The Legality of United States Participation in Vietnam: An Appraisal

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The eyes of the world remain on Vietnam.[1] The reaction of reasonable men across the world swings between fear and hope; even as escalation, almost inevitably, continues, the chance of peace remains.

The conflagration in Vietnam confronts the international lawyer with an array of complex and significant problems. Once again, in the face of crisis, international law is shown to be embarrassingly impotent; without adequate fact-finding procedures; lacking clearly defined content; requiring the necessary inclusive infra-structure of international institutions; and even, perhaps, seeking consolidated community support. Instead, one is faced with enlarged national and exclusive decision-making, within the framework of a variety of pretexts. Thus, for example, we witness the United States assuming the role of keeper of the world security and—with Australia as a faithful disciple—attempting, by relatively unilateral action, to meet head-on what it sees as Communist aggression.

In pursuance of this effort, the United States is engaged in a global economic, diplomatic and military offensive of considerable magnitude and necessarily international law has been occasionally (if not often) invoked. American spokesmen argue that their country's stand in Vietnam is not only good policy, but also that it is legal. Indeed, the crux of the United States approach is that North Vietnam has committed aggression against the South, an essentially legal conclusion.[2] President Johnson and his associates have repeatedly claimed govern-

1 There is a growing general literature on Vietnam. Two useful collections of background material are: Raskin and Fall, *The Viet Nam Reader* (Vintage ed. 1965); and Gettleman, *Vietnam: History, Documents, and Opinions on a Major World Crisis* (Penguin ed. 1966) (hereinafter cited as Gettleman). Recommended for care and impartiality would be the factual work of Scheer, *How the United States Got Involved in Vietnam* (Center for the Study of Democratic Institutions, Santa Barbara 1965); and also *Peace in Vietnam: A New Approach in Southeast Asia* (a Report Prepared for the American Friends Service Committee 1966). Brief valuable reassessment is presented in Lord Avon, *Towards Peace in Indo-China* (Chatham House Essays 1966).

2 In this article the Republic of Vietnam will be referred to as South Vietnam, and the Democratic Republic of Vietnam will be referred to as North Vietnam.

mental respect for international law;[3] and in 1965 Secretary of State Rusk took his legal arguments on Vietnam to the forum of the American Society of International Law.[4]

But, in the context of international law and international politics, what is "legal"? Is the question of "legality" even appropriate?[5] While there is an obvious inclination of the international lawyer to leave situations of such high crisis to the pressures of power politics and contending national interests, the premise of this article is that the legal observer interested in both world peace and world justice has an appropriate and proper role as a relatively objective appraiser of past decisions. It is further submitted that, granting the numerous inadequacies of the international legal system, there does exist an interacting process of authoritive decision-making, wherein rules are formulated, adapted and applied, and by which (at least over a period of time) initially unilateral and national decisions are judged according to the expectations of the world community. This process of international evaluation must take into account the real interests of the participants, the necessity in a legal system of a correlation between authority and power, and the common interest of the world community.

Not all international lawyers, even in the United States, have succumbed to the legal arguments of the administration as to its action in Vietnam, and there is indeed some sharp dissent. This article attempts to articulate, as assayed from available sources, the premises of the argument that American action in Vietnam is legally justifiable, and the opposing views.[6] Not covered here are those questions relating

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3 The following words of Ambassador Goldberg are representative: "For though law alone cannot assure world peace, there can be no peace without it. Our national power and all our energies should operate in the light of that truth." Reported in the *New York Times*, 19 May 1966, p. 6, col. 4 (city ed.) at col. 5.

4 "Address by Secretary of State Dean Rusk", *Proceedings*, American Society of International Law 1965, 247.

5 This question is prompted in part by a statement of Abram Chayes, at the time Legal Adviser to the Department of State, in the course of discussing the Cuban quarantine of 1962. He said: "One is often struck at the generality and abstractions of the questions thought appropriate by scholars and publicists of international law and as well as by the Euclidean majesty of the discussion "Was the quarantine legal?" A question put in that form is bound to elicit over-generalized and useless answers. The object of a first-year law school legal education is to teach students not to ask such questions." Chayes, Remarks, reported in *Proceedings*, American Society of International Law 1963, 10, at p. 11.

6 The principle pro-administration sources are: Meeker, "The Legality of United States Participation in the Defense of Viet-Nam", a Memorandum prepared as Assistant Legal Adviser of the Department of State, reprinted in 54 *Department of State Bulletin* pp. 474-89 (28 March 1966) (hereinafter cited as Meeker); and Moore and Underhill, in collaboration with Professor Myres McDougal: "The Lawfulness of United States Assistance to the Republic of Vietnam", a Brief presented to the American Bar Association, reprinted in 112 *U.S. Congressional Record* pp. 14943-89 (14 July 1966)

to points other than international legality, namely the legal obligation of the United States to assist the Government of South Vietnam; the internal constitutionality of United States participation; and evaluation of the efficacy of present and alternative United States policy.

