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Legal Implications of the Cuban Crisis

The situation in Cuba which confronted this country last fall and the action taken to meet it are matters still vivid in our memory. The President of the United States succinctly and dramatically presented them during the course of his historic address to the nation. He began by stating that it had been clearly established that a series of offensive missile sites was then in preparation on that imprisoned island.

The purpose of these bases can be none other than to provide a nuclear strike capability against the Western Hemisphere. . . . In addition, jet bombers, capable of carrying nuclear weapons, are now being uncrated and assembled in Cuba, while the necessary air bases are being prepared. . . . To halt this offensive buildup, a strict quarantine on all offensive military equipment under shipment to Cuba is being initiated. All ships of any kind bound for Cuba from whatever nation or port will, if found to contain cargoes of offensive weapons, be turned back.¹

The President also said he had "directed the continued close surveillance of Cuba and its military buildup," and announced that we would "regard any nuclear missile launched from Cuba against any nation in the Western Hemisphere as an attack by the Soviet Union on the United States requiring a full retaliatory response upon the Soviet Union."²

What legal implications are involved in thus imposing a quarantine against all shipping bound for Cuba, in directing a surveillance involving overflights of Cuba, and in treating the launching of a Soviet missile against another nation of the Western Hemisphere as if it were an attack upon the United States? The following discussion will attempt to answer these questions in some detail by examining their current legality and political background.

THE NATIONAL SECURITY

The last question will be considered first. By what right did the President commit this nation to treat an attack on some Latin-American country as an attack upon the United States? To this there is a quick answer.

The first of our current mutual defense pacts, the Inter-American Treaty of Reciprocal Assistance of 1947, generally referred to as the Rio Treaty, was complete authority for such a pronouncement by the President. All twenty Latin-American republics as well as the United States were parties to that treaty.

The High Contracting Parties agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations.³

That treaty had the advice and consent of the Senate and under the Constitu-

¹ 47 DEP'T STATE BULL. 715, 716 (1962).

² 47 DEP'T STATE BULL. 718 (1962).

³ 62 Stat. 1681, 1700 (1948).

tion became the law of the land.⁴ The President, as the Chief Executive and as Commander-in-Chief of the Armed Forces,⁵ needed no further authority to make the statement he did regarding retaliation against the Soviet Union. We were internationally committed to this policy. Any other course of action might have subjected us to the accusation of violating our international obligation.

AERIAL SURVEILLANCE AND QUARANTINE

Aerial surveillance of Cuba is, in many respects, tied to the quarantine operation as far as the legal implications are concerned and should be treated together. Certainly the overflights would be an invasion of the airspace of Cuba,⁶ just as action on the high seas to stop ships bound for Cuba would be an invasion of the rights of the state whose flag those ships were flying.⁷

There appears to be no question, however, that the President was supported by domestic law in his Cuban action. The Constitutional powers of the President as Commander-in-Chief of the Armed Forces are well known. Furthermore, in this matter, the President was assured of Congressional backing by the Joint Resolution of the Congress of October 3, 1962, which expressed the determination of the United States "to prevent in Cuba the creation . . . of an externally supported military capability endangering the security of the United States."⁸

More important to our discussion, nevertheless, are the problems raised by the international aspects of the Cuban affair. We shall deal with three of them in particular: the problem of our relationship with Latin America, questions involving the Charter of the United Nations, and legal issues under what is sometimes called customary international law.

In dealing with questions of international law it is often impossible to discuss the legal issues without giving some consideration to the political climate in which the law is to operate. It will be helpful, therefore, to first take a brief look at the political background of the resolution of the Latin-American Foreign Ministers meeting in Washington with Secretary Rusk, which authorized the so-called "quarantine."

POLITICAL BACKGROUND

In 1954 communism got a brief foothold in Guatemala. At that time the Organization of American States adopted a resolution which condemned the activities of the international communist movement as constituting intervention in American affairs and declared that "the domination or control of the political institutions of any American State by the international communist movement, extending to this hemisphere the political system of an extracontinental power,

⁴ U.S. CONST. art. VI.

⁵ U.S. CONST. art. II, §§ 1, 2.

⁶ "The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory." International Air Services Transit Agreement (Chicago Civil Aviation Agreement), Dec. 7, 1944, art. I, 59 Stat. 1693, to which the United States and Cuba are parties.

