

From the Bag

Anticipatory Self-Defense

A 1962 OLC OPINION ON LAWFUL ALTERNATIVES FOR THE U.S. IN THE CUBAN MISSILE CRISIS

Norbert A. Schlei

This document has been cited before. See, e.g., *The Office of Legal Counsel: A Survey of Its Role and History* 8 (ABA Section of Admin. Law & Regulatory Prac. Oct. 16, 1997). But it has not, to the best of our knowledge, been published in its entirety. Now seems like a good time. We filed a FOIA request to get our copy, which is typewritten and 13 pages long. In addition, there is a handwritten note at the bottom of the first page that reads, “c – Memo 8/30 to Dept State (Rusk)”.

– The Editors

Aug. 30, 1962

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: *Legality under International Law of Remedial Action against Use of Cuba as a Missile Base by the Soviet Union.*

This is in response to your request for the views of this Office as to certain legal issues bearing upon a proposed declaration by the President of the intentions of this Government in the event that missile bases should be established in Cuba by the Soviet Union. In general, it is our view that international law would permit use by the United States of relatively extreme measures, including various

forms and degrees of force, for the purpose of terminating or preventing the realization of such a threat to the peace and security of the Western Hemisphere. An obligation would exist to have recourse first, if time should permit, to the procedures of collective security organizations of which the United States is a member. The United States would, further, be obliged to confine any use of force to the least necessary to the end proposed.

Section I of this Memorandum deals with the function and content of the concept of self-defense in international law generally. The next succeeding section examines certain regional differences which have developed in the application of that concept as a result of historical attitudes and practices and other factors. The Memorandum concludes with

Norbert Schlei was the Assistant Attorney General for the Office of Legal Counsel in the U.S. Department of Justice from 1962 to 1966.

several concrete suggestions as to the form and content of the proposed statement by the President.

I

International law relating to the use of force centers about the polar concepts of aggression and self-defense. Although forcible violation of a state's boundaries or of its ... [The second page of the memorandum provided to the *Green Bag* by OLC appears to have been re-typed, with a couple of lines missing here. – *The Editors*] ... most highly developed systems of municipal law permit the use of force in self-defense within relatively narrow limits. In the international community, where there exists no centralized authority capable of maintaining order, states must have, and are accorded by law, a proportionately greater freedom to protect their vital interests by unilateral action. Not only customary international law but the United Nations Charter and substantially all other conventions and treaties which relate to this subject recognize the indispensable role of self-defense under present conditions.

The concept of self-defense in international law of course justifies more than activity designed merely to resist an armed attack which is already in progress. Under international law every state has, in the words of Elihu Root, "the right ... to protect itself by preventing a condition of affairs in which it will be too late to protect itself."¹ Cases commonly cited as illustrative of this principle include that of the *Virginius*,² in which Spanish forces seized an American vessel on the high

seas en route to Cuba carrying arms for the use of insurgents. Britain demanded reparations for arbitrary treatment of its subjects found on board the vessel after the seizure was effected, but conceded the legality of the seizure itself. The United States withdrew its initial protest and eventually adopted the British view of the incident as its own. Similarly, in the case of the *Caroline*,³ Canadian forces invaded the United States and destroyed the vessel, which was to be used by Canadian insurgents and American sympathizers in an attack on Canada. Many other illustrations of the principle could be cited.⁴

Although it is clear that the principle of self-defense may justify preventive action in foreign territory and on the high seas under some circumstances, it is also clear that this principle is subject to certain limitations. For example, such defensive action is subject to a rule of proportionality. Thus in the *Caroline* case the United States called upon Great Britain not only to justify the taking of preventive action, but also to show that its forces "did nothing unreasonable or excessive, since the act, justified by the necessity of self-defence, must be limited by that necessity and kept clearly within it."⁵

A further limitation on preventive action, at least unilateral action not sanctioned by any collective security arrangement, relates to the degree of urgency that must exist before it is invoked. In the next section of this Memorandum it is argued that, under the special regime applicable to the Western Hemisphere, the mere maintenance of facilities for certain kinds of armed attack, without more, may justify preventive action. However, apart from

1 *The Real Monroe Doctrine*, 35 A.J.I.L. 427, 432 (1914).

2 2 Moore, *Digest of International Law* 895-903, 980-983 (1906).

3 Hall, *International Law* 328-330 (8th ed. Higgins, 1924); 1 Hyde, *International Law* § 66 (2d ed. 1945).

4 See, e.g., Howatt, *Self-Defense in International Law* (1958), *passim*.

5 Note of Mr. Webster, Secretary of State, to Lord Ashburton, July 28, 1842, *Brit. and For. State Papers*, Vol. XXX, p. 193.

such special regimes, it is clear that preventive action in self-defense is warranted only where the need for it is "instant, overwhelming, leaving no choice of means, and no moment for deliberation."⁶ It thus is clear that preventive action would not ordinarily be lawful to prevent the maintenance of missile bases or other armaments in the absence of evidence that their actual use for an aggressive attack was imminent.