A synthesis of the claims forwarded in justification of United States participation in Vietnam will now be postulated separately. They are, in brief, that:—

1. South Vietnam is a nation;
2. North Vietnam has breached international rules prohibiting aggression, and has committed aggression against South Vietnam;
3. South Vietnam enjoys the right of self-defence in this circumstance;
4. and of collective self-defence;
5. even if South Vietnam is not a nation, propositions (2), (3) and (4) above still apply.

Claim 1: That South Vietnam is a nation

The basis of this claim, often a hidden premise in policy statements, is that South Vietnam satisfies those minimum requirements of statehood necessary for entry into the family of nations. Supporting evidence is found for this proposition in the fact that even before the Geneva Accords of 1954 there had been little historical unity, and, indeed, by the Potsdam Agreement of 1945 the country was divided at the 16th parallel. In 1952, further, South Vietnam was recommended for membership of the United Nations by the General Assembly (although this move was defeated in the Security Council by the Soviet veto). And neither the intention of the Geneva Accords nor the contemporaneous expectation of the participants at that time was to reduce this status of statehood; on the contrary the idea was the recognition of the *de facto* relationship, the cease-fire line of the 17th parallel taking on the character of an international boundary. Finally, and more convincingly, South Vietnam is today recognized by 60 countries and participates in 30 international organizations.[7]

The contending view, that South and North Vietnam are essentially one country, albiet temporarily divided, draws on two perspectives. First, the long historical quest by the Vietnamese people for independence and freedom from foreign control—a quest led, almost since

6 —Continued
(hereinafter cited as Moore and Underhill). A brief regurgitation is found in Deutsch: "The Legality of the United States Position in Vietnam", (1966), 52 *Am. Bar Ass, J.* 436. The most coherent statement of opposition to United States participation on legal grounds is the "Memorandum of Law of Lawyers' Committee on American Policy Toward Vietnam", reprinted in 112 *U.S. Congressional Record* pp. 2551-9 (9 Feb. 1966) (hereinafter cited as "Lawyers' Memorandum"); similar views are presented in Standard, "United States Intervention in Vietnam is not Legal" (1966), 52 *Am. Bar. Ass. J.* 627. An earlier attempt of appraisal is seen in Comment: "The United States in Viet Nam: A Case Study in the Law of Intervention" (1962), 50 *Calif. L.* Rev. 515.

7 Based on the same factors, this line of reasoning is willing to accord statehood to North Vietnam also.

the memory of man, against the French, Japanese and Chinese, by Ho Chi Minh—is emphasized. Secondly, within this different historical context, the Geneva Accords of 1954 are interpreted quite differently. They are read, it might be said, to say what they mean instead of what the United States would now like them to mean. The expectation of Geneva, therefore, is seen as one of a united Vietnam, under elections proffered only two years later (but, in fact, never held). Far from constituting an international border of permanence, the 17th parallel was designed as "a provisional demarcation line, pending reunification",[8] providing "recognition of the historical fact that Vietnam is a single nation, divided into two zones temporarily for administrative purposes pending an election".[9] The conclusion offered by this reasoning is that the affair is one to be worked out by the constituent parts of the country of Vietnam, within, at least, the international legal principles relating to third-party intervention in civil wars.

Claim 2: That North Vietnam has breached international rules prohibiting unilateral force and has thereby committed aggression against South Vietnam

There is general international agreement on the major premise of this claim, namely that, according to article 2, paragraph 4 of the United Nations Charter and the provisions of other instruments, the international community expectation is that armed force cannot be legitimately used to pursue national objectives. That is, military aggression is no longer legal. Complementarily, article 51 of the Charter preserves the exception of self-defence. There is room for differences of opinion, however, in both adding meat to the contentious bone of aggression (for the concept still escapes internationally agreed definition) and (as for any legal abstraction) in its application to concrete situations.

That South Vietnam is suffering from aggression from the North is the corner-stone of United States policy and legal arguments. It is oft-repeated. As put by Secretary of State Rusk:—

> "Viet-Nam presents a clear current case of the lawful versus the unlawful use of force . . . . Were the insurgency in South Viet-Nam truly indigenous and self-sustained, international law would not be involved. But the fact is that it receives vital external support, in training, men, in weapons and other supplies."[10]

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8 Lawyers' Memorandum, at p. 2553.

9 Lawyers' Memorandum, at p. 2556.

10 "Address by Secretary of State Dean Rusk", *Proceedings*, American Society of International Law 1965, 247, at p. 251. There is, directly to the contrary, the proposition that would have the United States the aggressor. Cf. for instance the more-or-less typical statement of U.S.S.R. Foreign Minister Gromyko to the General Assembly recently that: "The intervention of more than 300,000 American soldiers in South Vietnam, the barbaric bombing of the territory of the democratic Republic of North Vietnam, the military intervention in the affairs of Cambodia and Laos—all this is aggression." Reported in the *New York Times*, 27 Sept. 1966, p. 4, col. 5 (International ed.).

