EDITORIAL COMMENT

INTERNATIONAL LAW AND THE QUARANTINE OF CUBA: A HOPEFUL PRESCRIPTION FOR LEGAL WRITING

At this writing, in January, 1963, professional commentary by international lawyers on the quarantine of Cuba in October, 1962, is just beginning to be published. There is as yet little in the way of detailed or detached analysis,[1] but certainly there is a flood to come. The directions that expected writings might take are not only fascinating subjects for speculation but of great potential significance for international law. Seldom has there been an international episode giving so much leeway for characterization or so tempting from the standpoint of the lawman's usual inclination toward doctrinal formulation. And seldom has the probability been as great as here that what scholars dispute will go beyond disagreements between them out into the stream of laymen's attitudes toward the reality or not of law in relationship to use of force.

It is probably fact that international law, both the customary and the newer organic, came to public attention during the crisis of October 22–28, 1962, to a degree beyond its association in the public mind with other crises in the international arena since World War II, not excluding the Suez and Hungarian affairs. As many professors of international law know from their own experiences during last October, laymen and mass media tended toward preoccupation with the legitimacy or not of the "quarantine" under the rules of the general international law on "blockade," the latter term being used rather imprecisely to cover mainly approach, visitation, search, and seizure on the high seas, rather than the interdiction of a particular port by a force effective to accomplish interdiction. A favorite popular syllogism in more or less informal logic was " 'Quarantine' is just another name for 'blockade'; blockade is something that occurs during wars; therefore this 'quarantine' is an act of war." At one Eastern university seventy-odd non-law professors, led by a distinguished Sinologist,

[1] There is a short editorial, "The Legal Basis for the Quarantine of Cuba," in 48 A.B.A. Journal 1141 (December, 1962). The writer had the somewhat stressful experience of having to meet a Nov. 1, 1962, deadline for his working paper, "The Inter-American Security System and the Cuban Crisis," prepared for the Third Hammarskjold Forum of the Bar Association of the City of New York. Rewritten in part on the basis of radio reports and held "open" until late on the afternoon of Oct. 28, 1962, this paper only highlights, particularly in the accompanying outline (Appendix A, heading IV), the legal aspects of the Oct. 22–28 crisis. It may be of some use with regard to the legal setting at the time the crisis began. Eventually this paper and a report of the panelists' presentations and discussion, Nov. 19, 1962, will be re-published by the Association of the Bar in a Hammarskjold Forum Series. Of possible interest is the policy statement on the crisis by the American Association for the United Nations, adopted at its Third Biennial Convention, Nov. 17, 1962, 34 A.A.U.N. News 3 (Dec., 1962–Jan., 1963).

whose familiarity with contemporary international law had until then escaped attention, made legal arguments about blockade (as well as policy arguments in favor of a base-for-base negotiation) to the White House by telegram. Some other teachers of international law might have experienced, as this writer did, a degree of resistance (probably because of the novelty of the notion) among non-professionals, such as reporters and newscasters, to the suggestion that the meaningful legal issues in the crisis lay, not in the pre-World War I rules of neutrals' rights and duties under the Declaration of Paris, 1856, and the like, but in the Charters of the United Nations and of the Organization of American States.

While, on the whole, there seemed to be general realization that the decision-makers had taken the requirements of "international law" or of these Charters into account, there was little instruction given the public as to the precise nature of the inter-relationships between law and politics involved. Thus, the public probably has very little understanding or appreciation of the legal implications of some of the measures taken and of their timing, such as that the quarantine was put into effect only after the action of the Organization of American States, and that it was quite specifically limited to the traffic in missiles and called for diversion, not arrest, of the carrying vessels. How well understood are the differences in the missions of the United Nations and the Organization of American States that led to the splitting of the response to the Soviet challenge into (1) quarantine through the O.A.S. and (2) the demand for the dismantling of missiles already in Cuba to the Security Council? How many are aware of the victory for concrete proof that lay behind the votes of Mexico, Brazil, and other states in the Organization of American States? Oblivious to the earlier failures of the United States (Caracas, 1954, San José, 1960, and Punta del Este, earlier in 1962) to convince the other members that there was a clear and present danger of extra-hemispheric presence in Cuba, there was even some feeling expressed that the other American states just rubber-stamped actions that, in any event, would have been taken by the United States. After the crisis had passed the crest, sensational journalism reported hearsay from "hawks" (*unidentified*) that largely ignored legal considerations, although in an earlier, hour-by-hour study in decision-making published in the *New York Times* for November 2, the legal environment had been mentioned as a take-off point in the planning of the response. The unhappy addendum to a great moment—perhaps a turning point—in history may outlast the meticulous report in general recollection.[2]

And, of course, the *realpolitik* determinists are beginning to be heard from, certainly in college and high school classrooms across the land. As usual they knew it all along; as they have always said: law, international

[2] This writer has no reliable information upon which to judge the comparative accuracies of these reports; and it may be that the Attorney General, labeled a "dove" (or inclining initially to that viewpoint) in the Saturday Evening Post article, was as "legal" as he was "moral" in reported opposition to an air strike. Saturday Evening Post, Dec. 8, 1962, pp. 15–20 (Vol. 235, No. 44).

