THE INFLUENCE OF INTERNATIONAL LEGAL CONSIDERATIONS
IN THE CUBAN MISSILE CRISIS, 1962

THESIS

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By

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The purpose of this study is to demonstrate that international legal considerations played a vital role in the Cuban Missile Crisis. All major areas of legal considerations are discussed, including both an American and Soviet perspective. An analysis of the American approach to the crisis exemplifies the participation of various departments of the Executive branch, Congress, the Executive Committee of the National Security Council, and the President. The approach by the Soviet Union in justifying the deployment of offensive nuclear weapons and the Kremlin's objection to the U. S. quarantine of Cuba were influenced by legal considerations.

The time period that this study encompasses is August 1962 through October 1962, a period much longer than is usually associated with the crisis.
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CHAPTER I

INTRODUCTION

On October 16, 1962, President John F. Kennedy was alerted to the news that the Soviet Union had secretly placed missiles in Cuba which American officials classified as offensive. There had been repeated warnings by the United States that such weapons would not be tolerated. Following recurrent assurances by the Soviet Union that only defensive weapons would be introduced, Major Rudolph Anderson, flying a U-2 long-range reconnaissance mission on October 14, photographed the evidence of emplacement of offensive missiles in Cuba. Immediately upon receiving the news of the developing situation, the President summoned a group of close advisers. This group, later to be officially named the Executive Committee of the National Security Council (ExCom), met almost continuously from October 16 to 28.

During those crucial thirteen days, the intense drama of the Cuban Missile Crisis unfolded. The decision of the United States to blockade--quarantine--the Cuban coastline was reached. And on October 28, the Soviet Union capitulated to the American demand. Most often, this period serves as the parameter in which the Missile Crisis is discussed. Several in-depth studies
of the period have been written by men who held government positions as well as others who did not possess that vantage point.¹

This study, however, does not confine itself to this thirteen-day period, for the influence of international legal considerations was not confined to so short a time. The purpose of this thesis is to demonstrate that legal considerations played a vital role in the Cuban Missile Crisis. These considerations were evident in the U.S. Congress (Chapter II). The influence of the legal divisions of the U.S. Executive Branch prior to the discovery of offensive weapons in Cuba is presented in Chapter III. Chapter IV illustrates the legal influences on the President and the members of the ExCom as demonstrated by them between October 16 and 28. Also included are legal considerations affecting the thinking of the leaders of the Soviet Union (Chapter V). Chapter VI examines the disagreement between Congress, noted journalists, and President Kennedy regarding the interpretation of an important international legal principle based on the Monroe Doctrine. Finally, Chapter VII provides concluding analyses. It is impossible at this time to determine how much effect legal considerations had on various sectors, including executive decision-makers and the U.S. Congress. But it would seem that nations are not impervious to legal considerations in their dealings in international crisis situations.

According to two prominent authorities, "Disputes are not routinely decided by an international judiciary, and there exists no coercive agency of formal international status which can effectively enforce the law." This does not imply, however, that in a crisis situation law is disregarded and deemed irrelevant to the solution. Yet, there are those who make this contention, a contention which seems shallow in light of the evidence presented in this study. One must understand that "international law is not a set of fixed, self-defining categories of permissible and prohibited conduct." No national leader is going to interpret international law in this manner, particularly when he perceives that the national security of his country is at stake. When the President of the United States obtains opinions from government lawyers in the form of legal memoranda, he will not respond, "I am disposed to do thus-and-so, which I think to be in the best interests of the country, but if you tell me it would be illegal, I won't do it." This study will illustrate that opinions of government legal advisers do affect a President's thinking and that of other decision-makers.


3For this argument see William P. Gerberding, "International Law and the Cuban Missile Crisis," in International Law and Political Crisis, edited by Lawrence Scheinman and David Wilkinson (Boston: Little, Brown and Company, 1968), pp. 209-210; see also in the same volume Wolfgang Friedman and Lawrence A. Collins, "The Suez Canal Crisis of 1956."


5Ibid., p. 35.
When one mentions law in regard to a specific situation, the question often arises, "Is the action legal or illegal?" This study makes no effort to construct a legal theory that indicts or exonerates either the United States or the Soviet Union for their chosen courses of action. That task is left to those legal scholars who desire to answer such questions.\(^6\)

The solution to the Cuban Missile Crisis was not decided in a courtroom. It was determined in a world susceptible to destruction by the men making the decisions. Yet, these men were influenced by legal considerations as they contemplated their decisions in attempting to prevent the world from being destroyed.

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CHAPTER II

CONGRESS AND SENATE JOINT RESOLUTION 230

The last two weeks of September, 1962, represented for the U. S. Congress a period of vigorous and decisive debate pertinent to the Soviet buildup of armaments and technicians in Cuba. This period was the culmination of the discussion in Congress, which had begun much earlier, of the Cuban situation. Critics of the Kennedy administration maintained scrutinizing vigilance on the apparent Castro-Khrushchev alliance from the moment John Kennedy took office as President of the United States. As early as August 24, 1961, Senator Carl Curtis (Republican, Nebraska) introduced a resolution urging the President to take military action against the threat to the security of the U. S. and the Western Hemisphere that had been created by the establishment of the Communist base in Cuba.¹ Although adequate support for the resolution was lacking at that time, such was not to be the case in September, 1962. It is the primary purpose of this chapter to examine that September resolution, Senate Joint Resolution 230, along with the debate in both Houses of Congress

which led to its passage. Though the debate touched on a variety of topics,\(^2\) this examination will concentrate on the points where international law entered the discussion and the effect international legal considerations had on the adoption of the resolution. Also, this chapter will observe President Kennedy's position toward the Soviet military buildup in Cuba. His position was directly attacked by some members of Congress. The opposition to the President's position played a key role in the debate over Senate Joint Resolution 230.

The Classification of Weapons: Offensive or Defensive?

On September 13, President Kennedy clarified for everyone, including Congress and the Soviet Union, his position on the Communist military buildup in Cuba.

> If at any time the Communist buildup in Cuba were to endanger or interfere with our security in any way, . . . or if Cuba should ever attempt to export its aggressive purposes by force or the threat of force against any nation in this hemisphere, or become an offensive military base of significant capacity for the Soviet Union, then this country will do whatever must be done to protect its own security and that of its allies.\(^3\)

The President had made it clear that this country would act, but not until the material in Cuba constituted an offensive capability.

\(^2\) Included among these topics were: The call up of reserve troops and aid to Cuban freedom fighters, *Congressional Record*, September 11, 1962; p. 19003; Possible repercussion in Berlin, *Congressional Record*, September 26, 1962, p. 20867.

The "Wait and See" approach employed by the President, as assessed by some members of Congress, of distinguishing between offensive and defensive weapons stirred continuous controversy among members of Congress. Some Congressmen believed that the weapons and personnel already present in Cuba constituted a threat to the security of the U. S. and the Western Hemisphere. Soviet military technicians numbered 3,500, and the European power had supplied Cuba with Mig jet fighters, T-34 and 35-ton tanks, JS-2 51-ton tanks, and field and anti-aircraft artillery. Patrol vessels and torpedo boats were equipped with guided missile launchers having a range of fifteen miles.

Senator Kenneth Keating (Republican, New York) adamantly rejected the President's distinction between offensive and defensive weapons, labeling such differentiation as "dangerous and unrealistic." He further argued that a hostile military base only ninety miles from U. S. shores could be viewed as nothing short of a threat to our security. The shipments of arms and technicians had not worried Senator Keating as much as had the thought of complete Soviet takeover of Cuba. "Cuba," he noted, "is now a Russian base, and Castro is a complete puppet. If he doesn't do exactly what they want him to do they will take him out and put somebody else in."

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4U. S., Congress, Senate, Committee on Foreign Relations and the Committee on Armed Services, Situation in Cuba, Hearings, 87th Cong., 2nd sess., September 17, 1962, p. 7. Hereafter cited Situation in Cuba, Hearings.

5Ibid., p. 13.
Senator Wallace Bennet (Republican, Utah) joined Senator Keating in his criticism of what he felt was Presidential inaction. He argued, "Both Congress and the American people are far ahead of the President in their willingness and earnest desire for prompt, affirmative action to meet the Communist threat in Cuba. . . . It will be fatal to continue the present policy of drift, timidity, and indecision." Thus, to Senator Bennett, President Kennedy had no strong affirmative plan for countering the Soviet threat in Cuba.

There were many criticisms of the administration's policy, and one predominated. Within this predominant criticism, the President was portrayed as the great violator of one of the most sacred principles of international law. Simply by allowing Soviet extension into a portion of this hemisphere--for offensive or defensive purposes is irrelevant to the matter--President Kennedy had irresponsibly disregarded the Doctrine put forth by President Monroe in 1823. The President's critics were prepared to publicly castigate him for this dastardly neglect.

There were many who believed that the cautious path upon which the President had embarked was the proper course to follow at the time. One can

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7The issue of the Monroe Doctrine and its role in the Cuban Missile Crisis has proven to be of particular interest and will be treated more extensively in Chapter VI.

8Some of those who agreed with the President include: Senator Mike Mansfield (Democrat, Montana), Congressional Record, September 11, 1962, p. 19004; Senator Hubert Humphrey (Democrat, Minnesota), Congressional Record, September 11, 1962, p. 19072; Senator Frank Lausche (Democrat, Ohio), Congressional Record, September 20, 1962, p. 20057.
even find some semblance of support, or at least an acknowledgement of legal concern, for the arguments propounded by Senator Frank Moss (Democrat, Utah) included the idea that the U.S. could tolerate defensive weapons. "By rash and headlong action," Senator Moss believed, "we well might destroy the beginnings of a world order under law which is slowly and painfully emerging at the United Nations." 9

Senate Joint Resolution 230

In support of any action which the President might decide to take, 10 Senate Joint Resolution 230 was passed overwhelmingly by both Houses of Congress. The Senate passed the Joint Resolution on September 20 by the vote of 86 to 1. 11 In the House of Representatives, September 26, the vote was 384 for and 7 against. 12 The Resolution reads, in part, as follows:

9 Congressional Record, September 20, 1962, p. 20028.
10 A majority of Congress felt that the purpose of this Resolution basically was to demonstrate unified support for the actions which President Kennedy might take in the future. To support this conclusion and for an expansion of the debate, see arguments by Senator John Sparkman (Democrat, Alabama), Congressional Record, September 20, 1962, p. 20024; Senator Bourke Hickenlooper (Republican, Iowa), Congressional Record, September 20, 1962, p. 20030; Senator John Cooper (Republican, Kentucky), Congressional Record, September 20, 1962, p. 20033; Representative Cornelius Gallagher (Democrat, New Jersey), Congressional Record, September 26, 1962, p. 20891; Representative Thomas Morgan (Democrat, Pennsylvania), Congressional Record, September 26, 1962, p. 20865. Presidential critics, however, desired that the Resolution's purpose be to pressure the President into taking strong immediate action.

11 Congressional Record, September 20, 1962, p. 20058.
12 Ibid., September 26, 1962, p. 20910.
be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the United States is determined--

(a) to prevent by whatever means may be necessary, including the use of arms, the Marxist-Leninist regime in Cuba from extending, by force or the threat of force, its aggressive or subversive activities to any part of this hemisphere;

(b) to prevent in Cuba the creation or use of an externally supported military capability endangering the security of the United States; and

(c) to work with the Organization of American States and with freedom-loving Cubans to support the aspirations of the Cuban people for self-determination.\(^{13}\)

By encouraging the President to do whatever may be necessary, "Including the use of arms," Congress had knowingly consented to the imposition of a blockade, if the President should choose to follow that course.

The concept of using a blockade as a solution to the Missile Crisis was not originated during the meetings of the ExCom. Upon reading the major accounts of the Missile Crisis, one may be left with the erroneous impression that someone simply mentioned blockade as a possible solution on Wednesday, October 17. Congress had also discussed such a move. However, Congress cannot be credited with the idea of imposing a blockade in this particular situation any more than the ExCom can. As shall be demonstrated later, another source, one which played a far greater role than is commonly understood in the Missile Crisis, had much to do with the development of that idea.\(^{14}\)

\(^{13}\)Ibid., September 20, 1962, p. 20004.

\(^{14}\)The other source refers to the legal counsel of the Executive Branch, primarily those of the Department of Justice and the Department of Defense. The contributions of these Departments will be discussed in Chapter III.
Even though Congress had not originated the idea of applying a blockade, Congressmen debated at length the possibility of its use. The time spent on debate is no indication of the degree in depth with which blockade was discussed. Should it have been otherwise, one would have been well schooled in the principles of blockade under international law. Instead, it seemed as if some members of Congress knew little about the subject they were discussing and even less about the implications of the act of blockading. In short, much of the debate was non-intellectual and uninformative.

The High Seas

The cry heard most often was that blockade would constitute "an act of war." Usually, nothing followed these pronouncements which would indicate why or under what circumstances or under what international legal concepts a blockade would be an act of war. Senator Wayne Morse (Democrat, Oregon), on the other hand, during his questioning of Senator Keating on September 17, hinted that there existed an international legal concept pertinent to the high seas in general. What he was referring to had already been expanded on and debated by many international legal scholars. John Colombos defined the high seas as "the sea beyond the limits of territorial jurisdiction." From

15Situation in Cuba, Hearings, p. 58; Congressional Record, September 26, 1962, p. 20863; Congressional Record, September 20, 1962, pp. 20000, 20033.

16Situation in Cuba, Hearings, p. 19.

one perspective, the legal basis of the doctrine of freedom of the high seas is explained by the concept res nullius, "belonging to nobody." Hackworth advocates this point of view:

The term high seas may be said to refer, in international law, to those waters which are outside of the exclusive control of any state or any group of states, and hence, not regarded as belonging to the territory of any of them. The ocean, until it envelopes the shores of a littoral state and constitutes its maritime belt, is not a part of the domain of any territorial sovereign.\(^\text{18}\)

According to another viewpoint, the high sea represents that which is "common to everyone," res communis. In explaining this concept further, an international legal scholar has written that, "The high sea cannot be subject to the right of sovereignty for it is the necessary means of communication between nations and its free use thus constitutes an indispensable element for international trade and navigation."\(^\text{19}\) It follows that no state has the authority to occupy the high seas or to dictate to other states how the high seas might be used.\(^\text{20}\) This argument is derived from "Laws of Maritime Jurisdiction in Time of Peace," adopted by the International Law Association at its Vienna Conference of 1926. Article I states that "... for the purpose of securing the fullest uses of the seas, all states and their subjects shall enjoy absolute


\(^{19}\text{Colombos, pp. 47-48, 66.}\)

\(^{20}\text{Ibid., p. 48.}\)
liberty and equality of navigation, transport, communications, industry and
science in and on the seas." Further, Article XIII provides that "no state or
group of states may claim any right of sovereignty, privilege or prerogative
over any portion of the high seas or place any obstacle to the free and full use
of the seas."\(^{21}\) This concept of the freedom of the seas is not outdated nor
governed by archaic agreements. That which was agreed on at the Vienna
Conference of 1926 was reiterated in 1958 at the United Nations Conference on
the Freedom of the Seas. Article 27 of the U. N. document is as follows:

The high seas being open to all nations, no State may validly
purport to subject any part of them to its sovereignty. Free-
dom of the high seas is exercised under the conditions laid
down by these articles and by the other rules of international
law. It comprises, (1) Freedom of navigation; (2) Freedom
of fishing. . . These freedoms, and others which are
recognized by the general principles of international law,
shall be exercised by all States with reasonable regard to
the interests of other States in their exercise of freedom of
the high seas.\(^{22}\)

Blockade: An Act of War

While some members of Congress proclaimed that the imposition of a
blockade constituted an act of war, they offered little information to substantiate

\(^{21}\)"Laws of Maritime Jurisdiction in Time of Peace," Reports of the

\(^{22}\)United Nations, United Nations Conference on the Law of the Sea,
Vol. IV (1958), "Text of the Articles and Draft Resolutions Adopted by the
Second Committee," April 22, 1958, pp. 150-151.
their claims. Traditionally, blockade has been considered as an act of war. This much, at least, these Congressmen conceived. But why and with what understanding of blockade were these claims espoused? Senator John Cooper (Republican, Kentucky) noted that blockade implied a state of belligerency, i.e., state of war. Senator Morse asserted much the same argument. Blockade, he noted, would be an act of aggression, and, therefore, an act of war under international law.

