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John Norton Moore

James L. Underwood

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THE LAWFULNESS OF UNITED STATES ASSISTANCE TO THE REPUBLIC OF VIET NAM**†

JOHN NORTON MOORE and JAMES L. UNDERWOOD*

In recent months, critics of United States assistance to the Republic of Viet Nam have increasingly used legal arguments in their attacks on that assistance. They have asserted that the United States presence and

* John Norton Moore is Associate Professor of Law, University of Virginia; B.A. 1959, Drew University; LL.B. 1962, Duke Law School; LL.M. 1965, Univ. of Illinois; Graduate Fellow 1965-66, Yale Law School; James L. Underwood is Assistant Professor of Law at the University of South Carolina College of Law; B.A. Emory University, 1959; LL.B. 1962, Emory Law School; LL.M. 1966, Yale Law School.

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** This paper is presented as a brief for the lawfulness of the major outline of United States assistance to the Republic of Viet Nam—a policy which may share lawfulness in common with other alternatives—and is presented in the interest of obtaining a more complete exposition of the legal issues involved. It neither evaluates the alternatives available in the Viet Nam crisis nor argues for the present United States policy in Viet Nam, and is intended only to demonstrate that the United States policy in Viet Nam is a lawful policy alternative. This is not to divorce law from policy—any meaningful approach must do quite the opposite—but it is to recognize that in any given situation there may be a number of lawful alternatives. For a brief attacking the lawfulness of United States assistance to the Republic of Viet Nam see the *Memorandum of Law of Lawyers Committee on American Policy Toward Vietnam*, reprinted in 112 CONG. REC. 2551-59 (daily ed. Feb. 9, 1966). See also Friedmann, *United States Policy and the Crisis of International Law*, 59 AM. J. INT'L L. 857 (1965), and Wright, *Principles of Foreign Policy*, WORLDVIEW (February 1965), reprinted in, THE VIET-NAM READER 7 (Raskin & Fall eds. 1965) [hereinafter cited as VIET-NAM READER].

Since it is unnecessary for the conclusions reached, this paper does not consider whether the United States is legally *obligated* under international law to render assistance to the Republic of Viet Nam.

For general background documentation with respect to the Viet Nam conflict see STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 89TH CONG., 1ST SESS., BACKGROUND INFORMATION RELATING TO SOUTHEAST ASIA AND VIETNAM (Rev. ed. Comm. Print 1965) [hereinafter cited as *Background Information Relating to Southeast Asia and Vietnam*, Committee on Foreign Relations, United States Senate (Rev. ed. Comm. Print June 16, 1965)]; *Documents Relating to British Involvement in the Indo-China Conflict 1945-1965* (Miscellaneous No. 25 [1965], Command Paper 2834). See also *Hearings on S. 2793 Before the Senate Committee on Foreign Relations*, 89th Cong., 2d Sess., pt. 1 (1966).

† Since this paper first appeared in the *Congressional Record* in June, 1966 [112 CONG REC. 13232-33 (daily ed., June 22, 1966); 112 CONG. REC. 14943 (daily ed., July 14, 1966)]

activities in Viet Nam violate general principles of international law and the United Nations Charter. In support of these assertions, they argue that the Republic of Viet Nam is not a state, that the United States is merely intervening in a civil war, and that this intervention neither qualifies as self-defense under Article 51 of the United Nations Charter nor is otherwise legally justified. Although there is certainly room for choice and disagreement among the available policy alternatives, these legal arguments substantially misstate the case.

The present United States assistance to the Republic of Viet Nam is lawful under the most widely accepted principles of customary international law and the United Nations Charter. Since the Republic of Viet Nam has requested aid from the United States and other nations of the world to meet a situation with a significant component of outside armed aggression, there can be no question that the United States and the other nations responding with appropriate assistance are lawfully acting pursuant to the right of self-defense recognized under customary international law and the United Nations Charter.[1]

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so much of significance has been recorded with respect to the Viet Nam conflict that it would require another paper to adequately treat the new developments. On the theory that virginity may have its attractions we have reluctantly decided to leave the paper in its original form and to call to the attention of the reader that this paper reflects our assessment of the situation in early 1966 on the basis of materials then available. We might also add that although in early 1966 there were fewer sources for even semi-hard facts about the Viet Nam conflict, and for this reason we were sometimes forced to rely on newspaper accounts, today a host of good additional materials are available. For example, on the crucial questions of extent of military interaction between the Viet Cong and Hanoi prior to the first substantial increase in United States forces in late 1961 and prior to the commencement of regular bombing of the North in 1965, Douglas Pike's informative study of the Viet Cong is particularly helpful. (PIKE, VIET CONG, 1966). If anything, these additional materials strengthen our basic conclusion that United States assistance to South Viet Nam is a permissive defensive response to off-set at least substantial military assistance provided to the Viet Cong.

With respect to dialogue on lawfulness there have been several thoughtful articles critical of the lawfulness of United States policy which we feel should be called to the attention of the reader. In particular, Professor Richard Falk has written a scholary critique of the State Department Brief in the *Yale Law Journal* and Professor Quincy Wright has written a critical analysis for the *American Journal of International Law*. See, Falk, *International Law and the United States Role in the Viet Nam War*, 75 YALE L.J. 1122 (1966); Wright, *Legal Aspects of the Viet-Nam Situation*, 60 AM. J. INT'L. L. 750 (1966). Although we disagree with their general conclusion, we recommend that their arguments be studied and compared with those in this paper. For a reply to Professor Wright's article see Moore, *The Lawfulness of Military Assistance to the Republic of Viet Nam*, 61 AM. J. INT'L. L. —— (1967). For other recent treatments of the legal issues see Alford, *The Legality of American Military Involvement in Viet Nam: A Broader Perspective*, 75 YALE L.J. 1109 (1966); Partan, *Legal Aspects of the Vietnam Conflict*, 46 B.U.L. REV. 281 (1966).

We hope that despite the fact that this paper is now somewhat dated that it will provide balance to the current dialogue and that its somewhat heavy documentation will serve as a reference to materials not ordinarily encountered.

1. On February 21, 1966, the House of Delegates of the American Bar Association passed

These conclusions are based not on mere legalistic exercises but on the genuine shared expectations of the international community as developed through a long history of practices and authoritative communications and reflected in principles designed to ensure minimum world public order. The principal thrust of many of the more important principles of contemporary international law, both customary and as incorporated into the United Nations Charter, is to secure genuine freedom of choice to the peoples of the world about their own form of government. Thus, under customary international law, states have not only been accorded a most comprehensive right of self-defense but have also been authorized to give aid to the established governments of other states, when such states are attacked by enemies from without or within.[2] Similarly, the self-determination of peoples is stated as a principal goal of the United Nations and few of its goals have been more insistently sought in the practice of the organization; the Charter contains many provisions designed to preclude attacks, by any means, upon the territorial and political integrity of states; and the sum total of provisions in the Charter would, in the absence of an effective centralized peacekeeping machinery, appear greatly to enhance the authorization of states reciprocally to assist each other when subjected to attack.[3] These widely accepted principles are consistent with declared United States goals of complete self-determination for the people of the Republic of Viet Nam and the maintenance of minimum world order through the rule of law.

The following discussion will show point by point that the United States presence in Viet Nam is lawful under customary international law and the United Nations Charter, that the particular United States

a resolution affirming the lawfulness of the United States presence and activities in Viet Nam. The resolution stated in part: "[B]e [it] resolved by the American Bar Association that the position of the United States in Vietnam is legal under international law, and is in accordance with the Charter of the United Nations and the Southeast Asia Treaty. . . ." N.Y. Times, Feb. 22, 1966, p. 1, col. 7 (city ed.). See also the brief by Leonard C. Meeker, Legal Adviser of the Department of State, *The Legality of U.S. Participation In The Defense of Viet-Nam* (March 4, 1966) reprinted in DEP'T STATE BULL. (March 28, 1966); Deutsch, *The Legality of the United States Position in Vietnam*, 52 A.B.A.J. 436 (1966); the address by Secretary of State Dean Rusk 1965 PROC., AM. SOC. INT'L. L. 247; and Comment, *The United States in Viet Nam: A Case Study In The Law of Intervention*, 50 CALIF. L. REV. 515 (1962). This 1962 study is somewhat out of date, particularly with respect to the increased armed aggression from the D.R.V., the increased United States response and United States submission to the United Nations, but provides a useful analysis of the 1962 situation in Viet Nam under customary international law.

For a short statement endorsed by 31 professors of international law that the United States policy in Viet Nam is lawful under general principles of international law and the United Nations Charter see 112 CONG. REC. A410 (daily ed. January 27, 1966).

With respect to Australian aims in assisting the Republic of Viet Nam see Paltridge, *Australia and the Defense of Southeast Asia*, 44 FOREIGN AFFAIRS 49 (October 1965).

2. See the discussion and authorities cited at pp. 294-309 *infra*.

3. See generally McDOUGAL & FELICIANO, LAW & MINIMUM WORLD PUBLIC ORDER (1961).

activities in Viet Nam are lawful; that the United States has met its obligations under the United Nations Charter; and that the Geneva Accords support the United States position in Viet Nam. In particular, the discussion will show in detail that the Republic of Viet Nam is a state under international law and that today there are substantial expectations that the Republic of Viet Nam (South Viet Nam—the R.V.N.) and the Democratic Republic of Viet Nam (North Viet Nam—the D.R.V.) are separate and independent states under international law; that the Viet Nam conflict cannot be fairly characterized as a "civil war"; that the R.V.N. has requested assistance from the United States to meet armed aggression; that the present United States assistance to the R.V.N. is in accordance with the right of self-defense recognized under customary international law and the United Nations Charter; that the United States seeks a solution through the machinery of the United Nations; and that the United States assistance is supported by the Geneva Accords which have been fundamentally breached by the D.R.V. in its armed aggression against the R.V.N.

THE UNITED STATES PRESENCE IN VIET NAM IS LAWFUL UNDER CUSTOMARY INTERNATIONAL LAW AND THE UNITED NATIONS CHARTER

In examining the lawfulness of the United States assistance to the Republic of Viet Nam, it is important to distinguish between the lawfulness of the United States general presence in Viet Nam and the lawfulness of the particular United States activities in Viet Nam. When all relevant proscriptions are reviewed, it will appear evident both that the United States presence in the R.V.N. is lawful and that the use of the military instrument is well within the permissible limits of self-defense.

Under customary international law and the United Nations Charter, a recognized state such as the R.V.N. has the right to request and receive assistance from other states pursuant to its right of self-defense.[4] It is important to note, however, that even if the R.V.N. were not a recognized state under international law, and was instead a mere "temporary zone" not "qualifying politically as a state," there still would be no basis for suggesting that it would not be entitled to receive assistance pursuant to its right of self-defense when subject to armed aggression from another zone in violation of a major purpose of the international agreement establishing it. In fact, the United Nations action in Korea and the major thrust of contemporary international law and the United Nations Charter strongly indicate that even a temporary zone in an internationally divided country has the right to request and receive assistance in self-defense. One of the major purposes of the United Nations Charter is to authorize

4. See the discussion and authorities cited at pp. 294-309 *infra*.

collective measures for the suppression of acts of armed aggression, whether by United Nations action as such, or by collective assistance from individual states, until the United Nations is able to act. Moreover, clearly one state does not have the right under customary international law and the United Nations Charter to armed aggression against another.[5] And since there are substantial expectations today that the D.R.V. and the R.V.N. are separate and independent states under international law, any armed aggression by the D.R.V. against the R.V.N. is in violation of a fundamental principle of customary international law and the United Nations Charter. But again, it is important to note that even if the D.R.V. and the R.V.N. did not qualify as separate states under international law, but were instead merely separate "temporary zones" not "qualifying politically" as states, it is still clear that armed aggression by the D.R.V. against the R.V.N. would violate the same fundamental principles of customary international law and the United Nations Charter in breaching by force the core of the international agreement that established them in a situation not authorized by self-defense. Aggression in these circumstances, whether against a state under international law or against a mere "temporary zone" not "qualifying politically as a state" is still violative of fundamental principles of the United Nations Charter.

The Republic of Viet Nam Is A Recognized State Under International Law

The classical definition of a state under international law points to four factors: a people, a territory, a government, and capacity to enter into relations with other states.[6] The Republic of Viet Nam meets all of these qualifications. It has a current population of approximately 15 million, administers a territory in Viet Nam south of the 17th parallel of approximately 66,000 square miles,[7] has a widely recognized govern-

5. Article 2 §§ 3 & 4 of the UNITED NATIONS CHARTER provide:

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All Members shall 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.

There is substantial authority that this proscription binds nonmembers as well as members of the U.N., whether by its own force or as a rule of customary international law. See generally the authorities cited at pp. 294-309 *infra*, and note 248 *infra*.

6. See the statement of Philip C. Jessup in advocating the admission of Israel to the United Nations, reprinted in BRIGGS, THE LAW OF NATIONS 69-71 (2d ed. 1952).

7. Although no two sources agree perfectly on these population and area statistics, a recent Rand McNally Official Map of Vietnam, Laos and Cambodia puts the population of South Viet Nam at 15,900,000 and the area at 66,280 square miles. A 1963 State Department fact sheet on Southeast Asia puts the population at 14,520,000 and the area at 63,000 square miles. See Dept. of State Publication 7473, Far Eastern Series 118, released January 1963.

Although the Viet Cong exercise influence over a significant portion of this area, they do not remotely approach the status of the Saigon government with respect to international

ment,[8] and has repeatedly been recognized as having capacity to enter into relations with other states.[9] Similarly, at least since the Geneva Accords of 1954 the Democratic Republic of Viet Nam also meets these qualifications for statehood, although to a lesser extent with regard to international recognition.[10] And although the R.V.N. and the D.R.V. qualify as states even under these restricted classical requirements, there have been instances in which political entities have been recognized as states in spite of difficulty in meeting one or more of these requirements as, for example, was the case with the State of Israel in 1948.[11] In the final analysis, then, it is the expectations of the international community as manifested by their conduct toward a particular political entity which establishes its statehood. In this regard, probably the most important indicators of the expectations of the international community as to statehood are recognition and United Nations determinations. Thus it is said in *Oppenheim*, one of the leading international law treatises: "In recognizing a new State as a member of the international community the existing States declare that in their opinion the new state fulfills the conditions of statehood as required by International Law."[12] In fact, this author asserts in unnecessary extreme that it is the act of recognition itself which creates statehood: "Recognition, while declaratory of an existing fact, is constitutive in its nature."[13] Similarly, Article 10 of the Charter of the Organization of American States which is declaratory of the general international law in this respect provides: "Recognition implies that

recognition of governmental authority to administer and speak for this territory. Similarly, in light of this long continued international recognition, temporary loss of control by the Saigon government over portions of this territory in the course of civil strife largely precipitated by the defensive conflict against the D.R.V.—Viet-Cong, can not be validly regarded as reducing the established statehood of the R.V.N.

8. The Republic of Viet Nam is recognized by about 60 nations today and has *de jure* diplomatic relations with about 52 of these, including France, United Kingdom, West Germany, Brazil, Mexico, Switzerland and Ethiopia. A list of those nations may be obtained from the Embassy of Viet Nam, Washington, D.C. See also *Legal Status of South Viet-Nam*, Release 4/31b-865BT, Office of Public Services, Bureau of Public Affairs, United States Department of State.

9. This is discussed in more detail throughout this section but it might be noted briefly here that the Republic of Viet Nam is a member of at least 30 international organizations including 12 specialized agencies of the United Nations.

10. The Rand McNally Official Map of Vietnam, Laos and Cambodia puts the population of North Viet Nam at 17,500,000 and the area at 61,294 square miles.

The D.R.V. is recognized by about 24 nations. See Release 4/31b-865BT, Office of Public Services, Bureau of Public Affairs, Department of State.

11. See authority cited note 6 *supra*. See also BRIGGS, *op. cit. supra* note 6, at 66.

12. I OPPENHEIM, INTERNATIONAL LAW 127 (8th ed. Lauterpacht 1955). And Brierly says: "The primary function of recognition is to acknowledge as a fact something which has hitherto been uncertain, namely, the independence of the body claiming to be a State, and to declare the recognizing State's readiness to accept the normal consequences of that fact. . . ." BRIERLY, THE LAW OF NATIONS 124 (4th ed. 1949).

13. OPPENHEIM, *op. cit. supra* note 12, at 128.

the State granting it accepts the personality of the new State, with all the rights and duties that international law prescribes for the two States."[14]

In addition, as Professor O'Connell points out, United Nations determinations are also important indicators of statehood: ". . . the United Nations Charter allows membership only to States, and decision on membership would seem to be conclusive on the question of *de facto* Statehood."[15] Moreover, Professor Briggs has written that: "[A] determination [by the General Assembly of the United Nations] that . . . [a state has] the capacity to accept and perform the obligations of the Charter is a recognition of . . . statehood and international juridical capacity, whether or not . . . [it is] admitted to the United Nations."[16] It should also be pointed out that there are essentially no major differences in consequences under international law whether recognition is *de facto* or *de jure*.[17]

In the light of these general principles of international law the next sections will examine the international status of the Republic of Viet Nam and its predecessor governments and the Democratic Republic of Viet Nam. This examination will look at the international status of these communities prior to the Geneva Accords of 1954, will discuss the effect of the Geneva Accords on that status, and finally will examine their status today, nearly twelve years after the Geneva Accords.

STATUS PRIOR TO THE GENEVA ACCORDS OF 1954

Historically, the territory comprising all of Viet Nam has been divided between rival political factions or separate government units during a substantial part of its history.[18] In the words of Anthony Eden: "Indo-

14. See BRIGGS, *op. cit. supra* note 6, at 101.

15. I O'CONNELL, INTERNATIONAL LAW 169 (1965). "In order to be admitted to membership in the United Nations, the applicant must first of all fulfill the requisite conditions; one of them is that it be 'a State.'" Liang, *Who Are the Non-Members of the United Nations?* 45 AM. J. INT'L. L. 314, 316 n.11 (1951).

16. Briggs, *Community Interest In the Emergence of New States: The Problem of Recognition*, 1950 PROC. AM. SOC. INT'L LAW 169, 176.

17. "Although for political purposes *de facto* recognition has sometimes been regarded as provisional or limited, the legal consequences of *de facto* and *de jure* recognition are essentially the same. The distinction is thus properly a political rather than a juridical distinction, and is so regarded by contemporary doctrine." BRIGGS, *op. cit. supra* note 6, at 129.

See also I O'CONNELL, INTERNATIONAL LAW 176 (1965). "Since international law is indifferent to the form of recognition any practical distinction between recognition *de facto* and recognition *de jure* must be discovered, if anywhere, in municipal law." *Ibid.*

18. See generally DO VANG LY, AGGRESSIONS BY CHINA (2d ed. 1960); NGUYEN-VAN-THAI & NGUYEN-VAN-MUNG, A SHORT HISTORY OF VIET-NAM (1958); Jumper & Normand, *Vietnam: The Historical Background*, from KAHIN, GOVERNMENT AND POLITICS OF SOUTHEAST ASIA 375-390 (2d ed. 1964), reprinted in GETTLEMAN, VIET NAM: HISTORY, DOCUMENTS, AND OPINIONS ON A MAJOR WORLD CRISIS 10-28 (Fawcett ed. 1965).

China had no tradition of unity, and there was little in common between the rich south and the overpopulated north."[19] In recent times, Viet Nam was composed of several French territories themselves in turn parts of the larger French Indo-China, which during the Second World War was largely controlled by the Japanese. Following World War II, pursuant to the Potsdam agreements of 1945, Viet Nam was divided at the 16th Parallel between the British and the Chinese commands for the purpose of accepting the surrender of the Japanese troops in Indo-China. During this brief period of occupation in 1945-46, the Chinese allowed the Democratic Republic of Viet Nam under Ho Chi Minh to become entrenched principally in North Viet Nam as the government of Viet Nam, while the British subsequently encouraged return of French colonial government beginning in South Viet Nam and moving North and which also claimed sovereignty to all of Viet Nam.[20] Although territory

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Dr. B.S.N. Murti has written:

> As far back as 17th and 18th century, Vietnam was divided roughly along the 16th Parallel between Tonkin in the North and Cochin-China in the South. The Dong Hoi Wall, which was built in 1631 and was more than 100 kilometers long, 3 meters high and 6 meters broad at the bottom at certain places, was an impregnable thing located between the South and the North. . . . Thus geography, history and politics met for centuries somewhere near 16th Parallel in Vietnam."

MURTI, VIETNAM DIVIDED 27-28 (1964) [hereinafter cited as MURTI].

For an official British view focusing on events since World War II see *Documents Relating to British Involvement in the Indo-China Conflict 1945-1965* (Miscellaneous No. 25 [1965], Command Paper 2834), at 5-17.

> Viet-Nam had been partitioned before. Apart from divisions which had occurred in earlier centuries, the country had been split into two zones by the Potsdam arrangements in 1945; indeed, the partition of 1954 repeated, except for the difference of one degree of latitude, the partition of 1945, and was in fact the consequence of that partition, for it was the occupation of northern Viet-Nam by Chinese forces that enabled the Viet Minh to consolidate their grip on that part of the country to such a degree that it proved impossible to dislodge them.

Id. at 17.

19. EDEN, FULL CIRCLE 88 (1960).

20. This is a greatly condensed version of a complex situation. For more detail see *Documents Relating to British Involvement in the Indo-China Conflict 1945-1965* 5-12, 47-52 (Miscellaneous No. 25 [1965], Command Paper 2834), and NGUYEN, *op. cit. supra* note 18 at 323-46.

Although in the short period prior to the arrival of British occupation forces in southern Viet Nam the D.R.V. had proclaimed independence and sovereignty over all of Viet Nam, its provisional government was proclaimed in Hanoi and apparently its principal control was in the North. According to the British Foreign Office: "The Democratic Republic claimed sovereignty over the south as well as the north, and in Saigon a Communist-controlled Provisional Executive Committee for South Viet-Nam was set up. In practice, however, there was no government in Saigon or anywhere else in southern Viet-Nam, and looting and attacks on French nationals were common occurrences." *Documents, supra* at 7.

B.S.N. Murti has written:

> The Democratic Republic of Vietnam was ruling in the area North of the 16th Parallel as a sovereign State between August 1945 and December 1946. It was in effective control of this area and there was no French interference during this period.

both North and South has changed hands since then, at least from that time until the present, there have essentially been two separate governments in Viet Nam controlling different territories, developing along different ideological lines and both at least until recently, claiming sovereignty over all of Viet Nam.

In June 1948, the French High Commissioner for Indo-China signed a declaration recognizing the independence of the State of Viet Nam as an associated state within the French Union,[21] and in 1949 and 1950 pursuant to the Elysee Agreement this status was achieved.[22] Although the agreement did not effectively provide complete independence to the French recognized Boa Dai government at that time, it and subsequent French actions did create a substantial international status for the Bao Dai government which was in the next few years recognized by at least thirty states,[23] a number which would grow to about thirty-five prior to

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. . .

During this period, in the area South of the 16th Parallel, the French were brought back for civil administration and the revolutionary Government set up was dispersed within a few weeks and during the period from August 1945 to December 1946 the French were in effective control of that area. According to *de facto* doctrine, therefore, before the civil war there were in fact two sovereign authorities—the Democratic Republic of Vietnam as a sovereign State in the North and the French colonial rule in the South.

MURTI, 171. But see Isaacs, *Independence for Vietnam?* in GETTLEMAN, VIET NAM: HISTORY DOCUMENTS AND OPINIONS ON A MAJOR WORLD CRISES 37, 40-45 (Fawcett ed. 1965).

21. 1947-1948 DOCUMENTS ON INTERNATIONAL AFFAIRS 736-37 (Royal Institute of International Affairs 1952).

22. 1949-50 DOCUMENTS ON INTERNATIONAL AFFAIRS 596-609 (Royal Institute of International Affairs 1953). *Documents*, *supra* note 20 at 10-11.

For a discussion of these agreements and the Pau agreements of 1950 see SURVEY OF INTERNATIONAL AFFAIRS 1949-50 427-28, 432, 435-36, 437-38 (Royal Institute of International Affairs 1953). "With the regulation of these common services France [in 1950] relinquished control over the internal affairs of the Associated States." *Id.* at 438.

23. Vietnam [the State of Viet Nam] now has a government freely appointed by the head of the State, national representation and its own administration and army. Its existence as an international entity has been recognized by more than thirty powers. It participated in the San Francisco Conference on the Treaty of Peace with Japan; it belongs to many international bodies which are listed for members of the Security Council in document S/2756.

Statement of Mr. Hoppenot, of the French delegation to the United Nations, made in the Security Council on September 18, 1952. U.N. SECURITY COUNCIL OFF. REC. 7th year, 602nd meeting 16 (S/PV.602) (1952).

[The State of Viet Nam] . . . has been recognized by more than thirty nations, and . . . has been admitted to membership of most of the United Nations specialized agencies. Furthermore, . . . [it is a member] of the Economic Commission for Asia and the Far East, and . . . [has] participated in various important international conferences and . . . [is party] to several international conventions.

On the basis of all these facts my Government is satisfied that Vietnam . . . [has] attained a full measure of sovereignty and independence. For these reasons the Netherlands recognized . . . [Viet Nam] in April 1950 as [a] freely associated

the Geneva Accords.[24] Pursuant to this legal status, the State of Viet Nam was given legal authority over many internal matters and was able to enter into some treaties in its own name. In particular, on June 18, 1952 it ratified the Treaty of Peace with Japan.[25] And on November 5, 1952 it accepted the jurisdiction of the International Court of Justice with respect to disputes arising under this Japanese Peace Treaty, again in the name of the State of Viet Nam.[26] Most importantly, however, in 1952 it was recognized as a state by the United Nations. Pursuant to a French draft resolution to admit the Bao Dai government of the State of Viet Nam to the United Nations, the Security Council on September 19, 1952 voted 10 to 1 in favor of admission.[27] The Soviet Union cast the only vote against the resolution, but this negative vote by a permanent member of the Council prevented the adoption of the resolution. In response to this Soviet "veto," on December 21, 1952 the General Assembly of the United Nations adopted a resolution by a vote of 40 to 5 with 12 absten-

> . . . [State] of the French Union. By this act my country indicated more than two years ago, that it was satisfied that these three countries [Viet Nam, Laos and Cambodia] were sovereign States.

Statement of Mr. Von Balluseck, of the Netherlands delegation to the United Nations, made in the Security Council on September 18, 1952. U.N. SECURITY COUNCIL OFF. REC. 7th year, 602nd meeting 19 (S/PV.602) (1952).

Also see I OPPENHEIM, INTERNATIONAL LAW 174 (8th ed. Lauterpacht 1955).