In spelling out Australian interests in the situation, Australian spokesman have broadly and willingly endorsed this categorization.[11] More inclusively, the communiqués of Manila and of the South-East Asia Treaty Organization (SEATO) unequivocally view North Vietnam as the aggressor.[12]

The task of accurate appraisal of this claim, containing as it does factual and legal assertions, is hedged with difficulty. Preliminary, it can be noted that, as Professor Falk recently stated, "it is the uncertainty of the facts connected with prior Communist intervention that makes the use of military power by the United States so much more controversial than self-defence against direct aggression of the Korean variety.[13]

American policy documents, spokesmen, legal scholars and observers seek to demonstrate North Vietnamese aggression by a number of factual claims, compounded into the fermenting of civil strife and rebellion, committing and encouraging acts of terrorism, breach of the cease-fire agreement of 1954, and armed attack by the use of North Vietnamese regulars.[14] Included in the supporting assertions are that: from the beginning training centres were established in the North to train both Northern and Southern revolutionaries; there was a constant flow of men, supplies and military equipment; there was incitement and provocation to rebellion by North Vietnamese press and radio; there was hostile political activity in the North actively endorsing the Viet Cong revolutionary forces; and at least since 1964 North Vietnamese regulars have participated in the fighting in large numbers.

Essential to this claim of Northern aggression is that assistance from the North provides a (or the?) substantial proportion of the revolutionary base in the South. A coincidental proposition is that, therefore, the revolutionary forces in the South have minimal popular support (and that which they do enjoy is prised by acts of terrorism). "There is no evidence", said Secretary of State Rusk in April 1965,

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11 See, e.g., Hasluck, "Australia and Southeast Asia" (1964), 43 *Foreign Affairs* 51; Paltridge, "Australia and the Defence of Southeast Asia" (1965), 44 *Foreign Affairs* 49; and Prime Minister Holt: "Australian Foreign Policy", an Address to the National Press Club, Washington D.C., 30 June 1966, reported in June 1966 *Current Notes on International Affairs*, 321. Cf. also Sir Alan Watt, "The Geneva Agreements 1954 in relation to Vietnam", *Australian Quarterly*, June 1967, pp. 7-23.

12 See, e.g., the Final Communique, 11th Council Meeting of SEATO, reprinted in June 1966 *Current Notes on International Affairs*, 343, which refers, representatively, to the "continuing armed attack" by North Vietnam.

13 Falk, "The International Regulation of Internal Violence in the Developing Countries", *Proceedings*, American Society of International Law 1966, at pp. 58-9.

14 These claims are variously put and substantiated. See, e.g., The United States Government White Paper of 1965, correctly titled "Aggression From the North: The Record of North Vietnam's Campaign to Conquer South Vietnam," reprinted in Gettleman at pp. 300-4; Meeker; Moore and Underhill. See also the strong view of Carver, "The Faceless Viet Cong" (1966), 44 *Foreign Affairs* 347.

"that the Viet Cong has any significant popular following in South Viet-Nam".[15] Similarly the Government White Paper of 1965 proclaimed:—

> "South Vietnam is fighting for its life against a brutal campaign of terror and armed attack inspired, directed, supplied, and controlled by the Communist regime in Hanoi."[16]

Consistently, also, the United States policy refuses to accord the opponents in the field any status of belligerency, implicitly claiming that the Viet Cong fail to meet any required standards of international law.[17]

To some observers, these persistent claims—despite their repetition and whatever burden of proof is involved—have not proved persuasive. Factually, most would agree, there was evidence of some assistance from the North at least prior to the United States decisions of escalation in 1964 (and indeed, given the context, it would be surprising if this were not the case).[18] Yet, as has been pointed out in opposition, the most official United States attempt at documentation, the White Papers of 1961 and 1965, glisten with generalities and lend themselves to criticism. A few case studies seek to establish massive Northern infiltration and the supply of weapons from Hanoi.[19] Likewise, the incitement by press and radio is not subjected to analysis;[20]

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15 "Address by Secretary of State Dean Rusk", *loc. cit.*, at p. 253. The brief of Meeker, likewise, speaks of the aggression from the North as "the critical military element of the insurgency"; Meeker, at p. 475. Some have, of course, hinted the opposite. Of special interest, perhaps, is the finding that, at least by the '60's, whole areas of the South were openly hostile to the central administration: Tanham, *Communist Revolutionary Warfare* (1961), at p. 111.

16 Gettleman, at pp. 300-301. One American writer has phrased the revolutionary front in the South as a "wholly owned subsidiary" of Hanoi: Carver, "The Faceless Viet Cong," (1966), 44 *Foreign Affairs* 347, at p. 362.

17 Whatever those standards might be. See, for a discussion of this aspect, Moore and Underhill, at p. 14592.

18 The perspective of Fall seems appealingly sensible. Says he: "Much has been written, on both sides of the ideological fence, about the Vietnamese emergency that is wholly or partly inaccurate. The present situation in Vietnam is neither due entirely to North Vietnamese aggressiveness, nor can the blame be laid at the feet of the oppressive and woefully inefficient Ngo Dinh Diem régime. The truth, as almost always in such cases, lies somewhere in between." Fall, "The Second Indochina War" (1965), 41 *International Affairs* 59.

19 In the case of the source of enemy weapons, for instance, the fact that weapons are freely available on world markets is ignored. Further, and more deceptively, no mention is made in the 1965 White Paper of such crucial points that in the three preceding years the Viet Cong captured—according to figures of the Department of State—twice as many weapons as they lost. This latter fact is revealed in Stone, "A Reply to the White Paper", reprinted in Gettleman, at pp. 335-41.