Since blockade eventually was implemented to confront the Soviet placement of missiles in Cuba, it is important that this concept be analyzed. The analysis presented here will be placed within the context of certain principles of international law. The word "blockade" originally meant "seige of investment." When the coast represented the besieged place, the sea depicted the line of investment. And from this, the international doctrine of blockade has originated. Defining blockade in basic terms, one finds that it "is a belligerent operation intended to prevent vessels of all states from entering or leaving

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23 Besides Senators Cooper and Morse who are mentioned in this chapter of thesis, others supported this view. Included among them were: Representative Emanuel Cellar (Democrat, New York), Congressional Record, September 26, 1962, p. 20863; Representative Thomas Morgan (Democrat, Pennsylvania), Congressional Record, September 26, 1962, p. 20864.

24 Congressional Record, September 20, 1962, p. 20033.

25 Situation in Cuba, Hearings, p. 58.

26 Colombos, p. 714.
specified coastal areas which are under the sovereignty, under the occupation, or under the control of an enemy."27

The United States has long recognized blockade as an act of war. In this century, no counterclaim has been officially expressed. Before the First World War, the U. S. maintained it would not recognize a blockade under any circumstances unless a state of war existed.28 In 1941, Sumner Welles, acting Secretary of State, commented on the legality of blockade under international law. He held firm to the position that a blockade of Siberian ports by the Japanese would not be recognized as legal unless a state of war existed between the Soviet Union and Japan.29 Thirteen years later the U. S. position remained unchanged. The thought of blockading Red China in 1954 was labeled a resort to war by Secretary of State John Foster Dulles.30 Congressmen also put forth this same claim in September, 1962, regarding traditional blockade. In the traditional sense, and in light of the official U. S. position throughout history, those Congressional leaders who advocated that blockade was an act of war were correct.


However, an accepted definition of the term "blockade" does not adequately convey an understanding of blockade. A further description of its characteristics is necessary. The blockade must be: (1) impartial, (2) effective, and (3) declared, and the appropriate parties must be notified. Article 5 of the Declaration of London, 1909, stipulated that "a blockade must be applied impartially to the ships of all nations." It cannot be a tool whereby a belligerent may allow vessels of certain nations to pass while precluding the passage of others. Before the Declaration of London, the stipulation of impartiality was recognized in Great Britain by the Judicial Committee of the Privy Council. In 1855, in the case of The Franciska, the Right Honorable T. Pemberton Leigh concurred that a blockade could not be considered legitimate if it conceded to either belligerent a freedom of commerce which had been denied to those states not engaged in war. 32

The second characteristic of blockade is that it must be effective. According to the Declaration of Paris, 1856, Article 4, "blockades in order to be binding must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy." The Declaration of London, 1909, reiterated this qualification in Article 2. Further, Article 3


32Ibid., p. 901.

33Colombos, p. 717.
of the same document indicated that effectiveness "is a question of fact."

It follows that the effectiveness of a naval blockade depends on the naval superiority of the blockading state. If the blockaded state possesses paramount sea power, the effectiveness of the blockade cannot be maintained for any lengthy period of time and will no longer be considered binding. However, the words of the afore mentioned three Articles should be interpreted with caution and not be taken literally. One might be inclined to argue that if a single ship broke through a blockade, the effectiveness of that blockade would be questionable. But a contention such as this is of little sound value. It would appear that no state would refuse to recognize a blockade on those grounds. Practically, effectiveness is demonstrated when a blockade is supported and enforced by a sufficient number of vessels to quell communications and to pose a high risk of capture to ships attempting to run it. In 1899, the U. S. Supreme Court demonstrated its agreement with the Declarations of Paris and London. In the case of The Olinde Rodrigues, the Court concluded that the effectiveness of a blockade was a question of fact. Furthermore, the fact of effectiveness was not dependent upon the number of warships employed in the maintenance of the blockaded area. In the words of the Court:

An effective blockade is one which makes it dangerous for vessels to attempt to enter the blockaded port; and the question of effectiveness is not controlled by the number of the

34Briggs, pp. 908-909.

35Colombos, p. 717.
blockading force, but one modern cruiser is enough as a matter of law, if it is sufficient in fact for the purpose, and renders it dangerous for other craft to enter the port. . . . It is not practicable to define what degree of danger shall constitute a test of the efficiency and validity of a blockade. It is enough if the danger is real and apparent.36

Finally, a blockade must be declared, and the appropriate parties must be notified. The declaration is a high act of sovereignty and must state

"(1) the date when the blockade begins; (2) the geographical limits of the coastline under blockade; (3) the period within which neutral vessels may come out."37 All of the declaration must be accurate. If any part is defective, the entire declaration is void and another one must be affirmed.38 Neutral powers must be notified of the blockade at the same time that the authorized representatives of the port or coastline under blockade are notified.39

Blockade: Not an Act of War

Among all the clamor in Congress of blockade in conjunction with war emerged the counter argument that blockade was not an act of war. Those who supported this view, as far as can be determined by the debate in Congress, were few in number. Senator Keating interjected that there have been


37Briggs, p. 909.

38Colombos, p. 723.

39Briggs, p. 909.
circumstances where blockades have not been interpreted as acts of war. Senator Jack Miller (Republican, Iowa), in advocating the implementation of a pacific blockade, demonstrated a knowledge of international law far better than any of his colleagues. If not an established knowledge of international law, at least his presentation was organized and well-prepared. Perhaps more important than having been prepared to defend his position, the Senator based his argument on twentieth century phenomena. Those who contended that blockade was an act of war became too imprisoned by traditional concepts and arguments to expand their thoughts and analyses to the world order of the 1960's. To them, a blockade was an act of war, and that was that. No alterations of the concept were acceptable. This is not to imply that Senator Miller's idea of a "limited war material blockade," a pacific blockade, constituted something new and uninhibited by tradition. To the contrary, the pacific blockade principle is steeped in tradition, much as is that of the principle of blockade in time of war.

In the first half of the nineteenth century, it was generally felt that a war blockade might also be governed by the laws of peace. Thus, a blockade could be imposed during pacific times. Such a blockade was called a pacific blockade. The term "pacific blockade" refers to denying ships access to or egress from a foreign port or coast by a state's vessels. Its purpose is to

40Situation in Cuba, Hearings, p. 12.

41Congressional Record, September 6, 1962, p. 18754.
force a state to yield to enumerated demands placed upon it. Such action is
pacific when the blockading state desires to remain at peace. Peace is con-
tingent, however, upon the response of the blockaded state. The blockaded
state must assess the blockading action as an act short of war, and thus not
feel compelled to declare war on the blockading state for peace to remain.42
Pacific blockade is subject to the same qualifications as is a belligerent block-
ade. Again, these qualifications include: impartiality, effectiveness, and a
declaration and notification to the proper authorities. A pacific blockade
differs only in respect to the absence of a state of war and in regard to third
states or states not a party to the controversy. The interference with vessels
of third states while a pacific blockade is being imposed is not justified by
international law. Freedom of trade and commerce cannot be curtailed during
the time of peace. Of course, third states may themselves choose to limit the
activity of their ships as a precautionary measure.

The U. S. has consistently agreed with the concept of noninterference
in the rights of neutral states upon the implementation of a pacific blockade.
In anticipation of a blockade of Venezuela in 1902 by Great Britain, Germany,
and Italy, the U. S. made it clear that action which might adversely affect
neutral states would not be tolerated. Again in 1916, as the Entente Powers
prepared to blockade Greece, the U. S. stressed that such action in the

absence of a state of war must not interfere with the trading rights of neutral countries.43

While Senator Miller's idea was a traditional one, his justifications for its use were supported in contemporary terms. The failure to employ this type of approach in September, 1962, was precisely the failure of those Congressmen who contended that blockade was an act of war and could be nothing else. Senator Miller utilized the nineteenth century concept of pacific blockade, while applying it to the context of twentieth century institutions and world order. In advocating a pacific blockade, he contended that the question one must face was how would such a blockade be permissible under the United Nations Charter, particularly in respect to Paragraph 4 of Article 2 and Article 51.

Article 2, Paragraph 4, states, "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations."44 In his argument, the Senator proffered that the international Communist conspiracy had already violated the above Article. Furthermore, since the Soviet Union now controlled Cuba,


its political independence no longer existed. The "threat or use of force" by
the U. S. would not now violate this Article. 45

The primary aspect of Article 51 of the U. N. Charter is concerned with
the right of self-defense—not simply self-defense in general, but self-defense
in the event of an armed attack. Specifically, Article 51 provides that:

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 measures necessary to maintain
international peace and security. . . . 46

With this Article in mind, Senator Miller asked whether a pacific blockade,
an act of force under Article 2, Paragraph 4, was a means of self-defense under
Article 51. He contended that a limited blockade would not be contrary to this
Article. An armed attack literally would not have to occur before a sovereign
state could act to defend itself. In the present armament situation, he argued,
no state could be expected to wait for an initial attack by one's adversary. 47

There are numerous court cases which support this argument of self-
defense. One of the better known cases is that of the Caroline. In 1837, an
insurrection took place in Canada. Some of the defeated insurgents sought and
obtained refuge in the U. S. where they endeavored to recruit Americans who
were sympathetic to their cause and to regroup their forces. The Caroline,

45Congressional Record, September 6, 1962, p. 18755.
46Charter of the United Nations, p. 17.
47Congressional Record, September 6, 1962, p. 18755.
an American steamer, was to be used to transport these insurgents and their new recruits across the Niagara River from the U. S. to Canada. However, before this relocation of men and arms took place, British troops crossed into American territory, seized the Caroline, and sent it over Niagara Falls. Great Britain claimed that this action by British troops was a legitimate means of self-defense, even though an actual attack in which the Caroline would have taken part had not occurred. This claim of self-defense by the British Government received no argumentation from U. S. officials. The absence of major legal objections by the U. S. to the British act of self-defense indicated that the U. S. agreed that force could be used prior to or in the absence of an armed attack for the purpose of self-defense.48 From this case came a classical statement by Secretary of State Daniel Webster that there must be shown a "necessity of self-defense; instant, overwhelming, leaving no choice of means and no moment for deliberation."49 In discussing the principles of Webster's statement, McDougal and Feliciano have suggested that necessity and the proportionality of the response must be interpreted with reasonableness in each particular situation to secure the objective of self-defense.50


50Ibid., pp. 241-242.
Senator Miller had presented his questions within the limits of the U. N. Charter, and he had answered them in the same context. His answers indicated that a "war material blockade was not an act of war . . . emphasizing that this was particularly true when dealing with a country's political independence which had become a mere subdivision of the international Communist conspiracy." 51

Certainly international law did not serve as the focal point during the debate on Senate Joint Resolution 230. It was not interjected in any great depth even in those areas where legal concepts had been discussed in the debate. Although the concern for international law did not serve as the focal point of Congressional debate, it must be concluded that the concern over international legal concepts did play a role in the Resolution's adoption. Congress recognized the existence of international legal concepts and understood that they must be reckoned with.

51 Congressional Record, September 6, 1962, p. 18755.
CHAPTER III

THE ROLE AND INFLUENCE OF THE LEGAL DIVISIONS OF THE U. S. EXECUTIVE BRANCH PRIOR TO THE DISCOVERY OF SOVIET OFFENSIVE WEAPONS IN CUBA

Too often an assessment of the Cuban Missile Crisis is limited to a study of the thirteen days of crisis, October 16 through 28, 1962. If the President or his advisers had confined themselves to that period of time, they might not have chosen so wise a course. Furthermore, if President Kennedy had depended solely on his closest advisers for input, perhaps the decision reached would not have been the same. A study of the Cuban Missile Crisis should not be limited to the observation of the workings of the ExCom between October 16 and 28. Such a limited study deprives oneself of a thorough understanding of the crisis, particularly in regard to the role of international legal considerations and that of executive legal counsel closely associated with the crisis.

In the middle of August, the Department of Justice began preparing a legal memorandum pertinent to the Cuban situation. It was soon followed by one prepared under the auspices of the Department of Defense. It shall be the purpose of this chapter to discuss those memoranda and the role of the Government's legal advisers prior to the discovery of offensive weapons in Cuba. Also, Presidential policy will be traced to observe the influence of the legal advisers on the President.
The thought of taking legal action and the responsibility of the U. S. under law did not wait to surface until the time when the President reached his decision. The influence of legal considerations, or at least the acknowledgment by the administration that international legal criteria would have to be consulted, was explored much earlier. In the middle of August, Attorney General Robert Kennedy approached Norbert Schlei, the newly commissioned Assistant Attorney General in the Office of Legal Counsel, and told him of the buildup of Soviet weapons and military technicians in Cuba. Though Schlei was well aware of the increase of Soviet weapons and military technicians in Cuba, he probably did not know that the first task to be assigned to him at his new position would be as a participant in assessing what the U. S. might do in what would be the most crucial problem the Kennedy Administration would face. Robert Kennedy told Schlei that President Kennedy was contemplating the issuance of an official warning to the Soviet Union, a warning that would state unequivocally that the U. S. would not tolerate the installation of long-range, offensive missiles in Cuba. However, before this advance warning was issued, it was thought that a serious study should be undertaken to evaluate whether the U. S., "as a matter of international law," could take action to preclude the installation of long-range missiles in Cuba. Also, the attorney General asked Schlei to explore what possible course of action the U. S. could take.¹ Schlei and his staff began the assignment immediately.

This requested information was furnished by Schlei in a letter dated May 22, 1968, to Abram Chayes, who at the time of the Missile Crisis was serving in the capacity of Legal Adviser to the Department of State. Schlei's letter indicated when and in what manner the President and the Attorney General were concerned with law in the ensuing situation. Legal implications were explored before a warning to the Soviet Union was issued and while the U. S. was in the process of formulating a policy. It cannot be precisely determined from the information available whether it was the President or the Attorney General who first suggested that an international legal study should be pursued before a public warning was made to the Soviet Union. Two lines of thought are possible. First, the President might have instructed his brother to investigate how a warning should comply with international law. Second, the Attorney General, upon hearing his brother indicate that he would issue an official warning to the Soviet Union specifying that long-range missiles in Cuba could not be acceptable to this country, might have suggested that before such a move was made a legal study should be pursued. Understanding Robert Kennedy's position as Attorney General and his incessant concern with law, the latter seems more plausible.

The Department of Justice Memorandum

The Department of Justice Memorandum was completed in late August, 1962. Generally, it concluded that:

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.

While concluding that the U. S. could act under the principle of self-defense to justify its own preventive action, the Memorandum stipulated that there were several limitations to this action. Defensive action, it was noted, should be limited to the rule of proportionality. The Caroline case exemplified this. In this instance, the U. S. demanded that Great Britain show that it did not act unreasonably or excessively when British forces sent the Caroline over Niagara Falls.

The second limitation on preventive action, according to the Memorandum, was the degree of urgency. Again, the records of the Caroline case were cited. Preventive action in self-defense could be employed where the need for it was "instant, overwhelming, leaving no choice of means, and no moment for deliberation." Schlei recognized that this would place a strict limitation on U. S. action, but it was felt that it would be unlawful to destroy the missile installations unless there was evidence that an actual attack was imminent. One discouraging limitation, however, did not mean that it would be either difficult

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2 Ibid., p. 108.
3 Ibid., p. 109.
or unlawful for the U. S. to act against the missiles in Cuba. The purpose of this legal Memorandum was to explore all aspects of the situation and to project potential developments. From such an analysis, different conclusions would likely evolve, some of which might indicate that the U. S. would have to be cautious no matter what its decision was.