> Some members of the Union, such as Vietnam, Cambodia and Laos, seem to have acquired a certain degree of independent international status, including the power to make treaties. In recognising in 1948 the independence of Vietnam, France declared that the independence has no other limits than that implied in Vietnam's associate membership of the French Union. Vietnam undertook to respect the rights and interests of French nationals, to ensure respect for the principles of democracy and to give preference to French advisors and experts.

Ibid.

> The declaration [of 1948] was confirmed by a French law of February 2, 1950, which also covered the similar cases of Laos and Cambodia. . . . The independence of these three States was recognised soon after by a number of other States, including the United States of America and the United Kingdom.

Id. at 174 n.5.

And see generally SURVEY OF INTERNATIONAL AFFAIRS 1949-50 427-31 (Royal Institute of International Affairs 1953).

24. For the figure of thirty-five see the speeches by French Foreign Minister Bidault made at the Geneva Conference on May 8, 1954, and May 14, 1954. *Documents Relating to the Discussion of Korea and Indo-China at the Geneva Conference* (Miscellaneous No. 16 [1954], Command Paper 9186). Great Britain Parliamentary Sessional Papers, XXXI (1953/54), at 109 & 133. For the possibility that 33 nations may have been the maximum number recognizing the State of Viet Nam prior to the Geneva Accords see AMERICAN FOREIGN POLICY—CURRENT DOCUMENTS 121 n.3 (1958).

25. 136 U.N.T.S. 46-47 (1952); I OPPENHEIM, INTERNATIONAL LAW 174 n.4 (8th ed. Lauterpacht 1955).

26. 150 U.N.T.S. 147-149 (1952).

27. U.N. SECURITY COUNCIL OFF. REC. 7th year, 603rd meeting 11 (S/PV.603) (1952). For the Security Council debates on this resolution see *Id.* 602nd meeting 15-20; 603rd meeting 1-11.

tions to the effect that the State of Viet Nam was a state qualified for membership in the United Nations, and calling on the Security Council to take note of this General Assembly determination.[28] The resolution said in part:

"[The General Assembly] *Determines* that Vietnam is, in its judgment, a peace-loving state within the meaning of Article 4 of the Charter, is able and willing to carry out the obligations of the Charter, and should therefore be admitted to membership in the United Nations . . ."[29]

By this resolution, the United Nations recognized the Bao Dai government of the State of Viet Nam as representative of a state under international law. It should be pointed out that this recognition of the Bao Dai government of Viet Nam was made by the United Nations despite arguments by the Soviet Union that Ho Chi Minh's Democratic Republic of Viet Nam was the only government of Viet Nam entitled to admission to the United Nations.[30] A Soviet draft resolution to this effect to admit the D.R.V. as the sole representative of the State of Viet Nam was rejected in the Security Council by vote of 10 to 1.[31]

As further evidence of its international status at this time, the State of Viet Nam (the Bao Dai government) was a member of the United Nations Educational, Scientific and Cultural Organization, the Food and Agricultural Organization, the World Health Organization, the International Telecommunication Union, the International Labour Organization, the Universal Postal Union, and the Economic Commission for Asia and the Far East.[32]

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28. The Ad Hoc Political Committee of the General Assembly voted on December 19, 1952 by a vote of 38 to 5 with 16 abstentions to recommend admission of Bao Dai's State of Viet Nam to the United Nations. U.N. GEN. ASS. OFF. REC. 7th Sess., Ad Hoc Pol. Comm. 318 (A/AC.61/SR.50) (1952). A copy of this resolution appears in U.N. GEN. ASS. OFF. REC. 7th Sess., Annexes, Agenda Item No. 19, at 10 (A/2341 & Corr. 1) (1952). The General Assembly voted for this resolution as discussed in text at U.N. GEN. ASS. OFF. REC. 7th Sess., Plenary 410 (A/PV.410) (1952).

There is some authority that a vote for the admission of a state to the United Nations "implies recognition, at least for those members who vote for it." I O'CONNELL, INTERNATIONAL LAW 169 (1965).

29. U.N. GEN. ASS. OFF. REC. 7th Sess., Annexes, Agenda Item No. 19, at 10 (A/2341 & Corr. 1) (1952).

30. U.N. SECURITY COUNCIL OFF. REC. 7th year, 603rd meeting 9 (S/PV.603) (1952).

31. *Id.* at 19. Although the resolutions for the admission of Viet Nam, adopted by the Security Council and the General Assembly, did not on their face indicate which government of Viet Nam was being recommended for admission, this Soviet draft resolution calling for the admission of Ho Chi Minh's Democratic Republic of Viet Nam, which was defeated, and the debates themselves, made it evident that the Security Council and the General Assembly had voted to admit Bao Dai's State of Viet Nam. See particularly the remarks of Mr. Malik, the delegate of the U.S.S.R. *Id.* at 2, 7 & 8.

32. *Id.* at 1-2.

This substantial recognition by other nations of the world, membership in international organizations, conclusion of treaties in its own name, and United Nations recognition indicate that as early as 1952 the State of Viet Nam had substantial recognition as a state under international law.

This international status was further reinforced when in June, 1954 France signed a treaty with the State of Viet Nam which by its terms granted the State of Viet Nam complete independence as of June 4, 1954.[33] Subsequent to the signing of this treaty but prior to the Geneva Accords, the leadership of the State of Viet Nam substantially passed from Bao Dai to Ngo Dinh Diem, who Bao Dai had appointed as the new Premier of the State of Viet Nam.[34] Premier Diem formally organized his government on July 7, 1954. [35] Thus prior to the Geneva Accords, there were

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33. See 161 BRITISH & FOREIGN STATE PAPERS 649-51 (1954). See also the speeches by U.S.S.R. Foreign Affairs Minister Molotov on June 8, 1954 and of Chou En-Lai, Foreign Affairs Minister of the People's Republic of China on June 9, 1954, both made at the Geneva Conference and both apparently adverting to this independence agreement. Although Molotov's remarks on June 8, 1954 indicate that independence agreements were as yet "unsigned and therefore unpublished," and were not of a "nature to inspire confidence," Chou En-Lai's remarks on June 9, 1954 show full awareness of the treaties and indicate that they had been initialled by then. *Documents Relating to the Discussion of Korea and Indo-China at the Geneva Conference* (Miscellaneous No. 16 [1954], Command Paper 9186). Great Britain Parliamentary Sessional Papers, XXXI (1953/54), at 147 & 164.

The Speech by French Foreign Minister Bidault on May 14, 1954, during the Fourth Plenary Session on Indo-China indicated that an independence agreement was actually concluded with Viet Nam sometime prior to May 12, 1954, and that the delegation of Viet Nam read it to the Conference on May 12th. *Id.* at 134. Although possibly not Bidault's reference, the State of Viet Nam's proposal on May 12 refers to "the joint Franco-Viet Nam Declaration of April 28, 1954, which provides for the signature of two fundamental treaties: the first of these treaties recognises the complete independence of the State of Viet Nam and its full and entire sovereignty: the second establishes a Franco-Viet Nam association within the French Union based on equality." *Id.* at 123. Although this independence declaration reinforced substantial expectations of independence, it seems likely that the treaty was not formally initialled until June, although this was still more than a month prior to the Accords. See note 36 *infra.* Also see the July 3, 1953 declaration by the French government of its intention to accord full independence to the State of Viet Nam, 1949-50 DOCUMENTS ON INTERNATIONAL AFFAIRS 470-71 (Royal Institute of International Affairs 1953), and the joint Franco-Vietnamese declaration to the same effect on April 28, 1954, 161 BRITISH & FOREIGN STATE PAPERS 648 (1954). See also former President Eisenhower's discussion of these French declarations in EISENHOWER, MANDATE FOR CHANGE: THE WHITE HOUSE YEARS 1953-1956 218, 421 (Signet ed. 1963) [hereinafter cited as MANDATE FOR CHANGE].

34. See SCHEER, HOW THE UNITED STATES GOT INVOLVED IN VIETNAM 12-13 (1965) [hereinafter cited as SCHEER].

See also DO VANG LY, AGGRESSIONS BY CHINA 104 (2d ed. 1960).

> [T]he French under pressure from common friends were at last driven to negotiate with Ngo Dinh Diem, who agreed to head the government at Saigon on June 17, 1954, on condition that he was given full civil and military powers.

Ibid.

35. SCHEER, 13.

some expectations that the State of Viet Nam was an independent state under international law and by the conclusion of the Conference the State of Viet Nam was recognized by about thirty-five states.[36] Moreover, at the Geneva Conference itself, the French made it clear to all concerned that the State of Viet Nam was legally independent and that France lacked the capacity to negotiate on its behalf.[37]

36. There is also evidence of some degree of factual French control and influence over Vietnamese affairs, rapidly decreasing but continuing to some extent until 1956, but the evidence including the fact that Diem was asserted to be anti-French and that Prime Minister Mendes-France feared Vietnamese disruption of the Geneva Conference points to some degree of factual independence in decision-making prior to and during the Conference. For the proposition that Diem was committed to re-making Vietnamese society in an anti-French mold see SCHEER, 20.

With respect to Mendes-France's fears of Vietnamese disruption of the Conference, former President Eisenhower wrote in his memoirs that:

> Mendes-France had only one request: [to U.S. representative Bedell Smith] that we use our influence with the Vietnamese Premier, Ngo Dinh Diem—newly appointed by Bao Dai—to prevent him from needlessly obstructing any honorable truce which the French might reach with the Vietminh.

MANDATE FOR CHANGE, 442. Also see EDEN, FULL CIRCLE 146 (1960).

See also SURVEY OF INTERNATIONAL AFFAIRS 1954 44 (Royal Institute of International Affairs 1957).

> There was a delay of several days after the decision on the composition of the Indo-China conference, occasioned by the necessity of waiting for the arrival of representatives of the Vietnamese government and the Viet Minh, and by that of obtaining the consent of Bao Dai to Viet Minh representation. M. Marc Jacquet, Mr. Donald Heath, the American Ambassador in Saigon, and M. Bidault's personal secretary all flew to Cannes to exercise their persuasiveness to this end. Negotiations between France and the Vietnamese government had been under way since 8 March to draft the treaties which should accord independence to Viet Nam and define its relationship with the French Union, and it had been widely reported in the press that the treaties would be signed before the opening of the Geneva Conference. However, this plan collapsed at the last moment, apparently because of a decision by the French government to defer the signing of the main treaties until the accompanying detailed convention had been agreed upon. Bao Dai issued an indignant statement on 25 April saying that the failure to agree was no fault of the Vietnamese, and protesting against the idea of a "Munich" in Indo-China. A "joint declaration" that the two governments had agreed on the total independence of Viet Nam was signed on 28 April, though this did not change the juridical position of Viet Nam, which went to the conference with its sovereign status rather uncertain.

Id. at 44. "The treaties were initialed in June." *Id.* at 44 n.7.

It should be noted that the Indo-China phase of the Geneva Conference began in early May, 1954, and the Geneva Accords were not signed—orally agreed to in the case of the Final Declaration—until July 21, 1954. (The Agreement on the Cessation of Hostilities was back-dated to July 20, 1954 apparently to meet Mendes-France's self-pronounced deadline.)

For the recognition figure see note 24 *supra*.

37. Thus, French Foreign Minister Bidault said in a speech on May 8, 1954 at the opening of the Indo-China Phase of the Geneva Conference:

> [I]ndependence [for the State of Viet Nam] has already been completed. . . .
>
> In Viet Nam, and in spite of the war, France has been able to keep its promises and full independence has been recognised and has become effective. Thirty-five free

The Democratic Republic of Viet Nam on the other hand could, prior to the Accords, also claim some right to be regarded as a state under international law, for at one time the French had concluded a treaty with the D.R.V. at least factually recognizing its existence,[38] it had been recognized by the People's Republic of China, the Soviet Union and a number of East European nations,[39] and it had formal diplomatic relations at least with the People's Republic of China,[40] although arguably under the

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countries, by recognising those three States, [Viet Nam, Cambodia and Laos] and a number of international organizations by accepting them in their midst, have consecrated that independence. The national Government of Viet Nam has been able to set up an administration to organise its finance, to develop its economy, to establish diplomatic relations with the main free countries. It built up an army. All those elements mean sovereignty. . . . The independence of those States is not at stake. . . .

[The French Government has] . . . removed all reason for this conflict to exist by recognising fully and unreservedly the independence of Viet Nam. . . .

Documents Relating to the Discussion of Korea and Indo-China at the Geneva Conference (Miscellaneous No. 16 [1954], Command Paper 9186). Great Britain Parliamentary Sessional Papers, XXXI (1953/54), at 108-109.

And in a speech on May 14, 1954, at the Fourth Plenary Session of the Conference on Indo-China Bidault said:

Independence is the final goal of a process of development which began immediately after the Second World War and which has already been achieved, a fact proclaimed in this very place and in the most precise and detailed manner by the representatives of the three states [Viet Nam, Cambodia & Laos]. . . . The Vietminh proposals pay scant regard to facts and events. . . . [T]here does exist a Government of the State of Viet Nam. That Government is the government of His Majesty, Bao Dai, which is recognised by thirty-five states, is a member of various international organisations, and which is represented here in the eyes of all those who have recognised it. This Government is fully and solely competent to commit Viet Nam. With it the French Government has conducted a series of negotiations which, as I mentioned at the beginning of this statement, led to the joint declaration and to the conclusion of two treaties which the delegation of Viet Nam read to the Conference on the 12th of this month. The sovereignty and independence of Viet Nam are therefore recognised by France over the whole territory of Viet Nam. . . .

Id. at 132-34. See also 270 *infra*.

38. See *Documents Relating to British Involvement in the Indo-China Conflict 1945-1965* (Miscellaneous No. 25 [1965], Command Paper 2834), at 9.

Negotiations led to an agreement of 6 March, 1946, by which the Viet Minh undertook not to oppose the entry of French forces [in northern Viet Nam] while the French Government recognised the Democratic Republic as a free State with its own government, legislature, army and finances, forming part of the Indo-Chinese Federation and the French Union; a referendum was to decide whether Cochin-China should be united with Annam and Tongking as one State. . . .

Ibid.

39. MURTI, 171.

See also SURVEY OF INTERNATIONAL AFFAIRS 1949-50 429-30 (Royal Institute of International Affairs 1953).

40. "After the founding of the People's Republic of China, the Democratic Republic of Viet Nam established formal diplomatic relations with the People's Republic of China." Excerpt from a speech by Chou En-Lai, Head of the Delegation of the People's Republic of China, May 12, 1954. *Documents Relating to the Discussion of Korea and Indo-China at the*

classic test the statehood of the D.R.V. was not as clear as that of the State of Viet Nam. Perhaps an indication of the true state of international expectations prior to the Geneva Accords is indicated by the fact that Professor Lauterpacht, at one time a judge of the International Court of Justice, in a list apparently made prior to the Accords, listed both Viet-minh and Viet Nam as separate states under international law.[41]

THE EFFECT OF THE GENEVA ACCORDS OF 1954

Nine states participated in some phase or another of the 1954 Geneva Conference on Indo-China. They were Great Britain, Cambodia, the Democratic Republic of Viet Nam (Viet-minh), France, Laos, the People's Republic of China, the Soviet Union, the State of Viet Nam, and the United States.[42] It should be noted that both the D.R.V. and the State of Viet Nam were represented at the Conference, a factual recognition of the reality of two long separate and competing states in Viet Nam.[43] The final products of the Conference, reached on July 21, 1954, are widely known as the Geneva Accords of 1954.

The Geneva Accords with respect to Viet Nam consisted of an Agreement on the Cessation of Hostilities, signed only by representatives of the Democratic Republic of Viet Nam and the French Union Forces in Indo-China,[44] and an unsigned Final Declaration of the Conference.[45] The

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Geneva Conference (Miscellaneous No. 16 [1954], Command Paper 9186). Great Britain Parliamentary Sessional Papers, XXXI (1953-54), at 124.

41. Under the heading "States At Present International Persons" Professor Lauterpacht listed among others "Viet-minh, Vietnam, North Korea and South Korea." I OPPENHEIM, INTERNATIONAL LAW 255-258 (8th ed. Lauterpacht 1955). See also MURTI, 171-172, 172 n.7.

42. *Documents Relating to the Discussion of Korea and Indo-China at the Geneva Conference* (Miscellaneous No. 16 [1954], Command Paper 9186). Great Britain Parliamentary Sessional Papers, XXXI (1953/54), at 106. With respect to an account of the Geneva Conference see generally SURVEY OF INTERNATIONAL AFFAIRS 1954 42-73 (Royal Institute of International Affairs 1957).

43. This was not true of Cambodia and Laos where the governments of the Khmer and Pathet Lao were denied the right to participate.

44. *Further Documents Relating to the Discussion of Indo-China at the Geneva Conference* (Miscellaneous No. 20 [1954], Command Paper 9239). Great Britain Parliamentary Sessional Papers, XXXI (1953/54), at 27-38; 161 BRITISH & FOREIGN STATE PAPERS 818-837 (1954). The actual signatures appeared as:

For the Commander-in-Chief of the French Union Forces in Indo-China:

DELTIEL,
Brigadier-General.

For the Commander-in-Chief of the People's Army of Viet Nam:

TA-QUANG-BUU,
Vice-Minister of National Defence
of the Democratic Republic of Viet Nam.

Command Paper 9239 at 38; 161 BRITISH & FOREIGN STATE PAPERS at 835.

45. *Further Documents Relating to the Discussion of Indo-China at the Geneva Conference* (Miscellaneous No. 20 [1954], Command Paper 9239). Great Britain Parliamentary

Agreement On Cessation Of Hostilities which, as was indicated by the fact that it was signed, was the core of the Accords, provided principally for a military cease fire to be followed by a regroupment of opposing French Union and D.R.V. forces to the South and North respectively of a provisional military demarcation line, a limitation on the introduction of armaments and military personnel in order to prevent further conflict between the opposing forces,[46] and the creation of an International Control Commission to supervise the execution of the agreement. Civil administration was to be in the hands of the party whose forces were regrouped in that zone pending general elections for the unification of Viet Nam. The Agreement on the Cessation of Hostilities was dated July 20, 1954. The Final Declaration of the Geneva Conference made on July 21, 1954, which reiterated the spirit of the cease fire agreement and which dealt in slightly more detail with the provisions for elections was signed by no one. It was orally approved, however, by all of the nine states attending the Conference except the United States and the State of Viet Nam each of whom made unilateral declarations of their own.[47] The United States

Sessional Papers, XXXI (1953/54), at 9-11; 161 BRITISH & FOREIGN STATE PAPERS 359-361 (1954).

46. One of the puzzling aspects of the Accords is that by their terms they only prohibit the *introduction* into Viet Nam of military personnel and armaments and do not, at least by their language, prohibit buildup of indigenous military forces. If this interpretation is correct, and there is no indication in the Accords that it is not, it would seem to constitute one of the serious weaknesses in the Accords. It also makes the ban on *introduction* of armaments and military personnel seem somewhat onesided in view of the subsequent withdrawal of the substantial number of French troops constituting a major portion of the French Union forces in Viet Nam at the time of the Accords and it casts some doubt on the continuing efficacy of the ban on *introduction* of military personnel and armaments after that withdrawal, at least in a situation where elections could not be held and division continued for a substantial period. See Articles 16, 17 & 36 of the Agreement on the Cessation of Hostilities. Section 4 of the Final Declaration of the Conference strongly supports this interpretation that the ban is only on the *introduction* of military personnel and armaments and nothing in the final Declaration would suggest any other interpretation. Section 4 provides:

> The Conference takes note of the clauses in the Agreement on the cessation of hostilities in Viet Nam prohibiting the *introduction* into Viet Nam of *foreign* troops and military personnel as well as of all kinds of arms and munitions. (Emphasis added.)

Moreover, the Chairman of the International Control Commission took the position in a press conference on November 21, 1954 that the Accords were not concerned with increases in indigenous forces either in the North or the South. See MURTI, 53. If this interpretation is correct, neither an increase in the size of the R.V.N. nor D.R.V. forces would per se be prohibited by the Accords as is apparently popularly supposed. See SCHEER 62.

It should also be noted that by the terms of Articles 16 and 17 of the Agreement on the Cessation of Hostilities it was essentially the introduction of "troop *reinforcements*," "*additional* military personnel" and "*reinforcements*" of armaments and munitions that was prohibited. There was some latitude for replacement of existing forces and armaments written into the Agreement.

47. See *Further Documents Relating to the Discussion of Indo-China at the Geneva Conference* (Miscellaneous No. 20 [1954], Command Paper 9239). Great Britain Parliamentary Sessional Papers XXXI (1953/54), at 5-9. For discussion see text at pp. 324-41 *infra*.

declared that it would refrain from the use of force to disturb the settlements, in accordance with its obligations under the United Nations Charter but would view any future aggression in violation of the agreements as seriously threatening peace and security. The United States also reiterated its position that "peoples are entitled to determine their own future, and that it will not join in an arrangement which would hinder this."[48] The State of Viet Nam, toward which, as has been seen, there existed expectations that it was an independent state under international law at this time and which was not a party to the Accords protested them.[49]In a final declaration which the Conference took note of, however, the State of Viet Nam pledged itself not to use force to resist the cease fire arrangements in spite of its general objections to those agreements.[50]

Because the Agreement on the Cessation of Hostilities in Viet Nam referred to a "provisional military demarcation line," and "regrouping zones" pending general elections for the unification of Viet Nam, and the Final Declaration said:

> The Conference recognizes that the essential purpose of the Agreement relating to Viet Nam is to settle military questions with a view to ending hostilities and that the military demarcation line is provisional and should not in any way be interpreted as constituting a political or territorial boundary . . .[51]

some have concluded that "under the Geneva Accords of 1954, South Viet Nam is merely a temporary zone not even qualifying politically as a state,"[52] and that aggression by North Viet Nam against South Viet Nam

48. *Further Documents supra* note 47 at 7; 161 BRITISH & FOREIGN STATE PAPERS 365 (1954). For a full text of the United States unilateral declaration see text at pp. 324-41 *infra*.

49. See *Further Documents supra* note 47 at 7, 9. See also Fall, *How the French Got Out of Viet-Nam* in VIET-NAM READER 81, 86-87.

> At a restricted session of the Geneva Conference on 18 July, the Viet-Namese Delegate dissociated himself from discussion of draft documents embodying the principle of partition; and in the concluding session on the 21st of the month, he wanted the inclusion in the Final Declaration of terms indicating his Government's reservation, though the Chairman, Mr. Eden, rejected this suggestion. Thus the Government of Viet-Nam was not a party to the Agreement on the Cessation of Hostilities nor did it join in the Final Declaration of the Conference.

Documents Relating to British Involvement in the Indo-China Conflict 1945-1965 (Miscellaneous No. 25 [1965], Command Paper 2834), at 17.

See also SURVEY OF INTERNATIONAL AFFAIRS 1954 48, 64 (Royal Institute of International Affairs 1957). As to independence prior to the Accords see notes 36 & 37 *supra*.

50. *Further Documents supra* note 47 at 7, 9. See also SURVEY OF INTERNATIONAL AFFAIRS 1954 67 (Royal Institute of International Affairs 1957).

51. Article 6 of the Final Declaration.

52. *Memorandum of Law of Lawyers' Committee on American Policy Toward Vietnam*, reprinted in 112 CONG. REC. 2552-59, at 2553 (daily ed. Feb. 9, 1966). Although the "Lawyers' Committee" makes the claim that their "memorandum" is "fully documented" (*Id.* at 2553) they cite no authority for their interpretation of the Accords to the effect that

is merely a civil war, comparable even to the United States Civil War.[53]

These conclusions are based on erroneous interpretations of the Geneva Accords. As has been seen, at the Conference Viet Nam was represented by two states each claiming sovereignty to all of Viet Nam and each recognized as the only lawful government of Viet Nam by one or the other of the major opposing power blocs at the Conference. The Communist nations supported the credentials of the D.R.V., and the Western powers implicitly backed by the prior United Nations action supported those of the State of Viet Nam. Seen in context, then, this language as to provisional zones was intended to preserve the existing claims to sovereignty to all of a united Viet Nam by both the D.R.V. and the State of Viet Nam, and to indicate that the participants contemplated eventual unification of Viet Nam by free elections. This language was not intended to undercut the existing credentials of statehood of either of the contenders prior to unification. The participants at the Conference each wanted to avoid recognizing the government championed by the other side as a lawful government of any part of Viet Nam and each wanted to preserve the claims to sovereignty over all of Viet Nam of the government that they recognized. To say that the participants at the Conference intended to reduce the legal status of the particular government of Viet Nam that they recognized to that of a "temporary zone not qualifying politically as a state" is practically to state the opposite of what *both* sides intended. The

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the Republic of Viet Nam does not qualify as a state unless it is an asserted article by Judge Edgerton in the *New Republic* for May 22, 1965. See *Id.* at 2555 n.17. The communication by Judge Edgerton to the *New Republic* does not say that the Republic of Viet Nam is not a state and on this point does not advert to evidence beyond the language of the Accords set out above. See The New Republic, May 22, 1965, p. 28.

53. See 112 CONG. REC. at 2554, 2556 (daily ed. Feb. 9, 1966). It should be pointed out that there may be substantial differences between categorization of a conflict as a "civil war" as used in everyday speech, and categorization of a conflict as a "civil war" for a particular legal purpose. The legal realists have long since demonstrated to the legal world that categorization may differ depending on the purpose for which the categorization is made. Here, some critics seek to label the Viet Nam conflict as a civil war for purposes of arguing that assistance to the South Vietnamese government is unlawful. Although the proposition that it is unlawful per se to render assistance to a recognized government such as the government of the R.V.N. is highly doubtful even in a civil war situation, as is shown at pp. 294-309 *infra*, there are substantial legal differences between the Viet Nam conflict and a "civil war" that make authorities concerned with "civil wars" not controlling. As is demonstrated by this section there are substantial expectations today that the D.R.V. and the R.V.N. are separate and independent states under international law and in any event they are separated by a military cease-fire line making aggression across that line unlawful. For the purpose of assessing the lawfulness of assistance to the R.V.N., then, the use of the military instrument by the D.R.V. against the R.V.N. cannot be validly classified as a "civil war." Similarly, since the campaign to overthrow the government of the R.V.N. by armed attack receives at least significant assistance and direction from the D.R.V., the Viet Nam conflict within the R.V.N. cannot be validly classified as a "civil war" for purposes of prohibiting outside assistance to the recognized government under attack.

declarations and actions of the parties before, during, and after the conference make this opposite interpretation evident.