20 The general attribution to Hanoi radio, for instance, may be an oversimplification, in that at least some of these are replays of announcements originating in the South and elsewhere, where, it seems, the Viet Cong has considerable propaganda installations.

and the belligerent Northern political statements are culled from open political meetings producing policies of a united front.[21]

The impression continues, therefore, that the United States has either overplayed the extent of detailed control of the Viet Cong by Hanoi or underestimated the amount of indigenous support in the South. It is perhaps relevant to mention that the previously heralded "economic miracle" of the South was—if sound politics—unsound fact.[22] And more recent United States statements, by focussing on the current level of North Vietnamese commitment, tend to ignore the alternative view that the real struggle in Vietnam is a social and political one which took on its present form before 1960—the approximate date from which support from the North increased.[23]

Finally, to demonstrate Northern aggression, breach of the Geneva Accords of 1954 is invoked. It is pointed out that North Vietnam was a direct party to the military cease-fire and endorsed the final declaration of 1954. Although, in the light of the present crisis the exact status of the Accords would appear to be in doubt, Northern policy apparently continues to subscribe to the agreement.[24] Earlier, forces within the South were withdrawn in accordance with the cease-fire, and the North resorted to the complaint procedure before the International Control Commission.[25]

It is not without irony that South Vietnam and the United States, the two parties at Geneva who refused to join in the final declaration, should now fall back on the agreement to prove Northern aggression. For several years following 1954, Diem and others stated that the South was in no way bound by the Geneva Accords and manifested this hostility with appropriate State action. Later co-operation with

21 In other words there may be a distinction between the adoption of a provocative political policy and its implementation, a distinction that is not always appreciated. Thus the call in 1960 for a common front in the South is seen as "a renewal of the assault on South Vietnam". An interesting comparison might be statements made at the time of "Captive Nations Week" held in the United States in July 1959. It was said that the United States desired liberty for "conquered nations" and that "we clearly manifest to such peoples through an appropriate and official means the historic fact that the people of the United States share with them the aspirations for the recovery of freedom and independence". The legality of this action is scrutinized in Wright, "Subversive Intervention", 53 *American Journal of International Law* (1960), 521.

22 With those earlier (and occasionally still-encountered) assertions o f the economic miracle of the South, compare Dennis Warner's proposition that the "rural help programme did not exist. Land reform was a flop. Industry was insignificant, and the government was ridden with corruption." Warner, *The Last Confucian* (1963), at p. 114.

23 See Fall, "The Second Indochina War" (1965), 41 *International Affairs* 59, at pp. 66, 70.

24 "It is the unswerving policy of the Government of the Democratic Republic of Vietnam to strictly respect the 1954 Geneva Agreements on Vietnam." Address by Prime Minister Pham Van Dong to the National Assembly, 8 April 1965, reported in Aptheker, *Mission to Hanoi* (1966), at p. 113.

25 One American approach is to regard this apparent early compliance as a complete sham.

the International Control Commission was seen as a matter of grace. Undoubtedly, therefore, South Vietnam attempted to gain the benefits of the agreement—especially of the cease-fire—without the responsibilities.[26] It is now argued, incidentally, that if the South has in some way become obligated by the international agreement, the effect of aggression from the North would be to suspend such obligations.[27]

In its Special Report of 1962, a majority of the International Control Commission incorporated the finding of its Legal Committee that "there is evidence to show" that assistance in the forms of arms and personnel had come from the North and that the area had been used for perpetrating hostile activities in the South. This finding is (appropriately) relied on by the United States. It is unfortunate, however, that this finding is not presented in the context of past findings of the Commission or even other parts of the same report. The first reports of the Commission, for example, reflect the complete lack of co-operation of the Southern Government, rendering inspection of Northern complaints impossible. In 1956 the proffered election was not held. By 1957 the Commission recorded breaches of the Geneva Accords by South Vietnam by the introduction of United States personnel. The 1961 Report noted the extension of United States facilities and assistance. This led in 1962, finally, to findings (conveniently excluded from such sources as the White Paper) of serious breaches by the South, including the establishment of a United States Assistance Command, "as well as the introduction of a large number of United States military personnel".[28]

In addition to the factual difficulties, there is the legal one: Granted the various forms of assistance by the North, do they constitute international aggression within the prohibition of the use of military force in international relations? The continuing claim of the United States is, of course, that the above facts constitute "indirect aggression"—which is, after all, aggression, and should be so dealt with. In the words of Moore and Underhill, "such activities constitute highly intense attacks of such impact as to create in the target state a reasonable expectation that it must resort to the military instrument to preserve its political and territorial integrity".[29] Furthermore, adds one American legal opinion, the exact date of Northern aggression is immaterial, because "there can be no doubt that it had occurred before February 1965".[30]

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26 The view of Fall is felicitous: "... South Vietnam, in her own view, and in that of most Western observers, had in fact availed herself of the benefits of the cease-fire negotiated at Geneva. However, she had not assumed any of the responsibilities laid down as regards political relations with the northern rural state". Fall, "The Second Indochina War" (1965), 41 *International Affairs* 59, at p. 60.