Another limitation upon the concept of self-defense, as derived from customary law, is imposed by the United Nations Charter and the charters of regional collective security organizations, such as the Organization of American States, of which the United States is a member. The charters of these organizations in each case preserve the right of individual states to use force in self-defense, and, although certain ambiguities are presented by the language used, it appears that none of the charters prohibits the taking of unilateral preventive action in self-defense prior to the occurrence of an armed attack. However, although it is arguable that there is no express commitment in these charters to utilize the procedures they afford in situations calling for preventive action, adherence to such an organization undoubtedly carries with it a commitment to have recourse to the organization's procedures if at all possible before acting unilaterally.⁷ Indeed, an obligation to this effect might well be deduced from the general rules as to preventive action, summarized above, to the effect that such action is lawful only as a last resort. In any event, the United States is heavily committed to the use of collective security procedures as a matter of policy.

A further principle recognized in the U.N. Charter (Article 51) is that action may be taken in self-defense, pursuant to a regional collective security arrangement, by a state which is not directly threatened. If a sufficient threat against any member state is established, the organization and all its members may act. In this respect, the Charter has the effect of expanding the area in which preventive action is regarded as lawful.

Both the U.N. Charter and the Charter of the O.A.S. authorize collective action upon less provocation than would be required to justify unilateral action. The Security Council may take action against any "threat to the peace" or "breach of the peace" as well as any "act of aggression" (Article 39). Such action may include not only the economic and political sanctions listed in Article 41 but also "demonstrations, blockade, and other operations by air, sea, or land forces," as provided in Article 42. Action proposed in the Security Council is, of course, subject to veto by any one of the five permanent members. Upon a less explicit legal basis, the General Assembly may take similar action under the "Uniting-for-Peace" resolution. Under Article 25 of the Charter of the O.A.S. and Article 5 of the Rio Treaty, which are interrelated, measures for the common defense may be taken not only in the event of an armed attack but also if the "territory or sovereignty or political independence of any American State" is affected by "an aggression which is not an armed attack" or by "any other fact or situation that might endanger the peace of America" Under Article 17 of the Rio Treaty, enforcement action requires a two-thirds vote in the Organ of Consultation.

6 *Ibid.* Mr. Webster's statement was quoted with approval by the International Military Tribunal at Nuremberg. 41 A.J.I.L. 205 (1947).

7 Article 51 of the U.N. Charter requires that action taken in the exercise of the right of self-defense be reported to the Security Council. Unilateral action such as a blockade or an armed attack could, further, be brought before the O.A.S. for review by any member nation. Decisions by two-thirds vote of the Organ of Consultation created by the Rio Pact are binding upon all member states (Article 20), except that no state can be required to use armed force without its consent.

II

Since the Monroe Doctrine was announced in 1823, the United States has consistently maintained that it has the right to take all necessary action to prevent any non-American power from obtaining control over territory in the Western Hemisphere. Since 1846, when the so-called Polk Corollary of the Doctrine was added, it has been understood that this right is claimed regardless of whether the foreign intervention occurs with the consent of inhabitants of the area affected. In modern times, it has been understood that the right is claimed not only on behalf of the United States but on behalf of all American states. The right has repeatedly been respected and acknowledged throughout the Americas and the world.

Historical materials with respect to the Monroe Doctrine are collected in the Appendix which is attached. [The *Green Bag* did not receive an appendix from OLC. – *The Editors*] Perhaps the most relevant of these materials are those relating to action taken by the United States and other nations in the Western Hemisphere during the period of 1940-41, prior to their involvement in World War II. In 1940, by the Act of Havana, the American powers agreed to prevent by collective action, or by unilateral action if necessary, changes in the control of territory in the Western Hemisphere as a result of the European hostilities. In 1941, the United States occupied Greenland and dispatched troops to Iceland. Although the occupation of Greenland was justified in part under a treaty with the Danish government in exile, it seems clear that the true basis for the action taken by the United States was the concept of regional self-defense expressed in the Monroe Doctrine.⁸

The historical materials which are appended show that the Monroe Doctrine has from the beginning represented a regional

variation in the international law of self-defense. The Doctrine asserts that, in order to insulate the Americas from dangers to peace and security stemming from conflicts involving non-American states, the occupation or control of American territory by a non-American power in itself shall be deemed to present a sufficient danger to warrant exercise by the United States and other American powers of the right of self-defense. The result of the consistent adherence to this attitude by the United States and most other American states, together with the acquiescence of the rest of the civilized world, has been to create a specialized, regional body of law under which preventive action in self-defense is, in the Americas, authorized under less restrictive conditions than would be required in some other regions.