Thus, the foreign ministers of the United States, France, the United Kingdom, and the Soviet Union, in a February 18, 1954 Berlin Resolution agreeing on the holding of the Geneva conference said: "*It is understood* that neither the invitation to, nor the holding of, the above-mentioned Conference shall be deemed to imply diplomatic recognition in any case where it has not already been accorded."[54]

After consultations between the French and Soviet delegations at the Conference, the list of nine participating states, including both the D.R.V. and the State of Viet Nam was agreed to but again subject to this non-recognition provision of the Berlin Resolution.[55]

Similarly, French Foreign Minister Bidault made it clear in the opening address at the proceedings on Viet Nam that:

> For France, there is a Viet Nam State of which the unity, territorial integrity and independence must be respected. With the presence at this Conference of a party which, in order to fight against this state, has organised armed forces, has been admitted as a necessity with a view to bringing about a cessation of hostilities, this presence must not be interpreted as implying on our side any kind of recognition . . . The elements of this solution depend, first and foremost, in our opinion, upon the opinion which will be expressed by the Government of Viet Nam.[56]

and in a later address at the Conference he reiterated that:

> [T]here does exist a Government of the State of Viet Nam. That Government is the government of His Majesty, Bao Dai,

54. *Resolution On The Holding Of A Far Eastern Conference Agreed By The Four Foreign Ministers*, February 18, 1954, in *Documents Relating to the Meeting of Foreign Ministers of France, the United Kingdom, the Soviet Union and the United States of America, Berlin, January 25—February 18, 1954*, (Miscellaneous No. 5 [1954], Command Paper 9080). Great Britain Parliamentary Sessional Papers XXXI (1953/54), at 33. A major purpose of the resolution at this time, of course, was to avoid recognition of the Chinese People's Republic.

55. French Foreign Minister Bidault said in the fifth plenary session of the Conference on June 8, 1954:

> As a result of exchanges of views between the French Delegation and the Soviet Delegation, the list [of members of the Conference] was finally settled with the agreement of the nine participants, subject to the reservation included in the Berlin communique that 'neither the invitation to, nor the holding of, the above-mentioned Conference shall be deemed to imply diplomatic recognition in any case where it has not already been accorded.'

Documents Relating to the Discussion of Korea and Indo-China at the Geneva Conference (Miscellaneous No. 16 [1954], Command Paper 9186). Great Britain Parliamentary Sessional Papers XXXI (1953/54), at 137.

56. *Id.* at 110.

> which is recognized by thirty-five states, is a member of various international organizations, and which is represented here in the eyes of all those who have recognized it. This Government is fully and solely competent to commit Viet Nam. . . . The sovereignty and independence of Viet Nam are therefore recognized by France over the whole territory of Viet Nam. . . .[57]

Proposals made by both the State of Viet Nam[58] and the D.R.V.[59] at the Geneva Conference called explicitly or implicitly for recognition of the sovereignty of their particular government. And there is no indication in the records of the Conference in the *British Command Papers*[60] or in the Accords themselves that the D.R.V. consented to relinquish its existing claims to statehood and sovereignty, at least over North Viet Nam, by signing the cease fire agreement and acceding to the Final Declaration. Certainly the State of Viet Nam which expressly objected to the Final Declaration and which had not even signed the cease fire agreement did not consent to have its status reduced from a recognized state under international law to that of a mere zone. And the same is apparently true with respect to the interpretations by all of the other participants in the conference with respect to the Accords on Viet Nam. There can be no better evidence of this intention than by the subsequent interpretations on this point by the participants in the Conference itself. As the comments to the *Harvard Research Draft Convention on The Law of Treaties* indicate:

> In interpreting a treaty, the conduct or action of the parties thereto cannot be ignored. If all the parties to a treaty execute it, or permit its execution, in a particular manner, that fact may reasonably be taken into account as indicative of the real intention of the parties or of the purpose which the instrument was designed to serve.[61]

Similarly, Article 69 of the *International Law Commission 1964 Draft Articles On The Law Of Treaties* provides:

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57. *Id.* at 133-34.

58. *Id.* at 123. It is a generally accepted proposition in international law that preparatory work at a Conference, (*travaux* préparatoires) including the records of negotiation and the minutes of the plenary meetings, may be a useful aid in interpretation. See I OPPENHEIM, INTERNATIONAL LAW 862-63 (7th ed. Lauterpacht 1948); *Harvard Research Draft Convention on The Law of Treaties*, 29 AM. J. INT'L. L. 652, 937, 953-66 (Supp. 1935).

59. *Documents, supra* note 55 at 116-21. See particularly §§ 1 and 4 of the D.R.V. proposal. See French Foreign Minister Bidault's interpretation of the Viet-minh proposals *Documents, supra* note 55 at 133-34.

This insistence by both sides on recognition of the sovereignty of the government championed by their side was implicit in much of the discussion at the Conference. See *Documents, supra* note 55 at 105-168.

60. *Documents, supra* note 55 at 105-168.

61. 29 AM. J. INT'L. L. 966 (Supp. 1935).

> . . . There shall also be taken into account, [in the interpretation of treaties] together with the context: . . .
>
> (b) Any subsequent practice in the application of the treaty which clearly establishes the understanding of all the parties regarding its interpretation.[62]

By way of subsequent conduct of the participants with respect to Viet Nam, the British government, one of the Co-Chairman of the Conference, said sometime after the Conference was concluded:

> The references in the title and text of this message to the "Democratic Republic of Viet Nam" do not involve any departure from the policy of her Majesty's government in recognizing, in accordance with their obligations under Article 12 of the Final Declaration of the Geneva Conference, the Government of the Republic of Vietnam as the only legal Government of Vietnam.[63]

And, by way of further indication of this, the British Joint Parliamentary Under-Secretary of State for Foreign Affairs said in the House of Lords on June 25, 1957:

> The present division of Viet-Nam into two parts on either side of the 17th Parallel dates from the agreements reached at the Geneva Conference of 1954. In the North authority is vested in the so-called Government of the Democratic Republic of Viet-Nam resident in Hanoi. The South is administered from Saigon by the Government of the Republic of Viet Nam of which Ngo Dinh Diem is President. Her Majesty's Government recognizes the Government of the Republic of Viet-Nam as the sole Government entitled to represent the State of Viet-Nam in international affairs.[64]

Similarly, in a dispute with respect to the maintenance of a United States consulate in Hanoi shortly after the Accords, both the D.R.V. and the United States seemed to interpret the Accords as preserving the statehood of the governments of the D.R.V. and the Republic of Viet Nam respectively.[65] Later statements by the Soviet Union delegates to the

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62. *Report of the International Law Commission on the work of its sixteenth session 11 May-24 July 1964*, U.N. GEN. ASS. OFF. REC. 19th Sess., Supp. No. 9, at 25 (A/5809) (1964).

63. *Vietnam and the Geneva Agreements* (Vietnam No. 2 [1956], Command Paper 9763). Great Britain Parliamentary Sessional Papers XLV (1955/56), at 3 n.1.

64. *Documents Relating to British Involvement in the Indo-China Conflict 1945-1965* (Miscellaneous No. 25 [1965], Command Paper 2834), at 126.

65. See MURTI, 173-74. Dr. Murti also points out:

> Both the Western bloc as well as the Soviet bloc of countries recognised the State of Vietnam and the Democratic Republic of Vietnam Governments respec-

United Nations are consistent with the retention of claims to statehood by the governments concerned.[66] In fact, although it is always difficult to prove the negative, a cursory but conscientious search indicates that none of the participants in the Geneva discussions on Viet Nam ever put forth the interpretation that under the Geneva Accords the D.R.V. and the R.V.N. were both merely "temporary zones not qualifying as states." In the face of the uncontradicted evidence of what the participants actually intended by the Geneva Accords such assertions of loss of statehood are untenable.

Certainly the participants in the Conference intended, at least by the language of the agreements, that Viet Nam be unified by free elections under one or the other of the competing governments variously recognized by the two sides. This, however, is quite a different intent from that of reducing the statehood of the D.R.V. and the R.V.N. to "temporary zones not qualifying as states." It is principally this intent that Viet Nam be unified by free election which is expressed by the "provisional zones" language in the Accords. To suggest, however, from this intent that aggression by the D.R.V. against the R.V.N. is merely a "civil war" even comparable to the United States Civil War is to ignore the crucial fact, among others, that the central purpose of the internationally drawn provisional demarcation line in Viet Nam was for a military cease fire making aggression across that line unlawful. If nothing else, the two zones were at least intended as separate international entities with respect to the lawfulness of the use of force by one zone against the other.[67] Consequently, *even if* the D.R.V. and the R.V.N. were not today two *separate* states, aggression by the D.R.V. against the R.V.N. is a fundamental breach of the Geneva Accords entitling the R.V.N. to the appropriate corresponding right of self-defense. Since this point has often been ignored, it bears emphasizing that even if this were a "civil war" in Viet Nam in the sense that there were no current expectations that two independent and separate states exist today in Viet Nam, nevertheless, the fact that armed aggression by the D.R.V. against the R.V.N. is in fundamental breach of an internationally drawn cease fire line makes the legal consequences radically different from those attending a "civil

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tively, as the only legal Government over the whole of Vietnam. Even after the Geneva Agreement, the two blocs continued their recognition and their diplomatic missions in the two zones and claimed that the Government supported by them was the only legal Government for the whole of Vietnam.

Id. at 173.

See also as to continued French recognition of the Saigon government, SURVEY OF INTERNATIONAL AFFAIRS *1954* 83 (Royal Institute of International Affairs 1957).

66. See text at notes 91-94 *infra.*

67. See in particular Articles 19, 24 and 42 of the Agreement on the Cessation of Hostilities and paragraph 5 of the Final Declaration.

war."[68] As Professor Quincy Wright pointed out in the 1959 *Proceedings of the American Society of International Law:*

> Another complication may result from the protracted functioning of a cease-fire or armistice line within the territory of a state. While hostilities across such a line by the government in control of one side, claiming title to rule the entire state, seems on its face to be civil strife, if such lines have been long continued and widely recognized, as have those in Germany, Palestine, Kashmir, Korea, Viet Nam and the Straits of Formosa, they assume the character of international boundaries. Hostilities across them immediately constitute breaches of *international* peace, and justify "collective defense" measures by allies or friends of the attacked government, or "collective security" measures by the United Nations. If this were not so, armistice and cease-fire lines would have no meaning at all. . . .[69]

The United Nations action in Korea lends support to this distinction. Moreover, it cannot be validly maintained that the military demarcation line pursuant to the Geneva Accords no longer has validity in Viet Nam. For both the D.R.V. and the R.V.N. regard the Accords as having continuing legal validity and continue to make complaints to the International Control Commission.[70] Furthermore, the decisions and continued

68. Violation of a cease-fire line in an international agreement by the use of force, unless in self-defense or pursuant to valid United Nations collective action, would also seem to be a patent violation of the fundamental principle against the use of force in international relations; a principle embodied in Article II, sections 3 & 4 of the United Nations Charter. Since there can be no doubt that the D.R.V. violations of the Accords by force are aimed at the political and territorial integrity of the R.V.N., and are neither justified by self-defense nor by valid collective United Nations action, they are undoubtedly also in violation of fundamental principles of the United Nations Charter. Professor Quincy Wright has said:

> The Charter explicitly permits a state to use armed force in the territory of a foreign state or across an internationally recognized armistice or cease-fire line only in 'individual or collective self-defense' in response to an 'armed attack'; under authority of the United Nations itself; or on invitation by the government of the state in whose territory the force is used, in case that government is in fact in a position to speak for the state.

Wright, *International Law and Civil Strife*, 1959 PROC. AM. SOC. INT'L L. 145, 148 (1959).

69. *Id.* at 151.

70. For example, on the commencement of United States bombing of military targets in the D.R.V. in February, 1965, the D.R.V. registered a formal complaint with the I.C.C. of violation of the Geneva Accords. See *Special Report to the Co-Chairmen of the Geneva Conference on Indo-China of February 13, 1965* (Vietnam No. 1 [1965], Command Paper 2609), at 7-10. During the same period, the R.V.N. also registered a formal complaint with the I.C.C. of D.R.V. violations of the Accords by armed attack against the R.V.N. See *Id.* at 16-30.

That this is currently the official D.R.V. position is also indicated in a Report by D.R.V. Prime Minister Pham Van Dong made to the National Assembly of the D.R.V. on April 8, 1965 in which he said: "It is the unswerving policy of the Government of the

functioning of the International Control Commission long after the July 1956 failure to hold elections also indicate the continuing legal validity of the internationally set demarcation line in Viet Nam.[71] In addition, apparently all parties concerned regard the Accords at least as the beginning point of any current settlement, and the general international community attitude bears out this expectation that the demarcation line is of continuing validity today. This continuing legal validity of the demarcation line in Viet Nam is consistent with the stated United States policy not to attack the integrity of the D.R.V. as a territorial or political

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Democratic Republic of Vietnam to strictly respect the 1954 Geneva Agreements on Vietnam. . . ." APTHEKER, MISSION TO HANOI 113 (1966).

It should also be pointed out that Article 14 of the Agreement on the Cessation of Hostilities provided for administration of separate zones "pending the general elections which will bring about the unification of Viet Nam," and regardless of the cause, such elections have not yet been held.

71. Out of eleven Interim Reports and a number of Special Reports issued to date by the International Commission for Supervision and Control In Vietnam, six of the Interim Reports and all of the Special Reports have been issued after the July 1956 date for elections had passed. These also included the 1962 Special Report of the I.C.C., finding violations against the D.R.V. for its aggression against the R.V.N., and finding violations against the R.V.N. for receving military assistance to meet that aggression.

It is also clear from these I.C.C. reports and the official messages of the Co-Chairmen of the Geneva Conference that the failure to hold elections did not affect the continuing legal validity of the international cease-fire line in Viet Nam. Thus, in an official message from the British and Soviet Co-Chairmen of the Geneva Conference on May 8, 1956 which adverted to the possibility of non-implementation of the election provisions, the Co-Chairmen said: "Pending the holding of free general elections for the reunification of Viet-Nam, the two Co-Chairmen attach great importance to the maintenance of the cease-fire under the continued supervision of the Inter-national Commission for Viet-Nam." *Documents Relating to British Involvement in the Indo-China Conflict* (Miscellaneous No. 25 [1965], Command Paper 2834), 96-99, at 97. In the Eighth Interim Report of the I.C.C. issued on June 5, 1958, the Commission indicated that its supervision was to continue until free elections were held, saying:

> The Commission notes that there has been no consultation between the two Parties with a view to holding free nation-wide elections for the reunification of the country, and to resolving the political problems and thus facilitating an early termination of the activities of the Commission and the fulfilment of its tasks.

Eighth Interim Report of the International Commission for Supervision and Control In Vietnam (Vietnam No. 1 [1958], Command Paper 509), at 15. And in its Ninth Interim Report issued on March 10, 1959 the Commission said: "The Commission, as directed by the Co-Chairmen, has persevered, and will continue to persevere in its efforts to maintain and strengthen peace in Vietnam in accordance with the provisions of the Geneva Agreement. . . ;" and

> There has been no progress in the field of political settlement as envisaged in the Final Declaration of the Geneva Conference. There has been no consultation between the two Parties with a view to holding free nation-wide elections for the reunification of Vietnam. This has maintained the prospect of an indefinite continuance of the Commission and its activities.

Ninth Interim Report of the International Commission for Supervision and Control in Vietnam (Vietnam No. 1 [1959], Command Paper 726), at 17.

entity, but simply to induce the D.R.V. to halt its armed aggression against the R.V.N.

The nearly ten years of separate development of the D.R.V. and the R.V.N. along different ideological lines after the date set for elections had come and gone indicates that the cease fire line established by the Geneva Accords in fact created continuing expectations of an international boundary between the D.R.V. and the R.V.N. The actions of the D.R.V. in continuing attempts to conceal their military direction and assistance with respect to the N.L.F.,[72] rather than openly admitting that the attack on the R.V.N. includes elements of the PAVN army, also provides some indication that the D.R.V. regards the cease fire line as a valid international demarcation line with respect to the employment of force across that line, and that they regard the use of force by the D.R.V. against the R.V.N. as something other than "civil strife."

Although some have argued that assistance even to the recognized government in a "civil war" should be outlawed because of the danger of civil strife escalating to international war,[73] the same argument would appear to apply even more strongly with respect to the use of force by the D.R.V. across what is at least a factual international cease fire line dividing the major contending ideological systems in the world today. And once significant outside armed aggression takes place across such a line against the established government, certainly the situation should give rise to appropriate rights of self-defense. It should also be pointed out that there is no indication in the Accords themselves that they would cease to function should elections not be held. In the light of the complete lack of evidence of such an intent in the Accords and of the continuing evidence of expectations to the contrary this interpretation would be unwarranted. And it should be remembered that any argument depending on the cessation of the effect of the Geneva Accords because elections were not held would cut both ways. Under such a theory presumably it would also be a "civil war" should the R.V.N. openly invade the North even in some hypothetical situation in which they had no provocation. It is doubtful that in these circumstances the nations supporting the D.R.V. would be inclined to accept the "civil war" label and in any event this also would be too disruptive of minimum world public

72. D.R.V. Prime Minister Pham Van Dong said on January 8, 1966:

Question 3: If the United States withdrew its troops, would the DRV withdraw its troops from South Vietnam?

Answer: The so-called "presence of forces of the Democratic Republic of Vietnam in South Vietnam" is a sheer U.S. fabrication in order to justify their war of aggression in South Vietnam.

APTHEKER, MISSION TO HANOI 124 (1966). See also VIET REPORT 6, 7 (Vol. 2, No. 1, Jan. 1966).

73. See the discussion in pp. 294-309 *infra*.

order. Consequently, such a theory of the expiration of the Geneva Accords when elections were not held would seem neither realistic nor attractive.

Moreover, despite the language of the Accords there are some indications that at least some of the participants at the Geneva Conference were aware that the Accords might result in indefinitely partitioning Viet Nam until genuinely free elections could be held. Anthony Eden's memoirs indicate his feelings in 1954 that the partition of Viet Nam was the best solution.[74] In fact, in view of the German and Korean experiences partition seems a somewhat drastic way to arrange a cease fire and election if that was all that was contemplated by the parties.[75]

74. See EDEN, FULL CIRCLE 97, 101, 102 (1960).

> It was clear to me that any negotiated settlement was bound to produce either a Communist share in the government of most of Indo-China, or complete Communist control of part of the country, and I thought that the latter alternative was preferable. . . . There were some indications of a greater willingness in Vietnam to face partition. There was no love lost between north and south. We felt that the distress at amputation might prove more apparent than real.

Id. at 101.

75. Former President Eisenhower has written:

> In Vietnam . . . the French proposed military groupings in delimited zones—which means that all Red formations would move north of one established line, all those loyal to the French Union would pull south of that parallel. . . . To me these French proposals . . . . implied nothing else but partition. We knew, from experience in Korea, that this would probably lead to Communist enslavement of millions in the northern partitioned area.

MANDATE FOR CHANGE, 432. See also the seven point program jointly agreed to by the United States and the United Kingdom on June 29, 1954, which indicates that an armistice agreement on Indo-China would be respected which:

> 2. Preserves at least the southern half of Vietnam. . . .
> 3. Does not impose on . . . retained Vietnam any restrictions materially impairing . . . [its] capacity to maintain stable non-Communist regimes; and especially restrictions impairing . . . [its] right to maintain adequate forces for internal security, to import arms and to employ foreign advisers.
> 4. Does not contain political provisions which would risk loss of the retained area to Communist control.
> 5. Does not exclude the possibility of the ultimate reunification of Vietnam by peaceful means. . . .

EDEN, FULL CIRCLE 149 (1960). Apparently Mendés-France also supported these objectives. See *Id.* at 157.

See also SURVEY OF INTERNATIONAL AFFAIRS *1954* 48, 58, 60 (Royal Institute of International Affairs 1957).

> On 25 May the Viet Minh Foreign Minister, Mr. Dong, put forward a detailed plan, which was clearly in the nature of a first approximation to the 'accepting price' of the insurgents. . . . This plan was, clearly, rather more than a proposal for a regroupment of forces; if put into effect it would in fact provide something like a *de facto* military partition of the country, and one that, with its provision that the two areas chosen should be economically viable, seemed to be envisaged as lasting for some time.

Id. at 48. And see DO VANG LY, AGGRESSIONS BY CHINA 151 (2d ed. 1960).

Moreover, the Accords are not notoriously heavy in election provisions, mentioning them only in a rather airy fashion.[76] It was clear that the Conference had not come to grips with the key election problem in any meaningful way in 1954.[77] With this background, it may well be that the participants at the Conference were not particularly surprised when elections were not held in 1956.

In summary, the proponents of the view that the use of the military instrument by the D.R.V. against the R.V.N. is a "civil war" must establish not only that factually the Accords did not establish an international demarcation line creating expectations of two separate international

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> Naivete is not known as a Communist weakness. The Vietminh must have known the true meaning of "provisional" when they bargained at Geneva for division on the 17th Parallel. They could not have been unaware of the fact that the partitions in Germany and Korea were also "provisional" in the beginning, and that with the years they had, to all appearances, become about as "provisional" as the cold war.

Ibid.

The stress on civilian freedom to choose zones, which took the form of Article 14(d) of the Agreement on the Cessation of Hostilities providing for free transfer only during the troop movement period, also seems to some extent an implicit recognition by the parties that the partition might last a substantial period of time, and that in the interim there would be two separate international entities in Viet Nam.

According to the *Fourth Interim Report* of the I.C.C., by July 20th, 1955, 892,876 had moved from the North to the South and only 4,269 had moved from the South to the North under Article 14(d). *Fourth Interim Report of the International Commission for Supervision and Control in Vietnam* (Vietnam No. 3 [1955], Command Paper 9654). Great Britain Parliamentary Sessional Papers XLV (1955/56), at 30, Appendix IV. In referring to these figures the SURVEY OF INTERNATIONAL AFFAIRS 1955-56 (Royal Institute of International Affairs 1960), says: "The figures given seem to be incomplete, but not widely so." *Id.* at 18 n.1. According to Bernard Fall, ". . . perhaps as many as 80,000 local guerrillas and regulars and their dependents, including almost 10,000 mountain tribesmen, went northward." Fall, *How the French Got Out of Viet-Nam*, in VIET-NAM READER 81, 88.

76. The only reference to elections in the signed Agreement on the Cessation of Hostilities appears in Article 14(a) and reads: "Pending the general elections which will bring about the unification of Viet Nam. . . ."

The unsigned Final Declaration of the Conference adverts to the election problem in all three sentences of paragraph 7, but leaves most of the important problems to be solved by consultations between the zones to commence on July 20, 1955. The first two sentences of paragraph 7 are an experience in ambiguity.

77. See discussion note 76 *supra*. Some questions which immediately come to mind are: What are the Vietnamese to vote on: unification, a chief executive, a constitution, a constituent assembly, etc.? If the question of unification is the issue, do "general elections" mean that a majority of the total of both zones is necessary for unification, or a majority of each zone, both agreeing? Can elections be "free general elections" if there is only one choice on the ballot? If not how many and what choices must there be? Is a simple majority all that is required or some other figure?

This cavalier treatment of the political settlement problems must be considered a major weakness of the Accords and suggests that the parties were aware of the possibility of an extended partition in Viet Nam unless, of course, they contemplated unification other than by elections. See generally, Fall, *How the French Got Out of Viet-Nam*, in VIET-NAM READER 81, 87-88.

entities in Viet Nam today, but also that the military cease fire line of the Accords had ceased to have legal validity prior to the D.R.V. aggression against the R.V.N., a result which does not automatically follow from a mere recitation of the language in the Accords to the effect that "the military demarcation line is provisional and should not in any way be interpreted as constituting a political or territorial boundary."[78] For even if the line was not originally intended as a political or territorial boundary this does not mean that the cease-fire line itself, a major purpose of the Accords, is of no validity today on the issue of military aggression across that line.

The use of the military instrument by the D.R.V. against the R.V.N., then, is clearly not analogous to "civil strife" either for the purpose of assessing the lawfulness of that use or for the purpose of assessing the lawfulness of the responding assistance to the R.V.N. This is so both because of the existence of substantial expectations today that the D.R.V. and the R.V.N. are separate and independent states under international law and in the existence of an international cease-fire line in Viet Nam violated by armed aggression of the D.R.V. against the R.V.N. The "civil strife" label, then, ignores the essence of the Geneva Accords in preference to a facile verbalism. Also, of course, the United States Civil War analogy is non-comparable, among other reasons because the "Hanoi regime is anything but the legitimate government of a unified country in which the South is rebelling against lawful national authority."[79]

With respect to the effect of the 1954 Geneva Accords on the status as states of both the State of Viet Nam and the D.R.V., the Accords in no way lessened the established status of the State of Viet Nam or the existing claims of the D.R.V. Instead, they could only have strengthened the claims to statehood of the competing governments, particularly the seemingly weaker claims of the D.R.V., since the reality of the settlement was that the two governments had acquired, even if intended to be temporary, relatively fixed and separate territories and had participated in an important international conference even though that participation did not technically result in recognition of their asserted statehood by the countries of the opposing bloc.

In the nearly twelve years following the Geneva Accords, this reality of two separate and independent states in Viet Nam has become increasingly clear.

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78. From paragraph 6 of the Final Declaration.

79. *The Legality of U.S. Participation in the Defense of Viet-Nam* 4 (Reprint from the March 28, 1966 Department of State Bulletin—Department of State publication 8062, Far Eastern Series 147).

The Present Status of the D.R.V. and the Republic of Viet Nam

Although the settlements of an international conference are a means of effecting the status of statehood, in the final analysis they are only one means for effecting that status and may be superseded by later and contrary indications of the expectations of the World Community, or of the participants in the Conference. Moreover, treaties such as the Geneva Accords on Viet Nam cannot bind the international community as a whole with respect to recognition of statehood, but only those states agreeing to be bound.[80] The rest of the world Community, including the United States, which expressly refused to be bound by the Accords, has always been free to recognize the reality of two independent international entities in Viet Nam and certainly this is true for purposes of rendering assistance for their self-defense. Today, nearly twelve years after the Geneva Conference of 1954, there can be no real doubt as to the statehood of the Republic of Viet Nam, a statehood which substantially existed even prior to the Geneva Accords and which was not adversely affected by them. It would appear, however, that despite language of the Geneva Accords there are now substantial expectations of two states existing in Viet Nam which qualify as separate and independent states under international law.[81]

On October 26, 1955, following a referendum in South Viet Nam, the Republic of Viet Nam was formed with Ngo Dinh Diem as President.[82] Since the Geneva Conference of 1954, the statehood of this Republic of Viet Nam, the successor government to the Bao Dai government of the State of Viet Nam, has been repeatedly reaffirmed by the international community.