The third limitation in resorting to preventive action, as indicated by the Department of Justice Memorandum, dealt with the role international organizations might play. Neither the Charter of the United Nations nor the Charter of the Organization of American States (O. A. S.) prohibits unilateral preventive action in self-defense. However, membership in either of these organizations carries with it an obligation to employ the organization's procedures, if possible, before taking unilateral action. Finally, the Memorandum emphasized the extreme importance of attempting to involve the Organization of American States in whatever action might be required. Article 25 of the O. A. S. Charter and Article 5 of the Rio Treaty (the Inter-American Treaty of Reciprocal Assistance), 5 which

5Article 25 of the O. A. S. Charter reads: "If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State shall be affected by an armed attack or by an act of aggression that is not an armed attack, or by an extra-continental conflict, or by a conflict between two or more American States, or by any other fact or situation that might endanger the peace of America, the American States, in furtherance of the principles of continental solidarity or collective self-defense, shall apply the measures and procedures established in the special treaties on the subject." Pan American Union, Treaty Series, Charter of the Organization of American States, (1948), p. 6.

are interrelated, indicate that armed attack need not be actual or imminent before a nation can act for the common self-defense of those nations belonging to a regional collective security organization. That is, defensive action is justifiable if the "territory or sovereignty or political independence of any American State" is affected by "an aggression" or by "any other fact or situation which might endanger the peace of America . . . ."  

In answer to the Attorney General's request as to what specific course of action the U. S. might engage, Schlei proffered one suggestion. He specified that a visit and search blockade could be implemented. This procedure would assert the right to stop only those vessels transporting offensive weapons. To reduce the possibility of any confrontation on the high seas, the U. S. should offer to make inspections through its consular offices within the Soviet Union.  

The concept of visit and search is not unprecedented in international law. Principally, it is regarded as an act of war, but it can be exercised in time of peace, particularly as a means of self-defense. This contention was upheld in the case of the Virginius. When the Virginius sailed from Jamaica in 1875, she was transporting men and munitions to Cuban insurgents. A Spanish warship, the Tornado, captured her on the high seas. The Spanish

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6 Chayes, pp. 110-111.
7 Ibid., p. 132.
Government argues that its action was legitimate, for the right of self-preservation was paramount to the right of the freedom of the seas. In this case it was concluded by a trial of court-martial by the Spanish Government and recognized by Great Britain and the U. S. that it was within the legal jurisdiction of a state, in a circumstance of self-defense, to visit and arrest a vessel on the high seas when the conduct of the vessel was of grave suspicion.9

The blockade advocated by Schlei differed from that debated by Congress in Chapter II. Many members of Congress viewed the picture in simplistic terms—a blockade was an act of war or it was not an act of war. On the other hand, Schlei presented a modified version of blockade. Certainly, Congress maintained the prerogative to debate in whatever manner it desired, including a judgment on the legality or illegality of a resultant action of one of its resolutions. However, if the President plans to base any part of his decision on legal norms, he will seek advice from departmental legal counselors whose jobs entail legal thought.

The Memorandum of the Department of Justice
First Discussed

The Department of Justice Memorandum did not lie dormant waiting to be read by members of the ExCom during its weeks of discussion in the latter

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part of October. It had been written for use in the preparation of a forthcoming statement by President Kennedy. Nor was the Memorandum to be viewed solely by the President, the Attorney General, and a speech writer or two. This Memorandum had been completed and was ready for distribution on August 30, and Schlei delivered it to Robert Kennedy. At this time, the Assistant Attorney General recalled, "Bob proceeded to send copies . . . to various people in the government. I know the President and Rusk got copies, and I believe McNamara and Dillon were also on the list. In view of the distribution, I would guess Bundy and Allen Dulles were included." Schlei in his recollection mentions Dulles. However, Chayes corrects this by indicating that Schlei was referring to the Director of the CIA, John McCone. All of the above mentioned people, except Dulles, were included in what was to be known as the ExCom.

The extent of the treatment and distribution of the Memorandum did not stop here. On Labor Day, September 3, Nicholas Katzenbach, the Deputy Attorney General; Dean Rusk, the Secretary of State; and Robert Kennedy met to discuss this analysis. This meeting may be labeled a harbinger of the meetings of the ExCom, not due primarily to the participants but because of the subject matter discussed. Although the specifics of this meeting are not available, the discussion centered around "spot bombing and visit-and-search blockade as well as the basic legal question." During the meetings of the

10Chayes, p. 133.
11Ibid., p. 19.
12Ibid., p. 133.
ExCom, a month and a half later, the dominant topics of debate were bombing and blockade.

The President Has a Policy

The following day, September 4, a meeting was held at the White House to discuss the draft of a Presidential statement prepared by Schlei. Those present included McGeorge Bundy, Special Assistant to the President for National Security Affairs; Edward Martin, Assistant Secretary of State for Latin America; and Douglas Dillon, Secretary of the Treasury. Other participants were Katzenbach, Schlei, Robert Kennedy, and high officials from the Central Intelligence Agency.¹³

At his press conference on August 29, President Kennedy spoke with circumspection about the developing situation in Cuba. As no evidence of the presence of troops was apparent, he stated that this country would maintain close surveillance of what might appear to be military activity.¹⁴

Only six days later, September 4, the President issued a much stronger statement. The movement from a cautious to a strong statement was not due to the discovery of further evidence of any missiles in Cuba, but was a result of the research conducted by the Department of Justice. Even though a U-2 flight over Cuba on August 29 produced evidence of building activity, this can

¹³Ibid.

hardly be taken as the trigger for the President's statement on September 4. The August 29 flight was the first of a continuous series of flights over Cuba which did not culminate until November. From the photographs taken that day, surface-to-air missile (SAM) sites were discovered. These installations, however, offered no present threat to the U. S., as they did not acquire operational status until late October. This does not mean that these SAM sites represented little concern to the U. S. What the discovery of the SAM sites did mean was that their existence became part of a larger concern. This concern entailed a situation which had been under surveillance since the drastic increase in Soviet dry cargo and passenger ship arrivals in Cuba since the early months of 1962. By August, the increased number of Soviet ship arrivals had aroused grave suspicion in the American leaders. The projected result of these shipments was constantly on their minds. As has been indicated, President Kennedy felt it necessary to officially warn the Soviet Union about the possible result of the increased Soviet supply of armaments and personnel to Cuba, but the discoveries of the August 29 U-2 flight were not the reason for the quick change in his public statements from August 29 to September 4. The shift in the President's position was due primarily to the input of the legal advisers of the Department of Justice.

Schlei intimated that action should be taken only when offensive armaments could be identified. President Kennedy agreed with this analysis. He

specifically made the distinction between offensive and defensive weapons on September 4:

There is no evidence of any organized combat force in Cuba from any Soviet bloc country; of military bases provided to Russia; of a violation of the 1934 treaty relating to Guantanamo; of the presence of offensive ground-to-ground missiles; or of any significant offensive capability either in Cuban hands or under Soviet direction and guidance. Were it to be otherwise, the gravest issues would arise.16

On the strong suggestion that the O. A. S. should be involved in whatever action the U. S. might take, the President outlined this country's policy as follows:

... the Castro regime ... will be prevented by whatever means may be necessary from taking actions against any part of the Western Hemisphere. The United States, in conjunction with other hemispheric countries, will make sure that while increased Communist armaments will be a heavy burden to the unhappy people of Cuba themselves, they will be nothing more.17

Although the President does not categorically state that he will seek O. A. S. involvement, the above quotation certainly hints at that possibility. In light of the emphatic argument presented by the Department of Justice Memorandum stressing O. A. S. participation, it is most likely that that is what the President had in mind.

From this initial definitive response, the President's position remained firm. Only expanded, more detailed clarifications were to follow. At the


17 Ibid.
President's press conference on September 13, reporters were insistent upon how the President would determine whether weapons were offensive or defensive. The President responded:

But let me make this clear once again: If at any time the Communist buildup in Cuba were to endanger or interfere with our security in any way, including our base at Guantanamo, our passage to the Panama Canal, our missile and space activities at Cape Canaveral, or the lives of American citizens in this country, or if Cuba should ever attempt to export its aggressive purposes by force or the threat of force against any nation in this hemisphere, or become an offensive military base of significant capacity for the Soviet Union, then this country will do whatever must be done to protect its own security and that of its allies.  

President Kennedy maintained this position throughout the crisis and did not waver when confronted by criticism from Congress. And when the conditions in Cuba approximated those referred to in his comments to the press on September 13, as determined by U-2 photographs taken October 14, the U. S. acted.

The Department of Defense Memorandum

The General Counsel's Office in the Department of Defense had also deliberated the legal issues concerning possible U. S. responses to the developments in Cuba. Neither the date this legal study began, nor the period over which it evolved, can be precisely determined from the information available. However, it is known that this Memorandum was completed by September 14.  

Benjamin Forman, Assistant General Counsel for International Affairs in the Department

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18Public Papers of the Presidents of the United States, p. 674.
19Chayes, p. 21.
of Defense, furnished pertinent information regarding the subject matter of the Memorandum to Abram Chayes in a letter dated February 16, 1971. This note demonstrated, much as the one of the Department of Justice did, that preventive action would be unlawful unless attack was imminent. Yet, the Department of Defense Memorandum concluded that the U. S. had several options. For example, the U. S. could legally act if the United Nations Security Council concluded there existed a threat to peace. Another alternative open to the U. S. was that it could act in self-defense pursuant to Article 51 of the U. N. Charter. The third and final suggestion involved the participation of the Organization of American States. If the question of action to be taken were submitted to the Organ of Consultation, whereupon recommendatory action was decided, the U. S. would possess a valid legal argument for whatever endeavor it chose to follow.

The extent to which the Department of Defense Memorandum was distributed is not known. Abram Chayes contended that "it took its place among

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20 Ibid.

21 Ibid.

22 Article 51 of the United Nations Charter states: "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 effect the authority and responsibility of the Security Council under the present Charter to take at any time such actions as it deems necessary in order to maintain or restore international peace and security." U. S., Department of State, Charter of the United Nations, Conference Series Pubn. No. 2353 (1945), p. 17.

23 Chayes, p. 21.
the required supporting documents for the contingency plan."24 Yet, concern over distribution seems of little importance. To have remained within the confines of the Department of Defense, the Memorandum would have been accessible, long before the ExCom was even assembled, to three members of the group, Robert McNamara, Secretary of Defense, who already had a copy of the Department of Justice Memorandum; Roswell Gilpatric, Deputy Secretary of Defense; and Paul Nitze, Assistant Secretary of Defense. In addition, those who reviewed the Department of Justice Memorandum had also been exposed to the Memorandum of the Department of Defense, for their content was similar. Both documents assessed the right of self-defense and the involvement of the United Nations and/or the Organization of American States. While the earlier Memorandum suggested a visit-and-search blockade, the latter found support for a belligerent blockade.

Conclusions

The legal officers of the Departments of Justice and Defense had examined the international legal questions involved in a U. S. response to the Soviet deployment of missiles in Cuba well in advance of the time the offensive missiles were actually discovered. These analyses were not retained by the legal offices but were distributed to at least eight men who were to be a part of the ExCom. The material was not confined to mere distribution. Consequent to distribution were meetings. Meetings were held on September 3 and 4 to discuss

24Ibid. p. 22.
the legal questions. It seems that the men present at the meeting on September 3 had foreseen what was to constitute the major portion of the debate of the ExCom between October 16 and 28. That is, should the ultimate decision call for a blockade or an air strike? Of those men listed by the President on October 16 to participate in a special advisory capacity, there is strong reason to believe that most of them were familiar with the legal questions. Furthermore, views had already been aired on blockade and air strike issues by members of the ExCom. So, the meetings beginning on October 16 were not inundated with material unfamiliar to the participants. Before the creation of the ExCom, arguments had been formulated, thoughts had been provoked. The legal advisers of the various Departments and their analyses of international law were definitely an influence on government officials long before the ExCom was created.
CHAPTER IV

THE LEGAL CONSIDERATIONS DURING THE DAYS OF CRISIS: OCTOBER 16-28

The thirteen days, from October 16 through 28, were dominated by intense feelings, few restful nights, and men faced with a deadline for decision. The purpose of this chapter is to explore those thirteen days, concentrating primarily on those situations in which legal considerations played a role. It will be illustrated that in a crisis situation where national security was at stake, the advisers and the decision-maker, i.e., the members of the ExCom and the President, were influenced by legal considerations as they moved toward the final recommendations and ultimate decision.

To demonstrate the influence, or lack of influence, of legal considerations on a decision, one cannot approach the subject in as simplistic a manner as William P. Gerberding does. He questioned, "Were President Kennedy or any of his important policy advisers consciously applying legal criteria or 'principles' as they worked their way toward the decision to blockade Cuba?"1 If one were to read, he argued, the accounts of the Cuban Missile Crisis by

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Elie Abel, Arthur Schlesinger, Jr., and Theodore C. Sorensen, the only answer to the above question would be an emphatic "NO." It may in fact be true that the answer to Gerberding's question is an emphatic "NO." However, it is not the purpose of this chapter to answer his question. Furthermore, the question posed above is of too limited a nature to be of value in any scholarly analysis. To judge the influence of legal considerations upon reaching a decision by stipulating that legal criteria must be "consciously applied," results in an erroneous judgment. Within the decision-making process, law may not necessarily be "consciously applied." "Law is often subsumed or disguised in political and moral considerations that move policy-makers, considerations like those which help make the law in the first instance." As this chapter dissects the meetings of the ExCom, and dwells upon the President's comments, one will find that for legal considerations to affect the decision-making process they do not necessarily have to be "consciously applied."

In addition, this chapter will discuss other phenomena of those thirteen days. Presidential statements, including his quarantine proclamation, will be analyzed for the inclusion of legal grounds of justification for the U. S.

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3Gerberding, p. 201.

response. During the months of August and September, as has been previously indicated, the legal advisers of the Department of Justice and the Department of Defense were called upon for legal opinions. Again, when it appeared that a decision had been reached in October, legal advisers were summoned to participate in the deliberations. This time, it was the Department of State's turn to contribute legal opinions. 5

The Dilemma Which the President Faced

The U. S. could not accept the situation created by the deployment of the Soviet offensive missiles in Cuba. Not only would the missiles provide increased Soviet capabilities to destroy parts of the Western Hemisphere, but politically the balance of power would have been changed. President Kennedy stressed this dual probable consequence two months after the Missile Crisis began. The President recalled, "This was an effort to materially change the balance of power, it was done in secret, steps were taken really to deceive us by every means they could . . . it would have politically changed the

5Actually, this was not the first time that the legal advisers of the Department of State were asked to produce an analysis of the situation. They had developed a memorandum on September 29, 1962, entitled, "Legal Issues Involved in O. A. S. Surveillance Overflights of Cuba." But, the October session was the first time the Department of State developed a general legal analysis pertinent to a final decision or possible choices of action that could be followed.
balance of power. It would have appeared to, and appearances contribute to reality." 6

Did Chairman Khrushchev fully understand that the President must respond forcefully, that the only choice which President Kennedy had was to remove the missiles himself or convince Khrushchev to remove them? Perhaps the Soviet leader had misjudged Kennedy's will, his determination to stand firm. The Bay of Pigs fiasco and the Vienna meeting, where the young President allowed Khrushchev to verbally discredit him, may have encouraged the Soviet leader to question the President's willingness. If Khrushchev were guilty of this misjudgment, he would have to be corrected. He soon was.

From the beginning of his administration, President Kennedy sought to create an atmosphere of cooperation and trust with Chairman Khrushchev. On October 16, the President learned that Khrushchev had lied to him, that Khrushchev had deliberately deceived him about his intentions in placing Soviet weaponry in Cuba. From the time that the U. S. began warning the Soviet Union that this country would not accept Soviet offensive missiles in Cuba, the Soviet leadership vehemently affirmed that it had no such intention. After the first official warning by President Kennedy on September 4, 1962, Khrushchev responded:

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There is no need for the Soviet Union to shift its weapons for the repulsion of aggression, for a retaliatory blow, to any country, for instance Cuba. Our nuclear weapons are so powerful in their explosive force and the Soviet Union has so powerful rockets to carry these nuclear warheads, that there is no need to search for sites for them beyond the boundaries of the Soviet Union.7

The President realized that Khrushchev was apparently willing to take new risks to further the interests of the Soviet Union and to challenge America's prestige and power. The Chairman had challenged John Kennedy, testing the young President's courage to initiate an action which might ultimately lead to nuclear war. If the President did not accept this challenge, some noted authorities believed that Khrushchev would declare himself victor of this round. More importantly, Khrushchev might feel that victories in future rounds would come just as easily.8

The probable consequence, according to some authorities, could have possibly been on the President's mind. Less than vigorous action would destroy the confidence of key members of his administration and weaken the chances for the election of his fellow Democratic Congressmen who actively supported his Cuban policy. Inaction would encourage leaders of other countries, friend and foe alike, to look with suspicion and skepticism on his courage and commitments.


