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Title	Towards 'world support' and 'the ultimate judgment of history': The American Legal Case for the Blockade of Cuba during the Missile Crisis, October-November 1962
Type	Article
URL	https://clock.uclan.ac.uk/22487/
DOI	https://doi.org/10.1162/jcws_a_00879
Date	2019
Citation	Colman, Jonathan (2019) Towards 'world support' and 'the ultimate judgment of history': The American Legal Case for the Blockade of Cuba during the Missile Crisis, October-November 1962. <i>Journal of Cold War Studies</i> , 21 (2). pp. 150-173. ISSN 1520-3972
Creators	Colman, Jonathan

It is advisable to refer to the publisher's version if you intend to cite from the work.
https://doi.org/10.1162/jcws_a_00879

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Towards ‘world support’ and ‘the ultimate judgment of history’: The American Legal Case for the Blockade of Cuba during the Missile Crisis, October-November 1962

Prepublication version. Accepted for publication by *The Journal of Cold War Studies*.

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April 2018

What became known as the Cuban missile crisis began publicly in the evening of 22 October 1962 with President John F. Kennedy’s dramatic broadcast announcing ‘a strict quarantine on all offensive military equipment under shipment to Cuba’ to bring about the removal from the island of newly-discovered Soviet medium- and intermediate-range nuclear missiles. The U.S. Navy would stop and search vessels traveling towards Cuba over an area radiating 500 nautical miles from the island.¹ Although Soviet premier Nikita Khrushchev had agreed by 28 October to remove the missiles, wrangling over Soviet bombers in Cuba meant that the ‘quarantine’ or naval blockade remained in place until 20 November.² Historians have praised the decision to establish a blockade for striking a balance between belligerence and passivity, and for preserving other policy options such as military action or diplomacy.³ One of the disadvantages of the blockade, though, from the perspective of the American government, was that it might precipitate legal

The author would like to thank Barton Bernstein, Antonio Cerella, Philip Constable, Robert Poole, Laura Stanley, the anonymous referees, and the editors of this journal for their valuable help with this article. The University of Central Lancashire’s Sabbatical Leave Scheme 2015-16 funded archival research in London and Washington D.C. and provided time for writing up the findings.

¹ Report to the American People on the Soviet Arms Build-up in Cuba, 22 October 1962, *Public Papers of the Presidents of the United States: John F. Kennedy, 1962* (United States Government Printing Office: Washington, 1963), pp. 806-809. ‘Offensive’ weapons were defined as ‘Surface-to-surface missiles; bomber aircraft; bombs, air-to-surface rockets and guided missiles; warheads for any of the above weapons; mechanical or electronic equipment to support or operate the above items; and any other classes of materiel hereafter designated by the Secretary of Defense’. See Kennedy’s proclamation ‘Interdiction of the Delivery of Offensive Weapons to Cuba’, 23 October 1962, *Public Papers 1962*, pp. 809-811. For details about the interception area, see Adlai Stevenson to the UN Security Council, 27 October 1962, reproduced in R.P. Barston, *Modern Diplomacy*, third edition (Harlow: Pearson Longman, 2006), p.282. The missile crisis has inspired a vast literature. Recent overviews include Jonathan Colman, *The Cuban Missile Crisis: Origins, Course and Aftermath* (Edinburgh: Edinburgh University Press, 2016); Michael M. Dobbs, *One Minute to Midnight: Kennedy, Khrushchev and Castro on the Brink of Nuclear War* (New York: Knopf, 2008); Aleksandr Fursenko and Timothy Naftali, *‘One Hell of a Gamble’: Khrushchev, Castro, and Kennedy, 1958–64* (New York: Norton, 1997); Alice L. George, *The Cuban Missile Crisis: The Threshold of Nuclear War* (New York and London: Routledge, 2013); and Don Munton and David A. Welch, *The Cuban Missile Crisis: A Concise History*, 2nd edn (Oxford UK and New York: Oxford University Press, 2012).

² On the aftermath of the crisis, see David Coleman, *The Fourteenth Day: JFK and the Aftermath of the Cuban Missile Crisis* (New York: Norton, 2012), and Sergo Mikoyan, *The Soviet Cuban Missile Crisis: Castro, Mikoyan, Kennedy, Khrushchev and the Missiles of November*, ed. Svetlana Savranskaya (Stanford: Stanford University Press, 2012).

³ Mark J. White, ‘The Cuban Imbrolio: from the Bay of Pigs to the Missile Crisis and Beyond’, in Mark J. White, ed., *Kennedy: The New Frontier Revisited* (New York: New York University Press, 1998), p.75.

controversy, which would in turn undermine sympathy for U.S. policy. Washington strove, therefore, in the words of State Department legal adviser Abram Chayes, to win ‘world support’ and ‘the ultimate judgment of history’ by developing and promoting a legal case for the blockade alongside presenting political and security arguments.⁴

It was asserted, in an effort to establish law by precedent as well as to garner political backing, that the ‘quarantine’ fell short of a traditional belligerent blockade and so avoided the implications of a state of war. This proved hard to accept for some observers, though, as did the reliance on the Organization of the American States (OAS) instead of the United Nations (UN) to authorise the blockade. Allies backed American policy out of political self-interest rather than out of legal considerations, although evidence from British files demonstrates that the legal position still mattered because of the need to preserve domestic backing for supporting the United States. While the Soviet agreement to withdraw the missiles from Cuba was undoubtedly a triumph for Washington, a NATO diplomat noted after the resolution of the crisis that ‘the legal basis’ of the blockade had been ‘greatly criticized’.⁵ This indicates that the legal campaign met with limited success; in fact, even some American officials doubted the lawfulness of the blockade. Although within the next year or two most American jurists who expressed a view agreed that their government had acted within the law, over the longer term the legal status of the blockade of Cuba has generated mixed feelings.

International law specialists have explored the blockade’s legal propriety, and how far legal considerations influenced American and Soviet behaviour during the missile crisis.⁶

⁴ Abram Chayes, ‘The Legal Case for U.S. Action on Cuba’, *Department of State Bulletin*, 19 November 1963, p.763. On the State Department’s Legal Office (of which Chayes was head), see Richard B. Bilder, ‘The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs’, *The American Journal of International Law*, Vol. 56, No. 3 (July 1962), pp. 633-84. See also Stanley D. Metzger, ‘United States of America’, in H.C.L Merillat (ed), *Legal Advisers and Foreign Affairs* (Oceana: Dobbs Ferry, 1964), pp.153-59.

⁵ M. Couve de Murville to French diplomatic posts, 10 November 1962, *Cold War International History Project Bulletin*, 17/18 (Fall 2012), p.757.

⁶ Most U.S. jurists who published an opinion after the missile crisis considered that the blockade was compatible with international law. See, for example, Carl Q. Christol and Charles R. Davis, ‘Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Matériel to Cuba, 1962’, *The American Journal of International Law*, Vol. 57, No. 3 (July 1963), pp.525-545; W. T. Mallison, Jr, ‘Limited Naval Blockade or Quarantine Interdiction: National and Collective Self-Defense Claims Valid Under International Law’, *George Washington Law Review*, Vol. 31 (1962-1963), pp.335-98; Myres S. McDougal, ‘The Soviet-Cuban Quarantine and Self-Defense’, *Yale Law School Faculty Scholarship Papers*, Paper 2607 (1963), pp.597-604; and Eustace Seligman, ‘The Legality of U.S. Quarantine Action under the United Nations Charter’, *American Bar Association Journal*, Vol. 49, No. 2 (February 1963), pp.142-45. Larman C. Wilson, ‘International Law and the United States Cuban Quarantine of 1962’, *Journal of Inter-American Studies*, Vol. 7, No. 4 (October 1965), pp.485-492, examines the almost-complete consensus among American lawyers in favour of the legality of the quarantine, and provides a comprehensive bibliography (pp.491-92). The few critics included Quincy Wright, ‘The Cuban Quarantine’, *American Journal of International Law*, Vol. 57 (1963), pp.546-65, who maintained that while the American government fell short of its ‘legal obligations to respect the freedom of the seas, to submit threats to the peace to the United Nations before taking unilateral action, and to refrain from use or threat of force in international relations except in individual or collective self-defense against armed attack, under authority of the United Nations’ (p.563). For another critical stance, see Stephen R. Shalom, ‘International Lawyers and Other Apologists: The Case of the Cuban Missile Crisis’, *Polity*, Vol. 12, No. 1 (Autumn 1979), pp.83-109. For the influence of international law on the American and Soviet

However, historians have tended to overlook the legal side of the confrontation, perhaps out of a reluctance to engage with the perceived complexities of international law, and because of the influential realist conception that international law counts for little when vital national interests are at stake.⁷ This article explores the American government's making and presentation of the legal case for the blockade, and addresses how the British, Canadian and Australian governments responded.⁸ The research draws on declassified documents – some rarely used before – from American and British archives, alongside the analyses of jurists and historians. The work provides a fresh angle on the legality of the blockade and on how the U.S. administration tried to 'sell' its policy during the most dangerous confrontation of the Cold War.