On January 23, 1957, a draft resolution sponsored by 13 nations including two of the participants plus the Co-Chairman of the 1954 Geneva Conference, France, the United States and Great Britain, was introduced in the Special Political Committee of the General Assembly seeking the admission of the Republic of Viet Nam to the United Nations.[83] The resolution in final form provided:

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80. See the discussion in text at pp. 324-41 *infra*.

81. This does not mean, of course, that if at some time both the D.R.V. and the R.V.N. should agree to unification that it would be barred by international law.

82. See the Provisional Act constituting the Republic in South Vietnam in 162 BRITISH & FOREIGN STATE PAPERS 539-40 (1955). See also Fall, *How the French Got Out of Viet-Nam*, in VIET-NAM READER 89; THE UNITED STATES IN WORLD AFFAIRS 1955 113 (Council on Foreign Relations 1957).

For extracts from the Constitution of the Republic of Viet-Nam, promulgated on October 26, 1956, see UNITED NATIONS YEARBOOK ON HUMAN RIGHTS FOR 1956 259-62 (1958).

83. U.N. GEN. ASS. OFF. REC. 11th Sess., Spec. Pol. Comm. 77 (A/SPC/SR.17) (1957).

The question of the admission of the Republic of Viet Nam to the United Nations was also adverted to in December, 1955. Without a vote on the admission of Viet Nam as such,

The General Assembly,
Recalling its resolution 620 C (VII) of 21 December 1952 finding Viet-Nam qualified for membership in the United Nations
Noting that Viet-Nam [the Republic of Viet Nam] has been excluded from membership in the United Nations because of the opposition of one of the permanent members of the Security Council,

1. *Reaffirms its determination* that Viet-Nam is fully qualified for admission to membership in the United Nations;

2. *Requests* the Security Council to reconsider the application of Viet-Nam in the light of this determination and to report to the General Assembly as soon as possible.[84]

The co-sponsorship of this resolution by Britain, the United States, and France, with the approval of the Republic of Viet Nam is further evidence that the participants in the Geneva discussion on Viet Nam did not regard the Accords as affecting the recognized status of the Republic of Viet Nam as a state under international law. This draft resolution was adopted by the Special Political Committee of the General Assembly by a vote of 44 to 8 with 23 abstentions.[85] The only 8 votes against the resolution were the three Soviet Socialist Republics, joined by Albania, Bulgaria, Czechoslovakia, Poland and Romania.[86] The General Assembly adopted the resolution on February 28, 1957, by a vote of 40 to 8 with 18 abstentions.[87]

It was evident from some of the debates on this resolution that the General Assembly votes recognized the status of the Republic of Viet Nam as an independent state under international law. Mr. Matsudaira,

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the General Assembly passed a "package deal" resolution to admit "all those eighteen countries about which no problem of unification arises." It was evident from this language and the discussions that the Republic of Viet Nam and the Republic of Korea were not included in the General Assembly "package deal." Since their non-inclusion at the time was apparently in the interest of breaking the serious admissions deadlock confronting the United Nations and since the issue of the inclusion of the R.V.N. was never pressed in the General Assembly this non-inclusion can not be taken as authority for General Assembly opposition to the admission of the R.V.N. In fact, when the issue was pressed in the Security Council the Council voted 9 to 1 with 1 abstention to admit the Republic of Viet-Nam. Again, the negative vote of the U.S.S.R., a permanent member of the Council, prevented the resolution from passing with respect to the R.V.N. See U.N. GEN. ASS. OFF. REC. 10th Sess., Annexes, Agenda Item No. 21, at 4-7 (1955); U.N. GEN. ASS. OFF. REC. 10th Sess., Plenary 552nd, 409-420, at 420 (A/PV. 552) (1955); U.N. SECURITY COUNCIL OFF. REC. 10th year, 704th meeting 1-10, at 10 (S/PV. 704) (1955).

84. U.N. GEN. ASS. OFF. REC. 11th Sess., Annexes, Agenda Item No. 25, at 9 (A/RES/523) (1957).

85. U.N. GEN. ASS. OFF. REC. 11th Sess., Spec. Pol. Comm. 105 (A/SPC/SR.22) (1957).

86. *Ibid.*

87. U.N. GEN. ASS. OFF. REC. 11th Sess., Plenary 663rd (A/PV.663) (1957).

the delegate from Japan said: "Viet-Nam had now become an independent State which maintained diplomatic relations with forty-seven countries and belonged to many international organizations."[88] Mr. Navia Varon, the delegate from Colombia stated: "The Republic of Korea and the Republic of Viet-Nam were sovereign States which fulfilled the requirements of the Charter. . . ."[89] In fact, significantly the Soviet delegation at this time did not oppose the admission of the Republic of Viet Nam on the grounds that it was not a state or that the Geneva Accords had deprived it of status as a state but instead argued that *both* the Republic of Viet Nam and the D.R.V. were separate and independent states which should be admitted to membership in the United Nations together. And in January, 1957, the Soviet delegation introduced a draft resolution to that effect seeking "the simultaneous admission of all these States," the D.R.V., South Viet Nam, the Democratic People's Republic of Korea and the Republic of Korea.[90]

During the debate on these resolutions, Mr. Sobolev, the delegate of the Union of Soviet Socialist Republics, said in referring to the 13 power draft resolutions to admit the Republic of Korea and Viet Nam: "The two draft resolutions before the Committee served propaganda purposes: they suggested that South Korea and South Viet-Nam represented the whole of Korea and the whole of Viet Nam respectively. The real situation was quite different: both in Korea and in Viet-Nam two separate States existed, which differed from one another in political and economic structure."[91] And later he said: "The fact was that there were two States in Korea and two States in Viet-Nam."[92] And during the same debate, Mr. Kizya, the delegate of the Ukrainian Soviet Socialist Republic said: "The realistic approach was to admit that there were two States with conflicting political systems in both Korea and Viet-Nam. In the circumstances, the only possible solution was the simultaneous admission of the four countries constituting Korea and Viet-Nam. That was the purpose of the USSR draft resolution."[93] And Mr. Pyzhkov, the delegate of the Byelorussian Soviet Socialist Republic said: "[T]wo completely separate and independent States had been established in each of those countries, [Korea and Viet Nam] with different political, social and economic systems."[94]

This Soviet draft resolution and the views of the Soviet delegation

88. U.N. GEN. ASS. OFF. REC. 11th Sess., Spec. Pol. Comm. 77 (A/SPC/SR.17) (1957).
89. U.N. GEN. ASS. OFF. REC. 11th Sess., Spec. Pol. Comm. 80 (A/SPC/SR.18) (1957).
90. U.N. GEN. ASS. OFF. REC. 11th Sess., Annexes, Agenda Item No. 25, at 5-7 (A/SPC/L.9) (A/3519) (1957).
91. U.N. GEN. ASS. OFF. REC. 11th Sess., Spec. Pol. Comm. 79 (A/SPC/SR.18) (1957).
92. U.N. GEN. ASS. OFF. REC. 11th Sess., Spec. Pol. Comm. 101 (A/SPC/SR.22) (1957).
93. U.N. GEN. ASS. OFF. REC. 11th Sess., Spec. Pol. Comm. 81 (A/SPC/SR.18) (1957).
94. U.N. GEN. ASS. OFF. REC. 11th Sess., Spec. Pol. Comm. 87 (A/SPC/SR.19) (1957).

during the debates on the various resolutions indicate that the other Co-Chairman of the 1954 Geneva Convention, the Soviet Union, clearly took the position that in 1957 despite the Geneva Convention or perhaps as a result of it there were now two sovereign and independent states in Viet Nam. It should be noted that apparently the 1954 Geneva Convention and the partition of Viet Nam had substantially changed the position of the USSR from its 1952 stand that the D.R.V. was the sole legitimate government of Viet Nam. It in effect admitted the legitimacy of the government of the Republic of Viet Nam as a state under international law and sought to establish the statehood of the D.R.V. as well. Again, this position indicates that the participants in the Geneva discussions on Viet Nam did not regard the Accords as limiting the statehood of the governments of Viet Nam.

This General Assembly resolution for the admission of Viet Nam was debated on September 9, 1957 in the Security Council.[95] During the course of the debates it was reaffirmed that the Republic of Viet Nam was considered an independent sovereign nation. Thus Sir Pierson Dixon, the United Kingdom delegate, stated: "My Government played a leading part in the negotiations at the Geneva Conference in 1954 which brought an end to the tragic war in Indo-Chino and which thus enabled the State of Viet-Nam to establish itself in independence."[96] And Mr. Jarring, the Swedish delegate said: "[O]ur affirmative vote implies recognition by my Government of Viet-Nam, with the territory which it now possesses *de facto*."[97] From the context of the discussion as a whole it is evident that these remarks were in reference to the Republic of Viet Nam. The Security Council vote was 10 to 1 in favor of admission, but again this Soviet "veto" prevented the passage of the resolution.[98]

On October 25, 1957, the General Assembly again responded to this Soviet "veto" with a resolution substantially identical to that of February 28.[99] This time the resolution was passed by a vote of 49 to 9 with 23 abstentions.[100] On December 9, 1958, by a vote of 8 to 1 with 2 ab-

95. U.N. SECURITY COUNCIL OFF. REC. 12th year, 789-790th meetings (S/PV.789) (S/PV.790) (1957).

96. U.N. SECURITY COUNCIL OFF. REC. 12th year, 790th meeting 5 (S/PV.790) (1957).

97. *Id.* at 8.

98. *Id.* at 10.

99. U.N. GEN. ASS. OFF. REC. 12th Sess., Annexes, Agenda Item No. 25, at 2-4 (A/3712) (1957). The vote on this resolution on October 17, 1957, in the Special Political Committee of the General Assembly was 49 to 9, with 22 abstentions. U.N. GEN. ASS. OFF. REC. 12th Sess., Spec. Pol. Comm. 41 (A/SPC/SR.49) (1957). For debate on this resolution in the Special Political Committee of the General Assembly see U.N. GEN. ASS. OFF. REC. 12th Sess., Spec. Pol. Com., 44-49th meetings (A/SPC/SR. 44-49) (1957). For debate and vote on this resolution in the General Assembly see U.N. GEN. ASS. OFF. REC. 12th Sess., Plenary 709 (A/PV.709) (1957).

100. U.N. GEN. ASS. OFF. REC. 12th Sess., Plenary 709 (A/PV.709) (1957).

stentions the Security Council again voted in favor of the admission of the Republic of Viet Nam.[101] Again, however, the Soviet "veto" prevented the resolution from passing. These votes were taken after full presentation of the arguments that the Republic of Viet Nam was not a state representative of the people of Viet Nam and that unification of Viet Nam should be required prior to admission to the United Nations.[102] This General Assembly resolution, then, was another decisive rejection of the arguments against the statehood of the Republic of Viet Nam by the most authoritative organ of the international community. And at the least these General Assembly resolutions that the R.V.N. is fully qualified for membership in the United Nations mean pursuant to Article 4 of the Charter that in the judgment of the General Assembly the R.V.N. is capable of fulfilling its obligations under the Charter.[103] This would seem to specifically affirm that the R.V.N. has the right of individual or collective self-defense expressly reserved under Article 51 of the Charter. Moreover, at the present time both the R.V.N. and the D.R.V. have pending applications for membership in the United Nations,[104] which again under Article 4 of the Charter expresses their willingness to be bound by the United Nations Charter and indicates their assessment of their own status as states able and willing to carry out the obligations of the Charter.

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101. U.N. SECURITY COUNCIL OFF REC. 13th year, 843rd meeting 8-10 (S/PV.843) (1958).

102. For example: "According to Article 14 of the Agreement on the Cessation of hostilities in Viet-Nam, South Viet-Nam was merely a zone for the regrouping of French military units. Its administration was not a legal government which could be taken to represent Viet-Nam as a whole." Statement of Mr. Trhlik, the delegate from Czechoslovakia. U.N. GEN. ASS. OFF. REC. 12th Sess., Spec. Pol. Comm. 10 (A/SPC/SR.45) (1957);

> The draft resolution proposing that South Viet-Nam should be admitted to the United Nations . . . was contrary to the 1954 Geneva agreements on Indo-China, under which South Viet-Nam was merely an area for the re-grouping of the French armed forces and the régime established there could not be regarded as a legal government representing the interests of the Viet-Namese people. . . . The agreements had been signed on behalf of the people of Viet-Nam by the present Government of the Democratic Republic of Viet-Nam which had thus been given factual recognition as the only Government entitled to represent the entire Viet-Namese people.

Statement of Mr. Voutov, the delegate from Bulgaria. U.N. GEN. ASS. OFF. REC. 12th Sess., Spec. Pol. Comm. 16-17 (A/SPC/SR.46) (1957).

103. Article 4, section 1 of the UNITED NATIONS CHARTER provides: "Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations."

104. Information supplied by the Office of Public Affairs, the United States Mission to the United Nations, to J. N. Moore on February 22, 1966. According to the Office of Public Affairs, "South Vietnam submitted its application on December 17, 1951. North Vietnam submitted its application on November 22, 1948, but it was not circulated as a Security Council document until September 17, 1952."

This history of United Nations resolutions and debates on the status of the two Viet Nams after the 1954 Geneva Accords leaves no doubt that the Republic of Viet Nam is recognized as an independent state under international law and some of the debates lend support to the proposition that there are now two independent states in Viet Nam.

The present status of the Republic of Viet Nam as a state under international law is confirmed by the recognition presently accorded that state by about 60 nations.[105] It is also presently a member of at least 30 international organizations[106] including 12 specialized agencies of the United Nations,[107] has a permanent observer to the United Nations,[108] and has participated in about 48 international conferences.[109] In fact, the R.V.N. is a member of as many specialized agencies of the U.N. as is the Republic of Korea and is a member of more than are Albania, Cambodia, Cuba, Czechoslovakia and the U.S.S.R., among others.[110] It should also be pointed out that since the United Nations determinations and the continuing international recognition of the Republic of Viet Nam have overwhelmingly recognized the Saigon government as the lawful government of the R.V.N. rather than the National Liberation Front, there can be no question but that the Saigon government

105. See note 8 *supra.*

106. NGUYEN-VAN-THAI & NGUYEN-VAN-MUNG, A SHORT HISTORY OF VIET NAM 346 (1958).

107. The Republic of Viet-Nam is a member of the International Atomic Energy Agency, the International Labour Organisation, the Food and Agriculture Organization of the United Nations, the United Nations Educational, Scientific and Cultural Organization, the World Health Organization, the International Bank for Reconstruction and Development, the International Development Association, the International Monetary Fund, the International Civil Aviation Organization, the International Telecommunication Union, the Universal Postal Union, and the World Meterological Organization. *United Nations Press Services, Office of Public Information*, Note No. 2718/Rev. 3 (April 1964) (64-38338). The Republic of Viet Nam is also a member of the Economic Commission for Asia and the Far East. See U.N. EcoSoc COUNCIL OFF. REC. 20th Sess., Supp. No. 5, at 1 (E/2712) (E/CN.11/407) (1955). The government of the Republic of Viet Nam has also "made or pledged contributions to the United Nations programmes in Korea and Palestine and to the Expanded Programme of Technical Assistance." See the remarks of United States Ambassador Lodge made in the Security Council on December 9, 1958. U.N. SECURITY COUNCIL OFF. REC. 13th year, 843rd meeting 8 (S/PV.843) (1958).

108. The office of the Permanent Observer of the Republic of Viet Nam to the United Nations is located at 866 United Nations Plaza, Suite 547-9, New York 17, New York.

109. *Preliminary Report on the Achievements of the War Cabinet, from June 19, 1965 to September 29, 1965*, 52 (Republic of Vietnam 1965).

110. Out of 16 specialized agencies listed in April 1964, the Republic of Viet Nam and the Republic of Korea were members of 12, Cambodia, Cuba and Czechoslovakia were members of 11, Bulgaria, Romania and the U.S.S.R. were members of 9, Albania, Byelorussia, and the Ukraine were members of 8, Yemen was a member of 6, Monaco and Mongolia were members of 5, Zanzibar was a member of 4, Liechtenstein was a member of 2, and San Marino and Western Samoa were members of 1. *United Nations Press Services, Office of Public Information*, Note No. 2718/Rev. 3 (April 1964) (64-38338).

and not the N.L.F. is regarded by the international community as the generally recognized government entitled to speak for the Republic of Viet Nam.[111]

When the United States agreed to render assistance to the Saigon government these United Nations determinations and international recognition indicate that there was no uncertainty as to which government was entitled to speak for the R.V.N.[112] There was in fact no realistic alternative to the Saigon government, for no other governmental entity in South Viet Nam, including the N.L.F.—which apparently was not even formally created until 1960[113]—had any realistic claim to represent the people of the Republic of Viet Nam in international affairs. Moreover, as is discussed in the next section, the evidence indicates that the N.L.F. receives significant assistance and control from the D.R.V. and cannot validly claim to be representative only of indigenous sentiment within the R.V.N. itself. As such, the Saigon government and not the N.L.F. is the only government lawfully entitled to request defensive assistance for the Republic of Viet Nam.

With respect to the Democratic Republic of Viet Nam, its claims to statehood are strengthened by the recognition presently accorded to it by about 24 nations,[114] and its participation in a number of international conferences.

It should be pointed out that the continuing full recognition accorded to the Republic of Viet Nam by the United States, Great Britain, France

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111. As late as 1965 apparently the few N.L.F. representatives abroad still did not claim diplomatic status. Fall, *Viet-Cong—The Unseen Enemy in Viet-Nam*, in VIET-NAM READER 252, 260. It would seem that for purposes of assessing the lawfulness of assistance to a recognized government meaningful discussion as to when rebels become a generally recognized government must distinguish the situation in which they achieve that status by virtue of completely indigenous revolt from the situation in which the status is only achieved in the first instance by virtue of significant outside initiation, direction, or assistance.

112. The United States was assisting the Republic of Viet Nam with limited economic and military aid beginning in 1955, and had rendered assistance to the State of Viet Nam even prior to that date. As Don and Arthur Larson have pointed out:

> Of total aid from 1953 to 1961, less than one-fourth was classified as military, and more than three-fourths economic. Some idea of the relatively small size of the military side may be seen from the announcement on May 5, 1960, that the Military Assistance and Advisory Group would be increased by the end of the year from 327 to 685.

Larson & Larson, *What Is Our "Commitment" In Viet-Nam?* in VIET-NAM READER 99, 101.

The National Liberation Front, however, was not formally created until December 20, 1960, and even then led what Bernard Fall describes as a "very shadowy life for almost two years." Fall, *Viet-Cong—The Unseen Enemy in Viet-Nam*, in VIET-NAM READER 252, 257.

113. See Fall, note 112 *supra* at 257.

114. "North Viet-Nam has full diplomatic relations with 24 countries, 12 of whom belong to the Communist bloc." *Legal Status of South Viet-Nam*, Release 4/31b-865BT, Office of Public Services, Bureau of Public Affairs, United States Dept. of State.

and Laos and the recognition of the D.R.V. by the Soviet Union and Communist China is again indicative that the participants in the Geneva Conference of 1954 did not contemplate that the Accords would adversely affect the existing statehood of the D.R.V. or the Republic of Viet Nam in the absence of elections to unify Viet Nam.

It should also be noted that in the 1962 Geneva Conference on Laos, the D.R.V. and the R.V.N. again participated separately.[115] In fact Laos apparently has diplomatic relations with both states, constituting additional recognition of the reality of the separateness of the D.R.V. and the R.V.N.[116]

As Dr. B. S. N. Murti, an Indian scholar who was actively associated with the International Commission For Supervision and Control in Viet Nam has written in 1964: "[Since the Geneva Agreement] Two independent sovereign States, claiming sovereignty over the whole country, came into existence in Viet Nam and the division of the country seems permanent. . . .[117] Both the States are completely independent with full-fledged Governments of their own owing no allegiance to the other."[118] Today, nearly twelve years after the Geneva Accords of 1954 it can be said that there are substantial expectations within the international community that the Republic of Viet Nam and the Democratic Republic of Viet Nam are separate and independent states under international law.[119]

115. See *Declaration and Protocol on the Neutrality of Laos*, (Treaty Series No. 27 [1963], Command Paper 2025). Great Britain Parliamentary Sessional Papers, XXXVII (1962/63), at 2, 22-23, 26.

116. There may be several other states as well, that have recognized both the D.R.V. and the R.V.N. In any event, the situation is comparable to that in Korea where South Korea has full relations with 64 nations while North Korea is recognized by 25, and apparently both Koreas are recognized by only about one nation. For the figures on North and South Korea, see *Legal Status of South Viet-Nam*, Release 4/31b-865BT, Office of Public Services, Bureau of Public Affairs, United States Department of State.

See also SURVEY OF INTERNATIONAL AFFAIRS 1955-56 16-17 (Royal Institute of International Affairs 1960). "Mr. Nehru announced in the Lok Sabha on 16 March 1955 that, though India did not have formal diplomatic relations with them, it had for all practical purposes recognized Cambodia, Laos, and North and South Vietnam, and had a special mission in Cambodia and consulates-general in the other three states." *Ibid.*

117. MURTI, VIETNAM DIVIDED (1964).

118. *Id.* at 176.

119. Professor Friedmann, a critic of aspects of United States assistance to the Republic of Viet Nam, apparently agrees that North and South Vietnam may be regarded as *de facto* separate states.

> In Yemen, where Saudi Arabia supports the royalists and Egypt the Republicans, and in Viet-Nam, where North and South Viet-Nam may, since the agreement of 1954, be considered as *de facto* separate states, the civil war aspects of the conflict are purely political and to some extent religious, but not racial.

Friedmann, *Intervention, Civil War and the Role of International Law*, 1965 PROC. AM. SOC. INT'L L. 67, at 70 (1965).

> It may be conceded that North and South Viet-Nam are today *de facto* separate states, even though the Geneva Agreement of 1954 spoke of 'two zones.'

The Republic of Viet Nam Has Requested Assistance From the United States to Meet Armed Aggression

That the government of the Republic of Viet Nam has requested assistance from the United States and other nations currently rendering military and non military assistance has never seriously been questioned. In fact, the first government of the Republic of Viet Nam requested United States assistance and no successor government has asked the United States to leave. It is also clear that the present government has requested and approves of United States assistance in meeting continuing armed aggression of mounting intensity.

Among numerous indications of this request for assistance to meet armed aggression, and approval of that assistance, are a letter from President Ngo Dinh Diem to President Kennedy dated December 7, 1961 in which President Diem said:

> Mr. President, my people and I are mindful of the great assistance which the United States has given us. Your help has not been lightly received, for the Vietnamese are proud people, and we are determined to do our part in the defense of the free world. . . . But Viet Nam is not a great power and the forces of International Communism now arrayed against us are more than we can meet with the resources at hand. We must have further assistance from the United States if we are to win the war now being waged against us.[120]

President Kennedy responded in a letter of December 14, 1961: "[I]n

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Friedmann, *United States Policy and the Crisis of International Law*, 59 AM. J. INT'L L. 857, at 866 (1965).

For Professor Friedmann's views see the above two articles.

See also SURVEY OF INTERNATIONAL AFFAIRS 1954 83 (Royal Institute of International Affairs 1957).

> For all practical purposes, there were from the middle of the year [1954] four states in Indo-China, North Viet-Nam, South Viet Nam, Cambodia and Laos. Political developments took a separate course in each of them, although they had in common the problems of the armistice and of their relations with France.

Ibid.

At least with respect to the lawfulness of the use of force the Soviet Government appears to agree that the R.V.N. and the D.R.V. are separate states.

> [W]ho has given the USA the right to deal out retribution for the actions of partisans in South Vietnam and for the defeats which the occupation forces and their accomplices are suffering by bombing raids on the territory of a third country —the VDR [D.R.V.]?

Broadcast text of Soviet Government statement on Viet-Nam, February 8, 1965, in *Recent Exchanges Concerning Attempts to Promote a Negotiated Settlement of the Conflict in Viet-Nam* (Viet-Nam No. 3 [1965], Command Paper 2756), at 11.

120. *Background Information Relating to Southeast Asia and Vietnam*, Committee on Foreign Relations, United States Senate 85-86 (Rev. ed. Comm. Print June 16, 1965).

response to your request, we are prepared to help the Republic of Viet-Nam to protect its people and to preserve its independence."[121]

And in a letter of December 9, 1961 from the Republic of Viet Nam to the International Control Commission the R.V.N. said:

> In the face of the aggression, directed by the so-called 'Democratic Republic of Viet-Nam' against the Republic of Viet-Nam, in flagrant violation of the Geneva Agreement, the Government of the Republic of Viet-Nam has requested the Government of the United States of America to intensify the aid in personnel and material which the latter was already granting to Viet-Nam. The right of 'self-defense' being a legitimate and inherent attribute of sovereignty, the Government of the Republic of Viet-Nam found itself constrained to exercise this right and request for increased aid, since North Viet-Nam continues to violate the Geneva Agreement and to do injury to life and property of the free people of Viet-Nam.
>
> These measures can end as soon as the North Viet-Nam authorities will have ceased the acts of aggression and will have begun to respect the Geneva Agreement.[122]

And Nguyen Cao Ky, the current Prime Minister of the Republic of Viet Nam stated in a speech to the Vietnamese people on October 1, 1965:

> At the request of the Republic of Viet Nam, the governments of the U.S., the Republic of Korea, Australia and New Zealand have sent their military units to help us. Following a legitimate self-defense plan, and very moderately, the Viet Nam Air Force and the U.S. Air Force have successfully bombed enemy military bases, staging areas, army barracks and supply depots in North Viet Nam.[123]

Nor is this just an official United States and Vietnamese view of the nature of this request. Mr. Michael Stewart, the British Secretary of State for Foreign Affairs, stated in the House of Commons in April 1965:

> Faced with that situation [aggression against the Republic of Viet-Nam from the D.R.V.] South Viet-Nam appealed to the United States for help, and the United States responded. But it is important to notice that in 1959, when this pressure from the

121. *Id.* at 84.

122. *Special Report to the Co-Chairman of the Geneva Conference on Indo-China,* (Vietnam No. 1 [1962], Command Paper 1755). Great Britain Parliamentary Sessional Papers, XXXIX (1961/62), at 8.

123. *Preliminary Report on the Achievements of the War Cabinet From June 19, 1965* 3, 6 (Republic of Vietnam).

