# EDITORIAL COMMENT

## THE QUARANTINE AGAINST CUBA: LEGAL OR ILLEGAL?

The domestic situation in Cuba and the diplomatic crisis to which the discovery by the United States of missile bases gave rise have created a series of problems of international law in respect to which a wide variety of opinions have been expressed. Criticism of the action of the United States has not been wanting. We have violated international law right and left; we have permitted armed expeditions to leave our shores in violation of the clearest provisions of our own municipal laws adopted to uphold international obligations; we have instituted boycotts and economic measures against Cuba prohibited explicitly by the Charter of our Inter-American Organization; we have violated the sovereignty of Cuba by surveillance flights over its national airspace; we have acted individually and unilaterally where the obligations of the United Nations Charter and the Rio Treaty called for collective action; we have called the Soviet Union to account for doing in Cuba what we ourselves have done in the NATO countries; we have risked a nuclear war which would have involved our Allies in Europe without prior consultation; and so on—a broad indictment.

1. Let us look first at the "law" that is being taken as the basis of the indictment. The Charter of the United Nations is a treaty, binding as such upon the United States. But what if the treaty has been consistently and at times flagrantly violated by the Soviet Union, and the veto of the Soviet Union has been used to defeat decisions by the Security Council? How much of collective security is left in the situation of "co-existence" in which we have lived with the Soviet Union for the past fifteen years? Must the United States continue to respect obligations and follow procedures when the other party to the contract violates them? Traditional international law is about as clear as it could be in recognizing the mutuality of contractual obligations.

2. What of the obligations of the Charter of the Organization of American States? We have pledged ourselves to observe them; but in respect to a particular member of the community account must be taken of the conduct of that member. Is Cuba to be free to violate one article after another and still claim the protection of the provisions of the Charter? Is Cuba to be allowed to set aside the Resolution signed at Caracas in 1954,[1] condemning the Intervention of International Communism, and still claim the protection of the Charter and the Rio Treaty? Obviously in a multipartite treaty, such as the Charter of the O.A.S., the United States is still bound by its obligations in respect to the other contracting

[1] Resolution XCIII, Tenth Inter-American Conference, 1954; 48 A.J.I.L. Supp. 123 (1954).

parties. But these obligations are for their benefit, not for that of the state which has defied the treaty and openly repudiated the principles upon which it is based.

3. What of the general principles of international law which, it has been asserted, the United States has violated? They are, indeed, still binding, assuming that it is possible to give specific application to them when the more definite obligations of treaties have been so flagrantly set aside. What other way was there of detecting the presence of missile bases than by aerial flights over Cuban territory?

4. What "law," then, is to be applied to the case? We are forced to assume that international law, such as we have known it, is in a state of transition. The Charter of the United Nations is still binding insofar as the conduct of two of its Members permits, with a presumption in favor of the Charter. So, too, with the Charter of the Organization of American States under the same conditions. Let us see how both apply to the concrete situation created by the quarantine imposed by the United States on October 24, 1962.

5. Article 51 of the Charter of the United Nations recognizes the "inherent right of individual or collective self-defense," the adjective "inherent" suggesting that the right of self-defense is a fundamental one, not to be restricted or qualified except insofar as the Charter may expressly do so. The right of self-defense under Article 51 is, however, qualified by the provision that there must be an armed attack, and the right only lasts until the Security Council has taken the measures necessary to maintain international peace and security. Putting aside the latter item, was there "an armed attack"? Clearly not, in the old traditional sense. But clearly so, if we are to regard an atomic warhead, ready to be fired from a missile base, as a potential or constructive armed attack when in the hands of one whose intentions could easily be read from his past conduct. An armed attack in the old days still gave time for defense; an armed attack from a missile base located within short range would make self-defense meaningless; there would be nothing left to defend, if the victim were to await concrete evidence of the attack. A "threat to the peace" takes on a new meaning when the threat can be converted at any moment into an armed attack against which defense would be too late. Who could feel secure if he had to live with a pistol pointed at him day and night?