And, these authorities felt, he would doubt his own ability as an effective leader.9

Therefore, President Kennedy was convinced that the U. S. must act, and act forcefully, to rid the Western Hemisphere of this Soviet threat. Most any course that would be followed, except perhaps nuclear war, would directly threaten the prestige of Khrushchev. The President understood this. During a speech at American University in June, 1963, he explained that "nuclear powers must avert those confrontations which bring an adversary to the choice of either a humiliating defeat or a nuclear war."10 Such a confrontation existed in October, 1962. However, the course which the U. S. followed fortunately prevented both a humiliating defeat and a nuclear war. The ExCom was responsible for developing that course of action.

The Men Who Comprised the ExCom

The ExCom consisted of approximately fourteen members, including Robert Kennedy, Attorney General; Dean Rusk, Secretary of State; Robert McNamara, Secretary of Defense; McGeorge Bundy, Special Assistant to the President for National Security Affairs; Theodore Sorensen, Presidential Counsel; George Ball, Under Secretary of State; General Maxwell Taylor, Chairman of the Joint Chiefs of Staff; Edward Martin, Assistant Secretary of Defense.


10Public Papers of the Presidents of the United States, p. 462.
Six of the men who participated in the meetings of the ExCom were lawyers by training and profession: Robert Kennedy, Sorensen, Ball, Roswell Gilpatric, Acheson, and Adlai Stevenson. Rusk had attended law school, but he was not a member of the bar. \(^{12}\)

These were the men who presented the alternative policy positions to the President. They argued, debated, and some changed their minds about which course of action would be the best to follow. The bitter arguments and the changing of positions do not discredit these men. Each presented his arguments vigorously, for each felt his plan was the right course to save the nation. The role that legal considerations played in the decision was affected by the men who made up the ExCom. Each of these men brought with him different experiences, different backgrounds, different perspectives. As such, their interpretations of legal considerations were diverse.

\(^{11}\)Robert F. Kennedy, *Thirteen Days* (New York: W. W. Norton, 1969), p. 30. Other members of the ExCom were John McCone, Director of the Central Intelligence Agency; Douglas Dillon, Secretary of the Treasury; Alexis Johnson, Deputy Under Secretary of State; Paul Nitze, Assistant Secretary of Defense; and Roswell Gilpatric, Deputy Secretary of Defense. Also participating in various meetings were Lyndon Johnson, Vice President; Adlai Stevenson, Ambassador to the United Nations; Ken O'Donnell, Special Assistant to the President; Don Wilson, Deputy Director of the United States Information Agency; Robert Lovett, former Secretary of Defense; and Charles Bohlen, who attended the first day's session only, leaving immediately thereafter to fill the position as Ambassador to France.

\(^{12}\)Chayes, p. 13.
Yet, the effect legal considerations had on the decision cannot be precisely measured. It can only be demonstrated that there was an effect, for many other factors were a part of the decision-making process. The difficulty of even defining these factors was recognized by President Kennedy:

> The essence of ultimate decision remains impenetrable to the observer—often, indeed, to the decider himself. . . . There will always be the dark and tangled stretches in the decision-making process—mysterious even to those who may be most intimately involved.

As this chapter examines the arguments of the ExCom, it will demonstrate that legal considerations were involved in the final decision; and to understand the thrust of their involvement, one cannot be limited by Gerberding's stipulation that legal criteria must be "consciously applied." Instead, legal considerations were filtered through the diverse backgrounds and perspectives of the participants, resulting in the consideration and application of law both consciously and subconsciously.

The Alternative Choices of Response to the Soviet Emplacement of Offensive Weapons in Cuba

The ExCom had begun, as the President instructed, to "set aside all other tasks to make a prompt and intensive survey of the dangers and all

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14 Chayes, p. 30.
The following six major alternatives were considered.

(1) Do nothing. The President had already stated unequivocally his position against the installation of Soviet missiles in Cuba. Hence, a "do nothing" strategy was unacceptable. (2) Bring diplomatic pressures. Several forms of pressure could have been employed. The U. N. could have been authorized to decide the issue, or a secret emissary could have been sent to Moscow to demand action. (3) Secretly approach Castro. However, as the missiles belonged to the Soviet Union and were under the complete control of Soviet personnel, no significant gains would be realized. (4) Invade Cuba. This would be the strongest reply which the U. S. could make. Not only would the missiles be destroyed, but Castro would also be removed. (5) Use a surgical air strike. Through a conventional air strike, the missile sites would be eliminated. (6) Establish a blockade. This approach would be a less belligerent response than invasion or an air strike, and would prevent further military shipments to Cuba, while conveying America's determination to stand firm.

Two Concepts Contained Within International Legal Thought Which Influenced the Blockade Decision

Even though the members of the ExCom viewed the crisis from different perspectives, they all came together for a common purpose—to help determine a course of action which the President could follow. As Theodore Sorensen recalled, "The remarkable aspect of those meetings was a sense of complete

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15 Sorensen, Kennedy, p. 675.
equality. Protocol mattered little when the nation's life was at stake."

Further, he continued, "Experience mattered little in a crisis which had no
precedent. Even rank mattered little when secrecy prevented staff support."16

Before the details of the deliberations of the ExCom are examined, two
concepts within the scope of international law will be observed to demonstrate
that legal considerations affected the U. S. decision in the Cuban Missile
Crisis: (1) moral-legal norms, and (2) justification for action.

When George Ball was arguing, on October 17, that "every nation
ought to act in accordance with its own traditions,"17 he was arguing, at the
minimum, a moral norm. Gerberding takes a position similar to the one above
and stipulates that "only if one is willing to define American traditions as
an element of international law is it possible to construe this as an invocation
of such law."18 What Gerberding was implying is that he was not willing to
define American traditions in legal terms, and that international law would be
irreparably disfigured if they were. To him, legal considerations had little,
if any, influence on the decision. This statement by Gerberding indicated
his unwillingness to comprehend international law within certain contexts.
Perhaps, Ball himself would christen his statement of October 17 a moral
position. In fact, Robert Kennedy did label such arguments as moral. He

16Ibid., p. 679.

17Abel, p. 64.

18Gerberding, pp. 202-203.
stated, "We spent more time on this moral question during the first five days than on any other single matter."19

No one should doubt that statements like the one by Ball are moral. However, they are also legal. As Louis Henkin contended, "Law is often . . . disguised in political and moral considerations. . . . Experienced policy makers, moreover, more or less knowingly assimilate what the law requires, in the gross at least, and it inevitably shapes their inclinations and deliberations."20 An example will better demonstrate how moral norms contain legal overtones. Article 2, Paragraph 4, of the United Nations' Charter specifies that "all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State. . . ."21 "In the gross at least," Article 2, Paragraph 4, could be understood as a law against aggression and surprise attack.22 During their arguments, some of which can be denominated "moral," members of the ExCom did not preface or conclude their statements with an indication that their positions could be substantiated by any specific law. Within their moral arguments these men had "assimilated what the law required."

19Kennedy, p. 39.

20Chayes, p. 153.


22Chayes, p. 40.
Henkin and Chayes were not alone in this contention. Morton Kaplan and Nicholas Katzenbach offered much the same proposal. They recognized that "there is a direct connection between the rules prescribed and the prevailing ethics and morality."\(^{23}\) A sense of natural law may be expressed by a decision-maker as he prescribes his case in terms of what ought to be.\(^{24}\) The idea of what ought to be is usually the significant factor in the creation of law itself.

Myers McDougal and Florentino Feliciano have asserted that values constitute a part of decisions. The values to which they referred are concepts of human dignity.\(^{25}\) Although they do not specifically link moral norms and legal considerations, their acknowledgement that moral norms affect decisions helps to substantiate material presented in this chapter, for within these moral contentions law is disguised.

The second concept within the realm of international law to which this study refers is justification for action. Whenever a nation, particularly a major power, responds forcefully to a given situation in the international arena, as was the case in the Cuban Missile Crisis, it has no alternative but to justify its actions. Nations seek reputations for principled behavior. If a


\(^{24}\)Ibid.

state fails to justify an action in generally accepted legal terms, it may relinquish its respect, leadership, and influence around the world. The cost of this legal failure then, may well be in terms of political responses by other nations to the nation which fails to justify its action.

The concept of justification often produces the thought that a decision was made, an action was taken, a justification was proffered, in that order. In essence, some feel that the justification is formulated after the decision has been reached. The justification for an action may even bear little resemblance to the facts of the situation. Gerberding made this argument emphatically. He employed Sorensen's observation that the blockade's "legality much strengthened by the O. A. S. endorsement had been carefully worked out." From this statement, Gerberding concluded that the legality of the blockade decision had been worked out after the decision had been reached.

Perhaps, there have been instances where the justification for action was formulated after the decision was reached. However, this was not the case in the Cuban Missile Crisis. Throughout the debate, some members of the ExCom consistently integrated justification with their choice of response, specifically, those who advocated blockade. As they put forth their position,

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27Sorensen, Kennedy, p. 708.

28Gerberding, p. 201.
they demonstrated the areas of O. A. S. involvement. From the completed work of the legal advisers, the members of the ExCom were cognizant of the fact that reliance upon O. A. S. action was a wise choice for purposes of justifying U. S. action. The problem seemed to become, in part, the problem of determining a response which could be justified through O. A. S. action. By limiting the legal areas, the O. A. S. in this instance, from which an action could be justified, the choice of action itself was limited.

These two concepts within the scope of international law—moral-legal norms and justification for action, as discussed and defined within the preceding analysis—influenced the decision of the ExCom. The following presentation of ExCom deliberations for October 16 through 19 exemplify these influences of legal considerations on the blockade decision.

The ExCom Deliberations: October 16-17

The first two days of the ExCom meetings symbolized no concensus for action, and a panoply of alternatives were aired. Generally, these men agreed that the U. S. must act. Theodore Sorensen recalled that, on first observation, an air strike was generally favored. "The idea of ... eliminating the missile complex with conventional bombs in a matter of minutes—a so-called surgical strike—had appeal to almost everyone first considering the matter, including President Kennedy on Tuesday and Wednesday."29 If this were a concensus, it did not endure long.

29 Sorensen, Kennedy, pp. 683-684; See also Kennedy, p. 31.
On October 17, Robert McNamara strongly advocated blockade. As he viewed it, this pressure, limited though forceful, could be strengthened as circumstances changed.\textsuperscript{30} George Ball supported McNamara's contention, not by specifically favoring blockade at this time, but by arguing against an air strike on moral-legal grounds. An air strike, according to Ball was inconsistent with American traditions.\textsuperscript{31}

Diplomatic overtures were also considered in the beginning. McGeorge Bundy tended to veer away from military action because he feared events would escalate into a nuclear war. Bundy argued persuasively that the U. S. should inform either Gromyko, the Soviet Foreign Minister, or Khrushchev that the U. S. had discovered the missiles in Cuba, and it should demand that the missiles be removed. If diplomatic channels could resolve the issue, the threat to Khrushchev's prestige in the eyes of the world would be obviated. If the diplomatic approach failed, other options were still open.\textsuperscript{32}

Sorensen suggested that an airtight letter be carried to Khrushchev by a high-level personal envoy. Its contents would offer a quid pro quo: if Khrushchev would dismantle and remove the missiles, the U. S. would withhold any military action. Even though such a letter would repeatedly refer to peaceful intentions, Sorensen concluded, however, that it was nothing short

\textsuperscript{30}Kennedy, p. 34.

\textsuperscript{31}Abel, pp. 63-64.

\textsuperscript{32}Allison, p. 196.
of an ultimatum which the Soviet leader could not accept, which no great power could accept. Ultimatums, he felt, often trigger pre-emptive responses. He did not want history to indict the U. S. for such provocation. From this initial presentation, Sorensen convinced himself that an air strike was not the answer.\textsuperscript{33}

Two Distinct Groups Emerge in the ExCom: October 18

By Thursday, October 18, two distinct groups began to emerge, the blockade team and the air strike team. Those favoring the blockade were confronted with the question of what type of blockade to recommend. They decided that the lowest level of action was preferable— that offensive weapons would be the only material prevented from reaching Cuba. Various arguments surfaced at this juncture, however, over the nature of the low level response. McNamara, for example, voiced his opinion that a limited blockade would maintain the options for further, more forceful action. If this limited step failed, the President could have another course readily available.\textsuperscript{34}

Legal considerations also emerged on October 18 in the form of moral-legal norms and justification for action. Moral-legal norms have greater significance when one realizes that those who favored blockade did not feel that it would produce the desired success. Both Sorensen and Robert Kennedy admitted that blockade was probably not the course to follow if the U. S. wanted

\textsuperscript{33}Sorensen, Kennedy, p. 685.

\textsuperscript{34}Abel, p. 81.
the missiles removed. Sorensen noted that "the blockade appeared wholly irrelevant to the threat from missiles already in place."35 Robert Kennedy agreed: "I supported ... blockade ... not from a deep conviction that it would be a successful course of action..."36

Instead, these men supported the blockade for other reasons which included legal considerations. Sorensen, for example, recognized that a limited blockade would have the least adverse effect on innocent Cubans.37 The strongest advocate of this concern for innocent Cuban citizens throughout the week was Robert Kennedy. A continuation of his above quote explains fully his arguments favoring blockade:

... but most importantly ... I could not accept the idea that the United States would rain bombs on Cuba, killing thousands and thousands of civilians in surprise attack. Maybe the alternatives were not very palatable, but I simply did not see how we could accept that course of action for our country.38

Clearly within this asseveration against surprise attack was an understanding and an influence of Article 2, Paragraph 4, of the U. N. Charter.

Because of Robert Kennedy's proposals, Douglas Dillon changed his position to support the use of a blockade. He attributed this change of position to a norm which had alluded him in earlier deliberations. "What changed my

35Ibid., p. 89.
36Kennedy, p. 37.
37Sorensen, Kennedy, p. 688.
38Kennedy, p. 37.
mind," he admitted, "was Bobby's argument that we ought to be true to ourselves as Americans, that surprise attack was not in our tradition." He continued, "Frankly, these considerations had not occurred to me until Bobby raised them so eloquently."39

Concern for what the role of the O. A. S. should be was evident in the meetings of a subgroup of the ExCom—the blockade team—which favored the use of a blockade. Justification for establishing a blockade accompanied this subgroup's decision for blockade and was not formulated later. The suggestions resulting from the meetings of this group of advisers, as Robert Kennedy recalled, included "an outline of the legal basis for our action."40 The input of that outline originated from the early Legal Memoranda drafted by the Departments of Justice and Defense. Llewellyn Thompson and Ed Martin reiterated these early arguments. These men realized the importance of obtaining O. A. S. endorsement for American action. Thompson emphasized "the added legal justification such endorsement would give the blockade under international and maritime law."41 Martin attempted to dispel the trepidation of those who were, to some extent, skeptical of the feasibility of O. A. S. endorsement. Sorensen, for example, expressed some doubt as to whether or not O. A. S. endorsement could be obtained for U. S. action. He stated, "We could not even be certain that the blockade route was open to us. Without

39Abel, pp. 80-81.
40Kennedy, p. 45.
41Sorensen, Kennedy, p. 706.
obtaining a two-thirds vote in the O. A. S. . . allies and neutrals as well as our adversaries might well regard it as an illegal blockade. . . .”