⁷ "Ships shall sail under the flag of one state only and . . . shall be subject to its exclusive jurisdiction on the high seas." Convention on the High Seas art. 6, para. 1, reproduced in 52 AM. J. INT'L L. 842 (1958).

⁸ 76 Stat. 697 (1962).

would constitute a threat to the sovereignty and political independence of the American States, endangering the peace of America."⁹

The emphasis was clearly on intervention. Latin-Americans are intensely nationalistic and have a marked aversion to anything resembling intervention in the internal affairs of a state. This tendency was aggravated, to be sure, by our own acts in sending marines to disturbed areas in Latin-America during the early twentieth century. We had, however, renounced this policy in the Convention on Rights and Duties of States which we had entered into with the other American republics in 1933.¹⁰ In article 8 of the Convention we expressly committed ourselves to a very significant proposition: "No state has the right to intervene in the internal or external affairs of another." In 1954 the Latin-Americans would have considered any action or sanctions against Guatemala an intervention in its choice of government.

In 1960 at a meeting of the Foreign Ministers at San Jose, Costa Rica, we sought sanctions against Castro, yet all we could obtain at that time was another condemnation of intervention by extracontinental powers in affairs of an American state.¹¹ However, at Punta del Este in January 1962, after reiterating adherence to the principles of self-determination and non-intervention, the Foreign Ministers produced a resolution with teeth in it. The resolution stated that "the present Government of Cuba, which has officially identified itself as a Marxist-Leninist government, is incompatible with the principles and objectives of the inter-American system. [And] that this incompatibility excludes the present Government of Cuba from participation in the inter-American system."¹² The Ministers asked that steps be taken to adopt measures to carry out this resolution. Such steps were taken, and since then twenty instead of twenty-one states have acted in matters concerning the Organization of American States and related organs.¹³

It is against this background that we come to the action taken last October instituting aerial surveillance over Cuba and imposing the so-called quarantine on shipments of offensive weapons to Cuba. To deal now with the legal points involved in this action, we should turn to the Rio Treaty of 1947 on which such action was fundamentally based.

THE RIO TREATY OF 1947

A concept of hemispheric solidarity in the matter of defense had been taking shape during the early forties. That concept was finally incorporated in the Act of Chapultepec of March 3, 1945,¹⁴ which was the master plan for the Rio Treaty. The Treaty stated its paramount purpose to be: "to assure peace, through adequate means, to provide for effective reciprocal assistance to meet armed attacks against any American State, and . . . to deal with threats of aggression against

⁹ 30 DEP'T STATE BULL. 638 (1954).

¹⁰ 49 Stat. 3097 (1936).

¹¹ See 43 DEP'T STATE BULL. 407 (1960).

¹² 46 DEP'T STATE BULL. 278, 279, 281 (1962).

¹³ 47 DEP'T STATE BULL. 591, 592 (1962).

¹⁴ 12 DEP'T STATE BULL. 339 (1945).

any of them."¹⁵ We are not here concerned with the provisions dealing with armed attack but rather with those designed to assure the peace of the Americas and to deal with any threat of aggression.

Article 6 of the Rio Treaty recognized that a nation's security and integrity could be threatened by other means than armed attack.

If the inviolability of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack . . . *or by any other fact or situation that might endanger the peace of America*, the Organ of Consultation shall meet immediately in order to agree on the measures which . . . should be taken for the common defense and for the maintenance of the peace and security of the Continent.¹⁶

The measures on which the Organ of Consultation might agree include partial or complete interruption of sea and air communications, and the use of armed force.¹⁷ The consultations mentioned shall take place at meetings of Ministers of Foreign Affairs of the American republics, whose decisions shall be by two-thirds vote.¹⁸ Complete information concerning activities undertaken or contemplated for the purpose of maintaining inter-American peace and security are to be reported immediately by the parties to the Security Council of the United Nations.¹⁹ It was further provided that this function of consultation might be carried out "provisionally" by the Governing Board of the Pan American Union,²⁰ which is now the Council of the Organization of American States.²¹

