

BOOK REVIEWS

Nigel D. White, *The Cuban Embargo under International Law: El Bloqueo*, Abingdon/New York, Routledge, 2015, 208 pp., ISBN 9780415668170, £95
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The relationship between Cuba and the United States has ancient roots. It formally began in 1898 when Spain and the United States concluded the Treaty of Paris. Article 1 thereof established that the United States had title to occupy Cuba upon its evacuation by Spain. According to the same provision, such occupation was meant to be temporary and aimed at assuming and discharging ‘the obligations that may under international law result from the fact of its occupation, for the protection of life and property’.¹ Cuba gained independence in 1902, but the United States attached substantial conditions to this granting of independence which severely undermined the spirit of the agreement. However, as a matter of international law the conduct of the United States cannot be qualified as illegal, in part because Cubans only participated as observers in the Paris Treaty and in part because at that time the principle of self-determination of peoples had not yet emerged.

The conditions attached to the independence of Cuba – which included a prohibition on alliances with any other country and a reservation which allowed the United States to intervene in Cuba – created a legalized intervention by the United States in the political and economic life of the island. This scenario of significant dependence on the United States led to the 1959 revolution under Fidel Castro as the last resort to achieve full, unmediated sovereignty. One of the strongest expressions of this newly acquired sovereignty was the establishment of control by Cubans over their abundant national resources, which culminated in the expropriation of US-owned property by the revolutionary regime. The latter offered compensation for the nationalization of foreign property in accordance with the national standard whereas the United States argued the much higher international standard for compensation should have been applied. The two parties never reached an agreement on this issue and the controversy turned into a political confrontation culminating in the US economic embargo imposed against Cuba in 1960. Nigel White’s monograph examines the history of the Cuban embargo from the origins up to the present with

¹ A Treaty of Peace Between the United States and Spain, U.S. Congress, 55th Cong., 3d sess., Senate Doc. No. 62, Part 1 (1899), 5–11.

the aim to assess its legality under contemporary international law and provide a set of recommendations on how to start a normalization process of the relations between the two countries.

In the book, this prolonged and intractable dispute is analysed both chronologically and thematically. After a brief introduction, Chapter 2 examines the history of Cuba from the Spanish colonization to the 1959 revolution, while Chapter 3 explores the period of time from the US imperialism to the present. The subsequent chapters examine, in turn, the claims made by Cuba under international law (Chapter 4) and the mirror claims made by the United States (Chapter 5). The analysis shows that both parties have invoked international law to uphold their respective claims of self-determination and, in doing so, have relied upon the same principles of international law. The fact that international law has been interpreted in two radically different ways to justify two different courses of action under the aegis of legality reveals the true nature of the international legal system as both a neutral set of rules and a political tool. It is precisely this Janus-faced characteristic of international law that has allowed an escalation and exacerbation of the confrontation between the United States and Cuba in terms of a reciprocal accusation of violations of international law which has triggered a chain of actions and reactions. Against this backdrop, Chapter 6 examines the legality of the Cuban embargo as a countermeasure under international law. The remaining two chapters attempt to provide possible solutions to what today appears to be a complex and intractable dispute. Chapter 7 projects the problems raised by the imposition of the embargo against Cuba into a modern dispute over the nature of statehood and sovereignty, while Chapter 8 provides a set of recommendations on how to start a process of reconciliation between the two countries leading to a peace agreement.

The linear structure of the argument and the simple prose style of the book are a testament to the soundness of the theoretical bases of the inquiry which are mastered by the author to the point that, combined with a healthy degree of realism, the proposed set of recommendations amounts to an exercise into intellectual finesse. In particular, the main idea underlying the book is that academics and governments alike should resist the temptation of assessing the legality of the ongoing dispute between the United States and Cuba exclusively in the light of the modern categories of international law. By recognizing that international law is created by and operates in a restless fluid world of international politics, Nigel White adds a third dimension to an otherwise straightforward and rather flat inquiry into which specific rules apply to decide the lawfulness of the embargo. The argument put forward is that, if the ultimate purpose of international law is to facilitate a process of normalization of relations between states, it serves a restorative rather than a prescriptive function. Accordingly, the focus of the inquiry is on the restless politics of the embargo rather than its static, black letter law formulation as codified in the provisions of the Helms-Burton Act 1996. The latter is only the latest expression of the politics of the embargo, the tip of the iceberg of a much more complex legal issue.

