attack, took such measures as in its judgment were necessary. In this case the measures, for obvious political reasons, were far short of the formal war of earlier days, which would have put third parties in the position of neutrals and imposed far greater restraints upon their trade. If the central act of self-defense was justified, the collateral effects upon the trade of third states, minor as they were in fact, could be overlooked. Complaints, if any, should be directed to the inefficiency of the procedures of collective security.

These procedures of collective security have indeed reduced the dimensions of the traditional right of self-defense recognized by international law from time immemorial. The law of the good faith of treaty obligations calls upon the Members of the United Nations and the parties to the Rio Treaty to seek the solution of situations involving a threat to the peace by the established procedures. But when these procedures fail, or prove inadequate, the fundamental right, implicit in the acceptance of all treaty obligations, returns. The illustration given by Senator Root in 1914 still holds good:

> The most common exercise of the right of self-protection outside of a state's territory and in time of peace is the interposition of objection to the occupation of territory, of points of strategic military or maritime advantage, or to indirect accomplishment of this effect by dynastic arrangement.[3]

The words "dynastic arrangement" are perhaps an understatement of the presence of the many thousands of Soviet troops in Cuba.

It is indeed to be hoped that in time a more effective collective security system may be established. For the moment we are confronted with a divided world, in which the possession of the atomic bomb with the possibility of delivering it from missile bases within reach of the opponent has made it possible for a single member of the community to challenge the whole group. But if self-defense has still a place in the code of international law, it is obvious that in good faith it must be interpreted narrowly. The imminence of the danger must be balanced against the absence of organized procedures immediately at hand for the prevention of the attack. Taking all the circumstances into account, it is believed that the President was fully within the law of self-defense in taking the position declared on October 22, and making effective the quarantine on October 24.

C. G. FENWICK

SOME COMMENTS ON THE "QUARANTINE" OF CUBA

The "quarantine" of Cuba in the fall of 1962 demands thoughtful consideration by all international lawyers. It would be most unwise to be dogmatic in reaching conclusions as to the legality under international law of the measures employed in that crisis. What follows is an effort to place this serious episode in perspective, and suggest some considerations

[3] "The Real Monroe Doctrine," 1914 Proceedings, American Society of International Law at 11; 8 A.J.I.L. 427 at 432 (1914).

that lend support to the actions taken. It would be anomalous, indeed, in the present world context to find the generally non-aggressive Power an aggressor, unless the case for so doing is very clear. The time is not yet ripe for a final assessment, nor is this the occasion for a detailed legal analysis. But it may be opportune to suggest that this important incident presented a new situation that cannot be fruitfully analyzed exclusively in terms of past formulations.

Some commentators, popular and scholarly, have attempted to assess the matter as if it occurred in a nineteenth-century factual setting. In that period, the typical hostile situation involved a narrow confrontation between two states, or two geographically localized groups of states. In that context, "war" and "neutrality" were assumed to be the legal categories which would be appropriate tools for preliminary analysis. As is well known, the community of states at that time asserted no collective interest in the maintenance of peace. Resort to war remained the legal right of every sovereign state, and there were no community proscriptions of resort to force, except in the limited category of "forceful measures short of war." The principal policy goals of the international legal system were to regulate the modalities of hostilities, and to prevent their extension to other territorially organized units. The legal precepts that evolved in this milieu cannot be transposed to the present situation without critical analysis. It may be added that the certainty and precision sometimes currently ascribed to these precepts would probably amaze their original proponents.

What is important in interpreting the past is to extract the basic principles that underlay these rules as applied in the then existent situation. From this viewpoint, the rules of war and neutrality achieved a reasonably just resolution of the conflicting interests of belligerents and neutrals, and thus served the then viable objectives of nation states. "Forcible measures short of war," a concept susceptible to doctrinal attack, nonetheless made sense in that context. It provided a desirable escape-valve between the absolutes of war and peace. It may have continuing vitality in application to the current situation. Such a concept recognized the existence of power and served both to discourage resort to extreme violence, and to achieve defensible results, despite the occasional grave abuses and obvious lack of adequate international reviewing machinery. A warlike pacific measure is certainly better than a full-scale war unless we lose touch with reality.

It is within this framework that there has been much talk of the requirements for a lawful blockade in war as well as the contrasting requirements for a "pacific blockade" as a justifiable measure short of war. Under nineteenth-century conditions, the asserted requirements were relevant. The purpose behind the rules was to prevent undue interference with neutrals in their ordinary trade, even in war, and to prevent any interference with neutrals except in "war." The latter proposition was the United States position, although others urged that the requirements for "pacific blockade" were not so strict.