Acting pursuant to these provisions, the Council met on October 23, 1962 at the Pan American Union in Washington. At the end of a full day's discussion, it adopted a momentous resolution, which was immediately reported to the Security Council of the United Nations. That resolution called for the immediate dismantling and withdrawal from Cuba of all missiles and other weapons with any offensive capability and recommended that the member states, in accordance with articles 6 and 8 of the Rio Treaty, take all measures, individually and collectively, including the use of armed force, which they may deem necessary to ensure that the Government of Cuba cannot continue to receive from the Sino-Soviet powers military material and related supplies which may threaten the peace and security of America, "and to prevent the missiles in Cuba with offensive capability from ever becoming an active threat to the peace and security of the Continent."²² All voted in favor of this resolution save the representative of Uruguay, who abstained since he lacked instructions due to failure of communications with his government.²³

This resolution was precisely in accordance with the provisions of the Rio Treaty. It was in line with the purpose of the Treaty "to assure peace . . . and

¹⁵ 62 Stat. 1681, 1699-1700 (1948).

¹⁶ 62 Stat. 1681, 1701 (1948). Emphasis supplied.

¹⁷ 62 Stat. 1681, 1701 (1948).

¹⁸ 62 Stat. 1681, 1702 (1948).

¹⁹ 62 Stat. 1681, 1701 (1948).

²⁰ 62 Stat. 1681, 1702 (1948).

²¹ Charter of the Organization of American States, Apr. 30, 1948, arts. 51, 52, [1952] 2 U.S.T. & O.I.A. 2394 (effective Dec. 13, 1951).

²² 47 DEP'T STATE BULL. 723 (1962).

²³ 47 DEP'T STATE BULL. 722 (1962).

to deal with threats of aggression against any of" the American states;²⁴ it was taken because of a "situation that might endanger the peace of America,"²⁵ and it was designed "for the maintenance of the peace and security of the Continent."²⁶ Thus, the measures authorized were those specified in article 8.

Politically, the Foreign Ministers had come a long way from their vague condemnations of communist intervention. In January 1962 they had barred Cuba from the association with the American republics; by October they were ready to invoke sanctions of the most extreme nature authorized by the Rio Treaty. Had we been forced to act without this collective blessing of the use of armed force given by the Latin-American nations, they would quite likely have viewed whatever we might have done as "intervention" in Cuban affairs, in violation of our 1933 commitment so frequently reiterated. Regardless of any legal justification we might have had, we would probably have been branded by them as an illegal aggressor. In the solution of this international problem where political bodies (such as the Organization of American States and the United Nations) were bound to play so large a role, there had to be a marriage of law and politics to achieve a result acceptable to international society.

The resolution clearly was broad enough to cover the action of the United States, both as to the quarantine and to the surveillance. However, it might also be noted with respect to the surveillance that at an informal meeting held on the second and third days of October 1962, the Latin-American representatives had already taken the position "that it is desirable to intensify individual and collective surveillance of the delivery of arms and implements of war and all other items of strategic importance to the communist regime of Cuba."²⁷

Thus the procedures prescribed by our hemispheric commitments were followed, and proper authorization was obtained to legalize what might otherwise have been construed as a breach of our non-intervention agreement. But the question still remains, how does this resolution of October 23, 1962 and the action taken by the United States pursuant thereto square with the Charter of the United Nations?

UNITED NATIONS CHARTER

When the Charter was being drafted in San Francisco in 1945, the Act of Chapultepec already had been approved. That Act had recommended the very sort of regional arrangement that was later incorporated in the Rio Treaty. It specifically provided that the "use of armed force to prevent . . . aggression" constituted actions which might appropriately be taken by the regional arrangement.²⁸ Was this arrangement consistent with article 52 of chapter VIII of the Charter of the United Nations, which authorized the use of regional arrangements for "dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such

²⁴ 62 Stat. 1681, 1699-1700 (1948).

²⁵ 62 Stat. 1681, 1701 (1948).

²⁶ 62 Stat. 1681, 1701 (1948).

²⁷ 47 DEPT. STATE BULL. 599, 600 (1962).

²⁸ 12 DEPT. STATE BULL. 339 (1945).

arrangements . . . and their activities are consistent with the Purposes and Principles of the United Nations?"²⁹

At San Francisco the Colombian delegate made a statement before the drafters of the Charter concerning the application of article 52 to the proposed inter-American system.

