented and by the possible paralysis of the Council through the exercise of the veto. Yet the developments discussed give the right of "collective defense" only to members bound by regional, or, at least, by particular treaty ties. But may Article 51 not be invoked by any and all members, even those which have no special treaties with the state attacked? Such use was intimated by the British Representative on the occasion of the discussion of the Report of the Military Staff Committee,[8] as a substitute for non-existing "collective security." For the Report had, realistically, proposed to build up only a relatively small armed force to be used against small and medium-sized states, not against Great Powers.

The obligation of Article 2, paragraph 4, that the members "refrain in their international relations from the use of force," is subject, therefore, apart from Articles 106 and 107, to the following exceptions: (1) the right of individual self-defense, (2) the right of collective self-defense: (a) by the Inter-American System, (b) by the Pan-Arab League, (c) by possible new continental or regional organizations, (d) by states having alliances or mutual asssitance pacts against aggression and (f) eventually by any and all states members.

Whether such development will, in fact, substitute the independent use of force for the enforcement action by the United Nations is, first of all, a political problem; but it is also a juridical problem, depending on the legal meaning of the concept "individual and collective self-defense."

Let us analyze, first, the legal meaning of the concept of "collective self-defense." The term is new, but the thing was known previously. Military assistance to another state is the heart of any treaty of alliance. Prior to the League of Nations this problem was primarily political, as a state could at all times go to war, and as states could also conclude alliances for offensive purposes. Yet the idea of helping another state only to defend itself had often also a legal significance; the casus foederis was often restricted to an *attaque non-provoquée*.[9] The alliances and mutual assistance pacts of the inter-war period, concluded "within the framework of the League of Nations," all take this attitude. The idea of Pan-American solidarity, often proclaimed, was raised to the idea of Pan-American continental defense. It culminates in Declaration XV

[8] Security Council S/336, April 30, 1947.

[9] See W. Steinlein, *Der Begriff des nicht herausgeforderten Angriffs in Bündnisverträgen*, Leipzig, 1927.

signed at Havana in 1940, and the Act of Chapultepec, of 1945, which, for the first time, envisaged "the use of armed force to repel aggression."

A special problem is raised by the wording of Article 51, which gives the right of collective self-defense only "if an armed attack occurs against a member of the United Nations." In the hypothetical case of an illegal armed attack by a member of the United Nations against Portugal, with which Great Britain has a centuries-old alliance, has Great Britain a right of collective self-defense under Article 51?

The term "collective self-defense" is not a happy one. It is not self-defense, but defense of another state;[10] it corresponds, in municipal law, not to self-defense, but to the defense of others.[11] Neither is "collective self-defense" an action in the name and by authority of the United Nations. It is not a means to realize collective security. It does not correspond to the military *action commune* under Art. XVI of the Covenant. It is an autonomous exercise of force, legalized by the Charter only under the conditions and within the limits of Art. 51.

Is the exercise of collective defense merely a right, or also a legal duty?[12] If a state or states are bound by regional or mutual assistance treaties they are under a duty to act, imposed by particular international law. But for any state or states not having such particular obligations the exercise of collective defense is for it under Art. 51 merely a right and not a legal duty.

The right to defend others in muncipal law is often restricted to persons having a special family relation with the person defended and always made dependent on whether the person defended has himself a legal right of self-defense.[13] Here, too, the legality of the exercise of the right of collective self-defense depends on whether the state in whose favor it is being exercised has a right of individual self-defense. In consequence all further legal problems concerning collective self-defense depend on the problem of individual self-defense.

Self-defense must be distinguished from self-help. Self-help is a procedure of realizing and enforcing the law in a primitive legal order. In an advanced legal order self-help is excluded. As international law is, or at least was, a primitive legal order, it had to admit self-help (reprisals, war). In consequence the notion of self-defense had a political rather than a legal character. Self-defense as a truly juridical institution pre-

[10] Descamps (Hague, *Recueil des Cours*, 1930, Vol. I, pp. 469–485) speaks of the *concours à la légitime défense d'autrui.*

[11] In German *Nothilfe* as distinguished from *Notwehr.*

[12] In Roman Law a slave had not only the right, but also the legal duty, to defend his master if the master found himself in a situation of self-defense.

[13] Such person "has only the same right to defend another as he would have to defend himself under the same circumstances," although "even a stranger may take life, if necessary, in order to prevent the commission of a felony by violence or surprise" (Clark and Marshall, *A Treatise on the Law of Crimes*, Chicago, 1940 (4th ed.), p. 359).

supposes an advanced legal order and international self-defense is, therefore, closely bound up with a more advanced international organization. Only where self-help is forbidden does self-defense become legally meaningful. Only the attempts to restrict or eliminate the right of resort to war make international self-defense legally meaningful. The notion of international self-defense depends on the illegality of war, or, as the Charter puts it more sharply, on the illegality of the use of force by individual states.