obligations, international institutions, do not ever really contain the pursuit of national interest, and that pursuit is always essentially unilateral. But, on the other hand, there come rumors that Professor A has warned a law school international law association that the quarantine of Cuba was a flouting of international law by the United States. Professor B, it is reported, supports the legality of the quarantine, arguing, as did Professor C in the case of Suez, that the action taken was not a use of force directed against the political independence or the territorial integrity of any state or in any manner inconsistent with the purposes of the Charter of the United Nations. When asked, during the question period following a symposium on "The Inter-American Security System and the Cuban Crisis,"[3] what evolutionary growth of doctrine the crisis had brought about, this writer, who may live to regret it, replied, with the aid of another panelist,[4] "the doctrine of anticipatory, collective self-defense." The response was immediately clothed with warnings that this was dangerous doctrine, a temptation to the impatient, the angry and the nervous, always to be handled with the greatest care. But the temptation to label was not resisted, as perhaps it should have been.[5]

This extremely serious crisis, involving at its roots Soviet disregard of two basic, although tacit, understandings, was brilliantly met by the course of action taken. No commentator can hope to appraise it accurately and providently on the basis of the record now available. Many things must, as the President has said, be left to history. Proponents of international law and order cannot now and on the basis of the present record say with the assurance of absolute credibility that the resolution of the crisis was an unqualified triumph for the law of the Charters or for any particular legal outlook, theory, or doctrine. On the other hand, there should be resistance to explanations based on simplistic, "power politics" determinism. At this stage of man's time, international social control of deviant conduct by states is in large part based upon expectations (in turn based upon obvious need) not inescapably contradicted by events. In some events of recent history it is very hard, or impossible, to find support for such expectations. But the Cuban crisis of October, 1962, was not one of these. Without waiting for history, and on the basis of the present public record, it can be brought out, explained, analyzed, developed that:

[3] Note 1 above.

[4] Not a North American member of the panel. As my momentary collaborator in doctrinal statement has probably not seen the transcript of the discussion, I do not feel at liberty to associate him by name here.

[5] Or there have been added some more modifiers, such as "for a limited and special purpose under direct nuclear threat." Some slight comfort is taken from the fact that it was my South American colleague who, if memory serves, made the analogy to the common law and the pragmatic growth and shift of norms in that system under the stress of new situations. The writer did point out the uncomfortable parallel between "anticipatory self-defense" and the "hip-pocket move" defense to homicide in a certain Southwestern State: the other fellow might have been reaching for his handkerchief, or, to pursue the analogy toward escalation, he might have intended just to hitch up his six-shooter a little—but turned out to be faster on the draw after he saw what was coming.

1. The leadership initiative of the United States was not unilateral action by the United States.

2. The response to the threat did take into account obligations under existing international agreements regarding the deployment of forces, and referred to the international organizations created by these agreements proposals or positions with respect to the resolution of the crisis; the organizations through their appropriate agencies acted effectively; and even the respondents—at least the main respondent—acquiesced without objecting as to the juridical competence of the acting entities.[6]

3. The quarantine was limited to a specific nuclear threat to the Hemisphere, was to last only so long as the missile shipments might continue, and operated under directives for diversion rather than more drastic action, except in case of resistance to diversion.

4. National and Hemispheric interest that the present regime in Cuba be displaced, but presenting the possibility of serious contradiction with the United Nations Charter, patently was not pursued, even after the danger of nuclear response had receded.

5. The action authorized by the Organization of American States was a defensive response to the gravest external threat the Hemisphere has ever faced.

6. This threat involved much more than a disregard for the basic political principle of the Monroe Doctrine, whether the historic unilateral or the present multilateral versions, and there was no claim of "intervention" by even the most sensitive of the Latin American countries with respect to the quarantine.[7]

If it be unwise at this stage to "package" the episode into doctrinal formulations, even by those who have no general aversion to such exercises, it seems to this writer equally unwise by hindsight to array the variables and argue that, as this event "came out right" in terms of such an analysis, the non-doctrinal methodology is proved as a displacing universal. "Reasonableness" here was fairly self-evident and the judges of it readily identifiable.

Finally, it is not too soon, it is believed, for the community of international law to study the quarantine in terms of what might be needed by way of additional, positive law development. Instead of arguing what the crisis has or has not proved as to the present law of free seas in relation-

[6] In contrast, the Soviet delegate insisted to the last, during the Security Council consideration of the Guatemalan affair in 1954, that the Security Council had competence, to the exclusion of the Organization of American States, regarding the use of force against the Arbenz regime. See "The Inter-American Security System and the Cuban Crisis," note 1 above, pp. 23–25, and notes 33, 34 ff.

[7] Brazil, Mexico, and Bolivia abstained from that portion of the Oct. 23, 1962, resolution of the Organ of Consultation of the Organization of American States that provided for the use of force ". . . to prevent the missiles in Cuba with offensive capability from ever becoming an active threat to the peace and security of the continent." The action on the quarantine portion of the resolution was unanimous, once Uruguay's abstention for lack of instructions was removed.

ship to current weapons technology, perhaps some will block out proposals for some new treaty law about the right of approach and the like for use, if adequate arms control arrangements do not come along soon. Another interesting and important, although very delicate, area for study involves the examination of the Organization of American States, as it showed itself in this crisis, as a possible model for nuclear weapons exclusion arrangements in other geographic regions, such as, for example, Africa.

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