The Act of Chapultepec provides for the collective defense of the hemisphere. . . . Consequently such action as [the American States] may take to repel aggression, authorized by the article is legitimate for all of them. Such action is in accord with the Charter, by approval of the article, and a regional arrangement may take action, provided it does not have improper purposes as, for example, joint aggression against another state. From this, it may be deduced that the approval of this article implies that the Act of Chapultepec is not in contravention of the Charter.³⁰

The above statement was not challenged, and it is clear from the history of the negotiations that nothing in the Charter's provisions about regional arrangements should be interpreted to inhibit action authorized and taken under the Rio Treaty as long as the purpose of the action was proper.

The "Purposes and Principles" of the United Nations are found in the preamble and article 1 of the Charter. The preamble states the determination of the peoples of the founding states "to unite our strength . . . to ensure . . . that armed force shall not be used, save in the common interest." Article 1 includes among the purposes of the United Nations, "to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace." The collective action taken in October 1962 was taken to prevent and to remove a threat to the peace of the hemisphere that would have resulted from the introduction and emplacement of potentially annihilating weapons. Those weapons were not to be used in the common interest. The action we took was designed to ensure that they were not used for any other purpose, and thus was calculated to maintain international peace and security. This was precisely in accord with the purposes and principles of the Charter.

Article 2 of the Charter enjoins members to "refrain in their international relations from the threat or use of force . . . in any . . . manner inconsistent with the Purposes of the United Nations." It was the *Soviet-Cuban* combine that was using a threat of force in a manner inconsistent with the purposes of the United Nations. *Our* action was taken to remove that threat and to secure the peace.

The only other article that might have a bearing upon this discussion is article 53. Article 53 provides that the Security Council may utilize regional arrangements for "enforcement action under its authority." However, it further states that "no enforcement action shall be taken under regional arrangements without the authorization of the Security Council." The question is thus posed whether "enforcement action" as used in this latter clause refers to the enforcement action previously mentioned in the article; that is, to action *authorized*

²⁹ The Charter of the United Nations is found at 59 Stat. 1031 (1945).

³⁰ Information and text of statement furnished by the Department of State.

by the Security Council, or whether it refers to any action that might be described as enforcement action even though not initiated by the Security Council.

The Security Council has itself settled this point. In 1960 it rejected the notion that sanctions against the Dominican Republic, invoked by recommendation of the Organization of American States, were "enforcement action" as the term is used in article 53.³¹ It reached a like decision on the sanctions against Cuba early in 1962 growing out of the Punta del Este Conference mentioned earlier.³² Furthermore, a recent decision of the International Court of Justice³³ seems to have interpreted the term as used in the Charter to mean only action ordered by the Security Council under chapter VII. Nothing, however, was done by the Security Council under chapter VII in the case of Cuba. Article 53 is, therefore, not applicable, and the inexorable conclusion would seem to be that not only was the action of last October taken pursuant to the provisions of the Rio Treaty, it was also wholly consistent with the Charter of the United Nations.

CUSTOMARY INTERNATIONAL LAW

There remains one further question; a question which, it would seem, the general public considers the only question: Was the blockade legal under international law apart from what our organizational treaties may have provided?

A blockade is usually a war measure employed against an enemy. What this country did was clearly not a blockade in that sense. In the nineteenth and early twentieth centuries there were a number of instances of so-called "pacific blockades," which involved blockading the commerce of another country with which the blockading state was at peace. These were designed to bring economic pressure to bear in order to enforce redress of certain wrongs.³⁴ They were called "pacific" because no war was declared or prosecuted by the one party, and the other could treat it as a measure consistent with peace, thus avoiding the outbreak of war.³⁵

A serious problem of a pacific blockade came in those instances where ships of third parties were also stopped. Frequently this practice was protested by the third party's government. Indeed, the United States protested such action against its flag vessels when Japan, prior to the outbreak of hostilities, imposed

³¹ The Soviet Delegate took the position that the San Jose resolution of the Organization of American States calling for sanctions against the Dominican Republic was "enforcement action" and must be approved by the Security Council as provided by art. 53. The Council did not accept this view and merely took note of the resolution. U.N. SECURITY COUNCIL OFF. REC. 14th year, 893d meeting 3-5 (S/4491) (1960).