27 See, e.g., Moore and Underhill at p. 14960.

28 These reports are reproduced in part in Gettleman, at pp. 174-99.

29 Moore and Underhill, at p. 14950.

30 Meeker, at p. 475.

Incitement and hostile propaganda, infiltration of foreign persons, using territory for hostile acts, and economic hostilities, are probably, within the expectation of the world community, and despite considerable variation in State practice, illegal. But do they, even collectively, constitute the form of coercive and intense aggression which, as claimed by the United States, would justify military retaliation of considerable magnitude?

There is a need, it is submitted, to spell out in more detail what combination of factors in general constitute such aggression. The key questions would appear to be: Granted some hostile acts, what quantity and quality are needed to constitute such aggression?[31] Then, in Vietnam, is this quantity and quality satisfied? In addition, who is to make this categorization? What is the relevance of the motivations and pretexts of intervention, and of the size, available resources and support of the contending parties? Finally, what is the effect on overriding requirements of world order of such categorization, both for this and future cases?[32]

In the Vietnamese escalation, one of these factors, which has been substantially neglected, could be crucial, namely the possible pretexts for North Vietnamese intervention. Any Northern claim that it was giving only incidental support to a legitimate South Vietnamese revolution is directly countered by American claims. But there is another possible pretext. A key political precipitate of the war would appear to be that after Northern forces initially withdrew within the terms of the Geneva cease-fire, the French hastily left, and the government in the South—with United States support—refused to go along with the 1956 elections.[33] As noted above, the South also committed

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31 Thus Meeker, for instance, in presenting the legal argument in favour of the United States, after reciting the factual elements, quickly concludes that these constitute international aggression.

32 A tenuous aspect of the United States position is that world opinion supports its classification of North Vietnam's assistance to the South as international aggression justifying an intense military response. Moore and Underhill, e.g., say: "The statements and documents from representatives of third party States as well as from States directly concerned indicate international recognition of this armed aggression by the D.R.V. against the R.V.N." (Moore and Underhill, at p. 14950). Cf. Falk's assessment that generally "It is far from self-evident that participation by the United States in a civil war is in any way proportional to the degree of external Communist influence rather than responsive merely to an anticipation that without intervention the results of the conflict will be to place in power a government inclined towards Communism." Falk, "The International Regulation of Internal Violence in the Developing Countries" *Proceedings*, American Society of International Law 1966, at p. 59.

33 The reason, it is generally conceded today, is that if the election had been held there would have been an overwhelming vote for Northern figures and especially Ho Chi Minh. Eisenhower, e.g., recorded: "I have never talked or corresponded with a person knowledgeable in Indo-Chinese affairs who did not agree that had elections been held at the time of the fighting possibly 80 percent of the population would have voted for the Communist Ho Chi Minh as their leader rather that Chief of State Bao Dai." Eisenhower, *Mandate for Change: The White House Years 1953-56* (1963), at p. 372.

other breaches of the Geneva Accords at an early date. Would such acts amount to sufficient provocation by the South so as to justify the intervention, to the extent that it has taken place, of North Vietnam? Moore and Underhill deny the validity of such an argument. Such offences as the South committed, they say, could not be considered an armed attack within article 51 of the United Nations Charter so as to permit self-defence, and a contrary conclusion would be "too disruptive of world public order".[34] While this response is most reasonable, it should still be noted that such minor coercions by the South might be viewed as justifying earlier and minor Northern aggressions which were only later expanded following enlarged American involvement.

Claim 3: That South Vietnam enjoys the right of self-defence and is exercising that right

Aggression and self-defence are two sides of the use of force, the illegal and the legal. To aggression, the use of military force is an appropriate response; a basic national right, self-defence was preserved as an ingredient of the world order by article 51 of the United Nations Charter. The United States claim, therefore, is that the requirements of aggression having been met (within Claim 2) in Vietnam, general principles allow the necessary and immediate response. Although article 51 speaks of "armed attack" only, this phrase is interpreted to include the "indirect aggression" presented in Vietnam.

The Lawyers' Memorandum places a different interpretation on article 51 and leads to the contrary conclusion. From this perspective: "Article 51 of the Charter marked a serious restriction on the traditional right of self-defence", in that response by military force is limited to occasions of "armed attack" only.[35] Eliminated, therefore, are both anticipatory self-defence and self-defence in response to aggression less than an armed attack. The activities of North Vietnam, meanwhile, even if aggression of sorts, did not, at the relevant stage of escalation, lend themselves to classification as an armed attack. Support for this view is found, so it is contended, in the intention of the framers of the Charter and the necessary overriding world policy of restricting the use of military force between nations.

Article 51 of the Charter also refers to the right of "members" of self-defence. South Vietnam is not, of course, a member of the United Nations, and this has led to the technical argument that consequently South Vietnam is not entitled to the right of self-defence.[36] It is difficult, however, in light of both its technicality and castastrophic policy implications, to take this argument seriously; better, then, to agree with Meeker that if South Vietnam is a nation it enjoys, as a right of statehood, the right of self-defence.[37]

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34 Moore and Underhill, at p. 14959.

