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October 1, 1968

TO: The Secretary
FROM: L - Leonard C. Meeker
SUBJECT: Blockade of Cuba

The character of blockade

A blockade of Cuba would entail the use of armed force on the seas to interdict the commerce of Cuba.

International law does not recognize and give sanction to a so-called "pacific blockade". Blockade has long been regarded as an act of war, recognized and justified only in circumstances where a blockading country is entitled to use force against the blockaded country. For example, a State legally at war with another country could blockade the latter's ports. As another example, a State participating in individual or collective self-defense against armed attack would be entitled to blockade the ports of the attacking country; in the Korean conflict, the United Nations forces were entitled to blockade the ports of North Korea.

Charter of the United Nations

Declaration of war. Since the coming into force of the United Nations Charter, it has been legally doubtful whether any State is entitled to declare war on another. If attacked, a State is, of course, entitled to defend itself; Article 51 so provides. In such circumstances, the victim of the attack would perhaps be justified in making a declaration of war, although such a declaration would not alter or enlarge its rights under international law. Those rights,

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including the right to engage in hostilities and to impose a blockade, would flow not from the declaration of war but from the circumstances of the case, taken together with the provisions of the United Nations Charter and the rules of international law.

It would be my conclusion that a United States declaration of war against Cuba would not enhance our legal position if we were to blockade Cuba, but would impair that position. In the absence of a Cuban armed attack on the United States, such a declaration of war in itself might well be a violation of our obligations under the Charter and international law. Adequate justification for a blockade of Cuba would have to be found elsewhere than in an initial United States declaration of war.

Justifications for the use of force. Article 2, paragraph 4, of the Charter binds Members of the United Nations to "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 other manner inconsistent with the Purposes of the United Nations." This is an obligation not to use force -- including the imposition of a blockade -- against another country unless the use of force is sanctioned elsewhere in the Charter.

Article 51 sanctions the use of force in defense against armed attack. What has been done by and in Cuba so far would not constitute armed attack.

Provisions of the Charter authorizing collective action to meet a threat to the peace, breach of the peace, or act of aggression sanction the use of force in a situation where the Security Council or the General Assembly has decided upon or recommended the use of force to maintain or restore international peace and security.

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Article 52, paragraph 1, of the Charter, sanctions action by "regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations." A blockade of Cuba needs to be considered particularly in connection with this provision.

The Rio Treaty

The Rio Treaty of 1947 instituted a regional arrangement or agency for defense of the hemisphere. Article 6 of that Treaty provides:

"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 specifies the "use of armed force" as one of the measures on which the Organ of Consultation may agree for purposes of Article 6. Article 17 provides that "The Organ of Consultation shall take its decisions by a vote of two-thirds of the Signatory States which have ratified the Treaty." Under Article 20, "Decisions which require the application of the measures specified in Article 8 shall be binding upon all the Signatory States which have ratified this Treaty, with the sole exception that no state shall be required to use armed force without its consent."

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The establishment of Soviet long-range missile bases in Cuba could be characterized by the Organ of Consultation as a fact or situation endangering the peace of America. For the common defense and for the maintenance of the peace and security of the continent, the Organ of Consultation could agree upon the measure of blockade. A two-thirds vote would be required under Article 17. A blockade of Cuba would then be lawful as between Cuba and the other members of the OAS under the terms of the Rio Treaty.

Charter requirement of Security Council Authorization

There remains to be considered Article 53, paragraph 1, of the United Nations Charter, which provides that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council". It would be impossible to secure Council authorization for an OAS blockade of Cuba, since the USSR would be entitled to vote and would veto. Indeed, it is by no means clear that 7 affirmative votes could now be obtained in the Council. In addition to the USSR, Rumania, the United Arab Republic, and China would vote against authorization of a blockade. Seven votes could be obtained only if all 7 other Members of the Council were to vote affirmatively; this would mean, in addition to the United States, the United Kingdom, France, China, Chile, Venezuela, and Ireland. The vote of Ireland would be particularly doubtful.

Assuming an authorization from the Security Council to be unobtainable, could we successfully contend that a blockade of Cuba voted by the OAS did not constitute "enforcement action" within the meaning of Article 53? The term "enforcement action" has never been clearly defined. The Security Council has never determined any action taken by a regional organ to be "enforcement action". An argument could be made that an OAS blockade of Cuba would not constitute "enforcement action". In the first place, the OAS decision on blockade would be recommendatory rather than obligatory on the members of the OAS; none of them would be obliged to employ its

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armed forces in a blockade without its consent. Second, it could be argued that the measure of blockade voted by the OAS was not taken for the purpose of enforcing any decision or order upon Cuba, but was rather taken for the purpose of protecting the other countries of the hemisphere against the developing threat of Communist attack from the Cuban base. Even if a Soviet veto should prevent the Council from concluding affirmatively that the OAS blockade did not constitute "enforcement action", 7 votes might be obtainable in support of this position, and in any event 5 votes should be available to defeat a contrary motion.

Summary

1. There is no good legal basis for a United States declaration of war against Cuba at the present time. Such a declaration would impair our legal position rather than improve it.

2. A blockade of Cuba undertaken unilaterally by the United States in the present circumstances would subject this country to very telling charges of violation of the United Nations Charter and illegal use of force. In this connection, it should be observed that the Monroe Doctrine was a statement of policy and did not create a special legal regime for the Western hemisphere in which the United States is entitled to depart from the ordinary rules. This was the view taken by Charles Evans Hughes 40 years ago when he was Secretary of State. Over many years the United States has sought to effectuate the policy of the Monroe Doctrine through agreed collective arrangements among the American Republics. This is the understanding of the great majority of them today, as well as the understanding of countries elsewhere in the world.

3. The use of armed force, through blockade, to stop a build-up of Communist offensive capabilities in Cuba, would have substantial though not conclusive legal support if it were backed by an OAS decision under Articles 6 and 8 of the Rio Treaty. Security Council

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authorization under Article 93 of the Charter would be unobtainable, but some argument could be made that such authorization was not necessary. We could prevent Council determination that it was necessary.

4. To secure a two-thirds vote in the OAS for a blockade of Cuba would clearly be very difficult. To the extent that we are able to furnish convincing evidence to the OAS members of what has been taking place in Cuba, we may be able to improve our prospects for getting such a vote. Moreover, it could be helpful if as a preparatory measure the OAS were to call upon Cuba to permit impartial international inspection to determine the exact character of military preparations in Cuba.

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