Martin replied to this skepticism with the assurance that the fourteen necessary votes would be obtained. Robert Kennedy, as did Sorensen, Thompson, and Martin, placed great weight on the O. A. S. endorsement. After the crisis, he recalled, "It was the vote of the O. A. S. that gave a legal basis for the quarantine. . . . It . . . changed our position from that of outlaw acting in violation of international law into a country acting in accordance with twenty allies legally protecting their position." The other team of advisers, the air strike team, did not concern themselves very much with legal approaches. Dean Acheson rejected the idea of blockade. Its use, he believed, would only postpone, not prevent, the use of air strikes to protect American security and its leadership position in the Western Hemisphere and in Western Europe. He felt "that the Soviet Union did not need to bring any more weapons into Cuba. . . . The nuclear weapons were already there . . . were capable of killing eighty million Americans. That was enough." The Joint Chiefs of Staff, like Acheson, were staunch supporters of an air strike. Yet, their argument did not stop there. The ill-executed Bay of Pigs invasion failed to rid the Western Hemisphere of

42 Ibid., p. 687.

43 Chayes, p. 34.

44 Kennedy, p. 121.

45 Allison, p. 198.
Castro's Communism. It was felt by the Joint Chiefs of Staff that another opportunity was presenting itself in the Missile Crisis. The Joint Chiefs advocated, in addition to an air strike, an invasion and the overthrow of Castro. Legal niceties were not apparent in this discussion.

There is, however, one indication that the air strike group considered how their prescribed course of action could be justified. One participant has noted that this group discussed how their actions could be defended in the U. N. and how support from Latin American countries could be secured.

The Day the Legal Advisers Presented Their Views
Before the Members of the ExCom: October 19

Before the evening meeting of October 18 ended, a comment by Llewellyn Thompson spurred further legal considerations of the general situation for the following day. Thompson pointed out "that the Russians were impressed by legalities, even though they had a maddening way of twisting legal interpretations to justify every ferocity they had inflicted on their own people and the rest of the world." Following this interpretation, lawyers at the Departments of Justice and State were notified to draft legal briefs on what the U. S. could do about the situation. Working through the night, the lawyers were prepared to present their evaluations the following morning. Nicholas Katzenbach,

46 Ibid., pp. 197-198.
47 Kennedy, p. 45.
48 Abel, p. 87.
Deputy Attorney General, represented the Department of Justice; and Leonard Meeker, Acting Head of the Office of Legal Adviser, represented the Department of State. Katzenbach, because of his position and close association with the Attorney General, reflected primarily the concerns of Robert Kennedy who had become the chief advocate of using the blockade. Katzenbach emphasized the importance of endorsement by the O. A. S., as had been presented in the Department of Justice Legal Memorandum of August. At the same time, however, in order not to foreclose the possibility of military responses of greater proportions, he stated that U. S. military action could be legitimated under the principle of self-defense.\(^4\)

Since Chayes was not in Washington at that time, Meeker presented the legal views of the Department of State. Before discussing his position under the scrutiny of the full ExCom, Meeker aired his thoughts with Ball, Johnson, and Martin. At this early morning gathering, Meeker suggested that the word "blockade" be abandoned and replaced by the phrase "defensive quarantine." This was the first occasion that quarantine was mentioned, even though other contributors to the deliberations of the ExCom laid claim to its origin. The advantage of this substitution implies a less bellicose act than blockade itself.\(^5\)

Following Katzenbach's statements before the ExCom, Meeker presented his position with a sense of assuredness of purpose and with a deep personal commitment to and respect for legal solutions to problems. After fifteen years\(^1\)

\(^4\)Chayes, pp. 15, 32.

service in the legal affairs office of the Department of State, Meeker placed both trust and hope in the application of law in international affairs. Having acquired a respect for the capacities of international organizations, it is understandable that he supported their jurisdiction in this matter. Meeker favored a more restricted view than did Katzenbach. He hesitated to justify U. S. action, particularly unilateral action, purely as a matter of self-defense. To him, the soundest legal justification fell within the realm of Chapter VIII of the U. N. Charter, which allows regional organizations to deal with matters pertinent to peace and security. The use of force could be justified, he argued, only if the O. A. S. acted within the provisions of the Inter-American Treaty of Reciprocal Assistance.51 Articles 6 and 8 of the Treaty coincided with his argument.52 He contended that these Articles provided a legitimation

51 Ibid., pp. 15-16, 30-32.

52 Article 6 of the Inter-American Treaty of Reciprocal Assistance reads as follows: "If the inviolability or the integrity 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 an extra-continental or intra-continental conflict, 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 must be taken in case of aggression to assist the victim of the aggression or, in any case, the measures which should be taken for the common defense and for the maintenance of the peace and security of the Continent."

Article 8 of the same Treaty states: "For the purpose of this Treaty, the measures on which the Organ of Consultation may agree will comprise one or more of the following: recall of chiefs of diplomatic missions; breaking of diplomatic relations; breaking of consular relations; partial or complete interruption of economic relations or of rail, sea, air, postal, telegraphic, telephonic, and radiotelephonic or radiotelegraphic communications; and use of armed force." Pan American Union, Treaty Series, Inter-American Treaty of Reciprocal Assistance (1947), pp. 3-4.
of the use of force for the maintenance of peace in the hemisphere. Meeker's argument, restrictive though sound, demonstrated his legal acumen and provided a firm legal case for those who advocated quarantine.

Dean Acheson, a lawyer well-versed in international law and a private citizen at this time, responded favorably to the presentations of Katzenbach and disagreed with Meeker's argument that the best case for the U.S. use of force could be made through the O.A.S. and the Inter-American Treaty of Reciprocal Assistance. Acheson retorted that the idea of having to rely on either the O.A.S. or the Inter-American Treaty of Reciprocal Assistance for the approval of U.S. action was a misconception. Although he argued that legal niceties were irrelevant to the threat to American security, Acheson did acquiesce in one of Katzenbach's points. If it were necessary that questions of international law be followed, he noted, U.S. action could be justified by self-defense. It appears that that is the extent to which Acheson would concede the role of legal considerations in the Cuban situation. The summation of his position is best exemplified in his own words:

I must conclude that the propriety of the Cuban quarantine is not a legal issue. The power, prestige and position of the United States had been challenged by another state; and law simply does not deal with such questions of power—power that comes close to the sources of sovereignty. I cannot believe that there are principles of law that say we must accept destruction of our way of life. One would be surprised if practical men, trained in legal history and thought,

53Chayes, p. 33.
54Ibid., p. 16.
had devised and brought to a state of general acceptance a principle condemnatory of an action so essential to the continuation of pre-eminent power as that taken by the United States last October. . . . The survival of states is not a matter of law. 55

The President's Approaches to the Task of Reaching a Decision

Advisers have the burden of providing wise counsel, and the members of the ExCom labored long hours to achieve that objective. But they were not charged with the responsibility for deciding what the United States would do or how it would do it. The latter was the role of the decision-maker, the task of the President, and he would have to bear the consequences of that choice. He, and he alone, would have to choose from among the proposed alternatives, unless his own perspectives and prejudices dictated otherwise.

On October 21, John Kennedy reached his decision. A quarantine of all Soviet ships carrying offensive weapons to Cuba would be implemented.

Though the President occasionally vacillated on how to bring this confrontation to a successful end, he was consistent in the procedure used in the search for an answer. For example, he did not attend many of the meetings of the ExCom. This maneuver was intentional on his part, for he desired that these men be as candid with each other as possible. His presence, he felt, might inhibit the expression of straightforward thinking. Though he was

absent from most of the ExCom meetings, he often summoned individual participants to his office to obtain their reflections on what the U. S. response should be. Through these private conversations and his contributions at ExCom meetings, one can partially determine the President's thoughts as he considered what action should be taken.

One the first day that the ExCom met, October 16, President Kennedy called Adlai Stevenson to his office. Stevenson had not been present at the initial morning session of the advisers. The President exhibited the photographs indicating the missile launch areas and expressed his opinion to the Ambassador. "We'll have to do something quickly," he said. "I suppose the alternatives are to go in by air and wipe them out, or to take some other steps to render the weapons inoperable." To that statement Stevenson replied that it would be more appropriate if a diplomatic solution were sought, if all possible peaceful solutions were explored, before the U. S. resorted to an air strike. In March, 1965, Stevenson recalled this first meeting with the President over the Cuban Crisis. At that time he recalled, "I was a little alarmed that Kennedy's first consideration should be an air strike."

Two days after the Stevenson conference, President Kennedy was closeted with another member of the ExCom. On the afternoon of October 18,

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56 Abel, p. 49.
57 Ibid.
58 Ibid.
he took a different approach with Dean Acheson and appeared to reject the air strike alternative. Acheson expressed his view that an air strike was the course which the U. S. should pursue. In support of his argument, he indicated that the imposition of a blockade would only postpone the issue while allowing time for the missiles to become operable.⁵⁹

When the President spoke, he indicated that an air strike was tantamount to a Pearl Harbor in reverse. A Sunday-morning surprise attack was not consistent with our heritage and our ideals. He argued further that thousands of Cubans and Russians would be killed without warning.⁶⁰ The President was arguing a moral-legal principle much the same as his brother, the Attorney General, had in the ExCom meetings. In fact, it is apparent that President Kennedy and the Attorney General had discussed this Pearl Harbor analogy, and it seems that the President was impressed by it, as he used it in private consultation with Acheson. Robert Kennedy had argued what he considered to be the stigma of Pearl Harbor before the ExCom. He stated that he "did not believe that with all the memory of Pearl Harbor and all the responsibility we would have to bear in the world afterward, the President of the United States could order" an air attack.⁶¹ Having heard the Pearl Harbor theory now for a second time, Dean Acheson told the President


⁶⁰Ibid., p. 78.

⁶¹Schlesinger, p. 806.
that he knew where that argument came from, and, in his own opinion, it was a false analogy. He pointed out:

... that at Pearl Harbor the Japanese without provocation or warning attacked our fleet thousands of miles from their shores. In the present situation the Soviet Union had installed ninety miles from our coast offensive weapons that were capable of lethal injury to the United States. Moreover, within the last few months the Congress, and within the last few weeks the President, had reiterated this warning against the establishment of these weapons in Cuba. How much warning was necessary to avoid the stigma of Pearl Harbor in reverse?62

Of the various accounts of the President's thoughts during the week of decision, only one, the Pearl Harbor analogy of Robert Kennedy, attributed primary causation of any part of the decision to moral-legal principles. He emphatically stated that "the strongest argument against the all-out military attack, and one no one could answer to President Kennedy's satisfaction, was that a surprise attack would erode if not destroy the moral position of the United States throughout the world."63 No other account noted these areas where legal overtones were evident in the moral position of the President. Perhaps no other person writing about the Cuban Missile Crisis spent as much time with the President during those hours of decision or knew him as well as Robert Kennedy did.

Besides moral-legal norms, there is evidence of further legal considerations which President Kennedy applied in his decision to establish a blockade.

62 Acheson, p. 78.

63 Kennedy, p. 49.
When Leonard Meeker suggested that the phrase "defensive quarantine" should be used instead of the word "blockade," the President approved the change in wording. It is conceivable that he was concerned about the legal problems emanating from the word "blockade." Traditionally, blockade had been regarded in most circumstances as an act of war. Yet, in other situations it has not been so labeled. To possibly avoid this legal consideration, the President favored the word "quarantine." "Quarantine" sounded less belligerent.64

In the realm of legal justification for the action to be taken, one incident demonstrated the President's legal concerns. At the evening ExCom session of October 18, while speaking in regard to the quarantine alternative, President Kennedy stated that "it could be carried out within the framework of the Organization of American States and the Rio Treaty."65 This pronouncement was espoused before his decision was reached. The time of the statement is very important. It seems to indicate that he was thinking that the quarantine would be legitimated, and thus possible, under the provisions of the O. A. S. Charter and the Rio Pact. These considerations, in part, possibly influenced his choice of quarantine. Given his knowledge of the August legal Memoranda and his statement of October 18, legal considerations would appear to have influenced his decision to impose the quarantine.

64 Gerberding, p. 181.

65 Schlesinger, p. 805.
The Developments Which Followed the President's Decision:
October 22-23

Though the basic decision had been reached, the actual implementation of the quarantine was delayed. The American public had to be informed, parties other than the ExCom had to be consulted, and appropriate procedures had to be followed. These developments demonstrated that there existed an interplay between law and action, thus suggesting that legal considerations were still a part of the administration's thoughts. These developments included: the President's speech to the American public on October 22, the appeal to the O. A. S. and the resulting resolution, and the U. S. quarantine proclamation.

On the evening of October 22, President Kennedy announced to the American people what U. S. intelligence activities had discovered and verified in Cuba, along with the initial steps the Government was taking. He characterized the situation in the following words:

This urgent transformation of Cuba into an important strategic base—by the presence of these large, long-range, and clearly offensive weapons of sudden mass destruction—constitutes an explicit threat to the peace and security of all the Americas, in flagrant and deliberate defiance of the Rio Pact of 1947, the traditions of this Nation and hemisphere, the joint resolution of the 87th Congress, the Charter of the United Nations, and my own public warnings to the Soviets on September 4 and 13. 66

This list of legalisms was not unintentional. To demonstrate to the American

66 Public Papers of the Presidents of the United States, p. 806.
people that the U. S. response was not predicated on rash or ill-conceived judgments, the President carefully delineated those principles which the Soviet Union directly challenged, including provisions in the U. N. Charter and the Rio Pact. It was important that the American people be aware of this specific threat to American peace and security, and that they understand the global consequences if such action were not halted. He recalled the lessons of history, that aggressive action "if allowed to go unchecked and unchallenged, ultimately leads to war."  

The initial steps which the U. S. had taken, as symbolized in the President's speech, were characterized, in part, by legal procedures. Chapter VIII of the Charter of the U. N. recognizes the existence of collective regional security. Within the guidelines of Chapter VIII, the U. S. called for a meeting of the Organ of Consultation under the O. A. S. This threat to hemispheric security, since it did not specifically constitute an armed attack, could be considered under Articles 6 and 8 of the Rio Treaty. It was these Articles which the U. S. urged the Organ of Consultation to invoke.

In addition, as outlined by the President, the U. S. requested an immediate meeting of the United Nations Security Council. The U. S. planned to offer a resolution demanding the withdrawal of all Soviet offensive weapons in Cuba. The role of the U. N. would be to supervise and confirm the

67Ibid., p. 807.
68Ibid., p. 808.
dismantling and withdrawal of the weapons.\textsuperscript{69} American officials believed that it was important to take their case to the U. N., but they were convinced that the Soviet Union would veto the resolution. Nevertheless, this approach to the U. N. cannot be construed as a mere token move. If an organization such as the United Nations is to be a viable institution, if it is to provide an adequate forum for discussion, nations must be willing to approach these organizations with all problems, complicated or trivial, whether or not the problems can be resolved through regional arrangements.

Abram Chayes offered another insight into the President's speech to the American people. As originally drafted, the speech stated that the U. S. quarantine would be based on Article 51 of the U. N. Charter. This Article assures nations of their inherent right of self-defense. However, this right of self-defense is contingent upon armed attack. On the morning of October 22, Chayes argued that the quarantine's legal basis should be established under Articles 6 and 8 of the Rio Treaty. As a result of his contentions, specific references to Article 51 were deleted from the speech. Such references, he argued, would have indicated to the other nations that the U. S. did not consider seriously the legal issues involved in the situation.\textsuperscript{70}

The passages of the President's speech cited above exhibited the existing international legal concerns of the U. S. In addition to established

\textsuperscript{69} Ibid.