Does that mean that in every case missile bases with atomic warheads constitute an actual armed attack? The conclusion would depend upon the circumstances. In television shows of the West the sheriff would be dead if he waited to see if the bad man, in reaching for his back pocket, were about to pull out a handkerchief or a gun. Was there reason to think, in October, 1962, that the Soviet Union, or its satellite, the existing government of Cuba, might have an aggressive intention? The record of the Soviet Union in Hungary and East Berlin, and the affectionate embrace of Marxist-Leninist doctrine by Prime Minister Castro pointed clearly in that direction. Even if not used, the mere presence of the

missile bases would have given the Government of Cuba the opportunity for blackmail, and it would have altered the "balance of terror" heavily in favor of Russia. Could the same be said of the bases in Turkey, which more than one writer has brought forward as a parallel case? The answer is, except for those of Marxist-Leninist sympathies, that the whole conduct of the United States over the past fifteen years gives no suggestion of aggressive intentions, as the overwhelming majority of the international community would testify.

The United States is charged with having violated the provisions of the Charter of the Organization of American States and of the Rio Treaty of Reciprocal Assistance. In what way? By not consulting with the other Members before taking action? The charge is technically accurate, but legally unjustified under the circumstances. Article 1 of the Rio Treaty carries an undertaking not to resort to the threat or the use of force in any manner inconsistent with the provisions of the Charter of the United Nations, and Article 7 of the Rio Treaty specifically recognizes that the provisions for collective action shall be "without prejudice to the right of self-defense in conformity with Article 51 of the Charter of the United Nations." We are back, then, to what constitutes an "armed attack" under Article 51, and we repeat that a missile base armed with an atomic warhead in such close striking distance that no defensive radar equipment could operate effectively could be and was properly interpreted as an armed attack, if in the hands of one whose hostile declarations and whose past conduct indicated an evil intention. The fact that the United States called a Meeting of Consultation under the Rio Treaty on October 23, the day following the declaration of the President, and that the Council, acting provisionally, endorsed the action of the President by calling for measures to support it, would seem to prove that the United States had not violated its obligations by acting unilaterally in self-defense without risking the delay incident to formal consultation.

Was the invasion of Cuba by Cuban refugees in April, 1961, a violation of international law? Technically considered, it is not difficult to see in it a violation of our neutrality laws, even though the invasion did not start from our shores; but by every principle of equity and justice, no. Account must be taken of the fact that the invaders were refugees from a government that was executing its opponents without constitutional trial, that had denied the fundamental rights of freedom of speech and of assembly, and that had set aside the orderly procedures of democratic government. It was a situation wholly unlike that contemplated by the Convention on the Duties and Rights of States in the Event of Civil Strife adopted at Havana in 1928,[2] or by the Protocol to the same Convention adopted in 1957. The Cuban Government was already receiving aid from the Soviet Union which would enable it to suppress an uprising of the people, even if a large majority might be opposed to the dictatorial regime of the government. Putting the case from another angle, it might be said that the Cuban Government had, by its violation of the Caracas Resolution

[2] Sixth International American Conference, 1928; 22 A.J.I.L. Supp. 159 (1928).

against the Intervention of International Communism and by its defiance of the principles of the Charter of the Organization, forfeited the right to the protection of the Convention on Civil Strife. The "present government of Cuba" had only recently been excluded from the Organization of American States by decision of the Meeting of Foreign Ministers at Punta del Este in January, 1962, because of its declared affiliation with the Marxist-Leninist system. What more was needed to make the provisions of inter-American treaties inapplicable to Cuba?

It is a principle of international law, as of municipal law, that an accomplice to a crime comes within the indictment of the criminal. Insofar, therefore, as Cuba acted illegally, violating its obligations as a member of the inter-American community, the Soviet Union shared in the offense; and insofar as the Soviet Union violated the provisions of Article 2(4) of the Charter of the United Nations and sought to upset the already unstable balance of nuclear power, unashamedly attempting to deceive the United States in so doing, Cuba shared in the offense. To say that, in the absence of a treaty forbidding it, the Soviet Union was free to engage in trade with Cuba in any articles whatever in time of peace is equivalent to a failure to distinguish in municipal law between the sale of a gun to an ordinary purchaser and a sale to a person who the seller knows is about to use it to blackmail, perhaps to murder, a neighbor.