The analysis of the legal history of the embargo unfolds along four main lines of inquiry – namely, the issue of self-determination, the idea of countermeasures as a form of self-help, the changing nature of the embargo and the role of

international law in providing a framework for the peaceful settlement of the dispute.

The basic concept on which the whole dispute about the Cuban embargo is based is that all people have a right to self-determination by virtue of their existence into organized communities. However, the concept of self-determination is as essential for the peaceful coexistence of states as it is contested. What in practice amounts to a legitimate exercise of self-determination is a matter of interpretation by the people exercising it in their territory. Thus, the book points out that Cuba and the United States have two radically different perceptions of what is an acceptable standard of internal self-determination, their divergences being based on two opposed understandings of the concept of 'a democratic society'. On the one hand, the United States' vision postulates the existence of freely elected state institutions. On the other hand, Cuba maintains that the revolutionary regime is equally representative of the will of the people.

Given the stage of development of international law at the time Cuba achieved (a form of conditional) independence, the book points out that the heavy intrusion in the economic and political life of the island by the United States cannot be classified as illegal by the standards of the time. Accordingly, the Cuban claims of self-determination which led to the expropriation of US-owned property were an extreme attempt to break with the colonial legacy at a time when the principle of self-determination was still crystallizing through the work of the General Assembly. Revolutionary as the Cuban revolutionaries were from a legal perspective, they attempted to replace established norms of international law governing compensation for nationalization of foreign property and, in that sense, acted in breach of existent international law. This is the legal background of the economic embargo imposed on Cuba in 1960 as a countermeasure for breach of the existing rules of international law regulating compensation.

At this point, when a clear violation of international law by one party is identified, the original vein of the book emerges. By placing the imposition of the embargo in context of the ideological environment of the Cold War, Nigel White adds another level of meaning to the *legal* nature of the embargo. He explains that the break-up of the relationship with the United States meant that Cuba needed another source of economic sustainment and it found its best ally in the USSR. That move led the Cuban revolutionary government to embrace the Communist ideology professed by the USSR. The latter, in turn, took advantage of the geographical location of Cuba to increase the confrontation with the United States. By the time the Cuban missiles crisis unfolded, the embargo had become a diplomatic weapon wielded by the US President to protect US national interests and Cuba had been classified as an outlaw state.

The measures contained in the embargo were further tightened when the Cuban military started intervening in Africa and Latin America in support of left-wing regimes in the 1970s. However, with the end of the Cold War and the dismemberment of the USSR, that threat to the US national security ceased to exist whereas the Castro regime survived. Thus, in an attempt to kill the Communist regime in its backyard, the United States justified the continuing embargo as a means to force a regime change in favour of one fully committed to upholding the principles of liberal democracy. The new attitude of the United States was codified into law in

the Helms-Burton Act 1996, thus becoming a tool of *national* policy in the hands of the Congress aimed at inflicting suffering to the Cuban population. That piece of legislation is still in force today.

The political context unveils the changing nature of the embargo as a diplomatic and political tool. The book shows that the evolution of the embargo over time has been accompanied by the simultaneous consolidation of areas of international law, especially in the fields of self-determination, human rights protection and state responsibility. An argument is therefore made that while the initial claim of compensation for the expropriation of US-owned property remains valid, the continued use of the embargo as a means to end the Castro regime has become a form of retaliation which does not comply with the modern doctrine of countermeasures as it is not proportionate to the undergone injury (the unpaid compensation) and not limited in time. On the other hand, Cuba's military interventions in Africa and Latin America in the 1970s and the systematic denial of civil and political rights by the Castro regime violate another set of established rules and principles of international law which would, in the eyes of the United States, justify the embargo.

