

ARTICLE OF THE WEEK

# The Cuban Crisis and INTERNATIONAL LAW

By W. H. CHARLES

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Prof. Charles received his B. A. from Sir George Williams College in 1948. He returned to academic life to graduate with an LL.B. from Dalhousie in 1958. A member of the Alberta Bar, he received his LL.M. from Harvard in 1960 and then returned to Dalhousie to teach Legislation, Contracts (Comm. 14) and International Law (with Prof. MacKay). He has published several articles in magazines and newspapers.

On October 23, 1962, the President of the United States signed a proclamation entitled "Interdiction of the Delivery of Offensive Weapons to Cuba." By so doing he authorized the United States Navy to prevent the shipment of all offensive military equipment to Cuba. This "quarantine," or blockade as some prefer to call it, has provoked widespread argument as to its legality in light of current international law principles. One member of the Canadian House of Commons has branded it as "an act of unprovoked aggression;" in his opinion "there is no legal right but might." The Soviet Government has called the action "an unheard of violation of international law."

Interference with shipping and the possible use of force on the high seas, required to cut the supply of arms to Cuba, violates the principle of freedom of the seas. Generally all nations have an equal right to the uninterrupted use of the high seas for purposes of navigation. There are some circumstances in which a state is permitted to perform acts which might otherwise be considered violations of international rules.

## BLOCKADE

In times of war a "belligerent blockade" is permitted. Then ports of one belligerent may be closed to outside traffic by the called a "pacific blockade." In naval forces of the other side. If the United States and Cuba were officially at war a blockade of Cuban ports would be lawful but in the absence of an official declaration of war American action cannot be justified in this way.

In addition, international law has in the past recognized, albeit somewhat uncertainly, a practice times of peace more powerful nations have occasionally used their naval might to obtain reparations for alleged wrongs, to put an end to some disturbance or to prevent the outbreak of war. The application of measures under a "pacific blockade" to vessels of third states has fre-

quently been challenged. The United States has consistently opposed application of "pacific blockade" measures of other states to American vessels. Quite apart from this fact however, the United States action in the present case hardly fits the once accepted pattern of a "pacific blockade."

## JUSTIFICATION

If the activities of the United States navy do not fall within any permitted exceptions to the recognized freedom of the open seas, how can the blockade be justified? In explaining the action of the United States President Kennedy referred to the construction in Cuba of "a nuclear strike capability against the Western Hemisphere" as "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."

Of course, American traditions, resolutions of Congress and warnings issued by the President can hardly justify action which violates accepted principles of international law. Yet clearly the United States considers the clandestine Soviet buildup in Cuba

as a distinct threat to the security of the Americas. As such it is also considered to raise grounds for action under the Rio pact and to be a violation of the United Nations Charter. The Rio pact or the Inter American Treaty of Reciprocal Assistance as it is properly called, was designed to prevent and repel threats and acts of aggression against any of the countries in the Americas, Canada included, although this country was not a signatory to the treaty. In all, 21 American republics, including Cuba, became parties to the treaty. The Soviet Union, not a signatory state, is not bound by the Rio pact but as a member of the United Nations is bound by the provisions of the Charter. In the result, the United States action can only be justified on two possible grounds. These are (1) the right of self-defense against an impending attack and (2) a violation of the United Nations Charter of sufficient magnitude to warrant the action taken.

International law has always recognized the inherent right of one state to use force to defend itself against an attack by another. A state need not wait until it is attacked but can take action, even upon the territory of another state, in order to prevent an impending attack from actually taking place. Any such defensive action must be proportionate to the danger and can only be justified in case of instant and overwhelming necessity.

Aside from principles of customary international law members of the United Nations are obliged to observe the provisions of the Charter. Under Article 2 (3) all members agree to "settle

their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered." Article 2 (4) provides 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, or in any manner inconsistent with the purpose of the United Nations." Presumably this latter was the Charter provision President Kennedy was referring to in condemning the military build-up in Cuba as a violation of the Charter. Yet the United States' own action involves the threat of force. Is it expected from the prohibition of Article 2 (4) by Article 51? The latter 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 the measures necessary to maintain international peace and security."

## SELF DEFENSE

Collective self-defence, a right recognized by the Charter, is the very purpose of the Rio Treaty of 1947. Yet it may go further than the United Nations Charter. Article 6 of the Rio pact provides for the organ of consultation of the O.A.S. to take measures in cases where the inviolability or the integrity of the territory, or the sovereignty or the political independence, of any American state should be affected by an aggression which is not an armed attack or by intra-continental or extra-continental conflict or by any other fact or situation that might endanger the peace of America. The measures which can be taken include the complete or partial interruption of economic relations or of rail, sea, or air communications and the use of armed force. In this case the O.A.S. did approve the United States action before the President signed the declaration.

Article 2 (3) of the U.N. Charter has led to considerable disagreement as to the circumstances in which measures of self-defense may be adopted. The real difficulty lies in the fact that the right of self-defense under article 51 seems to be limited to situations where an armed attack has occurred. This is a more restricted view of the inherent right of self-defense than that recognized by customary international law and by the Rio Treaty in particular. In an era of atomic weapons and ballistic missiles time is a precious commodity and the threat of a nuclear attack can be a very near and real one. At this point in the history of the United Nations the meaning of "armed attack" in article 51 is not yet self evident. It can be argued that the terms of the Charter

should be interpreted in the light of technological developments, thus admitting the possibility of defensive action involving the use of force in certain threatening situations.