Legal Thinking About Naval Blockades

The law of naval blockades was an aspect of customary international law, which reflects legal customs or habits, and imposes obligations on governments. First used in the 16th century, the blockade was a form of siege warfare that involved isolating enemy ports or coastline from the high seas to prevent sea-borne commerce with other countries. A blockade was seen as a definitive act of war, but in the nineteenth and early twentieth century, 'pacific' (non-belligerent) blockades emerged as a supposedly legal means of coercion short of war. These were considered to be 'pacific' because they were confined only to the vessels of the blockaded country, and because they were associated with relatively minor disputes such as the non-payment of debts. However, the doctrine of pacific blockade was controversial. Jurist Lassa Oppenheim noted in 1952 that while there was ambiguity about the admissibility of blockades confined only to the vessels of the blockaded state, there was a consensus that the peacetime seizure and sequestration of the vessels of third party states was illegal.⁹ International law embodies law-making treaties as well as customary law. These treaties include the UN Charter (1945), the Geneva Conventions (1949), Law of the Sea (1948), the Vienna Convention on Diplomatic Privileges and Immunities (1961), and many others. Article 2 of the UN Charter states that 'all Members shall settle their international disputes by peaceful means', and should 'refrain in their international relations from the threat or use of force'. Furthermore, Article 42 appears to prohibit the unilateral institution of a blockade by providing for Security Council authorisation of operations 'by air,

governments during the missile crisis, see Radhika Withana, *Power, Politics, Law: International Law and State Behaviour During International Crises* (Leiden: Brill, 2008), pp.167-97.

⁷ For realist perspectives on the missile crisis, see Withana, *Power, Politics, Law*, pp.184-86.

⁸ The legal case was outlined in public statements, memoranda, the Department of State *Bulletin*, briefings to foreign officials, and – later – in publications from government lawyers. See especially Telegram to all diplomatic and consular posts, 24 October 1962, *FRUS 1961-1963 XXI/XII American Republics; Cuba 1961-1962; Cuban Missile Crisis and Aftermath* (1998), document 390 <<http://history.state.gov/historicaldocuments/frus1961-63v10-12mSupp/d390>> and Chayes, 'The Legal Case for U.S. Action'. See also Abram Chayes, *The Cuban Missile Crisis: International Crises and the Role of Law* (New York: Oxford University Press, 1974).

⁹ See Lassa Oppenheim, edited by Hersch Lauterpacht, *International Law Vol II Disputes, War and Neutrality*, 7th edition (London: Longman, 1952), pp.144-49, for changing legal perceptions of the blockade. See also Robert E. Morabito, 'Maritime Interdiction: The Evolution of a Strategy', *Naval War College Paper*, 11 February 1991, pp.3-11.

sea, or land forces of Members of the United Nations'.¹⁰ Jurist Ian Brownlie suggested in 1963 that the UN Charter helped to normalise 'the illegality of force as a means of self-help', other than in self-defense.¹¹

The U.S. government had since 1960 tried to depose the regime of Fidel Castro in Havana through a variety of measures, including the supposedly-covert orchestration of what turned out to be a disastrous attack on Cuba by émigrés at the Bay of Pigs in April 1961. Delegates in the UN and jurists criticised the action as violating the general principles of international law requiring a state to prevent military expeditions against other states from its territory in peacetime, and of contravening various inter-American conventions opposing interventions.¹² In the late summer of 1962 – against the background of Castro's consolidation of power and a Soviet military build-up in Cuba – there were voices in Congress advocating a naval blockade (of unspecified scope) of the island. However, Abram Chayes, Head of the State Department's Legal Office, questioned the lawfulness of this option. In his assessment, a belligerent blockade, involving the legal right to interfere with third-party commerce, was problematic 'because we are not in a state of war with Cuba'. At the same time, a pacific blockade would have to be 'proportionate to a specific international wrong' committed by the Havana regime, and would need to be 'reconciled with obligations undertaken in the Inter-American system and under the UN Charter'.¹³

In respect of the inter-American obligations, Chayes argued that with a two-thirds vote the OAS could be used to back the blockade of Cuba, and that in these circumstances a blockade could be regarded as a UN 'enforcement action' under UN Charter Article 53, which enabled the Security Council to 'utilize ... regional arrangements or agencies for enforcement action under its authority'. He noted that this, however, would be impossible given the Soviet right of veto in the Security Council. Chayes also suggested that it might be possible to avoid the designation of belligerent blockade by stretching the definition of a pacific one 'to cover shipping of nations aligned with the blockaded one', but, even so, the 'legal and political problems' would be formidable.¹⁴ These were disinterested reflections prior to the discovery of the Soviet nuclear missiles. As will be seen, Chayes later put his reservations aside to become a vigorous advocate

¹⁰ Gerhard von Glahn, *Law Among Nations: An Introduction to Public International Law* (New York: Macmillan, 1992), p.658; Josef Kunz, 'Sanctions in International Law', *American Journal of International Law*, Vol. 54 (1960), pp.324, 331 (324-348).

¹¹ Ian Brownlie, *International Law and the Use of Force By States* (Oxford UK: Clarendon, 1963), pp.120-21.

¹² Wright, 'The Cuban Quarantine', p.546. Literature on U.S. efforts to bring down Castro includes Don Bohning, *The Castro Obsession: U.S. Covert Operations against Cuba, 1959–1965* (Washington, DC: Potomac Books, 2005); Fabian Escalante, *The Cuba Project: CIA Covert Operations, 1959-62* (Melbourne: Ocean Press, 2004); Howard Jones, *The Bay of Pigs* (New York: Oxford University Press, 2008); and Jim Rasenberger, *The Brilliant Disaster: JFK, Castro, and America's Doomed Invasion of Cuba's Bay of Pigs* (New York: Scribner, 2011). On the role of the UN, see Daniele Ganser, *Reckless Gamble: The Sabotage of the United Nations in the Cuban Conflict and the Missile Crisis of 1962* (New Orleans: University Press of the South, 2000).

¹³ Brubeck to Bundy, 11 September 1962, enclosing Abram Chayes' 'International Law Problems of Blockade', 611.3722/9-1162, RG 59, National Archives and Record Administration, College Park (NARA II), Maryland.

¹⁴ Brubeck to Bundy, 11 September 1962, enclosing Abram Chayes' 'International Law Problems of Blockade', 611.3722/9-1162, RG 59, NARA II.

of the legality of the ‘quarantine’ – although the case would now rest in part on the presence of the weapons.

Around this time, there was a further analysis, for Attorney General Robert F. Kennedy, based on (as yet unfounded) speculation in Congress that the Soviets had turned Cuba into a nuclear missile base.¹⁵ Norbert Schlei of the Department of Justice concluded 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 such a threat to the peace and security of the Western Hemisphere’.¹⁶ Therefore the justification in Schlei’s argument was one of self-defense. As will be seen, the American government did not invoke self-defense in the legal case, but this justification for the blockade did feature heavily in the narrative of American policy. Likewise, Chayes’ idea of using the OAS as a UN substitute would be a pillar of the legal case – minus his reservations. The analyses from Chayes and Schlei meant that officials had already explored the lawfulness of the blockade by the time the Soviet missiles were discovered, which meant that there was an off-the-peg legal case available – subject to minor alteration to ensure the best fit.