> North began, and even as late as 1961—nearly two years later —there were still only 700 members of the United States Armed Forces in South Viet-Nam .... [I]t cannot be claimed that the action taken by the North was the result of a considerable United States military presence in the South. The action from the North preceded the arrival of United States forces in any considerable degree in the South.[124]

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124. *Documents relating to British Involvement in the Indo-China Conflict 1945-1965* (Miscellaneous No. 25 [1965], Command Paper 2834), at 250. With reference to this quoted figure of 700 members of the United States armed forces in Viet Nam as late as 1961, the exact figures vary from one account to another, possibly reflecting what month in 1961 one is referring to. There seems to be substantial agreement, however, that prior to 1961 the United States had only a very limited Military Assistance Advisory Group (MAAG) in South Viet Nam—probably not more than about 800-900 with figures somewhat lower in earlier years. See Larson & Larson, note 112 *supra* at 101. Some idea of the small military role of the United States during this period is indicated by the testimony of Secretary of State Dean Rusk before the Senate Foreign Relations Committee that the first United States military casualty in the R.V.N. occurred in December, 1961. THE VIETNAM HEARINGS 263 (Vintage ed. 1966). There is also substantial agreement that a moderate buildup of United States military advisory personnel began about mid-1961, going to roughly 12,000 by mid-1962 and about 23,000 by January 1965. See the address by William P. Bundy, Assistant Secretary for Far Eastern Affairs, January 23, 1965, reprinted in *Background Information Relating to Southeast Asia and Vietnam* 137 at 143, Committee on Foreign Relations, United States Senate (Rev. ed. Comm. Print June 16, 1965). See also *Special Report to the Co-Chairmen of the Geneva Conference on Indo-China*, (Vietnam No. 1 [1962], Command Paper 1755). Great Britain Parliamentary Sessional Papers, XXXIX (1961/62), at paragraph 16, page 9. See also on the level of United States forces in Viet Nam during this period the message from the President to Congress on May 4, 1965, in *Background Information Relating to Southeast Asia and Vietnam*, Committee on Foreign Relations, United States Senate 219-20 (Rev. ed. Comm. Print June 16, 1965). An indication of the relatively minor combat exposure of United States advisory personnel during much of this period is evidenced by the fact that as late as September 2, 1963, President Kennedy indicated that as few as forty-seven Americans had been killed in combat in Viet Nam. See *Background Information Relating to Southeast Asia and Vietnam*, Committee on Foreign Relations, United States Senate 100 (Rev. ed. Comm. Print June 16, 1965).

The more rapid build-up and the introduction of United States combat units as such apparently began in the Spring of 1965, leading to the present level of about 260,000 United States military personnel in the R.V.N. N.Y. Times, May 13, 1966, p. 1, col. 7 (city ed.), at p. 3, cols. 6 & 7. This defensive build-up is continuing.

Yet it seems to be accepted that a major escalation in the military attack on the government of the R.V.N.—said by some to really be the beginning of the conflict—took place about 1959-60, which is easily prior to the responding increases in United States forces. See, for example, Fall, *Viet-Cong—The Unseen Enemy in Viet-Nam* in VIET-NAM READER 252, at 256-57. It should also be noted that the D.R.V. issued a call in September, 1960, for the creation of a revolutionary front in the south to overthrow the Diem government. *Id.* at 257. Moreover, prior to the commencement of bombing of military targets in the D.R.V. in February, 1965, and the introduction of United States combat units as such in the Spring of 1965, ". . . in November, December, January, over the turn of the year 1964-65 . . . North Vietnam moved the 325th Division of the regular North Vietnamese Army from North Vietnam to South Vietnam to up the ante. . . ." Testimony of Secretary of State Dean Rusk to the Senate Foreign Relations Committee in THE VIETNAM HEARINGS 263 (Vintage ed. 1966).

And in an interview in April, 1966, Thich Tri Quang a South Vietnamese Buddhist monk with a wide popular following in the R.V.N. stated:

> Q. *Can you comment on rumors that the first thing a legislative assembly might do would be to ask the Americans to leave Viet Nam?*
>
> A. Rumors such as these are sheer libel. No proof or substantiation for them exists. One should not ask whether Americans should remain in Viet Nam. It is agreed by all that the struggle against Communism here must be made with the assistance of the Americans. So the problem is really how to enhance the value of that assistance. American assistance is not now fully supported in Viet Nam because there is no popular representation to give it such support. When an assembly is elected, it will, by giving its moral endorsement to such assistance, enhance its value and its acceptance.[125]

Although there is certainly evidence that the conflict in the Republic of Viet Nam also has internal support, no impartial observer today can question that the campaign to overthrow the internationally recognized government of the Republic of Viet Nam by force and violence receives significant military assistance and direction from the D.R.V. As such, the conflict within the R.V.N. cannot validly be categorized as a "civil war" for purposes of assessing the lawfulness of the responding assistance to the recognized government. As President Kennedy put it in a letter to President Diem as long ago as 1961:

> Your letter underlines what our own information has convincingly shown—that the campaign of force and terror now being waged against your people and your Government is supported and directed from the outside by the authorities at Hanoi. They have thus violated the provisions of the Geneva

125. "A Talk With Thich Tri Quang," Time Apr. 22, 1966, p. 27. Statements such as this perhaps take on added weight when it is remembered that Thich Tri Quang is highly critical of the present Ky-Thieu government and asserted United States support for that government.

See also "2 Top Buddhists Making Efforts To Mollify U.S.," N.Y. Times, June 10, 1966, p. 1, col. 1 (city ed.), at p. 3, col. 1; "New Buddhist Policy Raps Peace Talk As Cong Sellout," New Haven Register, June 9, 1966, p. 1, cols. 6-7 (city ed.).

> Buddhist foes of Premier Nguyen Cao Ky's regime . . . . disavowed neutralism and said any peace talks now would mean surrender to the Viet Cong.
>
> The presence of American troops in the country is obviously needed temporarily, said a 15-point proclamation by the Unified Buddhist Church. . . .
>
> The statement by the Unified Buddhist Church denied any neutralist tendencies among the estimated .5 million Buddhists it represents. It said the presence of American troops in the nation of 15 million "is obviously needed, temporarily."

Id. at p. 1, col. 6, p. 2, col. 1.

Accords designed to ensure peace in Viet-Nam and to which they bound themselves in 1954.[126]

Evidence of this external military assistance and direction is well documented and is not just a United States view. On June 2, 1962, the International Commission for Supervision and Control in Viet Nam, composed of representatives from India, Canada and Poland and which was established pursuant to the 1954 Geneva Accords issued a Special Report which considered allegations of aggression and subversion on the part of the D.R.V. against the Republic of Viet Nam. In this Special Report, the first report so designated since the commencement of the I.C.C.'s reporting in 1954, the Commission adopted the following findings of the Legal Committee:

(1) The Agreement on the Cessation of Hostilities in Viet-Nam proceeds on the principle of the complete cessation of all hostilities in Viet-Nam, respect by either Party of the Zone assigned to the other, and the inescapable responsibility of the Parties for the fulfillment of the obligations resulting therefrom . . . .

It follows that the using of one Zone for the organization or the carrying out of any hostile activities in the other Zone, violations by members of the Armed Forces of one Party of the territory of the other Party, or the commission by any element under the control of one Party of any act directed against the other Party, would be contrary to the fundamental provisions of the Agreement which enjoin mutual respect for the territories assigned to the two Parties.

(2) Having examined the complaints and the supporting material sent by the South Vietnamese Mission, the Committee has come to the conclusion that in specific instances there is evidence to show that armed and unarmed personnel, arms, munitions and other supplies have been sent from the Zone in the North to the Zone in the South with the object of supporting, organizing and carrying out hostile activities, including armed attacks, directed against the Armed Forces and Administration of the Zone in the South. These acts are in violation of Articles 10, 19, 24 and 27 of the Agreement on the Cessation of Hostilities in Viet-Nam.

(3) In examining the complaints and the supporting material,

126. *Background Information Relating to Southeast Asia and Vietnam*, Committee on Foreign Relations, United States Senate (Rev. ed. Comm. Print June 16, 1965), at 84.

> in particular documentary material sent by the South Vietnamese Mission, the Committee has come to the further conclusion that there is evidence to show that the PAVN has allowed the Zone in the North to be used for inciting, encouraging and supporting hostile activities in the Zone in the South, aimed at the overthrow of the Administration in the South. The use of the Zone in the North for such activities is in violation of Articles 19, 24 and 27 of the Agreement on the Cessation of Hostilities in Viet-Nam. . . .[127]

In adopting these findings of the Legal Committee the Commission said: "The Commission accepts the conclusions reached by the Legal Committee that there is *sufficient evidence to show beyond reasonable doubt* that the PAVN has violated Articles 10, 19, 24 and 27 in specific instances."[128] Although the Polish representative dissented from these conclusions,[129] the Indian representative who signed the Commission report issued a special statement indicating disagreement with the statement of the Polish delegation and reiterating the stand and findings of the Indian and Canadian delegations as formulated in the Special Report.[130]

And in a dissenting report from the Canadian delegation to the Co-Chairman of the Geneva Conference issued on February 13, 1965, the Canadian delegation made public what he indicated were conclusions of the Legal Committee of the I.C.C. to the effect that:

> The Legal Committee concludes (reference paragraphs 742 to 746 and paragraph 754 in Section VI) that it is the aim of the

127. *Special Report to the Co-Chairmen of the Geneva Conference on Indo-China*, (Vietnam No. 1 [1962], Command Paper 1755). Great Britain Parliamentary Sessional Papers, XXXIX (1961/62), at 6-7.

128. *Id.* at 7. (Emphasis added).

The Commission also found after discussing this armed aggression from the D.R.V. that the responding United States military assistance was a violation by the R.V.N. of Articles 16, 17 and 19 of the Geneva Agreements. *Id.* at 10.

In evaluating the legal import of these findings it should be kept in mind that the Commission's findings amount to findings of aggression by the D.R.V. against the R.V.N. in breach of the Geneva Accords. As a result of such aggression, the R.V.N. would be entitled to suspension of any corresponding obligations that may be binding on it as necessary to take appropriate defensive measures.

It should also be pointed out that even if all of the asserted political grievances of the D.R.V. against the R.V.N. were legally justified, including the failure to hold elections, still they do not remotely constitute an "armed attack" within any accepted interpretation of Article 51 of the Charter. As such, an attack by the D.R.V. because of alleged breach of political provisions is still violative of a major principle of the U.N. Charter. See the discusions in sections 1B and IV *infra*.

129. *Id.* at 21-22.

130. *Id.* at 23.

Vietnam Lao Dong Party (the ruling Party in the Zone in the North) to bring about the overthrow of the Administration in the South. In September 1960, the Third Congress of the Vietnam Lao Dong Party held in Hanoi (in the Zone in the North) passed a resolution calling for the organization of a 'Front' under the leadership of the Vietnam Lao Dong Party for the overthrow of the Administration in the South. Such a 'Front for Liberation of the South' was, in fact, constituted under the sponsorship of the Vietnam Lao Dong Party. There are present and functioning in the Zone in the South branches of the Vietnam Lao Dong party and the Front for Liberation of the South along with its armed branches, namely, the 'Forces for Liberation of the South,' and the 'People's Self-Defence Armed Forces.' The Vietnam Lao Dong Party and the Front for Liberation of the South have the identical aim of overthrowing the Administration in the South. The Vietnam Lao Dong Party, the Front for Liberation of the South, the Forces for Liberation of the South and the People's Self-Defence Armed Forces have disseminated in the Zone in the South propaganda seeking to incite the people to oppose and overthrow the Administration in the South. There exists and functions a 'Voice' of the Front for Liberation of the South and a 'Liberation Press Agency' which assist in the above-mentioned activities. It is probable that Hanoi Radio also has assisted in the said activities. Propaganda literature of the Front for the Liberation of the South and in favour of the activities of the Front has been published in the Zone in the North and has been distributed above by the official representatives of the DRVN.

The Legal Committee further concludes that:

(1) The Vietnam Lao Dong Party in the Zone in the North, the various branches of the Vietnam Lao Dong Party in the Zone in the South, the Front for Liberation of the South, the Forces for Liberation of the South and the People's Self-Defence Armed Forces have incited various sections of the people residing in the Zone in the South, including members of the Armed Forces of the South, to oppose the Administration in the South, to overthrow it by violent means and have indicated to them various means of doing so.

(2) Those who ignored their exhortation and continued to support the Administration in the South have been threatened with punishment and in certain cases such punishment has been effected by the carrying out of death sentences.

(3) The aim and function of the Front for Liberation of the South, the Forces for Liberation of the South and the People's Self-Defence Armed Forces are to organize and to carry out under the leadership of the Vietnam Lao Dong Party, hostile activities against the Armed Forces and the Administration of the South by violent means aimed at the overthrow of the Administration of the South.

The Legal Committee concludes also that the PAVN has allowed the Zone in the North to be used as a base for the organization of hostile activities in the Zone in the South, including armed attacks, aimed at the overthrow of the Administration in the South in violation of its obligations under the Agreement on the Cessation of Hostilities in Vietnam.[131]

In this same report, the Canadian representative to the I.C.C. said:

It is the considered view of the Canadian Delegation that the events which have taken place in both North and South Vietnam since February 7 are the direct result of the intensification of the aggressive policy of the Government of North Vietnam. In the opinion of the Canadian Delegation, therefore, it should be the chief obligation of this Commission to focus all possible attention on the continuing fact that North Vietnam has increased its efforts to incite, encourage, and support hostile activities in South Vietnam, aimed at the overthrow of the South Vietnamese administration. These activities are in direct and grave violation of the Geneva Agreement and constitute the root cause of general instability in Vietnam, of which events since February 7 should be seen as dangerous manifestations. The cessation of hostile activities by North Vietnam is a prerequisite to the restoration of peace in Vietnam as foreseen by the participants in the Geneva Conference of 1954.[132]

The majority report of the Indian and Polish delegations did not dispute these findings[133] but in a short separate statement on the Canadian

131. *Special Report to the Co-Chairmen of the Geneva Conference on Indo-China, February 13, 1965* (Vietnam No. 1 [1965], Command Paper 2609), at 12-13.

132. *Id.* at 14-15.

133. *Id.* at 4-5. The majority report was concerned with the commencement of United States and R.V.N. bombing of the D.R.V. on February 7, 1965. After adverting to documents indicating that the bombing had taken place the Commission said:

These documents point to the seriousness of the situation and indicate violations of the Geneva Agreement.

The International Commission is examining and investigating these and connected complaints still being received by it concerning similar serious events and grave developments, and will transmit a report to the co-Chairmen as soon as possible.

statement the Polish representative indicated his disagreement with the Canadian statement and denied that the material disclosed by the Canadian representative had any sanction by the Commission.[134] And in another short separate statement the Indian representative denied that the information quoted in the Canadian statement was sanctioned by the Commission or any of its committees.[135]

To anyone familiar with the cautious wording of the I.C.C. Reports, these findings within the context of Special I.C.C. Reports indicate recognition of military assistance and direction from the D.R.V. aimed at the overthrow of the Republic of Viet Nam by armed aggression.

This conclusion is expressed even more strongly by the SEATO Council. In a communique issued on March 30, 1961, the SEATO Council declared:

> Having examined the situation in Laos and the Republic of Viet-Nam, the Council *unanimously* approved the following resolution: . . . the SEATO Council has noted with grave concern the continued offensive by rebel elements in Laos who are continuing to be supplied and assisted by Communist powers in flagrant disregard of the Geneva accords. . . .
>
> The Council also noted with concern the efforts of an armed minority, again supported from outside in violation of the Geneva accords, to destroy the Government of South Viet-Nam, and declared its firm resolve not to acquiesce in any such takeover of that country.[136]

And on April 15, 1964, with the French Council Member abstaining, the final communique of the SEATO Council Meeting declared:

> The Council expressed grave concern about the continuing Communist aggression against the Republic of Viet-Nam, a Protocol State under the terms of the Manila Pact. Documentary and material evidence continues to show that this

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Id. at 4. In evaluating the legal import of these findings see the statement of the Canadian Delegation *id.* at 12-15 and note 128 *supra.*

134. *Id.* at 32.

135. *Id.* at 31. Although inquiries have been made in letters sent on April 14, 1966 to both the Indian and Canadian delegations in an effort to clarify their apparently contradictory reports with respect to the additional findings of the Legal Committee, at this writing no reply has been received from the Indian delegation. In a letter of April 22, 1966 to J. N. Moore, Commissioner V. C. Moore of the Canadian Delegation indicated that the letter had been forwarded to the Department of External Affairs in Ottawa for future substantive reply.

136. *Seventh Ministerial Meeting of the Council of Seato, Bangkok, March 27-29, 1961: Communique Issued March 30, 1961*, AMERICAN FOREIGN POLICY 940, at 940-41 (Current Documents 1961) (Emphasis added.)

> organized campaign is directed, supplied and supported by the Communist regime in North Viet-Nam, in flagrant violation of the Geneva Accords of 1954 and 1962. . . .
>
> The Council agreed that the defeat of the Communist Campaign is essential not only to the security of the Republic of Viet-Nam, but to that of South-East Asia. . . .[137]

And in a communique issued by the SEATO Council on May 5, 1965, again with the French reserving commitment, the Council said:

> The Council considered at length the dangerous situation caused by the aggression against the Republic of Viet-Nam—an aggression organised, directed, supplied and supported by the Communist regime in North Viet-Nam in contravention of the basic obligations of international law and in flagrant violation of the Geneva Agreements of 1954 and 1962. The Council noted with grave concern the increasing infiltration of arms and combat personnel from North Viet-Nam into South Viet-Nam and the evidence that this infiltration includes members of the regular armed forces of North Viet-Nam. . . .
>
> The Council reaffirmed its conclusion at Manila a year ago that the defeat of this Communist campaign is essential not only to the security of the Republic of Viet-Nam but to that of South-East Asia. . . .
>
> The Council agreed that Communist subversion continued to be a serious threat to the Asian member nations. It agreed that measures envisaged, namely, material and other aid at the request of the countries affected, should be continued.[138]

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137. SEATO RECORD 18, at 19 (Vol. III No. 3 June 1964). The French declared in abstaining: "The French Council Member, while expressing the sympathy and friendship of France for the Vietnamese people, who for such a long time have been undergoing such severe trials and who aspire towards real independence, stated that under the present serious circumstances it was wise to abstain from any declaration." *Id.* at 19.

The SEATO Council also "expressed concern that the achievement of a neutral and independent Government of National Union in Laos is being jeopardized by repeated violations of the Geneva Agreement of 1962, particularly by North Vietnamese military assistance and intervention and by repeated Pathet Lao attacks. . . ." *Id.* at 19-20.

See also the final communique of the thirteenth meeting of the ANZUS Council, July 18, 1964, in SEATO RECORD 14 (Vol. III No. 4 August 1964). "The Council gave particular attention to the aggression against South Viet Nam which the communist regime in Hanoi organized and is directing, supplying and supporting in flagrant violation of the Geneva Accords of 1954 and 1962." (The ANZUS Council is composed of representatives from Australia, New Zealand and the United States.)

138. *Extract from a Communique issued by the Council of the South-East Asia Treaty Organization, Bangkok, 5 May 1965*, in *Documents Relating to British Involvement in the Indo-China Conflict 1945-1965* (Miscellaneous No. 25 [1965], Command Paper 2834) 257, at 258, 260; SEATO RECORD 23, at 23-25 (Vol. IV No. 3 June 1965).

The SEATO Council is composed of representatives from Thailand, Pakistan, Australia, New Zealand, France, Great Britain and Northern Ireland, the United States, and the Philippines.

In recent study of the political roots of the Viet Cong—the National Liberation Front (N.L.F.) and the People's Revolutionary Party (P.R.P.)—published in the April 1966 issue of *Foreign Affairs*, George A. Carver, Jr. writes:

> In short, not only does the P.R.P. control all aspects of the Viet Cong movement, including the N.L.F., and not only is it a subordinate echelon of the North Vietnamese Lao Dong Party, but the P.R.P.'s own leaders appear to be individuals who themselves occupy ranking positions within the Lao Dong Party hierarchy.[139]
>
> An understanding of the Viet Cong's organizational structure enables us to recognize the real significance and function of the more than 50,000 persons infiltrated into South Viet Nam since the Lao Dong Party's 1959 decision to pursue its objective of political conquest by waging insurgent war. Until mid-to late 1963 these infiltrators were virtually all ethnic southerners drawn from the pool of regrouped Viet Minh forces and supporters taken north in 1954. They were not foot soldiers or cannon fodder (at least not until Hanoi began sending in whole North Vietamese units in late 1964 or early 1965). Instead they were disciplined, trained and indoctrinated cadres and technicians. They became the squad leaders, platoon leaders, political officers, staff officers, unit commanders, weapons and communications specialists who built the Viet Cong's military force into what it is today. They also became the village, district, provincial and regional committee chiefs and key committee members who built the Viet Cong's political apparatus. . . . Until the recent sharp rise in Viet Cong battlefield casualties,

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The Government of France, which was only represented by an observer at this tenth meeting of the SEATO Council, declared: "The French Observer indicated that, as he had not participated in preparing this communique, the French Government does not consider itself to be committed by it." *Id.* at 25.

The Council also "expressed concern that the Geneva Agreement of 1962 continues to be violated by the presence of North Vietnamese military forces and supplies in Laos, by the activities of the Pathet Lao, and by North Vietnamese use of the territory of Laos to send men and material to the Viet Cong in South Viet-Nam." *Id.* at 24. And the Council "noted with concern evidence of increasing Communist subversion from outside the country against Thailand notably in the north-eastern part of the country." *Id.* at 24-25.

139. Carver, *The Faceless Viet Cong*, 44 FOREIGN AFFAIRS 347, 364 (April 1966), reprinted in 112 CONG. REC. 6150 (daily ed. March 22, 1966). George A. Carver, Jr. holds degrees from Yale and Oxford, is a former officer in the U.S. Aid Mission in Saigon, and has been associated with the U.S. Central Intelligence Agency.

> approximately a third of all the personnel in Viet Cong military units at and above the district company level were 'returnees' trained in the North. At least half of the membership of most P.R.P. district committees, and an even larger proportion at higher echelons, also appear to be 'returnees.' Without this infiltration from the North, in short, the present Viet Cong organization could never have been developed.[140]
>
> There are unquestionably many non-Communists heroically serving in various components of the National Liberation Front out of a desire to redress genuine grievances or in the honest belief that they are thereby helping to build a better political structure for their native land. As an organization, however, the N.L.F. is a contrived political mechanism with no indigenous roots, subject to the ultimate control of the Lao Dong Party in Hanoi.[141]
>
> No Vietnamese of what could accurately be described as significant personal prestige or professional standing—not even one of known leftist persuasion—has ever been willing to associate himself publicly with the N.L.F. or lend it the use of his name.[142]

This direction of the N.L.F. by the D.R.V. is also backed up by Professor Tai Sung An writing in the Summer 1965 issue of *Orbis*, the Journal of the Foreign Policy Research Institute of the University of Pennsylvania who wrote:

> The overall strategy of the Viet Cong insurrectionary movement in South Vietnam is directed by the Lao Dong Party (the North Vietnam Communist Party) under the overlordship of the Chinese Communists.[143]

And in April, 1966, following several weeks of political unrest in the R.V.N., Thich Tri Quang, one of the leaders of the protest movement said in discussing the nature of the Viet Cong in an interview:

> Q. *Do you believe there are non-Communist elements within the Viet Cong?*

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140. *Id.* at 369-70.

141. *Id.* at 372.

142. *Id.* at 365. For an article substantially backing up this analysis of the N.L.F. membership see Pike, *How Strong Is the N.L.F.?* reprinted in 112 CONG. REC. 343 (daily ed. Feb. 21, 1966).

143. Tai Sung An, *The Sino-Soviet Dispute and Vietnam* IX ORBIS 426, at 429 (Summer 1965). Tai Sung An is an "Assistant Professor of Political Science, Washington College, Chestertown, Maryland, formerly, Research Associate, Foreign Policy Research Institute." *Id.* at 523.

A. If so, they are completely exploited and led by the Communists, so we can have no hope for them. Even if they are only followers, they can be of no use to us. Being led or directed by Communists is the same as being a Communist.

Q. *What do you think of the Viet Cong movement?*

A. This is mostly a matter of semantics to me. People try to separate North Vietnamese Communists from South Vietnamese Communists. No such separation exists. They are both Communists. And as far as I am concerned, as a religious man, the ideology they possess is much more dangerous than the guns they possess.[144]

And *New York Times* correspondent Neil Sheehan in an article in the May 2, 1966 *New York Times*, provides an analysis of the evidence on which the above conclusions are based which substantially supports these findings as to the character of the National Liberation Front. He points out that:

> The available evidence strongly indicates that the war was actually initiated on orders from Hanoi after the regime of the late President Ngo Dinh Diem refused in 1956, with United States support, to hold the Vietnam-wide elections that were to decide the circumstances for a reunification of the country. . . . The instrument for the renewal of guerilla warfare was the clandestine organization that had been deliberately left behind when the bulk of the Communist-led Vietminh troops, who fought the French and were the predecessors of the Vietcong, were withdrawn to the North in 1954.
>
> The existence of such a clandestine Communist party organization in the South has been documented. In this regard, analysts also point out a fact often little understood in the West, that there is only one Communist party in Vietnam and that its organizational tentacles extend throughout both the North and the South. At no time since the mid-nineteen-forties, when the struggle against the Japanese, and then the French began, has the politiburo of the party lost control over its branch in the South. . . .
>
> By 1960, the evidence indicates, Hanoi decided that some instrument was necessary to lend an aura of legitimacy and to disguise Communist control over the guerrilla warfare its cadres had fostered in the South. [leading to a call for the formation of the N.L.F.]. . . .

144. "A Talk with Thich Tri Quang," Time April 22, 1966, p. 27.

> Students of Vietnamese Communism view the character of the alleged non-Communist leadership within the Liberation Front as another indication that it is Communist controlled. Little is known about these men, but what is known indicates that they are, without exception, colorless figures with no significant political standing. All have histories of left-wing activities. . . .
>
> [T]he Liberation Front does not control the Vietcong armed forces, despite its claims to the contrary. Documentary evidence, interrogation of prisoners and other intelligence data indicate that guerilla units are directed by an organization known as the Central Office for South Vietnam, or Cosvin as it is commonly called here.
>
> Cosvin is believed to be the senior Communist headquarters in the South, reporting directly to the reunification department of the Communist party in Hanoi and thus to the politburo. Through its military affairs department, Cosvin acts as a high command for the Vietcong guerrilla units. . . .
>
> The Communist had hoped at the time of the Liberation Front's formation in 1960 to attract prominent South Vietnamese intellectuals, politicians and religious leaders. . . . None have as yet joined the front. . . . Practically all prominent non-Communist Vietnamese politicians, including Thich Tri Quang, have repeatedly stated their belief that the front is controlled by the Communists. . . .[145]

It should also be pointed out that even if all of the asserted political grievances of the D.R.V. against the R.V.N. were legally justified, including the failure to hold elections, still they do not remotely constitute an "armed attack" under any accepted definition of "armed attack" within the meaning of Article 51 of the U.N. Charter, or otherwise present a self-defense situation justifying the use of the military instrument by the D.R.V. against the R.V.N.[146] As such, the evidence of significant initiation and military assistance and direction of the conflict from Hanoi constitutes evidence of outside aggression in violation of a major principle of the U.N. Charter and gives rise to appropriate rights of self-defense in the Republic of Viet Nam, whether or not the

145. Neil Sheehan, "Hanoi's Troop Infiltration Said to Trouble Vietcong," N.Y. Times, May 2, 1966, p. 1, col. 2 (city ed.), at p. 4, cols. 1-6. See also the articles by R. W. Apple, Jr., "A Hanoi General May be In The South," N.Y. Times, Feb. 17, 1966, p. C 3, col. 1, (city ed.); and Jack Raymond, "Vietnam: The Facts Behind the War," N.Y. Times, Feb. 6, 1966, p. 4E, col. 1.