If this is accepted then according to both general international law principles and the law of the United Nations Charter it is up to the interested nation to decide as to the size and imminence of the peril threatening its security. The threatened state decides whether an emergency exists and then (in theory) acts at its own peril (in fact at the peril of the entire world) until the Security Council has taken the measures necessary to maintain international peace and security, if it is not too late. It is at this point that international law and the United Nations Charter exhibit their greatest weakness for it is here that the line between policy and law is difficult to draw.

In the present situation it would appear that the American action in instituting the blockade or quarantine is prima facie unlawful according to both customary international law and the law of the United Nations Charter. If, however, the United States action is based on instant and overwhelming necessity leaving no choice of means and no moment for deliberation, and it is proportionate to the danger, then the action is justified under existing international law principles. It is also justified under the terms of the Charter if we assume that an actual armed attack by nuclear weapons need not precede the defensive action.

We are still left with the question, who decides whether the state taking action was right or wrong in terms of international law and the Charter? The Charter is silent on this point. The Security Council, controlled by the veto power, is likely to decide this issue. Nor is it likely that the General Assembly will deal with the question even if it acts under a Uniting for Peace Resolution. Support of United States action throughout the Americas and elsewhere and support of the Soviet-Cuban position by other States will likely preclude any definitive judgment. In the result it is probable that the legality of the American action may never be formally determined by a recognized international authority.

The Cuban crisis graphically reveals the need for some sort of effective international procedure for dealing with situations which raise grounds for resort by states to self defense to protect their national security. As a well known legal authority has emphasized "The right of self-defense under general international law is as vague as it is unquestioned and as liable to abuse in its application as it is indispensable in the present stage of international Society."

## FROM THE MONASTERY WINDOW

# ALAN ABBOTT

## ARGUES ABOUT

Last week's excitement over Cuba tends to have eclipsed the less dramatic, but perhaps more important events taking place along the Chinese-Indian border. Unlike the Cuba crisis, which may be seen merely as another inconclusive move in the cold war chess game, the incursion of Chinese forces into Indian territory represents something at once more fundamental and more serious.

Possibly with a view to diverting her people's attention from domestic calamities within the home land and, possibly with a view to making herself heard and felt in a world which continues to exclude her from its councils in the United Nations, the government of China has decided on a course of substantial overt aggression.

Mr. Nehru's unswerving devotion to neutralism and non-alignment, his refusal to secure his country's defence through collective arrangements, such as S.E.A.T.O., have together combined to make India a natural for Chinese expansionist ambitions. For myself to suggest that such a situation might have been predictable would be to err on the side of modesty. The prediction was in fact made in an article appearing in the Dalhousie Gazette a year ago! It occurred to myself, if not to Mr. Nehru, that after the collapse of Tibet before the Chinese steam-roller, the question of "who next?" would be only a matter of time. The fact that Mr. Nehru took no positive steps to counter Chinese aggression in Tibet is to be deplored. The fact that he did not exert himself to increase his own country's defensive capacity would seem to amount to un-

warrantable negligence. And, finally, the fact that Mr. Nehru can acquiesce in the frittering of India's military resources in U.N. Congo ventures, while the home defences are entrusted to a Marxist ex-Defence Minister, appears as the consummation of the death-wish.

Now that the flimsy house of straw erected on Mr. Nehru's neutralist philosophy is about to be blown down by the big bad dragon, he turns to those wiser than himself who foresaw the need to build with bricks in the form of collective defence facts. However, the spectacle of Mr. Nehru asking assistance of those he has been at such pains to castigate in the past is not a sight that we should relish. The gravity of India's present position should silence our reproaches, which are in any case superfluous in view of Mr. Nehru's bitter and courageous "mea culpa."

In telling Indians that they have been "out of touch with reality in the modern world," Mr. Nehru has admitted his own delusions. He must now perceive what most of us in the West saw years ago; that successful neutrality depends on the willingness of one's neighbor to leave one in peace, a condition which a neu-

ralist usually laces beyond his own power to control.

In bravely rejecting Chinese overtures for peace talks, Mr. Nehru is possibly committing India to the prospect of a long and protracted struggle. With how much greater confidence might India now be able to face



such a confrontation had she been willing to co-operate in the global defences of the free world. All honour to Mr. Nehru, however, for his resistance to threats and aggressions now. And such honour will be accorded him no less sincerely by those of us who have felt him to be dangerously deluded in his past attitudes.

## Benny Prossin's

# SPOTLIGHT

By BENNY PROSSIN

A Dalhousie student, Mike Miller, has the distinction of hosting what is probably the longest radio program run by a university student in Canada. Mike's show ON CAMPUS is heard every Saturday from 4 p.m. till 8 p.m. on station CJCH.

Miller produces and co-ordinates ON CAMPUS himself and has great hopes for the show. The program is mainly for high school and college students featuring high school and university events, YMCA news, Hi-Y, live

talent, youth groups, and other items of interest. Mike wants to see Dalhousie, King's and St. Mary's students taking an active part in the show and he hopes that students interested in doing radio work will not hesitate to contact him through CJCH.

Mike, an Arts student here at Dal, was born 22 years ago in Kitchener, Ontario. His broadcasting career started at sixteen as host of his own program HI-TIME on station CKCR. It ran for five years.