The Legal Case for the ‘Quarantine’ of Cuba

First meeting on 16 October, ExComm (the Executive Committee of the National Security Council) explored whether to attack the missile bases, or to blockade Cuba as a means of inhibiting the development of the bases and pressuring the Soviet Union into withdrawing the missiles.¹⁷ As ExComm moved towards implementing a blockade, officials considered whether there should be a declaration of war against Cuba to legalise the stop and search of third-party vessels. Former ambassador to Moscow Llewellyn Thompson argued that declaring war would be useful because the Soviets would be more likely to respect a blockade that had been ‘legally established’. Undersecretary of State George Ball believed that a declaration of war would help allies to know where they stood, and Secretary of State Dean Rusk recognised that such a declaration would carry ‘many legal privileges as a belligerent that would be extremely useful for us’. By contrast, Assistant Attorney General Nicholas Katzenbach and former Secretary of State Dean Acheson believed that self-defense provided a sufficient justification for any military action. Robert F. Kennedy believed that OAS support was decisive, and so rendered a declaration of war superfluous. President Kennedy also opposed declaring war. Although he was keen to convey a stance of firm resolution, and was reluctant to make public concessions, he recognised the potential for a trade involving American ‘Jupiter’ missiles stationed in Turkey,

¹⁵ Some Republican senators asserted (speculatively) that the Soviet Union had stationed strategic nuclear missiles in Cuba. See e.g. Max Holland, ‘A Luce Connection: Senator Keating, William Pawley, and the Cuban Missile Crisis’, *Journal of Cold War Studies*, Vol. 1, No. 3 (Fall 1999), pp.139–67; and Roger Hilsman, *To Move a Nation: The Politics of Foreign Policy in the Administration of John F. Kennedy* (New York: Doubleday, 1967), pp.177-80.

¹⁶ Norbert Schlei, ‘Legality under International Law of Remedial Action Against Use of Cuba as a Missile Base by the Soviet Union’, n.d., reproduced in Chayes, *The Cuban Missile Crisis*, pp.108-132.

¹⁷ On ExComm, see Elizabeth Cohn, ‘President Kennedy’s Decision to Impose a Blockade in the Cuban Missile Crisis: Building Consensus in the ExComm After the Decision’, in James A. Nathan, ed., *The Cuban Missile Crisis Revisited* (New York: St Martin’s Press, 1992), pp.219-35; David R. Gibson, *Talk at the Brink: Deliberation and Decision during the Cuban Missile Crisis* (Princeton: Princeton University Press, 2012); and Sheldon M. Stern, *The Week the World Stood Still: Inside the Secret Cuban Missile Crisis* (Stanford: Stanford University Press, 2005).

and he felt that declaring war would reduce his options by generating pressure to attack the Soviet missile bases.¹⁸ Thus, the American government refrained from declaring war against Cuba.

U.S officials chose the term ‘quarantine’ instead of ‘blockade’ or Norbert Schlei’s suggestion of ‘visit and search’. The inspiration for the choice of word has been attributed to Leonard Meeker (by himself and by Chayes), to Dean Acheson (by Paul Nitze), and others, including Richard Nixon, who had used the term earlier. Whoever was responsible, Meeker explained that the rationale was ‘to avoid any implication of a state of war from the imposition of measures which we described as blockade’. The term was an attempt to convey restraint in a volatile situation as well as to obviate legal difficulties. It also had the benefit of echoing a 1937 speech from President Franklin D. Roosevelt in which he urged ‘peace-loving nations’ to ‘quarantine’ the European ‘aggressors’, and avoided unfavourable associations with the Soviet blockade of Berlin in 1948-49.¹⁹ The Department of State maintained that the ‘quarantine’ was ‘a selective effort designed to deal with a threat to peace’ by ‘preventing the introduction of offensive weapons into Cuba in order to protect ourselves and this hemisphere from war’. By contrast, a blockade was ‘an operational part of the conduct of war, designed to force a state to comply with the wishes of the blockading country by crushing the economy of the state’.²⁰ Therefore, according to the American government, the ‘quarantine’ was an instrument of peace, not war.

Withana has argued fairly that the U.S. government’s legal advocacy was an attempt to change international law, although historian Jutta Weldes sees the reference to a ‘quarantine’ rather than ‘blockade’ as an attempt to camouflage ‘an act of aggression against a sovereign state’. Similarly, historian Robert Weisbrot sees the word ‘quarantine’ as ‘a velvet wrap to

¹⁸ Record of Meeting, 19 October 1962, *FRUS 1961-1963 XI Cuban Missile Crisis and Aftermath* (Washington DC: USGPO, 1996), document 218; Record of Meeting, 19 October 1962, *XI*, document 31; and Timothy Naftali and Philip Zelikow, eds., *John F. Kennedy: The Great Crises, Volume II: September - October 21, 1962* (New York: Norton, 2001), pp.524, 532, 542, 610; and Philip Zelikow and Ernest May, eds, *John F. Kennedy: The Great Crises, Volume III October 22–28 1962* (New York: Norton, 2001), p.41. Although obsolescent, the Jupiter missiles were a sensitive issue in relations with Turkey and other NATO states. See Barton J. Bernstein, ‘Reconsidering the Missile Crisis: Dealing with the Problems of the American Jupiters in Turkey’ in Nathan, ed., *Cuban Missile Crisis*, pp.55-129; and Don Munton, ‘The Fourth Question: Why did John F. Kennedy offer up the Jupiters in Turkey?’, in David Gioe, Len Scott and Christopher Andrew, eds., *An International History of the Cuban Missile Crisis: A 50-Year Retrospective* (London: Routledge, 2014), pp. 258-78. See also Philip Nash, *The Other Missiles of October: Eisenhower, Kennedy, and the Jupiters, 1957–1963* (Chapel Hill: University of North Carolina Press, 1997).

¹⁹ Chayes, *Cuban Missile Crisis*, p.10; , Association for Diplomatic Studies and Training (ADST) interview with Leonard Meeker conducted by Robert J. Martens, 25 April 1989; NSC meeting, 21 October 1962, *FRUS 1961-1963 XI*, document 38; Norbert A. Schlei oral history interview conducted by John Stewart, 20-21 February 1968, JFKLM; Richard J. Walton, *Cold War and Counter-revolution: The Foreign Policy of John F. Kennedy* (Baltimore: Penguin, 1972), p.124; and Robert Weisbrot, *Maximum Danger: Kennedy, the Missiles and the Crisis of American Confidence* (Chicago: Dee, 2001), pp.131, 132.

²⁰ Questions and Answers, and Statements of the Legal Basis for the Quarantine, 23 October 1962, 611.3722/10-2362, RG 59, NARA II.

cushion global reaction to a U.S. show of seapower'.²¹ There were also those within the American government who were critical, with Richard N. Gardner of the U.S. Mission to the UN suggesting privately that 'a blockade cannot be justified by its selectivity or by using some other name'.²² However, the focus on terminology from Meeker et al, and the accompanying elaboration of the legal position, was both an effort to develop international law, and to shape moral perceptions of U.S. policy; each objective involved trying to bring about a positive view of the blockade. In the legal context, this was not straightforward. The position that only military cargo rather than the necessities of life was designated contraband, and that vessels carrying military cargo would be diverted rather than seized or destroyed,²³ represented the more pacific aspects of the blockade. At the same time, blockading third-party vessels presented a belligerent aspect that sat ill with existing international law. There also was the awkward question of the lack of UN backing.

Of course, the Soviet Union and Cuba were always going to criticise the U.S. legal position. A Soviet legal specialist had argued in *Pravda* in September that blockading Cuba would represent the 'same sort of international crime as an armed invasion', and during the missile crisis Nikita Khrushchev complained that the blockade violated 'international norms of freedom of navigation on the high seas', and that OAS authorisation had no legal standing.²⁴ Fidel Castro contended that the blockade contravened 'international law and Cuban sovereignty' and also attacked 'the rights of all countries because it was proposed to violate ships of all nationalities on the high seas'.²⁵ Both Khrushchev and Castro were selective in their respect for international law (given Soviet actions in Budapest in 1956, and Cuban subversion in Latin America, for example). A recent analysis has noted that while Soviet officials did not take the initiative in respect of making a case in law,²⁶ there were still worries in the U.S. administration that Soviet and Cuban legal arguments could gain momentum. Although it emerged on Wednesday 24 October that Soviet ships carrying military cargo *en route* to Cuba were retreating,²⁷ the fact that the blockade was to last indefinitely until all 'offensive' weapons had been removed led Chayes' assistant, Leonard Meeker, to spend time at the UN in New York to 'turn aside and defeat' Soviet arguments by outlining the 'legal grounds ... for taking measures of force to remove the missile bases'.²⁸

It is worth discussing why the U.S. government not taken its case to the UN as soon as the missiles were discovered, instead of going ahead independently with a naval blockade. First, it was recognised that there would be awkward questions about the comparability of American

²¹ Withana, *Power, Politics, Law*, p.194; Weisbrot, *Maximum Danger*, p.132; and Jutta Weldes, *Constructing National Interests: The United States and the Cuban Missile Crisis* (Minneapolis: University of Minnesota Press, 1999), p.83.