Self-defense is, further, in municipal and international law, clearly to be distinguished from the so-called "state of necessity."[14] Self-defense is a full justification; it is a right, not only an excuse. But it is a right, established by positive law, a right in the lawyer's sense, not merely a political or ethical principle. That is why it is unfortunate that Art. 51 puts it as a "right" of natural law,[15] although this phrase is also found in municipal law.[16] While the right of self-defense is granted by practically all legal orders, it may be denied, or it may constitute only an excuse, or it may be made dependent on particular conditions.[17] The phrase "inherent right" can only serve to obscure the legal meaning. As a legal right, granted by positive international law, it has to be defined by this positive law. Only thus can its legal meaning be discovered; only thus can we see whether Art. 51 constitutes a progressive development and measure it against the institution of "self-defense" in advanced municipal legal orders.

As in municipal law, self-defense under Art. 51 is not a procedure to enforce the law, is not designed to punish the aggressor or to obtain indemnities, is not an enforcement action by the United Nations, but serves primarily to repel an illegal armed attack. But, contrary to municipal law, it may not stop here: it seems to give the state or states exercising the right of individual or collective self-defense the right to resort to a justified war, to carry this war to victory, to impose a peace treaty upon

[14] It was, therefore, not correct, when Secretary of State Webster spoke, with regard to the Caroline Case of 1837, of the "great law of self-defense" (J. B. Moore, *Digest of International Law*, Vol. II, p. 412). Necessity may be an excuse, but never a justification; in the common law of crimes necessity even as an excuse for homicide is doubtful. See *Reg. v. Dudley and Stephens*, L. R. 14, Q. B. Div. 273 (1884). See also Jerome Hall, *General Principles of Criminal Law*, Indianapolis, 1946.

[15] "Inherent right"; in the French text *droit naturel;* in the Spanish text *derecho inmanente.*

[16] Already in Roman law: *vim vi repellere licere Cassius scribit idque ius natura comparatur* (Dig. 43, 16, 1, 27).

[17] See the development in the common law of crimes: originally no excuse at all; then, under the Statute of Gloucester (6 Edw. 1, c. 9, 1278), the life of one who had killed *se defendendo* was released but his chattels forfeited; later a full justification under the Statute of 24 Henry VIII, c. 5, 1532. Yet the exercise of the right of self-defense presupposes the "retreat to the wall," a condition wholly unknown to the countries of the Roman law.

the vanquished aggressor, always presupposing that the Security Council has failed and continues to fail of taking the measures necessary to maintain international peace and security. The right of self-defense is, in such cases, a right to resort to war. But as the action is war, even if illegal on the side of the aggressor, the state or states acting in self-defense are bound by the laws of war.

It seems also that the conditions of necessity, reasonableness, and a certain proportionality, which the municipal law prescribes for the exercise of the right of self-defense, are lacking in Art. 51.

Self-defense in municipal law presupposes an illegal attack; this is certainly true also in international law.[18] In consequence the right of Art. 51 cannot be exercised legally against the legal use of force, as against an enforcement action by the United Nations, or against a state or states legally exercising the right of self-defense under Art. 51.

As self-defense is legal only against an illegal attack, the problem of when self-defense is legitimate is of the utmost importance; the problem of the limits of self-defense is coördinate with the problem of the "definition of aggression." The recognition of a vague "right of self-defense," to be determined by the state which claims to act in self-defense, is apt to make the prohibition of "wars of aggression" illusory. That is why it could logically be asked whether the Pact of Paris could be violated at all. It is a commonplace that all states, determined to go to war, plead self-defense. The term "self-defense" has been diplomatically used in a very extended fashion, including the Monroe Doctrine,[19] the so-called British Monroe Doctrine, and, in general, the doctrine of the so-called "vital interests,"[20] the justification of the lend-lease bill[21] and so on. "Self-defense" has been recognized as an exception in the abortive Geneva Protocol of 1924, in Art. 2 of the Locarno Treaty of 1925, and under the Kellogg Pact.[22] In addition it was often insisted, as Hughes said 1923 with regard to the Monroe Doctrine, "that the U. S. in the exercise of this right of self-defense must have an unhampered discretion," or, as the Kellogg Note puts it, that "each nation is the sole judge of what constitutes the right of self-defense and the necessity and extent of the same."

In this respect Art. 51 constitutes an important progress by limiting the right of individual and collective self-defense to the one case of armed attack against a member of the U.N. Various problems arise with regard to the interpretation of the term "armed attack." The word "at-

[18] C. C. Hyde, *International Law*, Boston, 1922, Vol. I, p. 106.

[19] C. H. Hughes, 1923 (Hackworth, *Digest of International Law*, Vol. IV, p. 451).

[20] J. L. Brierly, *The Outlook for International Law*, Oxford, 1944, pp. 33–45.

[21] H. Rep. 18, 77th Cong., 1st sess., p. 5 (Hackworth, work quoted, Vol. VII, pp. 692–93).