\textsuperscript{70} Chayes, pp. 64–66.
international legal principles and institutions, it appears that Soviet action created the need for a new legal norm in the nuclear age, at least from the perspective of the U. S. Until this veiled movement of offensive nuclear weapons by the Soviet Union to Cuba, there had been a tacit understanding among the major powers that a nonviolent shift in the balance of power would be tolerated. Until now, the movement of arms had been considered nonviolent. The U. S. and the Latin American countries felt the need to amend this understanding. Their concern was not directed solely at the Soviet Union and this particular crisis. This situation, however, brought about their concern and awakened them to the need for a new international principle to apply to all nations at all future times. The alteration of existing principles should include the understanding that a stealthy and rapid deployment of nuclear weapons was intolerable. The President formulated this amendment in his speech. With intensity and wisdom he proclaimed:

We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation's security to constitute maximum peril. Nuclear weapons are so destructive and ballistic missiles are so swift, that any substantially increased possibility of their use or any sudden change in their deployment may well be regarded as a definite threat to peace.72

No matter the number of legal principles incorporated into this speech, there was no indication that the U. S. would act only within the confines of


72Public Papers of the Presidents of the United States, p. 807.
international law pertinent to Chapter VIII of the U. N. Charter and in compliance with an O. A. S. endorsement. After all, there was no assurance that the O. A. S. would endorse the U. S. position. And, the U. S. was going to act whether or not it received a favorable vote from the O. A. S. Even though, upon the insistence of Chayes, there was no direct reference to Article 51 of the U. N. Charter, there were many areas where it was implied. The last quoted Presidential statement is one example. As stated, the security of the U. S. was threatened, and it was not going to foreclose its inherent right of self-defense. Throughout the speech there were references such as, "... in the defense of our own security and of the entire Western Hemisphere," which signified that the U. S. was going to act and that that action was justifiable.

Still, there was hope for justification for the U. S. position through O. A. S. endorsement. At the time of the President's speech, the Organ of Consultation had not yet convened. If this support were to be available, the U. S. could not act until the O. A. S. met. Yet, while waiting for the O. A. S. decision, the possibility of not receiving such support had to be considered by the administration. This dilemma posed a problem in the President's speech. Theodore Sorensen projects it in this manner:

Would the President institute the blockade without the O. A. S. approval? Yes, if we could not get it, because

73 Ibid.

74 Chayes, p. 46.
our national security was directly involved. But hoping to obtain O. A. S. endorsement, he deliberately obscured the question in the speech. . . .

The uncertainty, yet the hope, that the quarantine would receive O. A. S. endorsement affected the timing of the actual quarantine imposition. The requested meeting of the O. A. S. convened on October 23, the day following the President's speech. By unanimous approval, the delegates adopted a resolution supporting the U. S. position. As the President had suggested, the Member States invoked Articles 6 and 8 of the Rio Treaty. In addition, the resolution was carefully worded to point out previous O. A. S. warnings that intervention in the Western Hemisphere by Sino-Soviet Powers would not be tolerated. Those actions included a resolution adopted in January, 1962, at the Eighth Meeting of Consultation of the Ministers of Foreign Affairs of the American Republics in Punta del Este, and a reassertion of that same resolution at an informal meeting of the Ministers of Foreign Affairs in October, 1962, in Washington.

It was not until after the passage of the O. A. S. resolution on October 23 that the President signed "Proclamation 3504: Interdiction of the Delivery of Offensive Weapons to Cuba." The signing ceremonies occurred on the same day the resolution was passed. Now, the justification for the U. S. position which had long been discussed, beginning with the Department of Justice

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75Sorensen, Kennedy, p. 699.

Memorandum of August, had come to pass. Within the Interdiction Proclamation, and consistently throughout the crisis, there was a specific and major reference to O. A. S. action:

Whereas the Organ of Consultation of the American Republics meeting in Washington on October 23, 1962, recommended that the Member States, in accordance with Articles 6 and 8 of the Inter-American Treaty of Reciprocal Assistance, take all measures, individually and collectively, including the use of armed force, which they may deem necessary. . . .

The timing of this proclamation, dictated, in part, by the need for O. A. S. approval, demonstrates that the legal considerations and actions were a concern of the administration.

The Task of the Legal Advisers of the Department of State After the President Reached His Decision

During this crucial period, i.e., from the delivery of the President's nation-wide speech on October 22 until his quarantine proclamation, the Office of Legal Adviser of the Department of State was busy preparing the official U. S. legal position for the actions to be taken against the emplacement of Soviet offensive weapons in Cuba. Staff members worked throughout the night of October 22 and the morning of October 23. To evaluate the legitimacy of U. S. action, two areas must be discussed: (1) the O. A. S. action and, (2) the U. N. Charter.

The U. S. took the position that O. A. S. action was authorized under the Rio Treaty. The purpose of the Inter-American system, as established
by the Treaty, was to assure peace and to deal with aggression and threats of aggression. By Article 6 of the Rio Treaty, the American States were authorized to deal with aggression that was not an armed attack. When alleged aggression did occur, the Organ of Consultation was to meet immediately to deal with the threat to peace and security. If it found that aggression had occurred, as defined under Article 6, the victim could respond in a variety of ways, as listed in Article 8, including the use of armed force. In the Cuban situation, the Organ of Consultation concluded that Soviet action constituted aggression under Article 6. Further, it recommended that the Member States "take all measures . . . including the use of armed force," to deal with the Soviet threat to peace. In sum, the recommendations of the adopted resolution were consistent with the terms and procedures of the Rio Treaty, and the U. S. quarantine was in accord with the resolution.78

The second question which the official U. S. legal position entailed was whether or not the O. A. S. action was consistent with the U. N. Charter. In the opinion of the U. S., it was. Article 52, Paragraph 1, of the Charter recognizes the existence of regional organizations and gives them express authority to deal with problems of peace and security. The only limitation is that "such arrangements or agencies and their activities be consistent with the Purposes and Principles of the United Nations." The Rio Treaty falls within this criterion.79

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78Chayes, pp. 141-143.
79Ibid., pp. 143-146.
One other stipulation had to be squared with the U. N. Charter. Article 53, Paragraph 1, of the Charter stipulates that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council. . . ." Generally, enforcement action could be equated with quarantine in the Cuban case. However, the definition of enforcement action had been narrowed in the past within the meaning of Article 53. One example shows that in September, 1960, the Soviet Union alleged that the embargo measures recommended by the Organ of Consultation constituted enforcement action. The Security Council rejected this Soviet plea as the action was only recommendatory in nature. Hence, in the Missile Crisis, the O. A. S. action was purely recommendatory since Article 20 of the Rio Treaty provides that no Member State shall be compelled to use armed force. As a result, Security Council authorization was not required. 80

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80 Ibid., pp. 146-148.
CHAPTER V

THE LEGAL APPROACH TAKEN BY THE SOVIET UNION

In an international dispute of the magnitude of the Cuban Missile Crisis, it is instructive to note the references of the two great powers to international law as they established and defended their positions. And, if Lewellyn Thompson's evaluation that the Soviet Union had a respect for law was accurate, it would be expected that the Kremlin would employ legal concepts when the opportunity presented itself. And that is precisely what happened. When the U. S. announced it would impose a quarantine around Cuba, the Soviet Union objected to its establishment in terms of international law and assumed the role of the prosecution. Its efforts were directed toward indicting the U. S. in the presence of the U. N., hence, castigating this country before the world. This chapter will illustrate and analyze the legal objections of the Soviet Union to the imposition of the U. S. quarantine of Cuba and the Soviet defense of its installation of missiles on that island.

Basis of the Soviet Position

Before any specific references are made concerning the legal objections of the Soviet Union, it is important to understand a concept developed by Soviet jurists. This is the principle of "piracy," or as entitled by Soviet international
lawyers, "state piracy." This concept has neither been accepted by Western Nations nor incorporated into general international law.

It was not until the latter part of 1954 that the concept of state piracy emerged as a prominent part of Soviet international legal literature.¹ No doubt that emergence was a product of the death of Stalin. Shortly after Stalin's death, Grigori I. Tunkin, the official spokesman for Soviet jurists, proposed a new interpretation of international law. Up to that time, Moscow had considered international law as merely an amalgamation of principles and norms binding upon nations. Tunkin added a new dimension. He emphasized the utilization of international law as an instrument of policy achievement for the state.² If international law were to be a successful tool for the Soviet Union, its ill-equipped and underdeveloped legal doctrines would have to be strengthened, i.e., modified in order to be acceptable to the West. Instead, it seems apparent that Moscow chose a different path. Rather than undertaking a sound, detailed study of legal principles to strengthen their new found tool, the Soviet jurists emphasized their exceedingly broad definitions of some existing principles, thus indicating a willingness to apply these principles in a greater number of situations. This emphasis of broad definitions


demonstrated not only the weakness of Soviet legal thought and development, but proved at times to be in conflict with the definitions acceptable in international law.

The Soviet concept of piracy was one principle which was exceedingly broad and proved to be in conflict with the generally accepted standard. In Soviet doctrine, piracy had been defined traditionally as an "unlawful act of coercion committed by a vessel or aircraft with respect to other vessels, persons, or property on the high seas or on other territory beyond the jurisdictional limits of any state." In defense of their new position, Soviet legal scholars interjected that piratical actions, as prescribed by the above definition, interfered with a nation's rights to the usage of the high seas. An infringement, they noted, was placed on international navigation and trade; and international transactions in general were encroached upon. Furthermore, the classical definition was not restricted to unlawful actions perpetrated for private objectives. Both private and state vessels could be charged with actions of piracy if their actions constituted a violation of the principle of the freedom of the high seas.

The idea that an act of piracy could be committed by a vessel of the state was inconsistent with Western principles and has yet to be accepted in general international law. Green Haywood Hackworth, a prominent international

\footnote{Butler, p. 180.}

\footnote{Ibid.}
lawyer, emphatically rejected the concept of state piracy. Specifically, he stated, "acts of piracy can only be committed by private vessels." The case of the Ambrose Light, 1885, also supported this contention. The Ambrose Light, a vessel participating in an insurrection in Columbia, was taken as a prize by the U. S. Alliance. In its decision, the U. S. District Court, Southern District of New York, clearly expressed the position that if a ship were armed, it must possess armaments under the authority of the state. If a vessel were armed without the authority of the state, that is, by private authorization, it was regarded as a pirate ship, whether it committed an act of violence or not. Throughout its opinion, the court carefully and repeatedly indicated that the actions of a vessel, whose authority was derived from the state, could not commit an act of piracy.

The U. N. Conference of the high seas in 1958 was the last gathering of world leaders convened prior to the Cuban Missile Crisis to discuss principles related to the high seas. It provided the Soviet Union with an opportunity to modify its international legal interpretations of some principles in terms that would be acceptable to the West. On the concept of piracy, at least, the Soviet Union refused to pursue this opportunity. As adopted by the Conference, piracy is encompassed in the following:


(1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or passengers of a private ship or a private aircraft, and directed:
(a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
(b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any state.

Here again, one finds that the accepted concept of piracy referred only to private vessels.

At the Conference, the Soviet Union objected to the above adopted Article and to other Articles relating to piracy. Tunkin contended that the concept endorsed by the world leaders was undoubtedly obsolete. In our modern world, he argued, piracy could be committed by vessels other than private ones. Tunkin argued that the greatest danger of piratical acts did not come from private ships; it came from state-owned warships. Despite Soviet objections to the Articles relevant to piracy, its chief delegate signed the final product of the Convention. In signing, however, the Soviet delegation declared that, "the definition of piracy given in the Convention does not enhance certain actions which under contemporary international law must be considered piratical and does not respond to the interests of ensuring freedom of navigation on international sea lanes."


9Butler, p. 182.
As the Soviet Union began in the latter part of 1953 to view international law as an instrument of achievement for the political state, Soviet international legal scholars emphasized an exceedingly broad definition of piracy. The principle of state piracy could be applied to many situations, albeit, these applications might not necessarily be recognized in accepted international law. Nevertheless, this principle played an important role in the Soviet Union's legal objections to the U. S. quarantine of Cuba in 1962.

The Soviet Legal Position Immediately Prior to and After The Crisis Settlement

When President Kennedy announced the U. S. decision on October 22 to impose a quarantine on the transporting of all offensive weapons to Cuba, the Soviet Union objected vociferously. The Kremlin's remonstration came in two areas. Now that the U. S. had discovered and verified the clandestine installation of Soviet offensive weapons, the Soviet Union deemed it necessary to defend its actions. Second, Moscow objected to the U. S. quarantine and charged that the U. S. had violated international law. The Soviet Union was not convincing in its presentation of legal arguments in either area. But, the desire to include legal criteria in their arguments demonstrated the influence and the importance of legal considerations in an international crisis situation.

Primarily, Soviet legal arguments were offered during the meetings of the U. N. Security Council, which the Soviet Union, like the U. S., requested. In defending its actions, however, the Soviet Union offered little sound reasoning. It was Moscow's contention that only U. S. action necessitated the
defensive arming of Cuba and that Soviet assistance to Cuba was for defensive purposes. From the inception of the Castro regime, Cuban independence had been threatened by the North American giant. Positive proof of this threat had been best exemplified in the April, 1961, invasion at the Bay of Pigs. No nation, according to the Kremlin, which valued its independence could refuse to accept the military equipment necessary for its self-defense. The Soviet delegate who presented his country's case before the U. N. Security Council stated that the Soviet Union and its arguments reflected the spirit of the U. N., as indicated in the following:

> Under the Charter of the United Nations, all countries, large or small have the right to organize their lives in their own way, to take such measures as they consider necessary to protect their own security, and to rebuff aggressive forces encroaching on their freedom and independence. To ignore this is to undermine the very basis of existence of the United Nations, to bring jungle law into international practice, and to engender conflicts and wars without end.

As the U. S. found substance in international law to legitimize its quarantine, the Soviet Union resorted to legal principles to support its contention that a quarantine and the manner in which it was legitimated were in violation of international law. Prior to the resolution of the conflict, the legal case that Moscow initially presented was very general. In the U. N. Security Council,

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there were constant overtures by the Soviet Ambassador that the Soviet Union had always upheld the principles of the U. N., and that in the Cuban situation it would respond no differently. This, in turn, implied that the U. S. was not always loyal to the principles of the U. N. Charter, and this case represented one of those unloyal moments.  

One has to look very closely at the Soviet presentation to extract the specific grounds on which these general charges were based, for the record is inundated with statements simply claiming U. S. violation of international law. As noted earlier, the Soviets held the U. S. quarantine to be an act of state piracy, a position that had been rejected at the last international conference on the law of the sea prior to the Missile Crisis. Nevertheless, the Soviet delegate to the Security Council argued that American action was in violation of the principle of state piracy. According to this argument, "... the United States usurped the right ... to attack ships of other states on the high seas—i.e., to engage in piracy." This same claim was reiterated to President Kennedy by Chairman Khrushchev in private letters dated October 23, 24, and 26. These letters basically stipulated that blockade was a piratical act and that the Soviet Union would not recognize such an act as legitimate. The Chairman warned the President that the captains of

12Ibid., p. 153.

Soviet vessels were instructed not to submit to the orders of American naval forces.\(^{14}\)

Having argued that the U. S. quarantine was an act of piracy, the Soviet government demonstrated that it had not changed its views on piracy since the 1958 Conference on the high seas. This also illustrates that the Soviet Union was determined to establish its own brand of international legal principles, though there had been some internal Soviet disagreement. The temporary uncertainty of a firm view on blockade occurred during the years 1958–1961, that is, shortly before the Cuban Missile Crisis developed. In 1961, Lisovskii, a Soviet jurist, expressed his opinion about blockade in the absence of war. It was his contention that when such a blockade was in effect the rights of a third state were lawfully curtailed. No vessel of a third state had the right to pass through the blockade and proceed to a port of the blockaded state, regardless of the content of its cargo. In rejecting this interpretation, A. L. Kolodkin, a Soviet legal scholar, supported the rights of a third state in the event of a pacific blockade. Dominant Soviet law rejected Kolodkin's claim of the rights of third states. He had to rely exclusively on Western international law to sustain his arguments.\(^{15}\)


\(^{15}\)Butler, p. 197.
The manner in which the U. S. legitimated the quarantine was also attacked by the Kremlin. The Soviet Union envisioned no way in which the O. A. S. could be legally involved. To the Soviets, the U. N. Security Council was the only body authorized to act in this crisis. Valerian Zorin, the Soviet Ambassador to the U. N., expressed Moscow’s position before the members of the U. N. Security Council when he stated that, "Involving the O. A. S. is openly usurping the prerogatives of the Security Council, which is the only body empowered to take coercive measures." Further, the Soviet Ambassador emphasized that the U. S. was trying to destroy the efficacy of the Security Council and that if the Security Council sanctioned the American move, or if it refused to condemn U. S. action, the U. S. would succeed in its efforts. The Soviet Union attempted to make it clear that it vigorously supported the U. N. and its programs, and that it would not permit the destruction of the authority of the world body. On the other hand, the U. S., having sought legal authority through the O. A. S. for its actions, had flagrantly violated the very principles upon which the U. N. had been founded, and, thus, was deliberately contributing to the downfall of the Organization.