146. See the discussion of "armed attack" within the meaning of Article 51 at pp. 271-309 *infra* and in the authorities cited pp. 271-94 *infra*.

attack was in response to legally justified assertions of breach of political conditions in the Geneva Accords.[147]

Documentation by the United States and the Republic of Viet-Nam with respect to the aggression of the D.R.V. against the R.V.N. may be found in *A Threat to the Peace, North Viet-Nam's Effort to Conquer South Viet-Nam* (1961) and *Aggression from the North, The Record of North Viet-Nam's Campaign to Conquer South Viet-Nam* (1965), two reports issued by the U.S. Dept. of State, and *Communist Aggression Against The Republic of Viet-Nam* (1964), and *The Bogus War of Libera-*

147. The principle of the U.N. Charter violated is, of course, the prohibition against the use of force in international relations contained in Article 2, §§ 3 and 4.

With respect to the failure to hold elections in 1956 see generally Fall, *How the French Got Out of Viet-Nam* in VIET NAM READER 81, at 87-91; MURTI, 178-195; Young, *The Southeast Asia Crisis*, THE EIGHTH HAMMARSKJOLD FORUM 5, at 109-114 (The Association of the Bar of the City of New York, Working Paper 525/65/2, October 18, 1965).

> The United States Government indeed did try to persuade President Diem and his colleagues in Saigon to conduct the discussions for as long as necessary and in elaborate detail with the communist authorities in a location which would have been provided for this purpose in the demilitarized zone. However, as a matter of policy, the government in Saigon decided that it should not and could not compromise its position by any such consultations. The governments of the United States, France and Great Britain agreed jointly to persuade the governments in Saigon otherwise, but, despite their efforts, they were not in any position to force what they considered to be a sovereign government, recognized by many nations, to undertake action which was considered detrimental, possibly leading to vital harm, to the national interest and integrity of that *independent* state. At the Summit Conference in July 1955 the Soviet delegation was apprised of this situation but did not show particular concern. In 1956 the Western governments were of much the same opinion. The British and Soviet Co-Chairmen, anticipating that the elections under Paragraph 7 would not take place, advised the Vietnamese authorities in North Vietnam and in South Vietnam not to disturb the peace and to cooperate with the International Commission. Apparently the Soviet Government did not put any great pressure on its communist colleagues or on its Western adversaries to enforce these so-called election provisions of the Geneva Agreements.

Id. at 113. (Kenneth T. Young, Jr. is the former United States Ambassador to Thailand.); Tolischus, *Elections in Vietnam*, The New Leader, August 16, 1965, p. 9.

> These elections were to be held in Vietnam in 1956. They were not, and the impression has been spread that President Diem, prodded by the U.S., refused to permit them for fear the Communists would win. That is not true. The United States committed itself at Geneva to national unification elections supervised by the United Nations for all partitioned countries, including Vietnam.
>
> The Diem regime, which did not sign the Geneva Accords and did not consider itself bound by them nevertheless agreed to the elections and in July 1955 declared itself ready to discuss election procedures with Ho Chi Minh. But it quite properly demanded that Ho first comply with the Geneva agreement by creating the necessary conditions for free elections in the North, ending Communist terror and totalitarian control and assuring liberties at least equal to those in the South. These demands were repeated in 1958 and 1960.

Ibid. (Otto D. Tolischus is a Pulitzer Prize winning former member of the editorial board of the New York Times.)

tion in South Vietnam (1965), two reports issued by the Republic of Viet Nam.

In testifying publicly before the Senate Foreign Relations Committee on April 20, 1966 Secretary of Defense McNamara said that his information indicated that there were approximately 20,000 *regular D.R.V. troops* presently operating in the R.V.N. and receiving "day to day and hour to hour" direction from Hanoi, and that the infiltration rate from the D.R.V. was continuing at the current rate of approximately 4,500 per month. He also indicated that regular troops of the D.R.V. were operating in the R.V.N. as early as 1964 and prior to commitment of United States combat units as such.

And according to the United States Department of State:

> In the three-year period from 1959-1961, North Viet Nam infiltrated an estimated 10,700 men into South Viet Nam. . . . The gradual build-up of United States military assistance which began in late 1961 was a direct and justifiable response to the previous serious violations of the 1954 Geneva Agreements by North Viet Nam. The aggression by Hanoi became substantial in 1959 and had intensified to dangerous proportions by late 1961. . . .
>
> It is now estimated that by the end of 1964 North Viet Nam had infiltrated over 40,000 men into South Viet Nam. Most of these men were infiltrated through the territory of Laos in plain violation of the 1962 Geneva Agreement on the Neutrality of Laos. Native North Vietnamese began to appear in South Viet Nam in large numbers in early 1964, and in December 1964 full units of the regular North Vietnamese army began to enter the South. The latest evidence indicates that elements of the 325th PAVN division began to prepare for the move south in April 1964. . . .
>
> The level of enemy activity increased sharply in 1965 and new efforts were required to protect South Viet Nam from being overrun. The number of incidents and large-scale enemy attacks reached new highs, and the level of infiltration rose dramatically over 1964. Final figures for 1965 are not yet available, but it is estimated that seven regiments of the army of North Viet Nam and thousands of other troops entered the South in 1965.[148]

Although the conclusions of the State Department "White Papers" have been challenged with respect to the degree of indigenous v. outside

148. *The Basis for United States Actions in Viet Nam Under International Law* 5 (Mimeograph U.S. Dept. of State).

initiation, direction and assistance in the Viet Nam conflict,[149] the totality of evidence—whether or not all of the above evidence is accepted in its entirety—strongly indicates that the campaign to overthrow the recognized government of the Republic of Viet Nam by violence receives substantial military assistance and direction from the D.R.V. and suggests that prior to any significant increases in United States assistance, D.R.V. initiative was a critical element in the conflict. There can be no reasonable doubt from the evidence that this was so prior to the commencement of bombing of military targets in the D.R.V. in February, 1965 and the introduction of United States combat units as such in the spring of 1965. The statements and documents from representatives of third party states as well as from the states directly concerned indicate international recognition of this armed aggression by the D.R.V. against the R.V.N.

This continuing aggression constitutes an "armed attack" within the meaning of Article 51 of the United Nations Charter and general principles of international law, and is in violation of the 1954 and 1962 Geneva Accords.

All of the frequently cited definitions of aggression from the most conservative to the broadest, apply to the D.R.V. activities. Many of these definitions so closely fit these activities that they might well serve as factual descriptions, especially written to describe the entire range of those activities. Even the most narrowly conceived definitions apply to a large portion of those activities and in their totality such activities certainly constitute an "armed attack" justifying use of the military instrument in self-defense.

The findings of the International Control Commission and the evidence discussed above indicate at least four categories of D.R.V. activities that constitute aggression under customary international law and the United Nations Charter. They are:

> 1. . . . The PAVN has allowed the Zone in the North to be used for inciting, encouraging and supporting hostile activities in the Zone in the South, aimed at the overthrow of the Administration in the South.
>
> 2. Committing and encouraging acts of terrorism against the government of the Republic of Viet Nam.
>
> 3. Violation of articles 10, 19, 24 and 27 of the Agreement on the Cessation of Hostilities in Viet Nam.
>
> 4. Armed attack against the Republic of Viet Nam.[150]

149. See I. F. Stone, *A Reply to the White Paper* in GETTLEMAN, VIET NAM: HISTORY, DOCUMENTS, AND OPINIONS ON A MAJOR WORLD CRISIS 317 (Fawcett ed. 1965), and in VIET-NAM READER 155.

150. I.C.C. findings are quoted in part in *Documents Relating to British Involvment in*

Each of these categories has the common characteristic of being directed against the territorial and political integrity of the Republic of Viet Nam and would seem to violate Article 2(4) of the United Nations Charter. In other words, 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. This becomes evident when each of these categories is considered in the light of the definitions of aggression under the United Nations Charter and customary international law.

Fomenting Civil Strife and Aiding Rebellion in Another State Constitute Aggression Under International Law

The United Nations has repeatedly condemned the creation of civil strife by external elites using internal agents. Thus the General Assembly said in Resolution 380-V.

> The General Assembly. . . condemning the intervention of a state in the internal affairs of another state for the purpose of changing its government by the threat or use of force,
>
> 1. Solemnly reaffirms that whatever the weapons used, any *aggression*, whether committed openly or by *fomenting civil strife* in the interest of a foreign power, or otherwise is the gravest of all crimes against peace and security throughout the world.[151]

The General Assembly also condemned aid given by Yugoslavia, Bulgaria, and Albania to Greek rebels in a manner significantly similar to the D.R.V. activities. In Resolution 193 the General Assembly stated:

> The Greek guerrillas have continued to receive aid and assistance on a large scale from Albania, Bulgaria, and Yugoslavia, with the knowledge of the Government of those countries and that the Greek guerrillas in the frontier have, as found by the Special Committee:
>
> (i) Been largely dependent on external supply. Great quantities of arms, ammunition and other military stores have come across the border, notably during the times of heavy fighting. . . .
>
> (ii) Frequently moved at will in territory across the frontier for tactical reasons, and have thus been able to concentrate their

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the Indo-China Conflict 1945-1965 (Miscellaneous No. 25 [1965], Command Paper 2834) at 195, 198. See also *Special Report to the Co-Chairmen of the Geneva Conference on Indo-China*, (Vietnam No. 1 [1962], Command Paper, 1755). Great Britain Parliamentary Sessional Papers, XXXIX (1961/62).

151. Resolution No. 380 (v) U.N. GEN. ASS. OFF. REC. 5th Sess., Supp. No. 20, p. 13 at p. 17 (Doc. A 1775) Nov. 17, 1950 (emphasis added).

forces without interference by the Greek army, and to return to Greece when they wished..

(iii) Frequently retired safely into the territory of Albania, Bulgaria and Yugoslavia when the Greek army exerted great pressure.

3. Having noted further the conclusions of the Special Committee that a continuation of this situation *constitutes a threat to the political independence and territorial integrity of Greece and to peace in the Balkans and that the conduct of Albania, Bulgaria, and Yugoslavia had been inconsistent with the purposes and principles of the Charter of the United Nations.* . . .

5. Considers that the continued aid given by Albania, Bulgaria, and Yugoslavia to the Greek guerillas endangers peace in the Balkans, and is inconsistent with the purposes and principles of the Charter of the United Nations.

6. Calls upon Albania, Bulgaria and Yugoslavia to cease forthwith rendering any assistance or support in any form to the guerillas in fighting against the Greek Government including the use of their territories as a base for the preparation or launching of armed action. . . .

9. Recommends to all members of the United Nations and to all other states that their Governments refrain from any action designed to assist directly or through any other Government any armed group fighting against the Greek Government. . . .[152]

In article 2, paragraph 4 of the International Law Commission's Draft of a Code of Offenses against the Peace and Security of Mankind, the I.L.C. condemned:

> The organization, or encouragement of the organization, by the authorities of a state, of armed bands within its territory or any other territory for incursions into the territory of another state; or the toleration of the organization of such armed bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another state as well as direct participation in or support of such incursions.[153]

In article 2(5) the "undertaking or encouraging by the authorities of a

152. Resolution 193 (iii) U.N. GEN. ASS. OFF. REC. 3d Sess., pt. 1, Resolutions pp. 18-20 (A/810) (1948) (emphasis added).

153. Adopted by the I.L.C., 3 June-28 July 1954, U.N. GEN. ASS. OFF. REC. 9th Sess., Supp. 9, p. 10 at 11 (A/2693).

state of activities calculated to foment civil strife in another state"[154] is condemned.

Such legal disapproval of a state's fomenting civil strife in another state by offering sanctuary, military aid and encouragement to rebels seeking to overthrow the government of the other state are not peculiarly Western points of view. Communist nations have long purported to condemn the same activity. Thus in a draft resolution presented to the General Assembly in 1954 the USSR labeled as aggression "Support of armed bands organized in its own territory which invade the territory of another state. . . ."[155]

In the same resolution the USSR labels as indirect aggression an act which creates "An internal upheaval in another state or a change of policy in favour of the aggressor."[156]

Such definitions of aggression have historical precedent for the Soviet Union. In 1933 the USSR concluded a treaty with Rumania, Poland, Afghanistan, Persia, Latvia, Estonia, Turkey, and Finland. Article 2(5) labelled as aggression the "Provision of support to armed bands formed in its territory that have invaded the territory of another state. . . ."[157]

Such practices and pronouncements, taken together, constitute strong authority that the International Control Commission's findings that the DRV "has allowed the Zone in the North to be used for inciting, encouraging, and supporting hostile activities in the Zone in the South, aimed at the overthrow of the Administration in the South"[158] amounts to a finding that the D.R.V. has committed aggression against the R.V.N.

Committing and Encouraging Acts of Terrorism in the Republic of Viet Nam Constitute Acts of Aggression Under International Law

The finding of the Legal Committee of the International Control Commission—according to the Canadian representative—that those who opposed the D.R.V.-Viet-Cong effort to overthrow the government of the Republic of Viet Nam were "threatened with punishment and in certain cases such punishment has been effected by the carrying out of death sentences" constitutes a finding of aggression under international law.

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154. Prepared by I.L.C. 16 May-27 July 1951, U.N. GEN. ASS. OFF. REC. 6th Sess. Supp. 9. p. 10 at 12 (A/1858).

155. Article 1(f), USSR, Draft Resolution 18 Oct. 1954 U.N. GEN. ASS. OFF. REC., 9th Sess., Annexes, Agenda Item No. 51, at 6 (A/C. 6/L332) (Rev. 1).

156. *Id.* at art 2(c).

157. 147 L.N.T.S. 69, at 73. The treaty is also found in BRIGGS, LAW OF NATIONS 969, at 970 (1952).

158. See *Documents Relating to British Involvement in the Indo-China Conflict 1945-1965*, *supra* note 150, at 195, 198.

The seriousness of these acts of terrorism under international law can be appreciated only when the specific form they take is considered. The acts of terrorism are designed to have the greatest possible impact on what the United Nations Charter refers to in Article 2(4) as the "political independence of [a] state." The acts of terrorism are directed at school teachers and village chiefs and others whose effective performance of their duties is vital to the functioning of the recognized Government of the Republic of Viet Nam. Whether the persons attacked are popular or unpopular, such activities encouraged by the D.R.V. constitute aggression under international law.

The dangerous impact such acts of terrorism may have on the peace of the world is appreciated by customary international law as interpreted by the practice of states and the law of the United Nations as interpreted by the International Law Commission.

The International Law Commission condemns as endangering "the peace and security of mankind,"

> . . . the undertaking or encouragement by the authorities of a state of terrorist activities in another state or the toleration by the authorities of a state of organized activities calculated to carry out terrorist acts in another state.[159]

Similarly the Soviet draft resolution labels as indirect aggression an act which "Encourages subversive activity against another State (acts of *terrorism*, diversionary acts, etc.)."[160]

Violation of the Military Cease-Fire Provisions of the 1954 Agreement on the Cessation of Hostilities in Viet Nam Constitutes Aggression Under International Law

The International Law Commission has stated that international peace and security is endangered by

> Acts by the Authorities of a State in violation of its obligation under a treaty which is designed to ensure international peace and security by means of restrictions or limitations on armaments, or on military training, or on fortifications, or of other restrictions of the same character.[161]

A fortiori this provision would certainly seem to condemn as an offense against peace and security the violation of a military cease-fire line in a non self-defense situation; a violation which creates in another state a well grounded apprehension that its territorial or political integrity is

159. See article 2(6), *ILC Draft Code*, *supra* note 154, at 12.

160. Par. 2(a) USSR, *Draft Resolution*, *supra* note 155, at 6. (emphasis added).

161. See *I.L.C. Draft Code*, *supra* note 154, at 12.

militarily threatened. The treaty violations by the D.R.V. meet these requirements.

The International Control Commission found that the D.R.V. had violated articles 10, 19, 24 and 27 of the Agreement on the Cessation of Hostilities. Each of these articles provides for the limitation of military activities.[162]

Article 10 provides for the complete cessation of armed hostilities in Viet Nam.[163]

Article 19 requires that the parties shall ensure that the zones assigned to them ". . . are not used for the resumption of hostilities or to further an aggressive policy."[164]

Article 24 requires that "The armed forces of each party shall respect the demilitarized zone and the territory under the military control of the other party. . ."[165]

Article 27 places responsibility for insuring the performance of the agreement on the commanders of the respective parties.[166]

The cumulative effect of these findings of treaty violations is a finding by a competent international body of aggression against the Republic of Viet Nam by the D.R.V.

Armed Attack is Universally Considered Aggression Under International Law

Even apart from violation of any specific treaty provisions armed attack is universally considered an act of aggression justifying the use of the military instrument in self-defense.[167]

The D.R.V.'s armed attack upon the Republic of Viet Nam, involving the use of significant numbers of regular troops of the D.R.V., is without legal justification. Their claims of violation of the election provisions of the Geneva accords would not, even if legally valid, justify such attacks. Such political questions pose no real threat to the operation of the governmental machinery or to the territorial integrity of the D.R.V. and cannot be considered an "armed attack" on the D.R.V. within the meaning of Article 51 of the United Nations Charter. This principle of interna-

162. The Agreement on Cessation of Hostilities may be found in *Further Documents Relating to the Discussion of Indo-China at the Geneva Conference* (Miscellaneous No. 20 [1954], Command Paper 9239). Great Britain Parliamentary Sessional Papers, XXXI (1953/54) at 27.

163. *Ibid.*

164. *Ibid.*

165. *Ibid.*

166. *Ibid.*

167. U.N. CHARTER art. 51.

tional law that political conditions in another state do not justify individual armed attack is widely accepted. In its draft resolution on aggression the USSR states in paragraph 6:

> The attacks referred to in paragraph 1 [armed attacks] and acts of economic, ideological and indirect aggression. . . may not be justified by any considerations of a *political*, economic or strategic nature. . . . In particular, the following may not be used as justification:
>
> A. The internal situation of any state, as for example
> . . . (b) Alleged shortcomings of its administration.
> . . . (e) Establishment or maintenance in any State of any political, economic or social system.[168]

This principle would also seem to be applicable in the case of armed attack across an international cease-fire line.

Thus, the whole spectrum of acts of aggression, ranging from the direct and coarse to the indirect and subtle has been catalogued. Such aggression in its totality constitutes an armed attack within the meaning of Article 51 of the United Nations Charter. This attack is directed at the territorial and political integrity of the Republic of Viet Nam reasonably creating expectations in that state that it must use the military instrument to protect itself.

Professor Kelsen supports this interpretation that such activities constitute armed attack within the meaning of Article 51 of the United Nations Charter:

> Since the Charter of the United Nations does not define the term "armed attack" used in article 51, the members of the United Nations in exercising their right of "individual or collective self-defense" may interpret "armed" attack to mean not only an action in which a state uses its armed force but also a revolutionary movement which takes place in one state but which is *initiated or supported by another state*. In this case the members could come to the assistance of the legitimate government against which the revolutionary movement is directed.[169]

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168. *USSR Draft Resolution, supra* note 155, at 6-7. (emphasis added).

169. KELSEN, COLLECTIVE SECURITY UNDER INTERNATIONAL LAW 88 (1954), XLIX NAVAL WAR COLLEGE, INT. LAW STUDIES 1954 (1956). Brownlie states:

> In the present connexion it might be argued that "armed attack" in article 51 of the Charter refers to a trespass, a direct invasion, and not to activities described by some jurist as "indirect aggression." But providing there is control by the principal, the aggressor state, and an actual use of force by its agents, there is "armed attack."

See Brownlie, *The Use of Force in Self-Defense*, 37 BRITISH YEARBOOK OF INTERNATIONAL LAW 260 (1961).

In any event, the infiltration of regular troops of the D.R.V. army would alone seem to satisfy anyone's definition of "armed attack" under Article 51 of the United Nations Charter. The evidence suggests that even this was taking place prior to the introduction of United States combat units as such and the bombing of the D.R.V.

United States Assistance to the Republic of Viet Nam Is Lawful Under Customary International Law and The United Nations Charter

The right of the Republic of Viet Nam to request military assistance and of the United States to grant such a request is well established in international law. This right is derived from three sources, any one of which would be sufficient alone to support the United States military aid to the Republic of Viet Nam. The sources are (1) customary international law, (2) the right of collective self-defense under Article 51 of the United Nations Charter, and (3) the right of regional self-defense, of which the collective assistance to the Republic of Viet Nam and the regional defense structure of the South East Asian Treaty Organization are examples. The cumulative effect of these mutually reinforcing strands of authority is to confer upon the United States military presence in Viet Nam strong legal credentials. This can be best appreciated by first considering each of the component parts of the legal authority and by then taking an overview of the complete structure.

Customary International Law Authorizes the United States Military Assistance

The right of a state which is attacked (externally or internally) to invite other states to assist in its defense and the right of the invited state or states to render assistance is supported in both the ancient and contemporary practices of states. The invitation and response may result from the authority of a treaty or the necessity of the moment: Vattel noted that ". . . they who are not tied by a treaty may for their own conduct, take the merit of the cause into consideration, and assist the party which they shall judge to have right on its side, in case this party shall *request their assistance*, or accept the offer of it. . . ."[170] That the right to request and render defensive assistance is not an occasionally permitted departure from a general rule is indicated by Woolsey who states ". . . there is nothing in the law of nations which forbids one nation to *render assistance to the established* government in such case of revolt, *if its assistance is invoked*. The aid is not interference. . . ."[171]

Not only is the rendering of military assistance to a widely recognized government under attack a legal right; in some contexts it may become

170. VATTEL, LAW OF NATIONS 490 (1829) (emphasis added).

171. WOOLSEY, INTERNATIONAL LAW 89 (1st ed. 1860) (emphasis added).

a necessity for the maintenance of world order and genuine self-determination. This is especially true where the attack is wholly or partly external and assistance is needed to protect the autonomy or self-determination of the requesting state.

One contemporary scholar, Professor Richard Falk, has written that in some situations the failure to render military assistance to the legitimate government might constitute intervention on behalf of the other side whether or not such was the intention.[172] The legal principle of non-interference is based on the need to promote internal autonomy, or self-determination; conversely when the situation is such that the failure to give military assistance would result in the defeat of a legitimate government with a consequent defeat of the principle of self-determination, then such a failure to give assistance on request may even be regarded as illegal intervention on the other side. Falk applies this principle to the world community as it is currently composed by stating that "Furthermore it is evident that the existence of an important aggressor or 'expanding' state in the world community makes non-intervention impossible. A refusal to exert influence to balance the opposing exertion of influence does not protect the internal autonomy of the third state, it merely forfeits its destiny to the expanding state. . . . Eventually such forbearance will produce the threat of interference to one's own public order autonomy. That is, to a large degree non-intervention must be a universally shared and practiced ideal if it is to be feasible for any state."[173] Lauterpacht indicates that military assistance upon request may not be properly termed intervention whether the attack is internal or external because intervention implies a "dictatorial interference."[174] Lauterpacht further indicates that customary international law permits defense agreements to preserve a form of government against coerced change. He says that "a state that has guaranteed by treaty the form of government of another state. . . has a right to intervene in case of a change in the form of government. . . ."[175]

The practice of states is replete with examples of the exercise of the right to request defensive assistance and the right of the invited state to render such assistance. One frequently cited example bears significant similarity in its context to the Viet Nam situation. In 1826, Spain was playing a role similar to that of the D.R.V. by rendering military assistance and sanctuary to insurgents who were supporting the pretender to the throne of Portugal in an effort to overthrow the regency.[176] Pursuant to request Great Britain dispatched a corps of troops to assist Portugal. This

172. Falk, *The United States and the Doctrine of Nonintervention in the Internal Affairs of Independent States*, 5 HOWARD L.J. 163, 168 (1959).

173. *Id.* at 173.

174. I OPPENHEIM, INTERNATIONAL LAW 305 (8th ed. Lauterpacht, 1955).

175. *Id.* at 309.

176. WHEATON, LAW OF NATIONS 90 (1836).

example which is cited by Wheaton, Lauterpacht and others as evidence of customary law is significantly relevant to the situation in Viet Nam.[177]

The right under customary international law of an attacked state to request, and the invited state to render, aid is plainly applicable to the cooperative effort of the United States and the Republic of Viet Nam.

The Viet Nam conflict cannot be fairly characterized as civil war with respect to choice of legal rules to be invoked, because there are, as has been pointed out, substantial expectations that the Republic of Viet Nam and the Democratic Republic of Viet Nam are separate states under international law, and in any event the D.R.V. has been providing significant armed assistance to the Viet-Cong in violation of the core of an international cease-fire line. However, there is substantial authority that the right of the Republic of Viet Nam to request and of the United States to render military assistance remains in full force even if the Viet Nam conflict could be appropriately characterized as a civil war. Lauterpacht notes that when those opposing the recognized government are mere insurgents or rebels that third states may assist the government but not the insurgents, and Garner seems to hold the view that international law permits third states to assist *only* the recognized government in a civil war situation.[178] Applied to the Viet Nam conflict this means that even if there were no contextual differences from a civil war the United States assistance to the Republic of Viet Nam would still be lawful but the aid of the D.R.V. to the Viet-Cong would be illegal. Lauterpacht further notes that if the rebels attain the status of belligerency then the conflict becomes an international war and it would seem that in a context of international conflict third states may assist the recognized government in defending itself against international attack.[179] Therefore even if the

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The contemporary practice of states under the United Nations Charter provides ample support for military assistance to widely recognized governments even in civil conflict situations. Professor Sohn, in a recent letter to the authors, has called attention to several recent examples. He cites among other examples:

> 4. When military revolts tried to overthrow the Governments of Kenya, Uganda and Tanganyika in 1964, these Governments asked for British assistance and no objection was raised by anybody to it, though attempts were made later to replace the British troops with African troops.
>
> 5. Similarly, when revolts started in Gabon and other French-speaking West African states in 1964, French troops were invited to restore peace.
>
> Consequently, there are ample precedents for United States action in Vietnam.