The basic challenge to the use of these older principles comes of course from the fantastic development of destructive weapons that are not only different in degree but achieve a new dimension. The fact that thermonuclear weapons are presently almost exclusively possessed and controlled by the two super-Powers further accentuates the need for a re-evaluation of the whole subject of force. The offensive-defensive weapons argument, never solved under the older law, presents an even greater dilemma in a thermonuclear age.

It would be strange, therefore, if these older principles, developed as they were to meet a different factual and legal setting, would be relevant in the new context. Not only has weaponry development revolutionized the situation, but the legal scene has been transformed. Through the League of Nations Covenant, the Paris Pact and the United Nations Charter, the community of states has now asserted an interest in preventing, and a right to control, resort to violence except in certain defined situations. Organizations, both quasi-universal and regional in character, have been created for the purpose of asserting this interest and enforcing this right. The existence of these organizations for these purposes has added a third dimension to the two-sided nature of the nineteenth-century conflict situation.

It is within this new technological and legal structure that the validity of the quarantine must be judged. We must also recognize that these new legal norms and the organizational means for their enforcement have not yet achieved their goals or been uniformly successful in their implementation. Yet it is at least clear that the nineteenth-century legal regime has been displaced. The claims of neutral traders or of neutrality itself and the regulation of means of warfare are no longer central objectives, although the continuing importance of the latter is not to be minimized. The question to be decided is whether the purposes sought and the means employed in the Cuban question were consistent with the world community's current policy values in the same sense that the nineteenth-century institutions and concepts served that society's purposes.

Apart from differences in legal policy, what were the factual disparities that made the Cuban question wholly different from the earlier stereotype? Surely, it was not just Cuba and the United States that were confronting each other. The Soviet Union was not a third party neutral in the traditional sense. More realistically, it was the rival security systems that were in potential conflict. Moreover, the quarantine was not directed at neutral trade on the high seas in the conventional manner. It was a highly selective interdiction of missiles and related components, strategic weapons of tremendous destructiveness, whether "offensive" or "defensive." It followed a secretive introduction of such weapons outside of the Soviet Union for the first time and into a location where they could be used to threaten the United States and the Western Hemisphere, and also where they posed the threat of a drastic change in the balance of power on which the universal and regional security systems depend.

The objective of the quarantine was to stop the intensification of this

threat. The means employed were moderate in the circumstances. Vessels carrying missiles and related accessories were to be diverted from their projected destination. Only if diversion was refused, was military force to be used as a sanction. If such force had to be employed, the means authorized were to be the necessary minimum, presumably conventional arms, not a nuclear response to a nuclear threat. Fortunately, the actual course of events did not require the use of such force.

Is that which seems factually reasonable to be deemed legally objectionable? The answer is to be sought in the legal rules of the new community institutions, universal and regional, with their policy objectives previously mentioned. In this totally different factual and legal situation, most of the older rules are inappropriate; some of them, however, may remain relevant, and susceptible of adaptation to new conditions. Thus, even in the unorganized nineteenth century which did not proscribe war, self-defense was recognized as a customary right of states, and its proper exercise did not warrant condemnation. Does this basic concept retain its validity in the present situation?

These new community rules, as has been noted, asserted the right to control resort to violence except in defined conditions. Broadly speaking, the principal exceptions were collective action at the direction of the community and action taken in individual or collective self-defense within Article 51 of the Charter as the controlling instrument. Writers have differed as to whether Article 51 has preserved the customary right of self-defense of the older law or has narrowed that right to a response to only an "armed attack." The customary law recognized, as a minimum, a right of self-defense against a threat to the political independence or territorial integrity of a state which necessitated an immediate response, provided the response was proportional to the threat. The thrust of the modern system is to substitute a community response for unilateral resort to coercion, but there remains the necessity of unilateral or collective response when the community response is unavailable.

Such a necessity is universally recognized even in highly developed municipal legal systems. It would appear that recognition of such a right is more urgent in the international system where community enforcement is so easily frustrated. Nothing in the history of Article 51 requires a construction limiting self-defense to a response to an armed attack. Realism, common sense, and the destructive nature of modern weapons demand the retention of this customary right under adequate safeguards until the community system makes its use no longer necessary.

Assuming Article 51 is not restricted to an actual armed attack, it must still be determined whether the measures involved in the quarantine met the tests of the customary law. Whether there was a necessity in fact for immediate response presents a difficult question for decision. Hindsight could be an expensive luxury. It is not enough to suggest that a preliminary resort to the United Nations was a prerequisite, and that it would be interesting to know if it would have been successful. A threatened state must retain some discretion in its initial judgment of

necessity. Subsequent review will determine its validity. Inadequate as existing review procedures are, the unanimity of the Rio parties, and the general acquiescence by the overwhelming majority of United Nations Members suggests tacit agreement on the necessity.