Within the above argument, as expressed in the U. N. at the time of the Missile Crisis, the Soviet Union cited no specific legal principles to support


17Ibid., pp. 35-36.
its objections to U. S. actions. Only general arguments were offered as the Soviets endeavored to exasperate the emotions of the members of the Security Council and those of world public opinion. It was not until after the crisis was over that any substantive legal arguments were proffered by Soviet international lawyers. In December, 1962, E. A. Korovin pointed out several provisions of the U. N. Charter which he stated were violated by the quarantine. He noted that the U. S. action was not reconcilable with the preamble, which states that nations should "live together in peace with one another as good neighbors." Article 2, Paragraph 3, according to Korovin, was also disregarded because it required states "to settle international disputes by peaceful means." Furthermore, U. S. action was not guided by the principle set forth in Article 2, Paragraph 1, which suggested the "sovereign equality of all its members." And, he contended, Article 2, Paragraph 4, was violated because the quarantine was an illegal threat or use of force. Even though Korovin cited specific articles and paragraphs within the U. N. Charter to support the view that U. S. actions violated international law, the substance of the articles is extremely general. No firm legal case could be based on the alleged violation of such general concepts as to "live together in peace with one another as good neighbors."

Kolodkin presented perhaps the best legal case for the Soviets. Like Korovin's, his legal interpretation came after the crisis was over. First of

18Butler, p. 196.
all, Kolodkin attacked the concept of pacific blockade. The imposition of such a blockade, as he viewed it, was basically incompatible with the U. N. Charter. There were, however, specific instances in which a blockade would be consistent with the Charter, i.e., self-defense by an individual state during wartime. The establishment of a blockade would also be in accord with the Charter if it were invoked by the U. N. pursuant to Articles 39, 41, and 42, or if the stipulation of Article 51 were met. Article 39 specifies that in the absence of a state of war the Security Council has the authority to determine whether an act of aggression or breach of peace has occurred. Articles 41 and 42 list measures which the Security Council can call upon the Members of the U. N. to apply. The criterion that must be met, according to Article 51, is that an armed attack must have taken place. The quarantine implemented by the U. S. was not within the context of any of these situations.

Now, with specific reference to the quarantine of Cuba, Kolodkin concluded that it unequivocally violated the U. N. Charter. The U. S. had disregarded the peaceful settlement obligation of Article 2, Paragraph 3, and had exercised unlawful force in violation of Paragraph 4 of the same Article. Because a forceful response was undertaken by the U. S. in the absence of an armed attack, he also alleged that Article 51 had been breached. Finally, with respect to the U. N. Charter, Kolodkin argued that the O. A. S., a regional organization, could authorize the quarantine only if the Security Council had previously approved it. As this had not occurred, Article 53 had been violated and the quarantine was illegal. Insofar as the O. A. S.
Charter was concerned, Kolodkin argued that the U. S. quarantine was a violation of the principle of sovereignty as outlined in Articles 1, 15, 16, and 102 of that document.\textsuperscript{19}

Conclusions

In the Cuban Missile Crisis, the Soviet Union did not regard international law as an irrelevant factor. Moscow employed legal concepts both in defending its installation of offensive weapons in Cuba and in objecting to the imposition of a quarantine of the Cuban coastline by the U. S. In addition, legal arguments were not voiced altogether in an international meeting. Ambassador Zorin’s presentation in the U. N. Security Council was only one means. The personal letters from Khrushchev to President Kennedy was another means.

It has been demonstrated that Soviet legal doctrine with regard to areas concerning the high seas, blockade in this particular case, had not been strengthened, i.e., modified in order to be acceptable to the West, since Moscow had designated international law as an instrument of policy achievement. In this crisis, the U. S. was most often accused of an act of state piracy, a concept that conflicted with the generally accepted international legal definition of piracy. Due to its lack of a convincing legal view of blockade, the Soviet Union had little else to offer in its behalf. William Butler presented an

\textsuperscript{19}Ibid., pp. 196-197.
interesting supposition about the Soviet lack of well developed legal principles.

He suggested that:

One can only speculate whether the existence of a firm Soviet view opposing the legality of pacific blockade prior to 1962 could have stiffened Soviet resistance to the Cuban quarantine. The lack of a well defined position may have made it easier to accede to American pressures during the crisis.20

This observation by Butler indicated his willingness to attribute not merely a role, but an important role to legal considerations in international crises. Had the Soviet Union acquired a well defined legal position regarding blockade, Butler appeared to indicate that the results might have been different. Or if the results had not been different, the manner in which they were reached might have been.

20Ibid., p. 197.
CHAPTER VI

THE MONROE DOCTRINE AND THE CUBAN MISSILE CRISIS:

A VIEW FROM THREE PERSPECTIVES

On December 2, 1823, President James Monroe proclaimed to a joint session of Congress what was to become an instrumental foreign policy principle. His proclamation became known as the Monroe Doctrine. It reads, in part, as follows:

We owe it, therefore, to candor and to the amicable relations existing between the United States and those European powers to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power we have not interfered and shall not interfere. But with the governments who have declared their independence and maintained it, and whose independence we have, on great consideration and just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power in any other light than as the manifestation of an unfriendly disposition toward the United States.¹

At the time of the Cuban Missile Crisis, the issue of the Monroe Doctrine was raised. After one-hundred and thirty-nine years the world structure had been altered considerably, and it bore little resemblance to that of the time of

President Monroe. The developments of the 1960's could not have even been imaginable to Monroe at the time of his pronouncement of the Monroe Doctrine. Yet, there were some who maintained in 1962 that the action of President Kennedy, or rather his inaction, was an unmitigated and unjustifiable disregard for the principle put forth by President Monroe. Those critical of the President's position, including some members of Congress and certain noted journalists, contended that the Soviet Union had violated the Monroe Doctrine. If there were a violation, one may question whether or not the Monroe Doctrine was applicable to the Cuban Missile Crisis. This study makes no effort to determine through a legalistic analysis whether or not the Monroe Doctrine was legally applicable to the situation under consideration. Such is not its purpose. This chapter seeks to explore the views of Congressmen, journalists, and the President toward the Doctrine.

Congress's View Toward the Monroe Doctrine

On September 4, 1962, President Kennedy publicly announced his official position concerning the developing situation in Cuba. The policy of the U. S. was established at that time. That policy was that when offensive weapons were installed in Cuba, this country would act to insure that those weapons were removed. In his statement, the President indicated a toleration for defensive weapons but not for offensive ones. Having espoused this "wait and see" policy, the President came under heavy criticism. One of the primary areas of criticism was pertinent to the Monroe Doctrine.
In July, 1960, Chairman Khrushchev had announced, through his own volition, that the Monroe Doctrine was dead. In October, 1962, he seemed to be testing the U.S. acceptance of his challenge. Some Congressmen, those who opposed the President's policy toward Cuba, were determined to prove to the Soviet leader that the Doctrine had not taken up residency in the graveyard, that it was not dead. In response to Khrushchev's proclamation that the Monroe Doctrine was dead, Senator Jack Miller (Republican, Iowa) responded:

I believe that not to face up to that would be a grave error. I think that it is for the Congress of the United States to say whether the Monroe Doctrine is dead or not and I think inasmuch as Khrushchev has undertaken to say that it is dead, it would be well for us to make very clear in a ringing proclamation that it is alive, and I think we ought to so state.\(^2\)

With Senator Miller urging Congress to exercise its authority to determine the Doctrine's life or death, other Congressmen took it upon themselves to determine the applicability of the Doctrine to the existing situation. Senator Kenneth Keating praised the "profound wisdom" of President Monroe, and specified that Monroe's words applied directly to the present situation.\(^3\) Representative Hugh Alexander (Democrat, North Carolina) expressed the same opinion. "The Monroe Doctrine," he said, "is as applicable today to the troubled situation in

\(^2\)U.S., Congress, Senate, Committee on Foreign Relations and the Committee on Armed Services, *Situation in Cuba, Hearings*, 87th Cong., 2nd sess., September 17, 1962, p. 76. Hereafter cited *Situation in Cuba, Hearings*.

\(^3\)Ibid., p. 8.
the Caribbean as it was when it was proclaimed by President James Monroe, December 2, 1823.\textsuperscript{4} These men were objecting to the actions of the Soviet Union as an "attempt on their part to extend their system to any portion of this hemisphere." The arbitrary distinction between offensive and defensive weapons was felt to be irrelevant. The mere fact that an excessive amount of weapons, weapons of any kind, was being shipped to Cuba was the pertinent question. As Senator Miller viewed it, these weapons may not have been intended for use against the U. S., but their presence in Cuba represented a possible supply of machinery for revolution and guerrilla activities in other nations of the Western Hemisphere. The Senator concluded that these weapons presented a threat of armed attack to the Western Hemisphere and, thus, violated unequivocally the principles of the Monroe Doctrine.\textsuperscript{5}

To add credence and strength to his argument, Senator Miller held that there was a precedent for his contention. He stated that, "In 1947, the United States took the view that furnishing of war materiel by Albania, Bulgaria, and Yugoslavia to guerrilla forces in Greece fighting against the Greek Government constituted an 'armed attack' by those states on Greece. . . ."\textsuperscript{6} According to the Senator, the circumstances in Greece in 1947 and those in the Cuban situation in 1962 were the same. As the concept of "armed attack" applied to the Grecian conflict, the U. S. should apply the same judgment to the Cuban Crisis.

\textsuperscript{4}Congressional Record, September 19, 1962, p. 19963.

\textsuperscript{5}Ibid., September 6, 1962, p. 18755.

\textsuperscript{6}Ibid.
Certain Congressmen, after having incessantly urged President Kennedy to invoke the Monroe Doctrine, became disappointed and disgruntled with his policy which they labeled as one of inaction. They made verbal attacks against the President. Typical among these critical responses was one interjected by Representative Ross Adair (Republican, Indiana). He exclaimed that, "The Monroe Doctrine is suffering from a fatal disease of lack of exercise, and complicated by the faulty diagnosis of a physician who does not understand it." 17

The physician to which Representative Adair referred was the President. Yet, if President Kennedy did not understand the Monroe Doctrine, as claimed by some members of Congress, it is difficult to determine who misunderstood it more, the President or the President's critics. One is simply instructed that President Kennedy did not understand the Doctrine. In support of their accusations, the critics contended that the Soviet Union, by transporting arms to Cuba, had interfered with the affairs of the Western Hemisphere, and, thus, had violated the Monroe Doctrine. They refused to discuss why the Doctrine was applicable to the Cuban Crisis, even though one-hundred and thirty-nine years had passed. Alterations in the world situation since 1823 apparently were of little concern to the critics. The primary argument regarding its applicability was simply that it was applicable. Given the degenerate and ill-considered arguments accusing the President of lack of knowledge about the Monroe Doctrine, it is questionable who misunderstood the Doctrine.

17Ibid., September 26, 1962, p. 20871.
To those who were insistant upon the applicability of the Doctrine, Senate Joint Resolution 230 did not directly meet the Soviet challenge. As phrased, the Resolution made little reference to the words of President Monroe. Only if the Resolution relied primarily on the words of the Monroe Doctrine, according to some members of Congress, would it be strong enough.\(^8\) The alleged inadequacy of Senate Joint Resolution 230 prompted the introduction of other resolutions. It was Representative Harold Ostertag's (Republican, New York) observation that Resolution 230 distorted the Monroe Doctrine. He argued that the Resolution contained no direct statement of opposition to the Communist extension into the Western Hemisphere. In fact, he contended, the Resolution signified the acceptance for Communist takeover of Cuba.\(^9\) To resolve the inadequacies of Resolution 230, as expressed by Representative Ostertag, Representative Bruce Alger (Republican, Texas) urged that the measure be recommitted to committee and strengthened. The latter could be achieved, he noted, by including the following prefatory phrase: "Whereas the international Communist movement has increasingly extended into Cuba its political, economic, and military sphere of influence in

\(^8\)The weakness of Senate Joint Resolution 230 and its need to include references to the Monroe Doctrine were advocated by various Congressmen, including Representatives Frank Becker (Republican, New York), Katherine St. George (Republican, New York), and James Fulton (Republican, Pennsylvania), Congressional Record, September 26, 1962, p. 20863; Representative Bruce Alger (Republican, Texas), Congressional Record, September 26, 1962, p. 20890; Senator Jack Miller (Republican, Iowa), Congressional Record, September 20, 1962, pp. 20034-20036.

\(^9\)Congressional Record, September 26, 1962, p. 20890.
violation of the Monroe Doctrine..." His major concern was to indicate that the Soviet movement had violated the Doctrine. He also advocated that the second section of the Resolution be amended to read, "Be it resolved... that we stand behind our President in urging the enforcement of the Monroe Doctrine which has been violated."10

Senator Miller was adamant in his opposition to Senate Joint Resolution 230 and worked vigorously to get it rejected. In its place he offered Senate Joint Resolution 226 to specifically and directly counter Khrushchev's allegation that the Monroe Doctrine was dead. Senator Miller's resolution was liberally sprinkled with references to the Monroe Doctrine and its relevance to the Cuban Crisis. His wording of the introductory phrase and the concluding statements best exemplify this point:

Reaffirming the principles of the Monroe Doctrine and authorizing and directing the President of the United States to take such action as is necessary to prevent any violation thereof.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the President of the United States is hereby authorized and directed to take such action as is necessary to prevent any violation of the Monroe Doctrine.11

Senator Miller had made it evident that in urging President Kennedy to act, the President should be primarily conscious of the fact that the Monroe Doctrine was alive and that it had been violated.

10Ibid.

11Ibid., September 20, 1962, p. 20036.
Journalists' Views Toward the Monroe Doctrine

Members of Congress were not alone in raising the issue of the Monroe Doctrine vis-à-vis the President's policy. During the month of September, 1962, several journals and noted columnists expressed their opposition to Soviet activities in Cuba. They were raising such questions as, "What does the Monroe Doctrine mean?" and, "Has the Monroe Doctrine been violated?" Many of their own answers to these questions represented inimical attitudes toward the President and the policy position he had asserted.