Letter from Louis B. Sohn, Bemis Professor of International Law, Harvard, April 21, 1966.

177. WHEATEN, LAW OF NATIONS 90 (1836); I OPPENHEIM, INTERNATIONAL LAW 305 (8th ed. Lauterpacht, 1955).

178. II OPPENHEIM, INTERNATIONAL LAW 660 (7th ed. Lauterpacht 1952). See the discussion of Garner's views in note 179 *infra*.

179. *Ibid.*

The majority of commentators seem to support the view that even in a civil war situation military aid may be rendered to the widely recognized government. The majority also seems to support the view that aid may not be rendered to the rebels as such, at

Viet-Cong were purely indigenous to the R.V.N., received no outside assistance, and were considered to have attained the status of belligerency, there is still authority that the United States assistance to the Republic of Viet Nam would be lawful. The Viet-Cong, however, not only receive outside assistance but do not meet the requirements of belligerency, which are said to include some stability of control over territory and people, the

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least prior to achieving belligerent status. See note 181 *infra* for a discussion demonstrating that the N.L.F.-Viet-Cong has not achieved belligerent status under international law. In a comment on the Spanish Civil War Garner notes that:

> there is no rule of international law which forbids the goverment of one state from rendering assistance to the established legitimate government of another state with a view to enabling it to suppress an insurrection against its authority . . . . If assistance is rendered to the legitimate government it is not a case of unlawful intervention as is the giving of assistance to rebels who are arrayed against its authority.

Garner, *Question of International Law in the Spanish Civil War*, 31 AM. J. INT'L L. 66, 68 (1937). Professor Borchard has also taken the position that the recognized government and the rebels should not be treated alike. In his view international law permits military aid to the recognized government but it ". . . requires that revolutionists receive no aid or comfort . . . ." Borchard, *"Neutrality" and Civil Wars*, 31 AM. J. INT'L L. 304, 306 (1937). Writing of the Spanish Civil War, Professor O'Rourke states:

> Until an insurrection has achieved the status of belligerency, it would seem, therefore, that the established government may expect partial treatment from third powers. Non-intervention, which treats both Combatants impartially, amounts to neutrality. While one appreciates the diplomatic dilemma which gave birth to the policy, unless a recognition of belligerency was implicit in the move, *non-intervention* is legally incorrect.

O'Rourke, *Recognition of Belligerency and the Spanish War*, 31 AM. J. INT'L L. 398, 410 (1937).

Garner further notes that the Institute of International Law determined that:

> Among the obligations of foreign Powers in respect to the legitimate government is the duty "not to furnish to the insurgents either arms, munitions, military supplies or financial aid" or to "allow a hostile military expedition against an established and recognized government to be organized within their domains."

Garner also points out that:

> . . . among the jurists who supported the resolutions were Holland, Westlake, Rolin-Joequemyns, Pierantoni, Brusa, Renault and Von Bar. This also appears to be the view of all reputable text-writers who have discussed the subject, among whom may be mentioned Rougier, Hyde, Oppenheim, Weiose, Ferand-Giraud, Fiore and La Pradelle.

Garner, 31 AM. J. INT'L L. 66, 68 (1937).

Professor Friedmann has indicated that this seems to be the prevailing view. He states: "What is probably still the prevailing view is that the incumbent government, but not the insurgents, has the right to ask for assistance from foreign governments, at least as long as insurgents are not recognized as 'belligerents' or 'insurgents.'" Friedmann, *Intervention, Civil War and the Role of International Law*, 1965 PROC., AM. SOC. INT'L L. 67, 72.

Garner takes the position that even recognition of belligerency of the rebels does not permit states to render military aid to the rebels. 31 AM. J. INT'L L. 66, 69-70 (1937).

As has already been noted, Vattel seems to have taken the position that either side can be lawfully aided in a civil war context, although it may be doubtful whether the rebels may be aided prior to belligerency. See note 170, *supra*.

A minority of commentators, which apparently consists principally of Quincy Wright

maintenance of an established government, and observance of the rules of war. Greenspan notes, for example, that to be considered belligerents the opponents of the recognized government must observe the rules of war.[180] The Viet-Cong, though, have repeatedly broken the laws of warfare. Many of these violations take the form of acts of terrorism directed against the civilian population, including village officials, school teachers and ordinary farm laborers.[181] The rising tempo of terrorism is indicated by this statement made by Bernard Fall:

> Statistics now began to pile up inexorably: 452 village chiefs were lost by South Viet Nam in 1957-58. By January, 1960 they were being lost at the rate of fifteen a week. On May 25, 1961, President Kennedy told Congress that minor officials were being killed in Viet Nam at the rate of 4,000 a year: eleven a day. In 1964, over 1,500 small officials were lost, and over 400 during the first four months of 1965.[182]

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and Sir William Hall, seem to espouse the view that the mere existence of a rebellion of which the outcome is uncertain is sufficient to make the recognized government incompetent to ask for military assistance from another state. See Wright, *United States Intervention in the Lebanon*, 53 AM. J. INT'L L. 112, 121-122 (1959); HALL, A TREATISE ON INTERNATIONAL LAW, § 94, p. 347 (8th ed. 1924). Hall, however, would not seem to apply this doctrine to situations where the military opposition to the government is externally assisted or directed. He recognizes as legal, military assistance which is designed to check intervention in the affairs of the assisted state by a third state. He notes that: "Interventions which have for their object to check illegal intervention by another state are based upon the principle that a state is at liberty to oppose the commission of any act, which in the eye of the law is wrong. . . ." He further states that: "It has already been seen that the existence of a right to oppose acts contrary to law, and to use force for the purpose when infractions are sufficiently serious, is a necessary condition of the existence of efficient international law." *Id.* § 92, at 341-42.

Therefore, in situations in which the rebels are unlawfully receiving external military assistance and direction the authorities are unanimous or nearly so in saying that the widely recognized government may receive defensive military assistance. Any meaningful concept of self-determination strongly supports this conclusion.

180. GREENSPAN, THE MODERN LAW OF LAND WARFARE 18-19 (1959).

181. See *Id.* at 170-171 for a discussion of Article 33, Geneva Convention IV, 1949 prohibiting reprisals against the civilian population. At 155-156 Greenspan indicates that such conventions are considered to embody customary law and are considered binding on non-signatories. The rules of the conventions, being declaratory of customary law, would thus be relevant in determining whether or not the insurgents have gained belligerent status.

With respect to the laws of war it might also be pointed out that the attempts of the International Red Cross to enforce the rights of American prisoners of war to send and receive mail have been rebuffed by the D.R.V. The D.R.V., though a signatory to the relevant convention, has characterized its American captives as "war criminals" and not POW's. Moreover, the N.L.F. does not consider itself bound by these conventions. See N.Y. Times, May 7, 1966, p. 3, col. 5. The explicit denials by the N.L.F. that the rules of customary law embodied in these conventions apply to it, are another indication that the N.L.F. can not be considered to have gained belligerent status. For a discussion and quotation of the relevant articles, articles 69-74 of Geneva Convention III, 1949 on POW's see GREENSPAN, *op. cit. supra* note 180, at 126-128. See also the discussion in note 303 *infra*.

182. VIET-NAM READER 257.

School teachers, whose job was to prepare the people for self-government, were among the most frequent victims.[183] A typical example of Viet-Cong activities directed against civilians engaged in such pursuits as growing food is the recent killing by a Viet-Cong mine of 54 farm workers riding in civilian buses.[184] It would seem that just with respect to this element alone, the Viet-Cong are far from having achieved a belligerent status. Moreover, the status of belligerency, as historically understood, grows out of internal revolt. Here, however, there is substantial evidence, noted above, that the Viet-Cong receive significant direction and control from the D.R.V., and that there was significant initiation of the conflict from the D.R.V.

In summary, customary international law affirms the right of the Republic of Viet Nam to request defensive aid and the right of the United States to grant such aid. The United States was invited in by the widely recognized government of the R.V.N. No successor government has asked us to leave. In fact, the present Chief of State, as well as civilian leaders opposed to the present government, have recently reaffirmed their desire for continued United States assistance.[185]

The Right of Collective Self-Defense Under Article 51 of the United Nations Charter Authorizes United States Military Assistance

The right under customary international law of one nation to assist another in defense against aggression is reaffirmed by Article 51 of the United Nations Charter which takes cognizance of the "inherent" right of individual and "collective self-defense." Several distinguished scholars believe that the phrase "collective self-defense" used in the Charter not only reaffirms the right of self-defense but in at least one sense expands it. Lauterpacht has stated the principle as follows:

> It will be noted that, in a sense art. 51 enlarges the right of self-defense as usually understood and the corresponding right of resort to force by authorizing both individual and collective self-defense. This means that a member of the United Nations is permitted to have recourse to action in self-defense not only when it is itself the object of armed attack, but also when such

183. In a recent article Senator Edward Kennedy stated that "school teachers have been the prime targets of terrorism" conducted by the Viet-Cong. See *Hearings on S. 2793 Before the Senate Committee on Foreign Relations*, 89th Cong., 2nd Sess., pt. 1, at 109-110 (1966). Senator Kennedy further noted that in 1965 alone over 11,000 civil servants—a high proportion of them teachers—were killed, abducted or wounded by the Vietcong. *Ibid.*

184. Time, Feb. 25, 1966, p. 32.

185. See Joint Communique, Chiefs of State R.V.N. and U.S., part III, par. 9 and part IV, in N.Y. Times, Feb. 9, 1966, p. 14, col. 8. See also the statement by Thich Tri Quang at note 125 *supra*.

> attack is directed against any other state or states whose safety and independence are deemed vital to the safety and independence of the state thus resisting or participating in forcible resistance to the aggressor.[186]

McNair is in substantial agreement when he says ". . . the phrase individual or collective self-defense leaves something to be desired, but its significance lies in the fact that it *enlarges* the right of self-defense by authorizing and legalizing collective action. . ."[187]

Collective Self-Defense May Be by Non-Contiguous States

The origins of Article 51 of the Charter as well as the practice of states under that article indicate that states which are not geographically contiguous may assist each other by collective self-defense. The origins of the article at the San Francisco conference creating the United Nations indicate that those who adopted it had in mind mutual defense acts by states which were not contiguous as well as those which were. In the debates concerning the term "collective self-defense" an exchange occurred between the representatives of the USSR and the United Kingdom. The two representatives indicated agreement on two significant points. First, they agreed that the term extended to "agreements such as the Anglo-Soviet and French-Soviet pacts."[188] Secondly, they agreed that such agreements were "clearly not regional pacts."[189] No dissent

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186. II OPPENHEIM, INTERNATIONAL LAW 155 (7th ed. Lauterpacht 1952).

187. MCNAIR, LAW OF TREATIES 579 (1961) (emphasis added).

188. 17 U.N. CONF. INT'L. ORG. DOC. 396.

189. *Ibid.* The mistaken belief that Art. 51 permits collective self-defense only by contiguous states may stem from the fact that for a time prior to the adoption of the U.N. Charter the San Francisco Conference labelled the article which eventually became Art. 51 as Art. 52. Article 52 finally became the number given to an entirely different article which deals with regional arrangements. See 17 U.N. CONF. INT'L. ORG. DOC. 492, which records what finally became Art. 51 as being Art. 52 of the skeleton charter.

Not only is geographical proximity not a pre-requisite for membership in regional defense organizations under Article 51 of the Charter, but neither are cultural, historic, linguistic or spiritual ties necessary. At the San Francisco Conference, an Egyptian proposal to include such ties as necessary elements in the definition of regional arrangements was defeated in Committee III/4 by a vote of 29 to 5. See 12 U.N. CONF. INT'L. ORG. DOC. 701-02.

The defeated proposal stated:

> There shall be considered as regional arrangements organizations of a permanent nature grouping in a given geographical area several countries which, by reason of their proximity, community of interest or cultural ties, linguistic, historical or spiritual affinities, make themselves jointly responsible for the peaceful settlement of any disputes which may arise between them and for the maintenance of peace and security in their region as well as for the safeguarding of their interest and development of their economic and cultural relations.

12 U.N. CONF. INT'L. ORG. DOC. 850. In the debates prior to the defeat of the Egyptian proposal the delegate of the United States stated:

> While the language submitted by the delegate of Egypt clearly defined obvious

from this view is recorded in a meeting that included representatives from countries widely varying in their ranks in the world's power spectrum.

The practice of states under Article 51 has indicated that geographical contiguity of the parties is not a requirement of collective self-defense. For example, Denmark and Greece, widely separated countries, are both parties of NATO.[190] This alliance has existed for 17 years without having been regarded as illegal for lack of contiguity and historical or ethnic ties of some party states. Another example of a defense pact concluded between non-contiguous countries is the Baghdad (now CENTO) Pact which at one time included Iraq and Great Britain who were hardly next door neighbors.[191]

Collective Self-Defense Does Not Require Prior Security Council Approval

Three factors combine to demonstrate that collective self-defense may be taken without prior authorization of the Security Council. They are: (1) the wording of Article 51 itself, (2) the origins of Article 51 as seen at the San Francisco conference, and (3) the practice of states subsequent to adoption of Article 51. This section will take up these factors one at a time.

1. The terms of Article 51. Article 51 states:

> Nothing in the present charter shall impair the inherent right of individual and collective self-defense if an armed attack occurs against a member of the United Nations until the

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legitimate and eligible factors for a regional arrangement, it was probable that it failed to cover all the situations which might be embraced by regional arrangements. 12 U.N. CONF. INT'L. ORG. DOC. 701.

Without taking note of these United Nations records or citing any authority for the proposition the *Memorandum of Law of Lawyers Committee on American Policy toward Vietnam* states that:

> The concept that the United States—a country separated by oceans and thousands of miles from southeast Asia and bereft of any historical or ethnic connection with the peoples of southeast Asia—could validly be considered a member of a regional system implanted in southeast Asia is utterly alien to the regional systems envisaged in the charter.

112 CONG. REC. 2551, 2554 (daily ed. Feb. 9, 1966). The prevailing evidence clearly indicates that there are no such restrictions on regional defensive organizations under Article 51 of the Charter. In any event, it is generally accepted that any assistance to a state engaged in lawful self-defense is authorized pursuant to Article 51 whether or not such assistance is pursuant to action under a regional system.

190. For the text of the NATO Treaty of April 4, 1949, see TIAS 1964, 63 Stat. 2241 (1949).

191. *Accession of the U.K. to the Pact of Mutual Cooperation Between Turkey And Iraq Signed At Baghdad on Feb. 24, 1955*, (Miscellaneous No. 5 [1955], Command Paper 9429).

> Security Council has taken the measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present charter to take at any time such action as it deems necessary to maintain or restore international peace and security.

The use of the term *"inherent"* is significant. The inherent right of self-defense under customary international law was not limited by a requirement that prior approval be obtained from a central mechanism. The use of the term *"inherent"* can be taken to mean that the Charter reaffirms the lack of such prior restraint. It is also significant that the requirement for prior Security Council authorization appears in a different chapter (VIII) from the one (VII) in which Article 51 is found and that requirement does not refer to collective self-defense but rather to chapter VIII "enforcement" action. In addition, the use of the phrase "until the Security Council has taken measures" indicates that action may be taken before the Security Council acts.

2. The origins of Article 51. The diplomatic negotiations at the San Francisco conference which established the United Nations indicate that the very reason for the insertion of Article 51 was a desire to avoid the necessity of obtaining prior approval of the Security Council for collective self-defense. Several of the Latin American delegations were afraid that their ability to take collective defensive measures could be destroyed by a big-power veto in the Security Council.[192] Article 51 was therefore inserted in order to avoid the possibility that a major power could render other states legally defenseless without the ability to take action on their own or receive aid from the Council. It should be recalled at this point that the right of collective self-defense expressed by Article 51 applies to both non-regional and regional defensive action and is not limited to the right of the Latin American countries.[193]

The record of the debates in the Senate on the advice and consent to the ratification of the SEATO treaty indicate that the Senate was also acting pursuant to the understanding that Article 51 collective defense action did not require prior Security Council approval.[194]

3. The practice of states under Article 51. The practice of states as indicated by a succession of mutual defense pacts entered into subsequent

192. RUSSELL & MUTHER, A HISTORY OF THE UNITED NATIONS 668-713 (1958).

193. 17 U.N. CONF. INT'L ORG. DOC. 396.

194. The Senate's concept of the relation between Article 51 self-defense action and the Security Council is discussed below in the section of this article dealing with SEATO. See note 202 *infra*.

to the adoption of the Charter indicates that in the opinion of the parties prior approval by the Security Council of defensive action is not required. Each of these agreements makes direct reference to Article 51 of the Charter and interprets that provision in the manner that its terms clearly demand, *i.e.*, that initial action may be taken by the aggrieved party and its allies and that such action may continue until it is effectively replaced by Security Council measures. In order that it may be seen that such an interpretation is widely shared even by non-Western nations, the first example quoted will be the Warsaw Treaty of Friendship, Cooperation and Mutual Assistance of 1955 signed by the Soviet Union, Albania, Bulgaria, the Hungarian People's Republic, the German Democratic Republic, the Polish People's Republic, the Romanian People's Republic, and the Czechoslovak Republic. Article 4 of the Treaty provides:

> In the event of armed attack in Europe on one or more of the Parties to the Treaty by any state or group of states, each of the Parties in the Treaty, in the exercise of its right to individual or collective self-defense in accordance with Article 51 of the Charter of the United Nations Organization, shall immediately, either individually or in agreement with other Parties to the Treaty, come to the assistance of the state or states attacked with all such means as it deems necessary including armed force. The Parties to the Treaty shall immediately consult concerning the necessary measures to be taken by them jointly in order to restore and maintain international peace and security. Measures taken on the basis of this article shall be reported to the Security Council in conformity with the provisions of the Charter of the United Nations Organization. These measures shall be discontinued immediately when the Security Council adopts the necessary measures to restore and maintain peace and security.[195]

Moreover, such an interpretation of Article 51 is not confined to the principal capital exporting powers. A quotation from the Joint Defense and Economic Cooperation Treaty (1950) of the Arab League concluded between Syria, Transjordan, Iraq, Saudi Arabia, the Lebanese Republic, Egypt, and Yemen demonstrates this. Article 2 of that Treaty provides that:

> The Contracting States consider any [act of] armed aggression made against any one or more of them or their armed forces, to be directed against them all. Therefore, in accordance with the right of self-defense individually and collectively they under-

195. For complete text see *Disarmament and Security: A Collection of Documents 1919-1955*, STAFF OF SENATE FOREIGN RELATIONS COMMITTEE 84TH CONG., 2D. SESS., 551 (Comm. Print 1956) [hereinafter cited as *Disarmament and Security*].

> take to go without delay to the aid of the state or states against which such an act of aggression is made, and immediately to take, individually and collectively, all steps available, including the use of armed force, to repel aggression and restore security and peace. In conformity with Article 6 of the Arab League Pact and Article 51 of the United Nations Charter, the Arab League Council and U.N. Security Council shall be notified of such an act of aggression and the means and procedure taken to check it.[196]

Ruth Lawson summarizes the relationship of collective defense organizations to the Security Council as follows:

> The relationship of contemporary regional and global organizations is worthy of special comment. The collective defense organizations based on the North Atlantic Treaty and the Rio, Manila, Baghdad, and Warsaw pacts are ultimately grounded in Article 51 of the United Nations Charter, which with notable prescience legitimized collective defense against armed attack without Security Council authorization.[197]

U.N. Members May Act in the Collective Self-Defense of Non-Members

The practice of states since the signing of the Charter has indicated that it is the genuine expectation of the World Community that United Nations member states may conclude collective defense arrangements with non-members. At the time of the conclusion of the NATO Treaty two of the parties, Italy and Portugal were not members.[198] Kelsen states ". . . according to an almost generally accepted interpretation of

196. *Id.* at 622 ff.

197. LAWSON, INTERNATIONAL REGIONAL ORGANIZATION VI (1962).

That collective defense action under Article 51 is entirely different from "enforcement action" which under articles 52 can be taken only with prior Security Council approval is indicated by Kunz. He states:

> As in municipal law, self-defense under Art. 51 is not a procedure to enforce the law, is not designed to punish the aggressor or to obtain indemnities, is not an enforcement action by the United Nations, but serves primarily to repel an illegal armed attack.

See Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872, 876 (1947). From this it would seem that Article 52 "enforcement action" is action by the United Nations, through its own forces or those of a regional agency to which it has delegated authority to enforce international law concerning aggression or to take other action collectively authorized by the United Nations. Prior approval of the Security Council is required before a regional body can take such "enforcement action" on behalf of the world organization. Prior approval is not required, however, before a nation or group of nations can act in collective defense pursuant to Article 51, whether acting under a regional arrangement or not.

198. KELSEN, *op. cit. supra* note 169, at 128.

Article 51 the right of collective self-defense may also be exercised in case of an armed attack against a non-member state."[199] Apparently no international law scholar has ever seriously suggested that the United Nations Charter prohibits the right of self-defense of non-members or of the right of members to assist in the collective self-defense of non-members.

The various arrangements made between the United States and the Republic of Viet Nam amount to a collective self-defense request. These arrangements are composed of such acts as the exchange of letters between President Eisenhower and Premier Diem, and President Thieu's recent reaffirmation of the desire for United States assistance.[200] The close interaction between the two governments as demonstrated at the recent Honolulu conference is a further indication of this collective defense arrangement.

SEATO Regional Defense Agreement is Based on Article 51 and Covers the R.V.N.

The institutional framework of the United States military assistance to the Republic of Viet Nam is provided by the SEATO regional defense agreement[201] which is firmly rooted in Article 51 of the United Nations Charter which expanded the concept of self-defense to provide for such collective arrangements. Senator Mansfield, a member of the United States delegation to the conference which established SEATO, made clear the relation of SEATO to Article 51 when he told the Senate that:

> The Southeast Asia Collective Defense Treaty is consistent with the provisions of the United Nations Charter. The treaty would come under the provisions of Article 51, providing that nothing contained in the United Nations Charter shall deprive

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199. *Id.* at 88. Waldock, in speaking of the interpretation that Article 51 does not permit U.N. Members to act in defense of non-members states, ". . . we know this interpretation of the words was completely rejected by the United Nations with respect to the invasion of South Korea." See, BRIERLY, LAW OF NATIONS 305 (6th ed. Waldock 1963).

Without noting Kelsen and Waldock, in fact, without citing any authority, the *Memorandum of Law of Lawyers Committee on American Policy Toward Vietnam* implies that because Article 51 speaks of "an armed attack against a member of the United Nations," that "neither the right of individual . . . nor . . . collective self-defense can become operative" with respect to the R.V.N., a non-member of the United Nations. See 112 CONG. REC. 2552, 2554 (daily ed. Feb. 9, 1966). The authority is clearly against such an interpretation. And as a policy question such an interpretation makes even less sense. It would mean, for example, that the People's Republic of China would have no right to individual or collective defense.

200. N.Y. Times, Feb. 7, 1966, p. 3, col. 2. See also note 185 *supra.*

201. The text of the SEATO Treaty may be found in *Background Information Relating to Southeast Asia and Vietnam*, Committee on Foreign Relations, United States Senate 62 (Rev. ed. Comm. Print June 16, 1965).

> one of the states from the individual or collective right of self-defense.[202]

Senator Mansfield further noted in the same speech that measures taken under Article 51 "do not need prior approval of the Security Council. . . ."

The legal structure created by this agreement is composed of two strands: (a) the umbrella of protection extended by the treaty to the Republic of Viet Nam[203] and (b) repeated action on the part of the Republic of Viet Nam indicating acceptance of this protection.

The SEATO Treaty was concluded in September 1954 by Thailand, the Philippines, Australia, Pakistan, France, New Zealand, Great Britain and the United States.[204] The primary purpose of the treaty was to insure self-determination of the peoples of Southeast Asia by insuring the territorial and political integrity of the states into which they were organized.[205] While Viet Nam was not a party to the treaty the free territory under the jurisdiction of the State of Viet Nam was designated by the parties as a protocol state as to which the treaties' protection against aggression extended.[206] Such protection was not intended by the parties to the agreement to be forced on Viet Nam or any other protocol state. Article 4(3) states, "It is understood that no action on the territory of any state designated by unanimous agreement [as a protocol state] or on territory so designated shall be taken except at the invitation or with the consent of the government concerned."[207] The Republic of Viet Nam has consented to the over-all protection of the Treaty and has requested the particular defensive assistance currently being rendered by several parties to the Treaty. A treaty may confer a benefit, on a country not a party, if the parties to the treaty are clear and unequivocal as to their intention to confer such a benefit.[208] The parties to the SEATO Treaty made their intention to confer the benefit clear and the Republic of Viet Nam made clear its acceptance. In 1957 a joint declaration was issued by President Eisenhower and President Diem of the Republic of Viet Nam. In this statement specific recognition was given to the application of the SEATO treaty to the Republic of Viet Nam. Because of the importance of this statement as an indication of the Republic of

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202. 101 CONG. REC. 1055 (1955).

203. See the Protocol to the SEATO treaty in *Background Information Relating to Southeast Asia and Vietnam*, Committee on Foreign Relations, United States Senate 66 (Rev. ed. Comm. Print June 16, 1965).

204. *Id.* at 62, 65.

205. See Preamble to the SEATO treaty, *Id.* at 62.

206. See the Protocol to the SEATO treaty, *Id.* at 66.

207. *Id.* at 63.

208. BRIGGS, LAW OF NATIONS 871 (1952).

Viet Nam's approval of the SEATO shield of protection the two final paragraphs of the declaration will in large part be quoted:

> President Eisenhower and President Ngo Dinh Diem noted . . . the large buildup of Vietnamese communist military forces in North Vietnam during the past 2-1/2 years, the harsh suppression of the revolts of the people of North Vietnam in seeking liberty, and their increasing hardships. . . . In particular they agreed that the continued military buildup of the Chinese Communists, their refusal to renounce the use of force, and their unwillingness to subscribe to standards of conduct of civilized nations constitute a continuing threat to the safety of all free nations in Asia. To counter this threat, President Ngo Dinh Diem indicated his strong desire and his efforts to seek closer cooperation with the free countries of Asia.
>
> Noting that the Republic of Vietnam is covered by Article IV of the Southeast Asia Collective Defense Treaty, President Eisenhower and President Ngo Dinh Diem agreed that aggression or subversion threatening the political independence of the Republic of Vietnam would be considered as endangering peace and stability. The just settlement of problems of the area by peaceful and legitimate means within the framework of the United Nations Charter will continue to be the mutual concern of both governments. Finally, President Eisenhower and President Ngo Dinh Diem expressed the desire and determination of the two governments to cooperate closely together for freedom and independence in the world.[209]

The SEATO treaty has proved to be more than an abstract framework within which to discuss the theory of collective self-defense. Since the SEATO Council contains several Southeast Asian nations among its members, it is one of the better suited deliberative bodies of the World Community to judge aggression and its effects on self-determination of the peoples of that area. As has been mentioned previously, the Council has on two occasions, 1964 and 1965,[210] adjudged that aggression was being committed by North Vietnam against the Republic of Viet Nam. This regional finding has been effectuated by military support on the part of a majority of the countries composing SEATO. Combat troops have been contributed by Australia and New Zealand. Thailand has given support

209. *Background Information Relating to Southeast Asia and Vietnam*, Committee on Foreign Relations, United States Senate 73-74 (Rev. ed. Comm. Print June 16, 1965).