²² Gardner to Cleveland, 'Fundamentals of United States Position in Cuba', 27 October 1962, U.S. Mission to the UN, RG 84, NARA II; and Morabito, 'Maritime Interdiction', p.1.

²³ Zelikow and May, eds, *John F. Kennedy III*, p.73.

²⁴ Translation of G. Tunkin, 'Cuba's Enemies Violate International Law', *Pravda*, 19 September 1962, Office of Assistant Legal Adviser for Interamerican Affairs, RG 59, NARA II; Khrushchev to Kennedy, 23 October 1962, *FRUS 1961-1963 XI*, document 48; and Khrushchev to Kennedy, 24 October 1962, *FRUS 1961-1963 XI*, document 61.

²⁵ Havana to FO, 24 October 1962, FO 371/162377, The National Archives (TNA), Kew, Surrey.

²⁶ Withana, *Power, Politics, Law*, p.197.

²⁷ See Dobbs, *One Minute to Midnight*, pp. 87-9, 91, for an iconoclastic account of the 'eyeball-to-eyeball' confrontation between Soviet and American vessels.

²⁸ Interview with Leonard Meeker conducted by Robert J. Martens, ADST, 25 April 1989.

nuclear missile bases abroad – especially in Turkey – and the Soviet bases in Cuba (see page ?? of this article). Two, there was not likely to be great alarm within the UN at news of the bases, and even if it was accepted that the missiles represented an act of aggression, the organisation would not have been able to authorise the use of force because of the Soviet veto in the Security Council. Three, pursuing the issue in the UN would be time-consuming. Finally, as the President had warned the Soviet Union in September about the danger of stationing ‘offensive’ weapons in Cuba it would be difficult to compromise on the issue.²⁹

In respect of the politics of the Security Council, Meeker had anticipated that members Romania, the United Arab Republic, and Ghana would oppose the blockade. The seven votes required to authorise the measure would be available only if the other states – Britain, France, the Republic of China, Chile, Venezuela, and Ireland – voted affirmatively. However, there were doubts about the Irish position, and even if there were enough votes available to endorse American policy, the Soviet Union would use its veto to prevent matters from going any further.³⁰ The U.S. delegation in New York proposed a Security Council resolution under Article 40, which enabled the Council to moderate a dispute by ‘call[ing] upon the parties concerned to comply with such provisional measures as it deems necessary or desirable’. The proposed resolution required the prompt dismantling and withdrawal of all ‘offensive’ weapons in Cuba, under UN supervision. The initiative was purely symbolic, with Chayes noting that it ‘stood no chance of being adopted and was not introduced with an expectation that it would be’.³¹

There was the possibility of General Assembly authorisation of the blockade using the ‘Uniting for Peace’ procedure, which the United States and Canada had sponsored in 1950 to circumvent the paralysis of the Security Council.³² This resulted in UN condemnation of the People’s Republic of China as the aggressor in Korea, but the increase in Assembly members in subsequent years through decolonisation did not bring a corresponding boost in support for the United States. The result was that, as a British analysis noted, U.S. officials doubted their ability during the missile crisis ‘to muster a sufficiently impressive majority’ in the General Assembly.³³ Therefore the ‘Uniting for Peace’ procedure remained dormant. Beyond the Council and the Assembly, Acting Secretary General U Thant strove to mediate. He proposed a suspension of the U.S. blockade and of Soviet arms shipments to Cuba, during which the superpowers would negotiate. By 28 October Washington and Moscow had reached an agreement between themselves featuring an American pledge not to invade Cuba and an unofficial commitment to remove the Jupiter missiles in Turkey within six months, in return for the removal of the missiles from Cuba. The subsequent negotiations in New York to work out the details of the arrangement took place under U Thant’s good offices. The Acting Secretary General visited Cuba to try to

²⁹ Ganser, *Reckless Gamble*, pp.92-94.

³⁰ Meeker to Rusk, 18 October 1962, 611.3722/10-162, RG 59, NARA II.

³¹ Chayes, *Cuban Missile Crisis*, p.83. For the text of the resolution, see ‘Draft resolution submitted by the United States to the Security Council’, 23 October 1962, in Henry M. Pachter, *Collision Course: The Cuban Missile Crisis and Coexistence* (New York: Praeger, 1963), pp.207-08.

³² Although the Western campaign during the Korean War of 1950-53 was carried out under the UN banner, this was only possible because when the war broke out the Soviet Union was boycotting the Security Council and so could not employ its veto. This enabled the American government to use the UN for its own purpose.

³³ New York to FO, 22 October 1962, PREM 11/3689, TNA.

establish a UN inspection regime to confirm the removal of the missiles, although Castro's concerns about national sovereignty made the effort abortive.³⁴

The difficulties in the UN obliged the U.S. government to look to the OAS to authorise the blockade of Cuba. On 23 October, Dean Rusk persuaded the OAS's Organ of Consultation to provide *post facto* support.³⁵ The use of a regional organisation putatively in service of the UN was a first, but because of the ambiguous legal position it was something that Richard N. Gardner feared would 'erode' the American position.³⁶ Certainly, as will be seen, some other governments did question the use of the OAS instead of the UN.

The vigorous response to the discovery of Soviet nuclear missile bases in Cuba was consistent with the Monroe Doctrine, a warning from President James Monroe in 1823 to deter European states against encroaching into the Americas. Eighty years later, the Theodore Roosevelt 'Corollary' used the Doctrine to legitimise U.S. military intervention in Latin America. By the 1930s, following debate among U.S. and Latin American international lawyers, politicians and intellectuals, the Monroe Doctrine had been reframed as what one historian has described as 'a continental and multilateral principle of non-intervention'.³⁷ This process of evolution meant that, as Dean Rusk told the Senate in September 1962, the Doctrine had changed 'both by circumstances and by agreement', although it remained 'an elementary part of our whole national security interests'.³⁸ The State Department suggested that in establishing the blockade, the United States had 'acted unilaterally in the spirit of the Monroe Doctrine as well as multilaterally with its friends in the hemisphere to counter' the Soviet 'threat in a manner

³⁴ See A. Walter Dorn and Robert Pauk, 'Unsung Mediator: U Thant and the Cuban Missile Crisis', *Diplomatic History*, Vol. 33, No. 2 (April 2009), pp. 261-92. Ganser, *Reckless Gamble*, notes (p.101) U Thant's statement to Castro that 'My colleagues and I are of the opinion that the blockade is illegal'.

³⁵ The OAS had expelled the Castro government at the Punta del Este Conference of January 1962. Wright, 'Cuban Quarantine', p.546; and Ganser, *Reckless Gamble*, pp.65-68. Article VI of the 1947 Inter-American Treaty of Reciprocal Assistance (commonly known as the Rio Treaty) provided that in the case of 'an aggression that is not an armed attack', the OAS's 'Organ of Consultation shall meet, and may, by a two-thirds vote, take measures which ... may include the use of armed force'. Shalom ('International Lawyers', p.87), however, has doubted whether the Soviet emplacement of nuclear missiles in Cuba was a genuine example of 'aggression'. There is evidence that the U.S. government would have blockaded Cuba irrespective of OAS endorsement, with President Kennedy telling Congressional leaders on 22 October that if the OAS refused to extend its backing 'we are going to have to have what's legally an illegal' blockade (he, did, however, suggest that a declaration of war might be considered in the absence of OAS support). Zelikow and May, eds., *John F. Kennedy III*, p.80. Note that, as Barton Bernstein has suggested, that the favourable OAS verdict was achieved with some 'deft coercion' involving the U.S. provision of economic aid. Barton Bernstein, 'The Cuban Missile Crisis: Trading the Jupiters in Turkey?', *Political Science Quarterly*, Vo. 95, No. 1 (Spring 1980), p.116. For the regional Cuban Missile Crisis, see Renata Keller, 'The Latin American Missile Crisis', *Diplomatic History*, Vol. 39, No. 2 (2015), pp.195-222. See *Ibid.*, note 4, for references to the (very limited) literature.