³² By letter dated March 8, 1962, addressed to the President of the Security Council (U.N. Doc. No. S/5086) the Permanent Representative of Cuba took the position that the resolution adopted at Punta del Este in January, 1962, was "enforcement action" and required authorization of the Security Council. Although the question was thus brought to the attention of the Security Council it took no action in the matter.

³³ Certain Expenses of the United Nations, [1962] I.C.J. Rep. 151, 56 AM. J. INT'L L. 1053, 1062-63 (1962).

³⁴ Giraud, *Pacific Blockade up to the Time of Foundation of the League*, LEAGUE OF NATIONS OFF. J., 8th Ass. 841 (1927).

³⁵ 2 HYDE, INTERNATIONAL LAW 1667-68 (2d rev. ed. 1945).

a pacific blockade of Chinese ports. We protested even though our ships were stopped only for the purpose of checking identification papers.³⁶

The use of our Navy and Air Force last fall against shipping headed for Cuba was neither a blockade of war nor a pacific blockade. It should be noted that both of these measures are aimed at the *commerce* of the other state in order to deprive it of imported goods as well as revenues from the sale of exports, thus bringing *economic* pressure to bear on the situation. With Cuba we specifically proclaimed we were *not* stopping legitimate commerce, only the importation of offensive missiles and other weapons of aggression.³⁷ In fact, practically no Cuban shipping was involved. The measures were primarily directed against shipping of third states, particularly the Soviet Union.

Our government has for these reasons chosen not to call our action a blockade, but a "quarantine,"³⁸ which is as good a term as any. It might be well to recall at this point that, in 1937, President Roosevelt spoke of a "quarantine" when seeking to prevent the spread of lawlessness and war throughout the world.³⁹ In substance our conduct during the Cuban crisis was a preventive measure, short of war, designed to inhibit the dispersal of offensive missiles and nuclear bomb capabilities in an area of the world heretofore free of them. It was adopted to remove a threat to international peace and security, and its thrust was against those states responsible for the creation of that threat. Whether it be called a blockade, a quarantine, or something else, no one can point to anything in international law that forbids this type of action. On the contrary, it is wholly within the principles adopted by the nations of the world in the Charter of their organization.

CONCLUSION

During World War I, Sir Samuel Evens, speaking of the general principles governing the right of restriction of the commerce of third states, pointed out the inherent flexibility of international law.

[T]he boundary of the law of nations has been extended from time to time to adapt itself to new and ever-changing conditions. This law must from its nature have room for expansion. . . . It never had or could have the quality of immutability attributed to the laws of the Medes and Persians. It could not be confined within artificial limits like an Act of Parliament. It has the essence and qualities of a living organism like the common law of this realm.⁴⁰

It is submitted that in the action taken to save the peace and security of the Western Hemisphere and, indeed, of the world, the United States has written a new chapter in international law by a sound, albeit novel, application of those of its principles which are basic to the collective security arrangement of the Rio Pact and to the purposes and principles of the United Nations.

³⁶ 7 HACKWORTH, DIGEST OF INTERNATIONAL LAW 9 (1940).

³⁷ 47 DEP'T STATE BULL. 715, 716-18 (1962).

³⁸ 47 DEP'T STATE BULL. 716 (The President), 721 (Secretary Rusk), 725 (Ambassador Stevenson), 764-65 (Legal Adviser of the Department of State) (1962).

³⁹ President Franklin D. Roosevelt's Chicago speech of October 5, 1937, reproduced in material part in BROCKWAY, BASIC DOCUMENTS IN UNITED STATES FOREIGN POLICY 116-17 (1957).

⁴⁰ Quoted in *The Lenora and Other Vessels*, [1918] I.C.J. Rep. 182, 202-04, and in 7 HACKWORTH, DIGEST OF INTERNATIONAL LAW 4-5 (1940).

The wise employment of force is still essential if we are to check lawless aggression and threats of aggression throughout the world. Until there comes about an effective world government fully supported by the various nations, or at least a substantial number of them, the burden of furnishing the armed force to take the necessary action to preserve international order must still fall on those states powerful enough to produce the desired result. Only thus will it be possible for men to live under some semblance of peace.

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