Was international law violated in the enforcement of the quarantine against third states? Not if the quarantine was lawful against the two parties directly involved. International law is familiar with the former procedure of "pacific blockade," in the form of measures of coercion against a delinquent state when the claimant state, acting in its own individual interest, did not wish to resort to the more rigorous measures of formal war; and in such cases protests were frequently heard from third states when they were not in sympathy with the action of the claimant state. But with the adoption of procedures of collective security there were no "third states" to protest. Article 41 of the Charter of the United Nations clearly imposes upon all of the Members the duty of acquiescing in a blockade established by the Security Council as a measure to give effect to its decisions; but it is silent with respect to the effect upon third states of measures taken by a state or regional group of states acting in self-defense under Article 51 of the Charter. The parties to the Rio Treaty of Reciprocal Defense found no difficulty, in the case of the Dominican Republic in 1960, in planning to resort to measures of collective blockade as a sanction against a state held to be violating the provisions of the treaty. But again no provision was made in the treaty for the case of a state resorting to measures of blockade in self-defense when the urgency of the situation did not permit of delay.

Perhaps the simplest answer is that when the procedures of collective security, whether under the Charter of the United Nations or under the Rio Treaty, cannot meet a situation in which recourse to the inherent right of self-defense is justified, we are thrown back upon the law of pre-collective security days when a nation, confronted with the danger of an

attack, took such measures as in its judgment were necessary. In this case the measures, for obvious political reasons, were far short of the formal war of earlier days, which would have put third parties in the position of neutrals and imposed far greater restraints upon their trade. If the central act of self-defense was justified, the collateral effects upon the trade of third states, minor as they were in fact, could be overlooked. Complaints, if any, should be directed to the inefficiency of the procedures of collective security.

These procedures of collective security have indeed reduced the dimensions of the traditional right of self-defense recognized by international law from time immemorial. The law of the good faith of treaty obligations calls upon the Members of the United Nations and the parties to the Rio Treaty to seek the solution of situations involving a threat to the peace by the established procedures. But when these procedures fail, or prove inadequate, the fundamental right, implicit in the acceptance of all treaty obligations, returns. The illustration given by Senator Root in 1914 still holds good:

> The most common exercise of the right of self-protection outside of a state's territory and in time of peace is the interposition of objection to the occupation of territory, of points of strategic military or maritime advantage, or to indirect accomplishment of this effect by dynastic arrangement.[3]

The words "dynastic arrangement" are perhaps an understatement of the presence of the many thousands of Soviet troops in Cuba.

It is indeed to be hoped that in time a more effective collective security system may be established. For the moment we are confronted with a divided world, in which the possession of the atomic bomb with the possibility of delivering it from missile bases within reach of the opponent has made it possible for a single member of the community to challenge the whole group. But if self-defense has still a place in the code of international law, it is obvious that in good faith it must be interpreted narrowly. The imminence of the danger must be balanced against the absence of organized procedures immediately at hand for the prevention of the attack. Taking all the circumstances into account, it is believed that the President was fully within the law of self-defense in taking the position declared on October 22, and making effective the quarantine on October 24.

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### SOME COMMENTS ON THE "QUARANTINE" OF CUBA

The "quarantine" of Cuba in the fall of 1962 demands thoughtful consideration by all international lawyers. It would be most unwise to be dogmatic in reaching conclusions as to the legality under international law of the measures employed in that crisis. What follows is an effort to place this serious episode in perspective, and suggest some considerations

[3] "The Real Monroe Doctrine," 1914 Proceedings, American Society of International Law at 11; 8 A.J.I.L. 427 at 432 (1914).