³⁶ Gardner to Cleveland, 'Fundamentals of United States Position in Cuba', 27 October 1962, U.S. Mission to the UN, RG 84, NARA II.

³⁷ See Juan Pablo Scarfi, 'In the Name of the Americas: The Pan-American Redefinition of the Monroe Doctrine and the Emerging Language of American International Law in the Western Hemisphere, 1898-1933', *Diplomatic History*, Vol. 40, No. 2 (2016), pp.189-218. See also Carl Schmitt, 'The Changing Structure of International Law', translated by Antonio Cerella and Andrea Salvatore, *The Journal of Cultural Research*, Vol. 20, No. 3 (2016), pp.310-328, for a powerful exploration of the creeping expansion of American claims over the Western Hemisphere by the Second World War.

³⁸ Wright, 'Cuban Quarantine', p.552.

consistent with international law and our treaty obligations'.³⁹ However, American officials did not raise the Doctrine in the legal case because, in the words of one analysis, it 'did not create a special legal regime for the Western Hemisphere in which the United States is entitled to depart from the ordinary rules'.⁴⁰ Furthermore, the Doctrine had long-term associations with unilateralism and heavy-handedness, despite a partial repudiation of the Roosevelt corollary and the adoption of a more 'neighbourly' turn under Franklin D. Roosevelt in the 1930s. Therefore, the U.S. argument was that the naval embargo or 'quarantine' fell short of a belligerent blockade, and that the OAS could properly be used as a regional agency of the UN even without Security Council authorisation.

Self-Defense?

The legal attempt to justify the blockade was silent about the right of self-defense, that is, the right to respond with force to an actual or imminent armed attack. Abram Chayes wrote later that presenting self-defense arguments would have suggested that the U.S. government took the view that 'the situation was to be governed by national discretion not international law'.⁴¹ Nonetheless, self-defense did feature in the general narrative of American policy, with Kennedy describing the Soviet missiles in his 22 October public address as 'offensive weapons of sudden mass destruction' that would generate a 'full *retaliatory* response' should any be launched.⁴² American officials tended to think that Moscow's chief objective behind establishing the bases in Cuba was strategic, to remedy the inferior status of the Soviet Union in the nuclear balance of power. National Security Adviser McGeorge Bundy, for example, speculated that Khrushchev's 'generals have been telling him ... that he was missing a golden opportunity to add to his strategic capability'.⁴³ Although no comparable Soviet assessments are available, an American analysis suggested that the missiles in Cuba were of great strategic significance because they 'increase the first-strike missile salvo which the USSR could place on targets in the continental United States by over 40%'.⁴⁴

Yet it did not follow that the Soviet Union intended to launch the missiles; for a start, the country was still in a position of inferiority, and, more broadly, as L. W. Fuller of the State Department's Policy Planning Staff noted, nuclear weapons meant 'deterrence, for actual use means mutual destruction'.⁴⁵ After the resolution of the missile crisis and the provision of a non-

³⁹ 'The Monroe Doctrine and Cuba', n.d., Office of Assistant Legal Adviser for Interamerican Affairs, RG 59, NARA II.

⁴⁰ Meeker to Rusk, 18 October 1962, 611.3722/10-162, RG 59, NARA II. See also Rostow to Bundy, 31 August 1962, *Foreign Relations of the United States, 1961-1963 X Cuba, January 1961-September 1962*, document 400.

⁴¹ See Brownlie, *International Law*, pp.250-79, for the right of self-defense after the Second World War; and Chayes, *Cuban Missile Crisis*, pp.65-66.

⁴² Report to the American People, 22 October 1962, *Public Papers 1962*, p. 808.

⁴³ Zelikow and May, eds., *John F. Kennedy III*, p.451.

⁴⁴ Garthoff to ExComm, 27 October 1962, in Raymond L. Garthoff, *Reflections on the Cuban Missile Crisis* (Washington: Brookings, 1987), p.138; and 'Soviet Military Buildup in Cuba', 21 October 1962, Mary S. McAuliffe, ed., *CIA Documents on the Cuban Missile Crisis* (Washington: CIA History Staff, 1992), pp.247-59.

⁴⁵ Fuller to Rostow, 29 October 1962, 611.3722/10-2962, RG 59. The doctrine of Mutual Assured Destruction (MAD) would become prominent in the wake of the missile crisis.

invasion pledge from the US government, Soviet representatives maintained that it was now reasonable to remove the missiles from Cuba because the Cuban revolution was now safe.⁴⁶ Western officials tended to see this argument as a *post facto* rationalization of the climb-down under pressure, but the emergence of new evidence since the end of the Cold War has brought greater acceptance of the defending-Cuba argument. After reviewing Soviet sources, historian Sergey Radchenko concluded recently that ‘it is no longer safe to claim that Khrushchev was motivated strictly by strategic considerations’.⁴⁷ Securing an ally in the Western Hemisphere was a tremendous political advance for Moscow, and was to be guarded carefully.

Despite taking the legal initiative, U.S. officials never gainsaid Cuba’s right to accept the missiles. There was simply no basis for making that argument – Cuba had consented to the placement of the missiles, and as jurist Quincy Wright noted, a sovereign state is legally free to take, within its own territory and in the absence of treaty obligations to the contrary, measures which it considers necessary for its defense.⁴⁸ The Soviets raised the issue of Cuban sovereignty successfully in the UN Security Council on 24 October. Vladimir Zorin, according to the British representative in the UN, Patrick Dean, ‘contrived to bring home effectively’ the point that ‘every country has a right to choose what weapons of defense should be stationed on its own sovereign soil’.⁴⁹ This argument was a compelling one, as some American officials acknowledged. Richard F. Pederson of the U.S. mission to the UN admitted that ‘from the point of view of international law missiles in Cuba and in Turkey were equally legal’, while L. W. Fuller conceded that ‘the argument that Soviet missiles in Cuba are offensive while ours in Turkey are defensive is a plain, subjective rationalisation’.⁵⁰

The American government had in recent years established nuclear missile bases in Britain, Italy and Turkey. It was maintained, though, that these were a different proposition to the bases in Cuba because Soviet actions were covert and completely unwarranted, while the United States had acted openly in response to the adversary’s ‘expansion and aggression’.⁵¹ Yet

⁴⁶ János Kádár’s account of his visit to Moscow, 12 November 1962, *Cold War International History Project Bulletin*, Issue 17/18 (Fall 2012), p.437.

⁴⁷ Sergey Radchenko, ‘The Cuban Missile Crisis: Assessment of New, and Old, Russian Sources’, *International Relations*, Vol. 26, No. 3 (2012), p.330. See James G. Hershberg, ‘Before the “Missiles of October”’: Did Kennedy plan a Military Strike against Cuba?, *Diplomatic History*, Vol. 14, No. 2 (Spring 1990), pp. 163-98, on the likelihood of a further American attack on Cuba.

⁴⁸ Wright, ‘Cuban Quarantine’, p.550. As for Castro’s motives for accepting the missiles, he stated later that they would ‘strengthen the entire socialist camp’ while contributing to Cuba’s defense. James G. Blight, Bruce J. Allyn and David A. Welch, eds., with foreword by Jorge I. Domínguez, *Cuba on the Brink: Castro, the Missile Crisis, and the Soviet Collapse* (New York: Pantheon, 1993), p.198.

⁴⁹ New York to Foreign Office (FO), 24 October 1962, FO 371/162376. For Adlai Stevenson’s successful riposte to Zorin the following day, see Ganser, *Reckless Gamble*, pp.113-18.

⁵⁰ Richard F. Pedersen, ‘Cuba’, 4 December 1962, U.S. Mission to the UN, RG 84; and Fuller to Rostow, 29 October 1962, 611.3722/10-2962, RG 59, NARA II.