35 Lawyers' Memorandum, at p. 2553.

36 Lawyers' Memorandum, at p. 2553—although the point is ambiguously presented there, being compounded with an argument that North and South Vietnam are not separate states.

37 See Meeker, at p. 476.

Claim 4: That the expectation of the world community permits collective self-defence, and the participation of the United States upon the request of South Vietnam satisfies this expectation

The practice of States indicates the expectation of legitimacy of assistance to another country in its defence from external attack. As a minimal requirement, it appears that there must be a request for aid from the legally constituted government, a condition which may be satisfied by the numerous requests for assistance by the Government of South Vietnam to the United States, and to other allies, such as Australia, to counter Northern aggression. Further, the permissive articles 51 and 52 of the United Nations Charter, which speak of regional or collective self-defence must be interpreted in the light of the practice of States and primary community policy that in turn show that such alliances need not, in fact, be strictly "regional". To eliminate the legitimacy of the involvement of SEATO on the technical ground that it is not "regional" in the geographic sense, says one opinion, would have "seriously detrimental consequences for international peace and security" and would, in effect, be contrary to the purposes of the Charter.[38]

The contrary argument has at times been strongly presented. Viewing the Charter as sanctioning only genuine regional systems, designed to preserve the inter-American arrangement and the like, it denies that the United States can be a genuine participant in an Asian security system. As for the argument based on SEATO, it is "a legalistic artificial formulation to circumvent the fundamental limitations placed by the United Nations Charter on unilateral action by individual members".[39] Moreover, the request for assistance by South Vietnam cannot be material in affecting this primary obligation of members in light of the "supremacy" clause of article 103 of the United Nations Charter, which provides that the Charter is to prevail over obligations under other international instruments.

Appended to article 51 of the Charter is the requirement that measures taken in individual or collective self-defence "shall be immediately reported to the Security Council". A strand of the American argument is that this requirement has been satisfied. The earlier United States attitude was that the matter was not one for the United Nations; in 1961 Secretary of State Rusk implied, for example, that this was because there was no threat to international peace within the meaning of article 33.[40] This policy was apparently reversed after the Tonkin Gulf incident in August of 1964, after which the Security Council met upon the request of the United States—without result. During February 1965 the United States sent two reports on

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38 Meeker, at p. 477.

39 Lawyers' Memorandum, at p. 2554. The same source is prepared to argue, incidentally, that the internal constitutional procedures of SEATO have not been met.

40 See Report of a Press Conference of Secretary of State Rusk on 8 December 1961, in (1961), 44 *Department of State Bulletin*, 1058.

further measures it had taken, and in January 1966 Ambassador Goldberg placed before the Security Council a draft resolution calling for immediate negotiations "among all the appropriate interested governments", in order to reach a Geneva-type agreement. Again, however, the response was not positive; only nine of the fifteen members even voted to discuss the matter, and the President of the Council adjourned. In his speech before the General Assembly upon the opening of the 1966 session, Ambassador Goldberg again openly called for peace through negotiations.

Almost certainly, the United States has not found in the world body the positive response it would prefer, as it did, for example, on Korea. All that can be said, as the State Department legal opinion is quick to point out, is that the United Nations "has not expressed criticism of United States actions".[41] Evident, also, is an effort to shift any burden of blame for this non-action by the world body from the possible unacceptability of United States policy to the inadequacy of the United Nations itself.[42] Meanwhile, the attitude of the Secretary-General has remained one of frustrated neutrality; diplomatically, he has not pointed to any of the parties as breaching either the Charter or general international law.[43]

Some observers think that the emphasis by the United States on unilateral action, leading to practically no co-operation with the United Nations, risks a breach of Charter obligations inasmuch as the "reports" have been scanty, few, and after the fact. Especially was this the case before 1964 when the United States avoided bringing its increasing involvement to the notice of the United Nations. This leads to another legal question: Would the failure to report measures taken mean that those actions could no longer be justified within the framework of self-defence of the Charter and that they would be thereby illegal? Such a result has, indeed, been argued.[44] But such a conclusion is hardly justified; it would be a severe sanction to attach to

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41 Meeker, at p. 479.

42 It is pointed out, for instance, that the Secretary-General has not, within the powers available to him, brought the matter before the Security Council. Meanwhile, it is said, the willingness of the United States to have the conflagration and aggression suitably treated by the United Nations has met with "an unfortunate" lack of response: Moore and Underhill, at p. 14955.

43 The various statements of U Thant make interesting reading. Generally speaking they have been interpreted in the United States as incorporating a lack of sympathy with the position of that country. U Thant has consistently suggested the cessation of the bombing on the North by the United States; the de-escalation of military operations; the inadequacy of the United Nations, where at least two of the participants are not represented, to deal with the crisis; and the need for negotiations between all parties concerned. Recently, he said that the conflict "should be related to the longing of the Vietnamese people for independence without any interference from outside". Reported in 3 *U.N. Monthly Chronicle* 36 (Aug.-Sept. 1966).

44 See Comment: "The United States in Viet Nam: A Case Study in the Law of Intervention", (1962), 50 *Calif. L. Rev.* 515. "By failing to report to the Security Council, the United States has lost any justification that Art. 51 might have provided." Ibid., at p. 529.

the failure to report, especially as the assumption is that the responsive action would otherwise be justifiable as self-defence, and is an unacceptable position in a world community dominantly relying on unilateral self-defence for the protection of its members.