Nigel White suggests that there is no straightforward solution to the prolonged dispute between Cuba and the United States. In particular, it seems unlikely that the removal of the Helms-Burton Act 1996 in itself would be sufficient to settle the dispute because the roots of the conflicts are much deeper. A better, and more realistic, approach would be to take steps towards the conclusion of a peace agreement aimed at both recognizing the wrongs of the past from both sides and consolidating the process of normalization of diplomatic and economic relations. Despite the recent steps taken by the Obama administration aimed at restoring diplomatic relations,² facilitating travel and remittances to Cuba by US persons,³ and authorizing certain commercial relations,⁴ the predictions of the book on the difficulty of removing the economic sanctions by the US Congress remain accurate. Yet the book is meant to support current and future developments in the US-Cuba relations by suggesting that international law has the capacity to complement the political willingness of the parties to reach a compromise. Such compromise could include the establishment of both judicial and non-judicial mechanisms to deal with the old issue of compensation and setting up commissions of inquiry to ascertain violations of human rights on both sides. Successful examples in which mechanisms governed by international law have been set up include the Iran-US Claims Tribunal and the UN Compensation Commission established by the Security Council in the aftermath of the First Gulf War. With regard to human rights, the monitoring mechanisms available under the two International Human Rights Covenants of 1966 and the optional protocols thereto appear to be the most suitable alternative.

A unique piece of scholarly literature, *The Cuban embargo under international law* stands out as a compelling reading for researchers and students of international

2 www.cfr.org/cuba/us-cuba-relations/p111113 (visited 19 April 2016).

3 www.whitehouse.gov/the-press-office/2014/12/17/fact-sheet-charting-new-course-cuba (visited 19 April 2016).

4 www.cfr.org/cuba/timeline-us-cuba-relations/p32817 (visited 19 April 2016).

law and international relations. The argument set out by the author is convincing and the breadth of sources covered is impressive. Perhaps the only area where the book falls somewhat short of expectation is its rather superficial discussion of the resolutions of the UN General Assembly condemning the embargo. That, however, does not detract anything from the quality of the analysis.

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Emily Crawford, *Identifying the Enemy: Civilian Participation in Armed Conflict*, Oxford, Oxford University Press, 2015, ISBN: 9780199678495 (hb), 288 pp., £60.00
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It is trite to say that warfare has existed almost since the beginning of humankind, and that the laws of war have developed from centuries of practice on the battlefield into a quite extensive treaty regime.¹ In this regard, the *jus in bello* (international humanitarian law / the law of armed conflict) has deep historical roots and constitutes amongst the oldest branches of international law.²

By contrast, wars have often been significant drivers of technological advancement, whose development has allowed for new and innovative ways in which to conduct activities on the battlefield. The technology and complexity of warfare continues to evolve, sometimes quite rapidly, giving rise to interesting questions as to how to apply these well-established legal principles in modern times. There certainly are challenges to be met in attempting to reconcile law that has emerged primarily over the nineteenth and twentieth centuries with the realities of twenty-first century technology and combat strategy.

Indeed, the principles of international humanitarian law have traditionally been regarded as being ‘one war too late’ or, as Emily Crawford puts it in her recently published book, ‘one war behind reality’.³ Similar to several other areas of law, this reflects the ‘reactive’ nature of international law, which typically develops only over a period of time rather than very rapidly. Indeed, in most cases, the ‘creation’ of new binding rules (or the adaptation of existing international law rules) generally arises in *response* to certain, perhaps unforeseen, situations, rather than beforehand.

The reality is that much of the codification of international law, particularly, as noted in this book, in areas where technology moves forward very quickly, is (and can only be) responsive in approach. This certainly extends to areas where humans

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1 There are now well over 100 instruments that comprise the *jus in bello* treaty regime: J. Saura, ‘Lawful Peacekeeping: Applicability of International Humanitarian Law to United Nations Peacekeeping Operations’ (2007) 58 *Hastings Law Journal* 479, at 488.

2 The first significant attempt (in more modern times) to codify the laws of war borne from the battlefield came in 1863, when American President Lincoln issued a General Order authorizing the so-called ‘Lieber Instructions’ or ‘Lieber Code’, which introduced a set of legal guidelines to be applied at the time of the American Civil War.

3 P. 230.