⁵¹ On the missiles in Britain, see Stephen Twigge and Len Scott, ‘The Other Other Missiles of October: The Thor IBMs and the Cuban Missile Crisis’, *Electronic Journal of International History*, 3, 30 January 2012, <<http://sas-space.sas.ac.uk/3387/>> On the missiles in Turkey, see Philip Nash, *The Other Missiles of October: Eisenhower, Kennedy, and the Jupiters, 1957–1963* (Chapel Hill: University of North Carolina Press, 1997). Telegram to all diplomatic and consular posts, 24 October 1962, *FRUS 1961-1963 XXI/XII*, document 390. John Lewis Gaddis points out that ‘the Turkish deployment, while no secret, was not widely publicized’. John Lewis Gaddis, *We Now Know: Rethinking Cold War History* (Oxford UK: Oxford University Press, 1997), p.268.

by stationing nuclear missiles in Cuba, Khrushchev and Castro were responding at least in part to *American* aggression, and it was the case that the secrecy of the Soviet operation had no bearing on its legality.⁵² For the Kennedy administration, though, secrecy did make the issue more inflammatory, given that in September the President had warned Moscow that grave issues would arise if Cuba was turned into a nuclear missile base. Political concerns were also very much evident in his 22 October public address, which condemned ‘the secret, swift, and extraordinary buildup of Communist missiles in an area well known to have a special and historical relationship to the United States ... in violation of Soviet assurances, and in defiance of American and hemispheric policy’.⁵³ The following day he referred to the Soviet missiles as a ‘horror’ that would ‘embarrass me in the [November Congressional] election’.⁵⁴ Historian Peter Ling has suggested fairly that Kennedy would have been ‘damaged politically’ if he did not challenge the deployment in Cuba successfully. Allies in Europe would ‘fret about irresolute American leadership... Third World countries would perceive the USSR as a more assiduous protector of its allies, and Khrushchev himself would be emboldened to act forcefully elsewhere’ – perhaps Berlin. Additionally, there would be the boost to the President’s ‘domestic Republican opponents’.⁵⁵

Historian William J. Medland has noted that designating the Soviet missiles in Cuba as offensive enabled the U.S. government to present an international political matter as a security threat.⁵⁶ To be sure, the response to the discovery of the missiles in Cuba could have reflected, without contradiction, worries about politics and prestige on one hand *and* about physical security on the other, but politics and prestige are not pertinent to the law of self-defense. Furthermore, any attempt to convey the impression that the Soviets were poised to launch a nuclear first strike from Cuba was mere hyperbole, which means that the invocation of self-defense in U.S. rhetoric must be taken with a substantial pinch of salt.

Allied Responses to the Legal Case

⁵² On the failure to anticipate the Soviet establishment of missile bases in Cuba, see David M. Barrett and Max Holland, *Blind Over Cuba: The Photo Gap and the Missile Crisis* (College Station: Texas A & M, 2012); Jonathan Renshon, ‘Mirroring Risk: The Cuban Missile Estimation’, *Intelligence and National Security*, Vol. 24, No. 3 (June 2009), pp.315–38; and Len Scott, ‘The “Incredible Wrongness” of Nikita Khrushchev: The CIA and the Cuban Missile Crisis’, *History*, Vol. 100, No. 340 (April 2015), pp.218-222.

⁵³ Report to the American People, 22 October 1962, *Public Papers 1962*, p.807.

⁵⁴ Zelikow and May, eds., *John F. Kennedy III*, p.178. On how far domestic politics influenced the response to the discovery of the Soviet missiles, see Barton J. Bernstein, ‘Reconsidering the Missile Crisis’; and Richard Ned Lebow, ‘The Traditional and Revisionist Interpretations Reevaluated: Why Was Cuba a Crisis?’, in Nathan, ed., *Cuban Missile Crisis*, respectively pp.55-129 and 161-86; Timothy J. McKeown, ‘The Cuban Missile Crisis and Politics as Usual’, *The Journal of Politics*, Vol. 62, No. 1 (2000), pp.71-87; and Thomas G. Paterson and William J. Brophy, ‘October missiles and November Missiles: The Cuban Missile Crisis and Domestic Politics’, *The Journal of American History*, Vol. 73, No. 1 (1986), pp.87-119.

⁵⁵ Peter J. Ling, *John F. Kennedy* (New York and London: Routledge, 2013), pp.148-49.

⁵⁶ William J. Medland, *The Cuban Missile Crisis of 1962: Needless or Necessary?* (New York: Praeger, 1988), p.143.

Withana has argued that ‘Soviet representatives were unable through their legal rhetoric to establish the “legality” of their position or the illegality of the U.S. position’,⁵⁷ but those foreign officials outside the Soviet bloc who expressed a view tended to doubt only the American legal position. This was evident in the attitudes of the United States’ ‘special’ ally, Britain.⁵⁸ Prime Minister Harold Macmillan’s initial reaction to news of the Soviet missiles was to favour military action, with him writing in his diary that the President ought ‘to seize Cuba and have done with it’. Historian Peter Catterall maintains that this view derived from doubts about the blockade’s ability to facilitate the removal of the nuclear missiles, and about its legality.⁵⁹ But after Washington had decided to blockade Cuba rather than attack the bases, Macmillan asked President Kennedy for ‘the best legal case’ so that Patrick Dean could ‘weigh in effectively’ on behalf of the U.S. government at the UN. It was necessary, as Macmillan pointed out, to address the point ‘that a blockade which involves the searching of ships of all countries is difficult to defend in peacetime’.⁶⁰ Duly, Kennedy instructed his ‘experts’ to ‘confer’ with British ones ‘to provide the best possible legal case’.⁶¹

The legal status of the blockade mattered to London, because there were limits to British sympathy with American policy. Labour Party leader Harold Wilson argued on television that the United States should have taken the case to the United Nations before imposing a blockade.⁶² A National Opinion Poll in *The Daily Mail* on 25 October indicated that there was 36% opposition to the blockade, and that 63% of those surveyed thought that the U.S. action threatened world peace.⁶³ Letters to Foreign Secretary Alec Douglas-Home, who gave a televised, pro-American speech to the International Chamber of Commerce in London on 23 October, are also revealing. Alongside urging British mediation, many of the correspondents raised legal objections to American policies. It was maintained, for example, that the government should ‘state unambiguously that Britain will refuse to have her legal maritime rights abused’ by having to comply with the blockade; Kennedy should ‘cancel his illegal blockade of a sovereign state in time of peace’; and the blockade was an example of ‘piracy on the High Seas ...

⁵⁷ Withana, *Power, Politics, Law*, p.197.

⁵⁸ On the Anglo-American ‘special relationship’, see, e.g., Nigel J. Ashton, *Kennedy, Macmillan and the Cold War: The Irony of Interdependence* (Basingstoke: Palgrave, 2002); James G. Hershberg, ‘Their men in Havana: Anglo-American intelligence exchanges and the Cuban crises, 1961–62’, *Intelligence and National Security*, Vol. 15, No. 2 (2000), pp.121-176; Michael F. Hopkins, ‘David Ormsby-Gore’, in Michael F. Hopkins, Saul Kelly and John W. Young, eds., *The Washington Embassy: British Ambassadors to the United States, 1939-77* (Basingstoke: Palgrave, 2009), pp.130-49; Christopher Hull, ‘“Going to War in Buses”: The Anglo-American Clash over Leyland Sales to Cuba, 1963–1964’, *Diplomatic History*, Vol. 34, No. 5 (November 2010), pp. 793–822; idem., ‘Parallel spheres: Anglo-American cooperation over Cuba, 1959–61’, *Cold War History*, Vol. 12, No. 1 (2012), pp.51-68; David Nunnerley, *President Kennedy and Britain* (London: Bodley Head, 1972); and L.V. Scott, *Macmillan, Kennedy and the Cuban Missile Crisis: Political, Military and Intelligence Aspects* (New York: St. Martin’s Press, 1999) - for British legal reservations, see pp.69-76.

⁵⁹ Peter Catterall, ‘At the End of the Day: Macmillan’s Account of the Cuban Missile Crisis’, *International Relations*, Vol. 26, No. 3 (2012), p.272.

⁶⁰ Macmillan to Kennedy, 22 October 1962, PREM 11/3689, TNA.

⁶¹ Kennedy to Macmillan, 22 October 1962, PREM 11/3689, TNA.