There is a distinction between the right of South Vietnam and the United States to launch measures of self-defence and the acceptability of particular measures in fact taken. The latter must be assessed individually, after a detailed contextual analysis, according to the standards of international law. It must suffice here to note that the United States claims to satisfy the international requirements for its individual actions, including that of proportionality. Specifically, it has been mentioned that its raids on North Vietnam are carefully aimed to cause the cessation of Northern aggression; that the occasional bombing pauses demonstrate the veracity of this; that ground actions have been similarly confined; and that the number of troops, although substantial, does not approach the number purportedly required for success in a war of counter-insurgency.[45]

What of the United States involvement *vis-à-vis* the Geneva Accords? Once again, there is little agreement; on the one side United States statements continue to assert respect for the Geneva Accords and lament that this respect has not been reciprocated; on the other side opponents of United States policy accuse it of breaching the Accords. The United States position would appear to be that first, it is not bound by any agreement; and secondly, if it is, then it has not disregarded the Accords. At the 1954 conference, it will be recalled, the United States refused to join in the joint declaration. Instead its delegate made a unilateral declaration in which the country undertook to respect the agreement reached, and to refrain from the use of force consistent with article 2, paragraph 4 of the United Nations Charter, and he also gave notice that the United States would regard any aggression as a threat to international peace.[46]

A treaty, of course, cannot impose obligations on a nation not a party to it (with the exception of a general international law-making treaty) and, consequently, the United States was not strictly speaking subject to the Accords; nothing in the statement made by its delegate indicated "United States consent to be bound by the provision".[47] This approach, nevertheless, has its difficulties, as the United States would probably prefer to see North Vietnam respect at least the cease-fire. One American sympathizer has suggested, realistically, that: "While the United States is not a party to the Accords, it did by contemporaneous unilateral declaration agree, in effect, to respect them."[48]

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45 For a presentation of these claims in detail see, e.g., Moore and Underhill, at pp. 14954-5.

46. The unilateral declaration of the United States is reprinted in Gettleman, at pp. 164-5.

47 Moore and Underhill, at p. 14957.

48 Deutsch, "The Legality of the United States Position in Vietnam" (1966), 52 *Am. Bar Ass. J.* 436, at p. 440.

The legal opinion of a Department of State adviser takes a more sophisticated tack. On the one hand the various forms of assistance rendered to South Vietnam before 1961 "were justified as replacements for equipment in Viet-Nam in 1954 and for French training and advisory personnel who had been withdrawn after 1954".[49] On the other hand justification for the American build-up after 1961 is found in the aggression of North Vietnam and the changed circumstances resulting therefrom; under international law, a fundamental breach of an agreement by one party justifies appropriate non-compliance by the other parties. The aggression from the North constitutes this fundamental breach, and, therefore, "certainly justifies a suspension of the pertinent treaty terms consistent with the right of self-defence of" South Vietnam.[50]

This feasible argument is lacking in cogency in two respects. Certainly, for the earlier period, it can be said that the Accords did not permit foreign troops to be reintroduced as replacements as suggested. In any case, the purported justification on this basis was found unacceptable to the International Control Commission as early as 1957, before any substantiated claims of Northern aggression. The reply of Moore and Underhill is that the Accords were faulty, suffering from "a serious weakness" in that they only prohibited the introduction of foreign troops, and not a build-up of indigenous forces.[51]

Secondly, for the period after 1961, for which a variation on the theme of *rebus sic stantibus* or operation of changed circumstances upon treaty obligations, is invoked, the possible pretexts for the North's growing involvement are again avoided. In fact, of course, this point relates directly back to the issue of who is the aggressor, when, and in what way, and permitting what response.

Claim 5: That even if South Vietnam is not a nation, the principles of aggression, self-defence and collective self-defence still apply

This final composite claim, while put at times, has not been stressed because of the primacy of the claim that South Vietnam exists as a nation separate from North Vietnam. Yet it remains a central point of attack for legal critics, carrying with it complex implications.

Moore and Underhill, in their brief, are prepared to argue that even if South Vietnam is treated as a "temporary zone" and not as a separate state, the North would still be guilty of armed aggression against the South in contravention of the United Nations Charter, of general international law, and of the Geneva Accords. The intent and meaning of the Accords are crucial, for the spelling out of an international boundary—even between temporary zones—"makes the legal consequences radically different from those attending a civil war".[52] For elucidation, take the example of Korea or Germany. And, what is

49 Meeker, at p. 483.

50 Moore and Underhill, at p. 14959.

51 Moore and Underhill, at p. 14945.

52 Moore and Underhill, at p. 14943.

more: "The Hanoi regime is anything but the legitimate government of a unified country in which the South is rebelling against lawful national authority."[53]