In more recent years, the United States has ceased to maintain the Monroe Doctrine in the more extreme forms which it assumed in the late nineteenth and early twentieth [sic] centuries. The Doctrine today does not protect purely economic or political interests, as it once did, or even security interests which are less than fundamental. Thus the United States has refrained from direct intervention in Cuba to prevent the mere continuance in office, apart from any specific military threat, of a government which is allied with the Communist Bloc and which has not hesitated to destroy economic interests of the United States in the island. The United States has further refrained from forcible intervention to prevent shipment of conventional arms to Cuba, thus tolerating a certain degree of danger that such arms might be used for aggressive purposes against the United States or against other American nations. So far the United States has withheld action in deference to conceptions, entertained strongly in some quarters in Latin America, of self-determination and

⁸ See, e.g., Briggs, 35 A.J.I.L. 506 (1941).

non-intervention. However, thus far it has been arguable that under modern conditions, no critical danger to the peace and security of other countries in the Western Hemisphere was presented; that shipments of conventional arms to the Castro Government could not necessarily be ascribed to any purpose beyond the defense of Cuba. The same cannot be said of missiles, certainly not of ground-to-ground missiles. The use of Cuban territory to mount such weapons, usable by the Soviet Union only to attack other states and not merely for the defense of Cuba against attack, falls wholly outside the reasons for mitigation by the United States of some aspects of the Monroe Doctrine. Equally important, it falls wholly outside the reasons advanced by our allies in Latin America for opposing interventionist aspects of the Doctrine.

There is nothing unique about the concept of regional differences, based upon historical attitudes and practices, in the impact and requirements of international law. In the *Anglo-Norwegian Fisheries Case*,⁹ for example, the International Court of Justice upheld a system for determining the baselines and boundaries of Norway's territorial sea that could be valid outside Norway, if at all, only in the Scandinavian region. In so doing, the Court relied upon "interests peculiar to [the] region, the reality and importance of which are clearly evidenced by a long usage," and upon the "general toleration of foreign States" over an extended period.¹⁰ Regional variations are also familiar features of the law of the sea with respect to bays and with respect to sedentary fisheries.

In a Memorandum for the Attorney General dated April 12, 1961, Assistant Attorney General Katzenbach noted that traditional

legal doctrines relating to intervention date from the pre-World War I period and reflect the existence at that time of a security structure based upon flexibility of alignment. Since change of alignment to preserve a balance of power was the principal technique by which security was maintained, legal doctrines tended to develop that would promote freedom to change alignment and would discourage intervention for the purpose of maintaining existing alignments.

The Memorandum continues as follows:

"The political structure today is vastly different. Alignments within the Communist Bloc and within the West are long-term political alignments with considerable aspects of supra-national authority. As a result, the security system from the point of view of each bloc depends less upon neutrality of alignment than it does upon preserving the alignments which exist. Therefore, ... there is considerable pressure for intervention in situations where bloc security is threatened. There is nothing in the existing legal structure which recognizes this state of affairs, but there are numerous instances where intervention has been tolerated in the postwar period; for example, Hungary, Guatemala, Lebanon, and, in 1948, Israel."

Although it is true that traditional legal concepts of general application do not expressly recognize interests in bloc security, the Monroe Doctrine constitutes an explicit qualification on a regional basis of general legal concepts insofar as the Western Hemisphere is concerned. The history of the Doctrine includes many incidents which emphasize its purpose to prohibit flatly the adherence of territories in the Americas to European or Asiatic power blocs, or for that matter the transfer by them of allegiance from one bloc to another.¹¹ The premise underlying this purpose – that

⁹ Judgment of Dec. 18, 1951, [1951] I.C.J. Rep. 116.

¹⁰ *Id.*, pp. 133, 138.

¹¹ See generally Logan, *No Transfer – An American Security Principle* (1961).

peace and security in the Hemisphere could be assured only by insulating it from the unstable alliances and rivalries of Europe and Asia – squarely contradicts the balance-of-power policies that infuse the doctrines of general application which are altered by the Doctrine.

Moreover, although publicists in the field of international law have not yet formulated concepts and doctrines which expressly recognize the changed world situation, it seems probable that international law, as reflected in the actual practices and expectations of states, already recognizes the decisive importance of bloc security today in certain geographic areas. International law is, after all, essentially a generalized statement in terms of rules and policies of the reasonable expectations of states as derived from their practices in making claims and reacting to the claims of others. The western states have, of course, condemned as unlawful the Soviet intervention in Hungary, directed as it was against a revolt which at the time posed a purely political threat against the Soviet Union. It may be doubted, however, whether the United States would have protested seriously the use of force by the Soviet Union if it had been designed for the limited purpose of compelling abandonment of a plan to install Western missile bases in Hungarian territory.