⁶² Christopher Hull, *British Diplomacy and U.S. Hegemony in Cuba, 1898–1964* (Basingstoke: Macmillan, 2013), p.186.

⁶³ Embassy London to State Department, 26 October 1962, 741.00 (W)/10-562, Subject-Numeric, RG 59, NARA II.

interfering with British ships going about lawful trade'.⁶⁴ Some of the criticism came from those who no doubt were always hostile to American actions, and in most cases the reflections appeared to derive from instinct rather than expertise. However, the hazy legal status of the blockade provided the amateur lawyers with ammunition.

It should be acknowledged that there was some sympathy in Whitehall with the American legal case. Leader of the House of Lords, Lord Hailsham (a lawyer) noted that in an age when nuclear weapons were 'ready to go off at a moment's notice', there were questions about the relevance of classical law reflecting the technology of the 'sailing ship and the cannon' and a clear distinction between war and peace.⁶⁵ Nonetheless, Lord Chancellor Dilhorne summarised the consensus of government lawyers as holding that 'the "quarantine" could not be justified as "pacific blockade"', given that it extended to third party vessels without a declaration of war. Although it might be contended that the Soviet nuclear missile bases in Cuba posed 'a threat to the United States of such imminence as to necessitate ... immediate steps to render that threat nugatory', this was questionable because the American action 'appears to be designed to *prevent* the threat becoming imminent'.⁶⁶ The British Mission to the UN concluded that Washington relied excessively on the regional agency argument, and that there was no adequate legal justification 'for the interception under the "quarantine" measures of ships of third states on the high seas'.⁶⁷ British officials in New York and Washington encouraged their American counterparts to use 'language indicating more precisely the nature of the measures which they are imposing' rather than the 'undefined term "quarantine"'. It was feared that the term could generate 'criticism and ridicule'.⁶⁸ Yet American officials felt that they had selected the best description of the naval embargo, so felt no reason to change.

For his part, Alec Douglas-Home thought that Cuba had been 'entitled to call for military aid from another government if necessary for the purpose of its defense', just as NATO countries had consented to American nuclear missile bases on their territory. He also considered that 'while it might be possible for the U.S. administration to justify action against Cuban ships and possibly Soviet ships', it was 'in the absence of United Nations authority ... very difficult to justify action' against the ships of other countries.⁶⁹ Freedom of the seas was a sensitive issue for a country with a proud naval heritage. Royal Navy frigates in the West Indies made a point of avoiding the blockade to allow the U.S. navy to focus on Soviet vessels,⁷⁰ but the fact that Britain had (over American objections) maintained trade links with Cuba meant that British civilian ships could be affected.⁷¹ There were British vessels in the Caribbean not destined for Cuba, and others that having loaded in communist ports were bound for the island.⁷² Douglas-Home noted that if Washington extended the blockade to include POL (petroleum, oil, lubricants) and other commodities, British shippers might have to 'abandon the Cuba run

⁶⁴ See FO 371/162409 and FO 371/ 162410, TNA, for the correspondence.

⁶⁵ Hailsham to Lord Dilhorne (Manningham-Buller), 25 October 1962, FO 371/162386, TNA.

⁶⁶ 'Meeting held in the Lord Chancellor's Room at 2:30 pm, 24 October 1962', LO2/578, TNA. My italics.

⁶⁷ 'Legal basis for the quarantine of Cuba', 2 November 1962, FO 371/ 162406, TNA.

⁶⁸ FO to New York, 23 October 1962, PREM 11/3689, TNA.

⁶⁹ FO to New York, 23 October 1962, FO 371/162375, TNA.

⁷⁰ Hockaday to Thomas, 24 October 1962, FO 371/162384, TNA.

⁷¹ On British trade with Cuba, see Hull, *British Diplomacy*, p.154-207; and idem, "'Going to War in Buses'", pp.793-822.

⁷² FO to New York, 25 October 1962, FO 371/162375, TNA.

altogether and take whatever action was open to them to secure legal redress'.⁷³ Macmillan recognised that extending the blockade would mean 'trouble',⁷⁴ because the British government would then face the awkward proposition of having to back the rights of its citizens against Washington.

The U.S. Navy was instructed to make only spot checks on friendly shipping, and ultimately no British vessels were detained.⁷⁵ However, the fact that the London government reserved its legal rights in relation to shipping showed that, as historian Christopher Hull has argued, it could take a legalistic stance when national interests were under threat. More vital, though, was the need to support the United States.⁷⁶ Therefore, according to historian L.V. Scott, Harold Macmillan 'subordinated international law to the exigencies of the [missile] crisis'.⁷⁷ The Prime Minister's pragmatism was evident in how he attempted to silence the legal critics. When in the House of Commons on 25 October an MP stated that there was 'talk ... about acts of piracy', he responded that this was not 'the moment to go into the niceties of international law ... in new ... unprecedented situations in the nuclear world we cannot rely on a pedantic review of precedents'.⁷⁸ In an effort to maintain the fullest international support for the United States, Macmillan told Canadian Prime Minister John Diefenbaker, who questioned the legality of the blockade and rued a lack of meaningful consultation from Washington, that legal criticisms were 'sterile and irrelevant'. The priority was to 'prevent consolidation of the offensive potential for the Soviet Union in Cuba'.⁷⁹ Promptings such as these may have had some effect. The Canadian Department of External Affairs (DEA) noted the '*sui generis*' nature of the quarantine, while the Chief of the Naval Staff concluded that because the lawfulness of the action was ill-defined, Canada could accept it without condoning an illegal act. Nonetheless, as Undersecretary of External Affairs Norman Robertson advised his colleagues, it was wise to avoid public discussion of the quarantine's legality, given the ambiguity of the issue.⁸⁰

There were also concerns in Australia's Department of External Affairs (DEA). An analysis for Secretary to the DEA Arthur Tange maintained that pacific blockades were serious, but justified, measures when enacted under the UN Charter to prevent the outbreak of war; outside the parameters of the UN, many jurists considered it illegal. William D. Forsyth of the DEA's UN Branch concluded that 'no clear positive legal basis appears'. Another assessment noted that Canberra had 'a distinct interest in preserving the right of powerful allies to put bases and offensive weapons in Australia if we want them'. Tange and Minister of External Affairs Garfield Barwick acknowledged the inconsistency of this position given the placement of Soviet strategic weapons in Cuba. Thus, the Australian government 'should consider carefully the concept that the presence of such bases and weapons on Cuban soil represents an act of Soviet

⁷³ Douglas-Home to Macmillan (draft), n.d., FO 371/162386, TNA.

⁷⁴ Macmillan to Douglas-Home, 26 October 1962, FO 371/162386, TNA.

⁷⁵ Washington to FO, 25 October 1962, PREM 11/3690, TNA. Only the *Marucla*, a Panamanian-owned, Lebanon-registered, Soviet-chartered ship, was ever detained and inspected.

⁷⁶ Hull, *British Diplomacy*, p.187.

⁷⁷ Scott, *Macmillan, Kennedy*, p.76.

⁷⁸ House of Commons, 25 October 1962, *Hansard*.

⁷⁹ Ottawa to Commonwealth Relations Office, 24 October 1962, PREM 11/3690, TNA; Macmillan to Diefenbaker, 26 October 1962, PREM 11/3690, TNA. 0032 On Canada and the missile crisis, see Asa McKercher, 'A "Half-hearted Response"?': Canada and the Cuban Missile Crisis, 1962,' *International History Review* Vol. 33, No. 2, June 2011, pp.335–352.

⁸⁰ McKercher, 'A "Half-hearted Response"?', p.341.

aggression'. If the Soviet nuclear presence in Cuba was an act of aggression, the installation of American weapons on Australian territory might invite a response from the Soviets commensurate with the U.S. action: Australia could be 'vulnerable to a Soviet blockade (in the name of a "quarantine") of any American offensive weapons which may be located on Australian soil at some future time and targeted on the Soviet Union'. This reasoning implied that the Soviet bases in Cuba and the American base in Turkey were analogous. Ultimately, though, Australia's interest in American defense backing prevailed, with historians Laura Stanley and Philip Deery arguing that Canberra 'pledged its support, albeit limited, to the American UN resolution, in order to obtain a maximum gain: the maintenance of its most important alliance in furtherance of its geostrategic interests'.⁸¹

To be sure, some allied representatives – such as President Charles de Gaulle of France and Chancellor Konrad Adenauer of the Federal Republic of Germany – endorsed American policy without displaying any interest in the legal dimension.⁸² All the same, the U.S. government's construction of a case in law recognised the fact that the legal propriety of the blockade was very much open to question. Few of the foreign officials or politicians who expressed a view had confidence in the case, although acknowledgements that the existing legal framework was outdated were consistent with the arguments of Washington.