[22] Circular Note of Secretary of State Kellogg of June 23, 1928.

tack'' is a strategic, not a legal word. It is clear that ''armed attack'' can only mean an illegal armed attack,[23] an ''aggression.'' But the problem of the definition of aggression has not only not yet been solved: the very desirability of the definition of aggression has been rejected by Pan-America[24] and at San Francisco.[25] Under Art. 39 of the Charter it is for the Security Council to determine the existence of any act of aggression at its discretion.

If ''armed attack'' means illegal armed attack it means, on the other hand, any illegal armed attack, even a small border incident; necessity or proportionality are no conditions for the exercise of self-defense under Art. 51. It is clear that there is no self-defense against a legal enforcement action by the United Nations or against a legal exercise of self-defense. An armed attack may also be unlawful, and thus give the right of self-defense if it constitutes an unlawful intervention, individual or collective; Art. 51 must be interpreted with regard to the doctrine of non-intervention and Art. 2, par. 7, of the Charter.[26] ''Armed attack'' gives the right of self-defense if directed against a member of the U.N.; how it is done, on land, by sea, in the air, by invasion of territory by armed forces, or by long-range guided missiles, and so on, is legally irrelevant. It is also irrelevant whether such armed attack is made ultimately against the sovereignty, territorial integrity, and independence of the U.N. member or whether any such purpose is expressly denied. Such interpretation will make illegal an armed intervention under the Monroe Doctrine or for the purpose of protecting citizens abroad; is, in the latter case, an ''armed intervention,'' the dispatching of men-of-war, without attack, legal or does it already give rise to self-defense under Art. 51? But the ''armed attack'' must not only be directed against a state, it must also be made by a state or with the approval of a state. One may think of the Pancho Villa affair, or now of the situation of Greece and Yugoslavia.

''Armed attack'' as the only condition of the right of self-defense under Art. 51 may, in conceivable circumstances, mean too little. For this right does not exist against any form of aggression which does not constitute ''armed attack.'' Secondly this term means something that has taken place. Art. 51 prohibits ''preventive war.'' The ''threat of aggression'' does not justify self-defense under Art. 51. Now in municipal law self-defense is justified only against an actual danger, but it is sufficient that the danger is *imminent*. The ''imminent'' armed attack does not suffice under Art. 51.

[23] Whereas the English and the Spanish texts use ''armed attack'' and *ataque armado*, the French text has the clearer term *agréssion militaire*.

[24] Res. XXIV, Lima Conference, 1938.

[25] Documents, work quoted, Vol. XII, pp. 341–349.

[26] Luis E. Nieto Arteta, *Intervención y dominio reservado del Estado* (in the first [1947] number of the *Revista Colombiana de Derecho Internacional*).

Apart from the problem of the definition of aggression, there is the problem of determining the aggressor. The aggressor, or he who has "provoked" an aggression, has no right of self-defense under municipal law; also in municipal law there are situations where neither of two fighting persons can invoke the right of self-defense. To determine the aggressor must, in cases of self-defense, be left, in the first instance, to the person in question. But self-defense becomes a truly juridical institution in municipal law only through the control of self-defense by independent courts with compulsory jurisdiction. No such judicial control is provided in Art. 51. But here, too, some progress has been achieved, through giving a certain control over the exercise of the right of self-defense to the Security Council. The latter not only retains, notwithstanding Art. 51, all authority and responsibility to take at any time the necessary measures, and thus to determine an act of aggression and, consequently, the legality of self-defense. The state or states acting in the exercise of self-defense, are, moreover, legally bound to report immediately to the Security Council the measures taken in the exercise of the right of self-defense, and they can take such measures only until the Security Council has taken the measures necessary to maintain international peace and security.

The concept of self-defense in Art. 51, to sum up, reveals a progressive development, although it is, of course, still far away from the juridical precision which the legal institution of self-defense has in advanced municipal law.

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PROPOSED ITO CHARTER

Eighteen United Nations have recently participated, through their representatives on the Preparatory Committee, in the preparation of a draft charter for an International Trade Organization.[1] Earlier phases of the effort looking to a United Nations Conference on Trade and Employment, which is to be held at Havana beginning on November 21, 1947, were the subject of earlier comment by the present writer.[2]

The provisions of the Charter as they have now evolved are the results of intensive work by the Preparatory Committee at its first session (held in London, October 15 to November 26, 1946),[3] revisory effort by the Drafting Committee (which met in New York from January 20 to February 25, 1947),[4] and further discussion and formulation at the second session of the Preparatory Committee which convened at Geneva on April 10, 1947, and

[1] Doc. E/PC/T/180.

[2] "Toward a World Conference on Trade and Employment," this JOURNAL, Vol. 41 (1947), pp. 127–131.

[3] Report in Doc. E/PC/T/33.

[4] Report in Doc. E/PC/T/34.