If in the future the government of Poland should become increasingly friendly to the United States, our government would undoubtedly defend strongly its legal right to withdraw from the Communist political bloc. It seems altogether certain that we would, however, feel obliged to refrain from attempting to supply Poland with ground-to-ground missiles or other armaments readily susceptible of aggressive use. Yugoslavia, and perhaps Finland as well, provide examples of states which the international community as a

whole probably regards as insulated, under threat of intervention by the Soviet Union, from full incorporation into the western military structure.

In appraising the rights of the United States vis-a-vis Cuba, the treaty of 1934¹² may have some relevance. The principal effect of the treaty was to abrogate the Cuban-American Treaty of 1903,¹³ under which the United States had the right to intervene in Cuba virtually at will. However, the treaty of 1934 preserved existing agreements indefinitely with respect to the leasing of naval stations in Cuba insofar as they applied to the naval station at Guantanamo. The Treaty of 1934 did not expressly obligate Cuba to refrain from permitting the use of its territory for military purposes by other states. However, the fair inference arising from the cession of naval rights to the United States is that the island was to be a part of, or at least not a breach in, the defensive military system protecting the continental United States and the Caribbean countries. At the time of the treaty, of course, a military threat to these areas from Cuba could arise only as a consequence of naval and air installations of the type which the treaty secured to the United States. The evident intention of the parties to the treaty, broadly stated, thus was to restrict intervention by the United States on political or economic grounds, but to preserve the position of Cuba in the defensive military system of the United States. Certainly the treaty is not inconsistent with the position here expressed as to the legal rights of the United States in the event of military use of Cuban territory by the Soviet Union.

It should be apparent that the conclusions here reached do not undermine the legal position of the United States with respect to its own missile bases abroad. In no case of which we are aware is a country in which the

12 State Dep't, Treaty Information Bulletin No. 56 (1934).

13 Foreign Relations of the United States (1904) 243-246.

United States maintains missile bases subject to a special regime comparable to the Monroe Doctrine. Moreover, in no case is any such country a member or former member of the Communist Bloc or within the acknowledged periphery of the Soviet security system. Finally, there is a basic factual difference in the military relationships of such countries to the Soviet Union and that of Cuba to the United States. The states in which bases are maintained by the United States are in each case among the major targets of Soviet military preparations. No impartial observer could conclude that Cuba is a major object of the military program of the United States, or that Cuba is in any danger of a missile attack by the United States. The United Kingdom may harbor U.S. missiles in self-defense because it is a likely target of Soviet missiles. For Cuba to harbor Soviet missiles would constitute a wholly disproportionate response to any sane estimate of its defensive needs against the United States.

III

We assume that any statement by the President on this subject would begin by announcing that there is reason to believe the governments of Cuba and the Soviet Union may be actively considering the installation of Soviet missiles on Cuban territory, and would be designed generally to warn those countries of the intentions of the United States in any such eventuality. We offer the following suggestions with regard to such a statement by the President:

(1) The statement should emphasize the historical and regional aspects of the rights being asserted by the United States.

(2) The statement should emphasize the threat to other countries as well as the United States, and the defensive character of any action that might be taken by the United States. Possibly the statement should expressly disclaim any intention to act for economic or political ends, or for any purpose other than to compel an abandonment of plans to create a specific military threat in Cuba.

(3) The statement should indicate an intention to have recourse first, if at all possible, to collective security arrangements to which the United States is a party, particularly the Organization of American States. It should also, without qualifying the strong commitment of the United States to the principle of collective security, make the point that the United States has an ultimate responsibility for its own safety which in situations of extreme gravity necessarily would take precedence over all other commitments. Consideration should be given to withholding the statement until it can be made as a first step in an integrated plan to secure collective action by the O.A.S. If made in that context, the statement should announce a call for a meeting of the Organ of Consultation pursuant to the Inter-American Treaty of Reciprocal Assistance (Rio Pact).

(4) The statement should acknowledge an obligation on the part of the United States to observe a rule of proportionality. An express reference might be made to total blockade or to "visit and search" procedures as appropriate reactions by the American states or by the United States to meet a threat to install missile bases in Cuba. In this connection, care should certainly be exercised to avoid the implication that Cuba is under any immediate threat of nuclear attack.

Norbert A. Schlei
Assistant Attorney General
Office of Legal Counsel

NS