Propelled by factual and policy differences, the alternate view sees United States participation as unjustified interference in a domestic battle. Within the area of Vietnam, then, there is a struggle by contending sovereignties. "This being so", the legal difference follows, "the action of the North Vietnamese, in aiding the South Vietnamese, to the extent that it has taken place, neither affects the character of the war as a civil war nor constitutes foreign intervention. It cannot be considered an armed attack by one nation on another." On the contrary, it is the United States who is "in fact a foreign nation *vis-à-vis* Vietnam; North Vietnam is not".[54]

The United States claim then continues that, because North Vietnam has breached the "internationally drawn cease-fire" of Geneva by aggressive acts, South Vietnam has the right to resort to individual and collective self-defence. In other words, one part of a temporarily divided state cannot be "legally overrun by armed forces from the other zone".[55] Collective self-defence? "There is nothing in the Charter to suggest that United Nations members are precluded from participating in the defence of a recognized international entity against armed attack because the entity may lack some of the attributes of an independent state", says Meeker.[56]

The international legal principles controlling the intervention of third parties in civil wars are, it is submitted, particularly hazy. There are two contextual situations which Vietnam might occupy that would call for the application of such principles, if ascertainable; if the war were viewed as a revolution in the South, only incidentally aided from the North, or if it were viewed as a normal civil war between North and South Vietnam. (Both of these positions are, clearly, contrary to the approach of the United States.)

There would appear to be at least three fundamentally different possible principles regarding intervention in civil war, each with some doctrinal support. Hall propounded the view, still popular because of its tendency to confine disputes, that neutrality must be maintained by third parties. The second view is that the legally constituted government may be assisted to retain effective control, but that belligerents may not be assisted. Finally, Vattel, and others since, suggested that nations have the option of assisting either the legal government or the belligerents, at least if the outcome is uncertain.

There is increasingly an overlap of civil and international war; with Vietnam in mind, President Johnson stated that "the old distinction between civil war and international war has lost much of its meaning" —particularly because of the launching of "wars of liberation" across

53 Meeker, at p. 477.

54. Lawyers' Memorandum, at p. 2556.

55 Meeker, at p. 477.

56 Meeker, at p. 478.

State boundaries by the Communists.[57] In practice, the United States attitude appears to be one of assisting the legally constituted government and of denying that outside aid can be legally given the rebel forces.[58] This would be consistent with the policy of the United States in Vietnam, and has led one respected critic of the United States stand generally to suggest that such an argument "offers the best available, although least invoked, legal justification for United States policies in Vietnam".[59] It can be noted, also, that the United States claims its policy to be consistent with the concept of self-determination, apparently thereby adding another element to the legitimacy of its response to requests by the legally constituted government.

State practice relating to intervention in civil wars appears to be considerably more pragmatic than any inhibiting legal principle, for a State will invoke any of the above three possible principles according to whether it favours the incumbent government or the rebels. It is difficult to escape the conclusion of Professor Friedmann that: "In the balance of international politics, the distinction between support for government as distinct from rebel movements, has become almost meaningless."[60]

For Vietnam, the implications of this view, if correct, are grisly. It would appear to provide adequate legal justification for American involvement in Vietnam upon the request of the South Vietnamese Government, and this would be the case whether the battle was viewed as a civil war between North and South or as a civil war between billegerents in the South and the Southern Government. To invoke this argument would be contrary, however, to current United States arguments. Furthermore, it has the danger of tending to justify North Vietnamese intervention, past or current, and of detracting from its character of international aggression.

Conclusions

The object of this article, obviously, has been to review the divergent views, and not to adjudge them. There is no doubt that the position in which the United States finds itself is relatively unique, and one wonders, therefore, whether the demand and need for legal justification is not commensurately greater. Or, conversely, should the demand and need for legal justification for its policies be diluted because of the noble proclaimed purposes of participation in Vietnam?

The lawyers of the Department of State have advised the President that the actions of the United States adhere to international legal

57 An Address by President Johnson, at Baylor University on 28 May 1965.

58 Cf. generally Sohn, "The Rôle of the United States in Civil Wars", *Proceedings*, American Society of International Law, 1963, at p. 208.

59 Falk, "The International Regulation of Internal Violence in Developing Countries", *Proceedings*, American Society of International Law, 1966, at p. 62.

60 Friedmann, "Intervention, Civil War and the Rôle of International Law" *Proceedings*, American Society of International Law, 1965, at p. 74.

expectations. As seen above, this assessment has not been without dissent. A small but respected group of international lawyers has specifically informed the President that, in their opinion, he has been wrongly advised as to the legality of the country's participation and that "the assumptions and justifications for our government policy do not appear to have support, either in law or fact".[61]

While, demonstrably, most nations conform to the expectations of international law most of the time, it unfortunately remains the case that in certain circumstances, and to meet the urgently-felt demands of national interest, nations will be prepared to at least risk being later found in breach of international law. In Vietnam, caught in the mainstream of the cold war and envisaged as a test against Communist aggression, the stakes are regarded as high. The inference would seem strong, therefore, that in the growing involvement in Vietnam, the United States has been prepared to engage in legal brinkmanship. Recently, specific efforts have been made to demonstrate the legality of participation. Whether the United States has, by arguments that are admittedly feasible, succeeded in persuading the world community must, it is submitted, await the clarification of fact and the judgment of history.

61 Lawyers' Memorandum, at p. 2556.