With respect to the requirement of proportionality, it has already been indicated that the writer believes the response was factually proportional. It is submitted that it was clearly within the legal limits of proportionality as well. Nor was the response truly unilateral. The unanimous approval of the quarantine by the states parties to the Rio Treaty made the response also a collective one within Article 51.

The basic proscription of force in the Charter is contained in Article 2(4). For the reasons that follow in summary statement, it is believed that the quarantine did not transgress the terms or spirit of that provision. The quarantine was neither a threat or use of force against the territorial integrity or political independence of Cuba, nor for that matter, of the Soviet Union, the real party in interest. It was not in any other manner inconsistent with the purposes of the United Nations, since it was the exercise of individual and collective self-defense within Article 51 of the Charter. It was in fact anticipatory individual and collective self-defense permitted by that article. A realistic assessment of the situation would suggest that it was the Soviet-Cuban missile threat that breached the spirit, if not the letter, of Article 2(4).

This necessarily brief discussion of such a vital issue cannot do justice to its complexities. The purpose of this comment is to suggest that the doctrine of self-defense provides a substantial legal justification for the quarantine. This is not to imply that other grounds urged in support of the quarantine may not also be cogent, such as the State Department case, which is based essentially on the Rio Treaty.

No one who aspires to assist in the creation of a peaceful world order based on justice can remain content with the existing situation. Confrontation between great Powers is always dangerous. When such Powers are thermonuclear Powers, it is explosive. Intensive effort should be directed to the prevention of such confrontations in the future, either by disarmament agreements, or by agreements on the deployment of missiles, for example. The unending struggle to improve existing community institutions in order to make effective the new legal norms against violence must be continued with renewed dedication. We must never lose hope. In the fullness of time, the day may come when the historic right of self-defense may no longer be necessary.

It is indeed tragic that the community system is not as yet sufficiently effective and that self-defense continues to be a necessary safeguard for survival. Its invocation can only be justified by urgent necessity, and its exercise must be governed by proportionality. Ideally, judicial or some other form of community review should be ultimately determinative as to validity. In the absence of adequate provision for such review, the regional approval and the United Nations assessment that took place provided an imperfect substitute for community review. However imperfect,

it revealed wide community support for the legality of the measures employed by the United States.

Critics of the self-defense argument contend that self-defense is too dangerous an instrument, and therefore the United Nations Charter must be so construed as to forbid its invocation. But the alternatives seem even more dangerous. Conceding, as these critics do, that states whose survival is threatened will nonetheless react to such threats, such responses will then be either outside or above the law. Surely, this cannot be more desirable. The measures employed by the United States were not "preventive war." They were moderate measures, skillfully executed, whose purpose was to prevent war. Under all the circumstances, factual and legal, the quarantine of Cuba constituted substantial compliance with both the spirit and the content of the principles and procedures of the world community.

BRUNSON MACCHESNEY

THE SOVIET-CUBAN QUARANTINE AND SELF-DEFENSE

In an article appearing elsewhere in this issue Professor Quincy Wright concludes—among many other things, most of which are largely dependent upon this particular conclusion—that the quarantine imposed by the United States in October, 1962, upon the importation of offensive weapons into Cuba cannot be regarded as a lawful exercise by the United States of the right of self-defense. This conclusion Professor Wright seeks to establish by interpreting Article 51 of the United Nations Charter as limiting the traditional right of self-defense by states to reactions against "actual armed attack." Such an interpretation enables him, since the United States acted before any actual firing of the weapons, to avoid the difficult task of a careful appraisal of the United States' measure for its necessity and proportionality in total context. With greatest deference to Professor Wright, it may be suggested both that his conclusion is not a necessary one and that his reasoning is inimical to appropriate clarification under contemporary conditions of the common interest in a viable minimum world public order.

The broad outlines of a different approach may be indicated by briefly noting, first, the more important characteristics of the traditional, customary right of self-defense, secondly, the considerations which should guide a genuine, as contrasted with a spurious, interpretation of the whole United Nations Charter, and, thirdly, the more obvious factors in the context of this particular confrontation between the United States and the Soviets which should be taken into account in any serious assessment of the necessity and proportionality of the United States' action.

Historically, states have demanded, and reciprocally honored, a right of self-defense of considerable, though not unlimited, scope. In broadest formulation, this right of self-defense, as established by traditional practice, authorizes a state which, being the target of activities by another state, reasonably decides, as third-party observers may determine reason-