Promoting The Legal Case after the Crisis

After Moscow's agreement to remove IL-28 nuclear capable bombers as well as the nuclear missiles from Cuba, Washington ended the blockade on 20 November. Abram Chayes wanted to neutralise legal criticisms of the blockade, including arguments from French sociologist Raymond Aron that power politics had prevailed over law, by outlining the legal case in the journal *Foreign Affairs*.⁸³ However, he faced opposition from Harlan Cleveland of the International Organizations Office of the State Department, who feared unnecessary controversy, and who was concerned that the legal rationale for relying on regional agencies needed a great deal of refinement if it was ever to work 'as good international organization doctrine'. Cleveland argued that the UN Charter should not be interpreted as 'licensing any use of force by a regional group', and the doctrine that 'regional security actions are valid unless specifically rejected by the UN' gave 'too much license to regional arrangements'. There was the danger of playing into the hands of the Soviet Union, which would seize on any legal justification framed by the U.S. government that could be used for orchestrating the Warsaw Pact against an Iron Curtain state 'striving for freedom'.⁸⁴ Nonetheless, Dean Rusk and George Ball backed Chayes, who argued in *Foreign Affairs* that relying on the OAS as a regional agency did not undermine the status of the UN 'as the paramount organization', and that the UN had, 'through the Council and the Secretary-General' become 'actively involved in the effort to develop a permanent solution to

⁸¹ Laura Stanley and Philip Deery, 'The Menzies Government, the American Alliance and the Cuban Missile Crisis', *Australian Journal of Politics and History*, Vol. 59, No. 2 (2013), pp.178-95 (quotations pp.184, 185, 195).

⁸² Meeting between General Charles de Gaulle and Dean Acheson, Paris, 22 October 1962; and conversation between Adenauer and Dowling, 28 October 1962, *Cold War International History Project Bulletin*, Issue 17/18 (Fall 2012), pp.750-2 and 633-34 respectively.

⁸³ Chayes to Rusk, 29 November 1962, 611.3722/11-2962, RG 59, NARA II; and Raymond Aron, 'International Law', *New Republic*, 1 December 1962.

⁸⁴ Cleveland to Rusk, 15 November 1962, 611.3722/11-2562, RG 59, NARA II.

the threat to the peace represented by the Soviet nuclear capability in Cuba'.⁸⁵ Meeker weighed in, too, with an article in *The American Journal of International Law*, extending the effort to set a legal precedent by arguing that 'no settled law was ready at hand to deal with the action created by the clandestine Soviet introduction of strategic missiles into Cuba in 1962'.⁸⁶ For Meeker, international law needed to catch up with the use of the quarantine, which was a measured and reasonable response to a real threat.

Conclusion

The U.S. government's promotion of the legal case for blockade of Cuba during the missile crisis represented part of a broader effort to win support, including the President's TV and radio broadcast of 22 October, and briefings to leaders of NATO states and to 95 foreign ambassadors.⁸⁷ Although there was little genuine consultation with allies about how to respond to the discovery of the Soviet missiles,⁸⁸ allied backing was vital to the moral standing of American policy. Withana has maintained that the American government's 'skilful use of the ideology of international law' was 'an important factor' behind the U.S. victory, while 'relatively weaker references to the ideology of international law by Soviet representatives was a factor in shaping the outcome of Soviet acquiescence to U.S. priorities to remove Soviet missiles from Cuba'.⁸⁹ Yet there is a consensus that Khrushchev relented because the Soviet Union was in a position of military weakness in the Caribbean and because he recognised the danger of catastrophic escalation.⁹⁰ As has been seen, the Soviet Union occupied the legal high ground during the missile crisis, but was forced to retreat. The reservations of U.S. allies about the legal status of the blockade suggest that Moscow was more adept at making a case than might be recognised.

Some Washington officials were sincerely confident that the blockade was legally sound, with Leonard Meeker telling US representative to the UN Adlai Stevenson that with the 'quarantine' the United States had 'made some unexpected new law' suited to contemporary conditions.⁹¹ Yet others, such as Richard N. Gardner, had their doubts about the legal position, as has been noted. The missile crisis demonstrated the scope for inconsistency among government legal specialists, given how on occasions they may be required to provide an objective judgment in law of a particular policy, and then, regardless of the merits of the case, be obliged to advocate publicly the same or a similar policy.⁹² This was evident in Abram Chayes' initial reservations

⁸⁵ Abram Chayes, 'Law and the Quarantine of Cuba', *Foreign Affairs*, April 1963, pp.550-57.

⁸⁶ Leonard C. Meeker, 'Defensive Quarantine and the Law', *American Journal of International Law*, Vol. 57, No. 3, p.513.

⁸⁷ Ernest R. May and Philip D. Zelikow, eds., *The Kennedy Tapes: Inside the White House During the Cuban Missile Crisis* (Cambridge: Belknap, 1997), pp.214-15; on the briefing of western European governments, see NSC meeting, 21 October 1962, *FRUS 1961-1963 XI*, document 38.

⁸⁸ British Ambassador in Washington David Ormsby-Gore suggested that 'It cannot be said that other Governments were consulted with any intention of their advice being taken into account.' The administration's handling of the Cuban Crisis, 12 November 1962, CAB 21/5581, TNA.

⁸⁹ Withana, *Power, Politics, Law*, p.198.

⁹⁰ For example, Don Munton, 'Hits and Myths: The *Essence*, the Puzzles and the Missile Crisis', *International Relations*, Vol. 26, No. 3 (September 2012), p.316; Fursenko and Naftali, '*One Hell of a Gamble*', pp.284-85; and Radchenko, 'Cuban Missile Crisis', p.335.

⁹¹ Meeker to Stevenson, 29 November 1962, U.S. Mission to the UN, RG 84, NARA II.

⁹² See Bilder, 'The Office of the Legal Adviser', about the judge and advocate functions, pp.640-41.

about the lawfulness of a naval blockade of Cuba, and then, after the discovery of the Soviet missile bases, his legal evangelisation on behalf of the blockade irrespective of any doubts – concerning, perhaps, the validity of using the OAS without UN endorsement. There is a tension in vesting both the judge and advocate functions in the same officials.

Soon after the missile crisis, many jurists in the United States published articles in scholarly journals in which they endorsed the legality of the blockade.⁹³ In 1990, as the first Gulf War approached, Richard N. Gardner – now a professor of international law at Columbia University – argued that ‘since the Cuban missile crisis, the law has been in evolution, so stopping ships may no longer be an act of war’. He was therefore a little more optimistic than he had been in 1962, but there was still a need to tread warily, with Secretary of State James Baker III telling an interviewer in connection with action against Iraq that ‘the Administration is avoiding the words “blockade” and “quarantine” because under international law those terms can be interpreted as acts of war’. The word ‘interdiction’ was used instead.⁹⁴ Since then, jurists have been ambivalent about the legal merit of the blockade against Cuba in 1962, with some arguing that it represented a ‘peaceful blockade’, and others maintaining that in the absence of an armed attack it contravened the UN Charter.⁹⁵ The ‘ultimate judgment of history’ has not been as favourable as Chayes and his colleagues had hoped.

⁹³ See note 6.

⁹⁴ Morabito, ‘Maritime Interdiction’, p.14; and Clifford Krauss, ‘Confrontation in the Gulf; and Now the ‘B Word’ (Do not say Blockade), *New York Times*, 13 August 1990.

⁹⁵ Ingrid Detter, *The Law of War* 2nd edition (Cambridge: Cambridge University Press, 2000), p.313; accepts the legality of the blockade of Cuba, while Yoram Dinstein, *War, Aggression and Self-Defense*, 5th edition (Cambridge: Cambridge University Press, 2011), p.199, takes the opposite position. Von Glahn, *Law Among Nations*, p.658, notes that the blockade had both pacific and hostile characteristics.