Some of the columnists and journals pointed out the importance of the Monroe Doctrine and the failure on the part of the President to invoke it. An editorial comment from a popular magazine labeled the Monroe Doctrine as "a foundation stone of U. S. foreign policy." 12 Given Soviet intervention in the Western Hemisphere, the editorial stated, there should be no doubt in anyone's mind, including the President's, that the Doctrine had been flagrantly violated. David Lawrence spelled out the violation in great detail. He stipulated that the Soviet Union had gained political control of Cuba, that it had extended "its system to a portion of this hemisphere," and, thus, had presented a situation that was "dangerous to our peace and security." Their action could be construed, he emphasized, as a "manifestation of an unfriendly disposition toward the

United States." Indeed, if one's neighbor was arming itself for possible offensive purposes, this conclusion was highly probable.13

Given the importance placed on the Monroe Doctrine and the unwillingness of President Kennedy to implement it, some journalists vigorously attacked the President. David Lawrence called him weak and unwilling to act decisively. He stressed that the President "will not take action in the face of European intervention in the affairs of a Latin American country. . . . He will take 'the first blow.' He will not intervene to save the people of Cuba . . . from domination by a European power."14 The Wall Street Journal expressed much the same opinion in several editorials. On September 5, 1962, that journal opined that "a strong nation has hoped that its weak neighbors will somehow rise and shield it from a danger on its own doorstep."15 On September 18, it commented again on the weakness of America. The reflection reads, "If the United States continues to appear weak and lets the Soviets move about the Western Hemisphere with impunity, there is no telling how far they will go."16

There is one other major point which the columnists and journals made with regard to the Monroe Doctrine. They observed that the Kennedy approach


14Ibid.


to the Cuban Crisis was a modification of the Doctrine. This observation was
not always intended as a critical response, though at times it was. It often
was a mere statement of fact, as understood by the journalists, a conclusion
to a simple comparison between the words of President Monroe and those of
President Kennedy. To add to his criticism of the President's policy, David
Lawrence suggested that the Doctrine had been interpreted with extensive
omissions. These omissions, in turn, had contributed to the surrender of
American initiative, thereby giving the Soviet Union the upper hand.17
Other writers were more sympathetic toward the President and analyzed his
position in relation to the world situation. Arthur Krock attributed no fault
to the President for narrowing the original scope of the Doctrine. Times had
changed; 1823 was not 1962. He stated that "this modification of the Doctrine
can be supported as sound policy in an age of nuclear weapons with the facil-
ity of almost instantaneous delivery to targets thousands of miles away--an age
not envisioned in 1823, even in a physicist's dreams."18

Senator Hubert Humphrey (Democrat, Minnesota), an ardent advocate
of the President's policy, responded forthrightly to the accusations that
President Kennedy had limited the Monroe Doctrine. The Senator found it

17David Lawrence, "Soviet Propaganda on Cuba--Moscow Believed
Taking Advantage of U. S. Silence on Violation," Washington Evening Star,
September 12, 1962, printed in Congressional Record, September 20, 1962,
p. 20039.

18Congressional Record, September 20, 1962, p. 20052.
difficult to believe that such accusations could be advanced. To him, the Doctrine had not been limited or modified. On the contrary, it had been expanded, given room to breathe, and updated so that it would be in "harmony with the nuclear age." Not as an official administration spokesman, only as a supporter of the President, Humphrey illustrated his point. He argued that the principles of the Doctrine pertinent to European expansion into the Western Hemisphere were as valid in 1962 as they were the day Monroe announced them. But, he stressed that they could not be applied automatically to all situations. In every specific case, considerable reinterpretation was required. It was not possible for President Monroe and John Quincy Adams to have been thinking in terms of the Soviet system as it existed in 1962.19

The Senator also answered the criticisms of those who claimed that the U. S. had shirked its duty by not having responded to this alleged violation of the Monroe Doctrine with the use of force. He instructed the critics that the Doctrine did not specifically prescribe how to respond to a violation against it. The implication was that force would be employed. Being only an implication, however, a response of force was neither binding nor obligatory. Furthermore, Senator Humphrey commented that it was not desirable that a response of force should be binding in all situations in which the Doctrine had been violated. He explained that the Doctrine must apply to many unforeseen and unpredictable circumstances.20 Besides, President Kennedy had already

19Ibid., p. 20049.

20Ibid., p. 20050.
made it clear when he would respond and in what manner, including the use of armed force.

Finally, to demonstrate the Doctrine's modernity, Humphrey spelled out in unequivocal terms what he called the Kennedy doctrine. He explained this doctrine in two parts. First, because of altered world conditions and the resulting, even necessary, U.S. involvement in world affairs, "we can no longer promise to stay out of Europe if only the European powers will stay out of this hemisphere. . . . Noninvolvement is no longer a tenable policy." Second, he argued, the portion of the Monroe Doctrine relating to the Western Hemisphere had been strengthened. President Kennedy had stated in greater detail than the Monroe Doctrine does itself "just how we intend to implement the Monroe Doctrine under the threat of Communist penetration in this hemisphere . . . ."21

This statement by Senator Humphrey is not directly supported by anything that President Kennedy said. At no time did the President delineate how the U.S. intended "to implement the Monroe Doctrine." He did emphatically specify the point at which the U.S. would take action, but this point was not shrouded with the cloak of the Monroe Doctrine. Furthermore, the President never did state that his intentions and efforts were conceived in conjunction with the Doctrine.

21Ibid.
By his statements, the Senator seemed to be attempting to mollify the critics. In so doing, he created an analogy between the Monroe Doctrine and the Kennedy doctrine. This comparison of the two policies was made by no one else. It appears that this analogy was, in all actuality, erroneously formulated and unsupported by Presidential statements.

The President's View Toward the Monroe Doctrine

While some observers concerned themselves with the "necessity" for immediately invoking the Monroe Doctrine, President Kennedy adroitly avoided mentioning the Doctrine, by name, in his public statements. Was this an indication that the President unalterably believed that there existed no special legal regime for the Americas? No, not at all. Or, was it that the President rejected the validity of the Doctrine? The answer is, again, no. What he was rejecting was the emphasis of the Monroe Doctrine as the primary justification for the U. S. action against the installation of missiles in Cuba. This section explores President Kennedy's feelings toward the Monroe Doctrine as expressed in both his public and private statements.

At his press conference on August 29, reporters questioned the President about his interpretation of the Monroe Doctrine. "Would you tell us," he was

22 In a critical analysis of the Kennedy policies, Louise Fitzsimons used the term "Kennedy Doctrine" to apply to the President's general approach to foreign policy. Specifically, she interpreted that policy to be, "because we could control events we ought to control them." Louise Fitzsimons, The Kennedy Doctrine (New York: Random House, 1972), p. 9.
asked, "what the Monroe Doctrine means to you today in the light of world conditions and in Cuba?" The President responded as follows:

The Monroe Doctrine means what it meant since President Monroe and John Quincy Adams enunciated it, and that is that we would oppose a foreign power extending its power to the Western Hemisphere. And that's why we oppose what is being--what's happening in Cuba today. That's why we have cut off our trade. That's why we worked in the Organization of American States and in other ways to isolate the Communist menace in Cuba.23

This definition coincides with a promise he made in his inaugural address to all nations of this hemisphere. On this occasion he stated, "Let all our neighbors know that we shall join with them to oppose aggression or subversion anywhere in the Americas."24

Stated in a straightforward, less tactful manner, the reporters were most likely asking, why has the Monroe Doctrine not been invoked, and why has the U. S. not responded unilaterally and militarily to eliminate the Communist extension into the Western Hemisphere? One can find the answer, in part, to the inferred question in the President's response to the actual question and in the portion of his inaugural address cited above. President Kennedy seemed to be intimating that the U. S. should act in conjunction with other Latin American Countries, if possible, and not unilaterally. Dean Rusk supported

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24Ibid., p. 1.
this approach and compared it with the Monroe Doctrine. He stressed that 
action taken with regard to the Doctrine should be carried out "with the associ-
ation of those who have joined with us for the security of the Hemisphere... So I would say that the Monroe Doctrine has not been abandoned. The method of carrying it out has been altered..." 25

It will be recalled that what President Kennedy believed the Monroe 
Doctrine meant was enunciated by him on August 29, 1962. This clarification 
was prior to his official policy statement which distinguished between offensive and defensive weapons. Before the President's official statement was made, the Department of Justice had been asked to prepare a study on the international legalities regarding the possible prevention of the installation of long-range missiles. This study has been referred to in Chapter III as the Department of Justice Memorandum and much of its contents has been ana-
lyzed. Heretofore, the discussion of one major section has been deliberately 
withheld. That section gave detailed attention to the Monroe Doctrine, exem-
plifying its value and implementation since its creation. It encompassed the 
various amendments to the original Doctrine, the Polk Corollary of 1848 and 
the Clark Memorandum of 1928, along with examples of implementation as late 
as U. S. intervention in Greenland in 1941. Above all, it concluded that there existed a special legal regime for the Western Hemisphere. The Memorandum stated that, "Although it is true that traditional legal concepts... do not

25Stiution in Cuba, Hearings, p. 34.
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.  

At the White House meeting of September 4, a public statement of the President's official position was being prepared. The initial draft included a direct reference to the Monroe Doctrine, as suggested by Norbert Schlei. To this suggestion, the President expressed his criticism. "The Monroe Doctrine," he exclaimed, "what the hell is that?"

Abram Chayes viewed this comment by the President as astute. He stated that "the President's instinct was sound. Although the idea of a special regime of law for the Western Hemisphere based on the Monroe Doctrine has sometimes been advanced by U. S. legal scholars, it has not been embraced by any other Western Hemisphere publicist." However, Schlei did not agree with Chayes' observation that no other country recognized a special regime of law based on the Monroe Doctrine. To Schlei, the Doctrine was, and had been, the basis for a special hemispheric regime of law. He added that this basis had been acknowledged not only by the U. S. and the Western Hemisphere, but also by other governments of the world.


27 Ibid., p. 133.

28 Ibid., p. 23.

29 Ibid., p. 111.
Chayes indicated in additional comments that President Kennedy's position was a sound one. He felt that the world had maintained little resemblance after World War II to any previous forms of security arrangements. Bilateral and multilateral treaties had emerged to govern hemispheric relations and security. In light of the existing security arrangement in 1962, Chayes concluded that "it is difficult to believe in 1962 unilateral action by the United States premissed on the Monroe Doctrine, would have been greeted with enthusiasm by other nations in the hemisphere." 30

These observations by Chayes provide perhaps the best insight into the refusal of the President to refer to the Monroe Doctrine by name in his public statements. As noted earlier, the President preferred to rely on multilateral agreements. Within his thinking on the blockade decision, it has been pointed out that the President took particular interest in the O. A. S. His comment that the blockade could be worked out in the O. A. S. served this purpose. And, since such organizations existed, U. S. action under the auspices of the Monroe Doctrine would have probably not been advisable.

Although the President declined to mention the Doctrine, there is an indication that he did not disavow the existence of a special legal regime for the Americas. Dean Rusk, as an official spokesman for the administration, put this thought in positive terms. He stated, "To a considerable extent our view is that there is a special regime of international law in this hemisphere . . .

30Ibid., p. 23.
which has special security arrangements in this hemisphere." In addition, there are references in the President's public statements to what might be construed as a regime based on tradition. In his announcement on September 4, his first public statement clarifying his position on Cuba, the President stated that the Cuban question "must be dealt with in the context of the special relationships which have long characterized the inter-American system." Then, in his announcement to the nation on October 22 that offensive weapons had been discovered in Cuba, the President again made such a reference. The intrusion, he stated, was "in an area well known to have a special and historical relationship to the United States and the nations of the Western Hemisphere." These references to "tradition and historical relationships" seem to imply a system based, at least in part, on the Monroe Doctrine. Yet, the Monroe Doctrine was never mentioned by name in any public statements of the Chief Executive, nor was it ever referred to in the Quarantine Proclamation or the O. A. S. resolution. The specific treaties defied by the Soviets, as stipulated by the President, included primarily the Rio Pact of 1947 and the Charter of the United Nations.

Thus, to the President, a legal regime for the Americas did exist in 1962. It was based on the multilateral arrangements negotiated since World War II.

31Situation in Cuba, Hearings, p. 64.


33Public Papers of the Presidents of the United States, p. 807.

34Ibid., p. 806.
The Monroe Doctrine was not totally cast aside in the thinking of the President, but it was never specifically mentioned publicly. With this in mind, Chayes' analysis seems sound.

Conclusions

The instrumental foreign policy principle expressed by President Monroe, subject to various amendments and interpretations, was illustrated in 1962. The Monroe Doctrine was not dead as Khrushchev had proclaimed. Some members of Congress should not have wasted their time attempting to bring something back to life that was already alive. What Congressmen failed to comprehend was that the principles of self-defense and hemispheric security, expressed in the Monroe Doctrine, had been subsumed by new arrangements entered into after World War II. These arrangements included the O. A. S. and the U. N. President Kennedy understood the Monroe Doctrine within the concepts of the O. A. S. and the U. N. It was those organizations to which he resorted to help resolve the Cuban Crisis. And, with their existence, unilateral action based on the Monroe Doctrine would have been difficult for other nations to understand and accept. So, the President avoided direct reference to the Monroe Doctrine, but he intimated the validity of its basic principle of self-defense. Certainly, one must agree with the wisdom of Dean Rusk's evaluation that the methods of carrying out the Monroe Doctrine had changed.
CHAPTER VII

CONCLUSION

With the national interest of the U. S. threatened by the Soviet emplacement of offensive nuclear weapons in Cuba in October 1962, the U. S. had no choice but to respond forcefully. Although it was definite that the U. S. would act to protect its national interest, the manner in which it would respond was less certain. However, as has been clearly demonstrated in this study, legal considerations played a vital role throughout the advisory stages, the decision-making process, and in the ultimate implementation of the policy agreed upon.

It is important to note the initial time at which legal considerations began to play a role in the American assessment of the Cuban Missile Crisis. Legal ramifications became a principal issue for some high level U. S. officials long before the President made his decision in late October. In this connection, the Department of Justice was directed to evaluate whether the U. S., as a matter of international law, could take action to prevent the installation of long-range missiles in Cuba. At this time it could not be absolutely determined what the Soviet activity in Cuba was leading to, and President Kennedy had not issued a warning to the Soviet leaders. This Department of Justice study, the initial legal opinion, was completed in the
middle of August 1962, two months before long-range missiles were discovered in Cuba. This early influx of legal considerations, and their continual interplay in many stages of the developing Cuban situation, demonstrate clearly that the Kennedy administration understood the need to incorporate them in the resolution of the crisis. Had the U. S. become concerned with legal criteria only after the President made the decision to impose a quarantine, this country would have demonstrated to its allies and the Soviet Union that it did not give credence to legal considerations, that it did not take them seriously.

By showing respect for international legal implications, nations, along with their high-level advisers and decision-makers, tend to place limitations on themselves. In the case of the Cuban Missile Crisis, both the U. S. and the Soviet Union were faced with a limiting effect. Limitation may be a factor which is not undesirable to nations in their attempt to resolve international crises. At least, this appeared to be the case for the U. S. The limitation on the U. S. was in itself a means of restraint.

In helping to determine the final recommendation by the ExCom and the ultimate decision by the President, restraint on the parties was revealed by two concepts within the scope of international law: 1) moral-legal norms, and 2) justification for action. Both concepts influenced some of the members of the ExCom and President Kennedy. Robert Kennedy favored a blockade of Cuba because a blockade would not kill thousands of civilians as a surprise bombing raid most likely would. His position was not based on the premise
that blockade would necessarily be a successful course to follow. And so, he argued his position with deep emotional and personal concern for the moral actions he preferred his nation to take. His brother, the President, made the decision to establish the blockade, at least in part on the grounds that surprise attack would contribute to the destruction of the moral leadership of the U. S. as viewed by all nations of the globe.

Further, it must not be disregarded that the fore-knowledge of means of justification for action influenced those members of the ExCom who ultimately supported blockade. To know that sound legal justification was available for a given action would appear to have significantly affected the alternative that each member advocated. If moral-legal concepts limited, in the minds of some men, the type of action which could be supported, these same men would have been reluctant to support a policy which could not be justified within a framework of well developed legal principles.

A respect for international legal considerations also imposed a major limitation on the Soviet Union. However, the limitation on the Soviet Union, unlike the ones placed on the U. S., seemed to be disadvantageous. This limitation resulted from policies emanating from the Kremlin. When the Soviet Union in the latter part of 1954 began to utilize international law as an instrument for policy achievement, its jurists emphasized exceedingly broad definitions of existing principles. In the early 1960's, the Soviet position remained firm and the concept of piracy played a major part in their legal argumentation in the Cuban Missile Crisis. However, their legal objection
to U. S. action was based on state piracy, a concept that had neither been accepted by the West nor incorporated into general international law. By broadening the concept of piracy beyond that which was acceptable to the U. S., the Soviet Union, in actuality, limited the grounds on which it could effectively present its legal case.

In the final analysis, a concentrated study of international legal considerations in the Cuban Missile Crisis clearly demonstrates that they played a vital role throughout the crisis. Respect for legal principles was by no means limited to the thirteen most crucial days of October 1962. Nor did such considerations influence the thoughts of only a very few people or only the thinking of one nation. The positions taken by both superpowers and their approaches to the resolution of the crisis ememplify the fact that nations are not impervious to legal considerations in international crisis situations.
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