210. See notes 137-38 *supra*. The decision to render military assistance to the R.V.N. pursuant to SEATO can be validly made by individual members as well as by the SEATO Council as such. Ruth Lawson notes that under both the SEATO and NATO treaties ". . . the commitment to act in event of armed attack is a matter for unilateral decision. . ." LAWSON, INTERNATIONAL REGIONAL ORGANIZATION 276 (1962).

by permitting its territory to be used as the site of air bases for supporting operations against aggression aimed at the R.V.N. The Philippines has indicated that it will dispatch some 2,000 support troops.[211] It should be noted that another Asian country, South Korea, though not a party to the SEATO Treaty has contributed some 20,000 combat and support troops for the collective defense effort and has recently indicated that it will double this amount.[212]

In summary, the SEATO treaty has at least the following bearing on the legality of military assistance to the Republic of Viet Nam: It creates an international body to some extent capable of making a determination as to the existence of aggression against area countries; by extending its protection to the Republic of Viet Nam it recognized that that country was the potential object of aggression; the R.V.N. completed the institutional structure for its defense by explicitly acquiescing in the SEATO protection; the SEATO Council has explicitly determined on two occasions the existence of external aggression from North Viet Nam against the R.V.N.; the terms of the treaty (Art. IV) permit defensive assistance to protected countries upon request; and such request was made by the Republic of Viet Nam to which a majority of the SEATO states are rendering some assistance.

These determinations and actions indicate that in the opinion of the assisting SEATO parties the Republic of Viet Nam was competent to make a request for military assistance and that the request was proper.

The Fundamental Principle of Self-Determination

The principles of customary international law and Article 51 collective self-defense are but separate manifestations of a larger principle: self-determination. Taken separately each of the principles discussed appears to furnish legal support for the United States presence in the R.V.N. Their cumulative effect is seen in the principle of self-determination. This principle would seem to require that if there are ambiguities in customary international law and the United Nations Charter, they should be interpreted in a way to promote the genuine freedom of choice of the Republic of Viet Nam to determine its own form of government and society.

The right of self-determination has frequently found expression in the practice of the United Nations. One example that is conspicuously relevant to the Viet Nam situation is the United Nation's treatment of the crisis confronting Greece immediately after the Second World War. In that crisis military assistance was rendered to the Greek government by the United States and Great Britain to oppose rebels who had been

211. New Haven Register, April 11, 1966, p. 1, col. 5.
212. N.Y. Times, March 1, 1966, p. 7, col. 1.

receiving arms, ammunition, other military assistance and sanctuary from the communist governments of Albania, Bulgaria, and Yugoslavia. Far from condemning the actions of the United States and Great Britain, the United Nations gave effect to the principle of self-determination by noting that a continuation of the action of Albania, Bulgaria and Yugoslavia "constitutes a threat to the political independence and territorial integrity of Greece and to peace in the Balkans and that the conduct of Albania, Bulgaria and Yugoslavia had been inconsistent with the purposes and principles of the Charter of the United Nations. . . ."[213]

This principle of self-determination would also seem to require that the United States continue to examine its policies in Viet Nam to ensure that alternatives are effectuated which maximize the genuine freedom of choice of the people of the Republic of Viet Nam.

THE UNITED STATES ACTIVITIES IN VIET NAM ARE LAWFUL

The Defensive Use of the Military Instrument by the United States and the Republic of Viet Nam Was Necessary

Under international law there are two requirements for the use of the military instrument in lawful self-defense, necessity and proportionality.[214] The first of these requirements of lawful self-defense, necessity, has clearly been met; the factual basis has been discussed in the preceding sections.

Armed attack launched from and by the D.R.V., civil strife fomented by the D.R.V., acts of terrorism inspired by the D.R.V., and cease-fire violations committed by the D.R.V. are acts directed at the Republic of Viet Nam's territorial and political integrity. Such acts created a situation of overwhelming necessity under either traditional international law standards or the United Nations Charter for a limited military response in self-defense directed at interdicting the aggression from the D.R.V. Many of the International Control Commission findings and other evidence demonstrating the necessity for use of the military instrument against the D.R.V. indicate that an armed attack occurred as early as the period from 1959 to 1962 or even earlier and was accelerated thereafter. The bombing of the D.R.V. did not begin until February 1965. This time lag between attack and response indicates that according to still another criterion, time, the D.R.V. is an aggressor in its actions against the R.V.N.

213. General Assembly Resolution 193 (111) para. 3, *supra* note 152.

214. McDOUGAL & FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 217-218 (1961).

> There is . . . increasing recognition that the requirements of necessity and proportionality as ancillary prescriptions (in slightly lower-order generalization) of the basic community policy prohibiting change by violence, can ultimately be subjected only to that most comprehensive and fundamental test of all law, reasonableness in particular context.

Id. at 218.

The second requirement of lawful self-defense, proportionality of the response, has also been met.

The Defensive Use of the Military Instrument by the United States and the Republic of Viet Nam is Proportional

The military response of the United States and the Republic of Viet Nam has been aimed at interdicting the D.R.V. aggression against the R.V.N. and has been carefully limited to those resources of the D.R.V. which contribute to that aggression.

This is most clearly demonstrated as to the bombing of the D.R.V. by Secretary of Defense McNamara's account of how the targets were selected with that objective in mind:

> The airstrikes have been carefully limited to military targets, primarily to infiltration targets, to transit points, to barracks, to supply depots, to ammunition depots, to routes of communication, all feeding the infiltration line from North Viet-Nam into Laos and then into South Viet-Nam.
>
> More recently there have been added to this target system railroads, highways, and bridges which are the foundation of the infiltration routes. . . .
>
> The primary emphasis has been placed upon the routes south of 20 degrees north. . . . Hanoi is at about the 21st parallel. . . . Our strikes are concentrated on the lines of communication running south and east and west, south of 20 degrees.
>
> . . . . The basic objective of the strikes has been to inhibit, to reduce, to deflect, the movement southward of men and material. We have sought to deny them the use of their primary lines of communication and to force dependence on an inadequate secondary road system and inadequate means of support.
>
> The strikes have been designed to increase the dependence on an already overburdened road transport system by denying the use of the rail lines in the South. In summary, our objectives have been to force them off the rails onto the highways and off the highways onto their feet. . . .
>
> These carefully controlled rail strikes will continue as necessary to impede the infiltration and to persuade the North Vietnamese leadership that their aggression against the South will not succeed. . . .
>
> Q. Mr. Secretary, what efforts are made to avoid killing civilians in our airstrikes?

> A. Each target is chosen after a very careful review of all reconnaissance photographs. We have carried out very complete reconnaissance of this entire area. Each target is chosen after careful review of reconnaissance photographs to insure that it is isolated and separate and apart from urban population or civilian population areas.[215]

The proportionality of the airstrikes is indicated not only by the limited nature of the targets but also by the manner in which the airstrikes have been used to serve the diplomatic objective: a negotiated settlement. The bombing has been stopped twice: once for approximately a week and again for 37 days.[216] Both pauses were to encourage the D.R.V. to negotiate. Both peace overtures were substantially disregarded by the D.R.V.[217]

The ground operations conducted by the United States and the Republic of Viet Nam also conform to the requirements of proportionality. This is true both as to the number of the troops involved and the nature of the operations.

In a recent address at Yale University, Bernard Fall noted that the optimum ratio of counter-guerrilla troops to guerrillas is 10 or 15 to 1.[218] Occasionally an even higher percentage is necessary. In Malaya the percentage was 55 to 1.[219] According to Fall, the recent figures indicate that the ratio of United States-R.V.N. troops to D.R.V.-Viet-Cong troops is approximately 3-1/2 to 4 to 1.[220] Such figures indicate that far from being excessive, the United States-Republic of Viet Nam troop strength could be increased several fold above current levels and still remain easily within the bounds of proportionality.

The nature of the military operations conducted by the Republic of Viet Nam and the United States is appropriate to the exercise of the right of self-defense.[221] A large number of the military operations have been clearing operations designed to assert control over Viet-Cong influenced areas and thus make possible a return of normal governmental

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215. *Background Information Relating to Southeast Asia and Vietnam*, Committee on Foreign Relations, United States Senate 210-12 (Rev. ed. Comm. Print June 16, 1965).

216. N.Y. Times, Jan. 31, 1966, p. 1, col. 8.

217. See N.Y. Times, Jan. 31, 1966, p. 1, col. 7, for an announcement by Ho Chi Minh refusing offers from the U.S. for unconditional peace negotiations. See Secretary Rusk's news conference, N.Y. Times, Jan. 22, 1966, p. 2, cols. 3-8. See also President Johnson's news conference announcing the resumption of the bombing of the D.R.V., N.Y. Times, Feb. 1, 1966, p. 1, col. 1.

218. Address by Bernard Fall, Yale University, March 3, 1966.

219. *Ibid.*

220. *Ibid.*

221. See *Newsweek*, April 18, 1966, p. 28

supervision over these areas.[222] Operations thus conceived are directly related to the territorial and political integrity of the Republic of Viet Nam.

Other operations which deliberately seek out D.R.V. and Viet-Cong troops in the R.V.N. and engage them in battle are also appropriate to the exercise of the right of self-defense. The legal Committee of the International Control Commission has found that a D.R.V.-Viet-Cong objective is the overthrow of the recognized Government of the Republic of Viet Nam. It would seem, then, that all operations within the R.V.N. against such troops, whether the troops are transient or hold particular territory, are appropriate measures to insure the territorial and political integrity of the Republic of Viet Nam.

THE UNITED STATES HAS MET ITS OBLIGATIONS UNDER THE UNITED NATIONS CHARTER

At the conclusion of his term in February 1966 as President of the United Nations Security Council, Akira Matsui of Japan said in a letter to the members of the Council that differences of view on the question of Viet Nam had "given rise to a general feeling that it would be inopportune for the Council to hold further debate at this time."[223] This was indicative of the unfortunate response to efforts on the part of the United States to utilize the machinery of the United Nations for seeking peace in Viet Nam. These efforts show full compliance by the United States with the requirement of Article 51 of the Charter that "Measures taken by members in self-defense shall immediately be reported to the Security Council." They further show full compliance by the United States with the requirements of Article 33 that settlement by peaceful diplomatic means be attempted of any dispute that is "likely to endanger international peace and security." The response by the Security Council and U.N. officials to these efforts indicates that the United Nations is presently reluctant to exercise its prerogative under Article 36 to "recommend appropriate procedures or methods of adjustment." Furthermore, the response indicates that the Security Council did not deem it necessary to take any action which under Article 51 would require a cessation of defensive action by the United States and the Republic of Viet Nam. These efforts and the response will be examined in detail chronologically.

On August 2, 1964 and again on August 4, 1964 United States ships were attacked in international waters by torpedo boats from the D.R.V.[224]

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222. *Ibid.*

223. Quoted in United Nations Press Service Release WS/231, 4 March, 1966.

224. Statement by U.S. Ambassador Stevenson to the Security Council August 5, 1964, in *Background Information Relating to Southeast Asia and Vietnam*, Committee on Foreign Relations, United States Senate 124-25 (Rev. ed. Comm. Print June 16, 1965).

Between the first and second attacks the United States complied with Article 33 by communicating its displeasure in a note to the Hanoi regime.[225] These peaceful efforts resulted in the second attack by the D.R.V. vessels. The United States then conducted a limited and measured response in the form of air strikes on the docking and supporting facilities of the torpedo boats.[226]

The very next day this defensive action was reported to the Security Council by United States Ambassador Stevenson.[227] This desire of the United States to use the peace seeking facilities of the United Nations sharply contrasts with the attitude of the Hanoi regime. In a statement made on August 8, 1964 the Government of the D.R.V. made the following statement: "The Foreign Ministry of the Democratic Republic of Viet Nam stresses that the United Nations Security Council has no right to examine this problem. . . ."[228]

The next defensive action against the D.R.V. was also immediately reported to the Security Council.[229] On February 7, 1965[230] Hanoi controlled Viet-Cong attacked the United States installation at Pleiku causing loss of American lives. The incident was a calculated escalation in a context of increasing armed attack from the D.R.V. against the R.V.N. and United States forces advising in their defense. The limited and measured response directed at this increasing armed attack was aimed at the staging areas in the D.R.V. from which guerillas infiltrated into the Republic of Viet Nam,[231] and has continued to be aimed at interdicting this armed attack.

The Security Council, after having been clearly informed of the United States action, made no effort to replace United States action with action of its own as it had a right to do under Article 51. The inability of the United Nations to take such action was clearly demonstrated by Secretary-General U Thant at a news conference on February 24, 1965.

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225. *Id.* at 125.

226. *Ibid.*

227. *Id.* at 124.

228. U.N. SECURITY COUNCIL OFF. REC., 19th year, Supp. July, August, September 1964 at 170 (S/5888). In contrast to this D.R.V. attitude, the R.V.N. communicated with the President of the Security Council on August 13th & 15th, 1964, offering its full co-operation in the investigation of the incident, calling attention to the overall problem of aggression from the D.R.V., submitting several R.V.N. "white papers" containing factual evidence of that aggression to be circulated as official Council documents, and offering to accredit a delegation to the Security Council to participate in debates on the incident. See *The Bogus War of Liberation In South Vietnam* 43-47 (The Republic of Vietnam, June 1965).

229. Letter from Ambassador Stevenson to Security Council President, Feb. 7, 1965 in *Background Information Relating to Southeast Asia and Vietnam*, Committee on Foreign Relations, United States Senate 149-151 (Rev. ed. Comm. Print June 16, 1965).

230. *Ibid.*

231. *Id.* at 150.

> Question: . . . If no progress is made toward negotiations, might you feel compelled unilaterally to step into the breach and bring the matter to the Security Council?
>
> The Secretary General: I do not think that is a practical proposition, for reasons that are obvious and well known to you. The government of North Viet-Nam has all along maintained that the United Nations is not competent to deal with the question of Viet-Nam since, in its view, there is already in existence an international machinery established in 1954 in Geneva. They have all along maintained that position and, as you all know, it is a position also maintained by the Peoples Republic of China. As far as the United Nations is concerned, I think the greatest impediment to the discussion of the question of Viet-Nam in one of the principal organs of the United Nations is the fact that more than two parties directly concerned in the question are not members of this organization. I therefore do not see any immediate prospect of useful discussion in the Security Council. . . .[232]

The United States has made continuous efforts of the sort envisaged by Article 33, *i.e.*, diplomatic attempts to bring about negotiations. Such attempts were made continously but were most dramatically emphasized by the two pauses in the limited and measured bombing of the D.R.V. The first occurred in May 1965 after President Johnson's April speech at John Hopkins University calling for unconditional negotiations.[233] A

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232. Press Conference, Feb. 24, 1965, quoted in VIET-NAM READER 263, 267 and in *Recent Exchanges Concerning Attempts to Promote a Negotiated Settlement of the Conflict in Viet-Nam* (Viet-Nam No. 3 [1965], Command Paper 2756), at 21. See also the July 10: Report From "The Times": U Thant's Visit To London.

> U Thant declined to comment on the visit of Mr. Harold Davies to Hanoi, but on the suggestion that the United Nations should be involved in Vietnam he said that China and North Vietnam had always maintained that international machinery already existed to cope with the question of Vietnam.
>
> 'In their view,' he said, 'the United Nations should not, and must not, be involved in trying to find a peaceful solution to the problem.'
>
> U Thant said that he did not think, therefore, that there was any immediate prospect of United Nations' involvement. Primarily the question of Vietnam was, he said, linked more with the Geneva Agreement of 1954.

Id. at 109.

233. Speech of President Johnson, April 7, 1965, at Johns Hopkins University printed in *Background Information Relating to Southeast Asia and Vietnam*, Committee on Foreign Relations, United States Senate 197 (Rev. ed. Comm. Print June 16, 1965).

The extensive efforts of the United States, Britain, Canada, and a number of non-aligned nations to achieve a peaceful solution pursuant to Article 33 of the Charter through negotiation, the machinery of the Geneva Accords and the machinery of the United Nations have been consistently refused by the D.R.V., the U.S.S.R., and the People's Republic of China. See the documents contained in *Recent Exchanges Concerning Attempts to Promote*

a Negotiated Settlement of the Conflict in Viet-Nam (Viet-Nam No. 3 [1965], Command Paper 2756). By way of indicative extracts:

Preface. *Id.* at 7:

> As will be seen from document No. 12, Mr. Gromyko (who visited London at the invitation of Her Majesty's Government from March 16 to 20) was unwilling to consider a joint message of an uncontroversial nature and said that in the prevailing circumstances it would be inappropriate even to discuss the possibility of convening an international conference. Much to the regret of Her Majesty's Government, therefore, and in spite of repeated efforts to induce the Soviet Government to reconsider their attitude, subsequent British efforts to promote negotiations on Viet-Nam have perforce been unilateral and their effectiveness has been greatly diminished by the absence of the traditional cooperation . . . .
>
> The story of these unilateral British efforts, together with those made by many other Governments and by the Secretary-General of the United Nations, is set out in the other documents now published. In spite of the discouraging responses from China, North Viet-Nam and the National Front for the Liberations of South Viet-Nam, Her Majesty's Government intend to persevere in their efforts . . . .

February 11: Mr. Kosygin's Visit To North Viet-Nam: Joint Communique (Extract). *Id.* at 18.

> The two sides unanimously declared that the only correct way to settle the South Vietnam problem is: The USA must correctly implement the Geneva Agreements, end at once the aggressive war, withdraw all its troops, military personnel and weapons from South Vietnam, stop all interference in South Vietnam's affairs and let the South Vietnamese people settle by themselves their internal affairs.

March 10: Statement by Huynh Tan Phat, the Leader of the Delegation of the South Viet-Namese Liberation Front to the Indo Chinese Peoples' Conference at Phnom Penh. *Id.* at 24.

> When asked why the SVNLF supported the proposal for the convening of new Geneva conferences on Laos and Cambodia and did not consent to hold such a conference on the South Vietnam question, Huynh Tan Phat said that every country had its specific conditions. . . . [F]irst and foremost, the US imperialists should withdraw all their troops, military personnel, arms and war material from South Vietnam and leave the South Vietnamese people to settle their own affairs.

March 15: Declaration by the Seventeen Non-Aligned Countries. *Id.* at 25.

> We . . . make an urgent appeal to the parties concerned to start . . . negotiations, as soon as possible, without posing any precondition. . . .

March 16: Note on Contacts Between the Co-Chairmen. *Id.* at 28.

> When Mr. Gromyko visited London from March 16-20 at the invitation of H.M. Government, the question of negotiations on Viet-Nam was discussed in detail with him by the Foreign Secretary and Prime Minister. During the course of these conversations, Mr. Gromyko rejected the idea put to him by the Foreign Secretary that the two co-Chairmen might agree on a message in terms sufficiently objective to be mutually acceptable to other members of the Conference. He also rejected the Prime Minister's proposal that the two co-Chairmen should actually reconvene the Geneva Conference on Indo-China and expressed the view that, until what he called American aggression in Viet-Nam had been terminated, it would be inappropriate even to discuss the possibility of calling a conference.

April 1: The Foreign Secretary's Speech to the House of Commons (Extracts). *Id.* at 38-40.

> What we have had to struggle with during these last weeks is a situation where the repeated attitude of the Communist side was that it saw no need for negotiations or a conference at all. It has sometimes been suggested that this attitude of the Communist Powers can be blamed on us; that if we had been prepared to engage

in phrases condemnatory of the United States, or to dissociate ourselves from its actions, we should have got a better response. But I think that we should notice what response others have been getting—France, India and Yugoslavia.

The French approach glanced at, but no result from it; the Indian ignored and the *People's Daily*, in Peking, saying on March 22, of the Yugoslav initiative, "the Tito clique serves America" and going on to say that President Tito had no right to express opinions about Vietnam. . . .

It might be said that the United States Government should spell out more fully what was required as a satisfactory assurance by North Vietnam that it was prepared to cease attacks on the South, or that the United States should describe the exact process through which a cease-fire might be reached, or that it should describe more fully how it pictures the future of Vietnam, for all these things must at some time be part of the discussion.

It is difficult for the United States to do this so long as there is no indication from the other side of its preparedness to consider a settlement on any terms. If and when there is a clear indication to that effect, when the other side communicates in any form that it desires a cessation of hostilities, or considers there is room for negotiation, then the door would be open and there would be something which could be regarded as a basis for negotiation; and then the thoroughly sound proposition that this whole problem must have a political and not merely a military solution could become alive and real.

April 8: Reply by the United States Government to the Declaration by the Seventeen Non-Aligned Countries. *Id.* at 49-50.

We welcome the concern and interest of the governments participating in the declaration of March 15; just as we welcome any initiative aimed at bringing peace to any part of the world. The declaration is a constructive contribution to the effort for peace. . . .

There may be many ways to this kind of peace. In discussion or negotiation with the governments concerned, in large groups or in small ones, in the reaffirmation of old agreements or their strengthening with new ones.

We have stated this position over and over again, to friend and foe alike. And we remain ready—with this purpose—for unconditional discussions.

April 8: Speech by Mr. Pham Van Dong (The Four Points) in North Viet-Nam (Extracts). *Id.* at 51.

It is the unswerving policy of the Government of the Democratic Republic of Vietnam to strictly respect the 1954 Geneva Agreements on Vietnam, and to correctly implement their basic provisions as embodied in the following points:

1. . . . According to the Geneva Agreements, the U.S. government must withdraw from South Vietnam all U.S. troops, military personnel and weapons of all kinds, dismantle all U.S. military bases there, cancel its "military alliance" with South Vietnam. It must end its policy of intervention and aggression in South Vietnam. According to the Geneva Agreements, the U.S. government must stop its acts of war against North Vietnam, completely cease all encroachments on the territory and sovereignty of the Democratic Republic of Vietnam. . . .

3. The internal affairs of South Vietnam must be settled by the South Vietnamese people themselves, in accordance with the programme of the South Vietnam National Front for Liberation, without any foreign interference. . . .

The Government of the Democratic Republic of Vietnam is of the view that the above-expounded stand is the basis for the soundest political settlement of the Vietnam problem. If this basis is recognized, favourable conditions will be created for the peaceful settlement of the Vietnam problem and it will be possible to consider the reconvening of an international conference along the pattern of the 1954 Geneva Conference on Vietnam.

The Government of the Democratic Republic of Vietnam declares that any ap-

proach contrary to the above stand is inappropriate; any approach tending to secure a U.N. intervention in the Vietnam situation is also inappropriate because such approaches are basically at variance with the 1954 Geneva Agreements on Vietnam.

April 11: "Observer" Article in the Peking Peoples' Daily "Johnson's Big Swindle" (Extracts). *Id.* at 52-53.

As a matter of fact, the talk about "unconditional discussions" is a swindle pure and simple. . . .

The South Viet Nam National Front for Liberation solemnly declared some time ago that 'all negotiations with the U.S. imperialists at this moment are utterly useless if they still refuse to withdraw from South Viet Nam all their troops and all kinds of war materials and means and those of their satellite countries, if they still refuse to dismantle all their military bases in South Viet Nam, if the traitors still surrender the South Vietnamese people's sacred rights to independence and democracy to the U.S. imperialists and if the South Viet Nam National Front for Liberation—the only genuine representative of the 14 million South Vietnamese people—does not have its decisive voice.' . . .

If the American aggressors refuse to quit South Viet Nam, the only road open to them is one of total defeat. . . . We would like to tell the Johnson Administration: whatever you have done or may possibly do, the Chinese people will staunchly side with the Vietnamese people and fight shoulder to shoulder with them to the end for the complete defeat of the American aggressors.

April 12: Article in the Peking Peoples' Daily "Serious Advice for U Thant" *id.* at 54-55.

According to Western press reports, U.N. Secretary-General U Thant has on more than one occasion of late indicated his intention to visit China and the Democratic Republic of Viet Nam to 'inquire about' what he calls 'the possibility of achieving a negotiated settlement in Viet Nam.' . . .

If U Thant is undertaking this activity in the capacity of U.N. Secretary-General, then we should like to tell him in all seriousness to spare himself the trouble.

The Viet Nam question has nothing to do with the United Nations. The 1954 Geneva agreements were reached outside the United Nations, and the latter has no right to interfere in the affairs of Viet Nam or of Indo-China as a whole. It is the responsibility of the Geneva Conference participant nations to uphold the Geneva Agreements, and no meddling by the United Nations is called for, nor will it be tolerated. This is the case; it was so in the past, and so will it remain in the future. . . .

The United Nations has never taken a just stand on the Viet Nam question. It has absolutely no say concerning a settlement of the South Viet Nam question. . . .

In short, U.N. intervention in affairs of Indo-China cannot be tolerated. . . .

We would like to advise U Thant: save yourself the trouble. There is nothing for the United Nations to do in Viet Nam, neither is it qualified to do anything there.

April 12: Reply by the Chinese Government to the British Co-Chairman's Message of April 2. *Id.* at 57-58.

. . . [T]he Chinese Government hereby states to the British Government that in the present circumstances it is not suitable for a special representative of the British Government to contact the Chinese Government on the problems of Viet Nam and Indo-China, and that he is not welcome.

April 14: Reply of the Canadian Government to the Declaration of Seventeen Non-Aligned Countries. *Id.* at 60.

The Canadian Government welcomes the spirit in which this appeal has been launched and commends the sponsoring nations for their initiative which reflects

the anxiety of all responsible nations of the world over the deepening crisis in Vietnam and their concern for a peaceful resolution of the conflict. . . .

Discussions or negotiations, however, require a willingness of both sides to participate. The Canadian Government earnestly hopes therefore that all the other interested governments will respond affirmatively to the appeal as a demonstration of their concern for peace, and that they will not hesitate to take up the offer of unconditional discussions made by the President of the United States of America.

April 22: Editorial in the Peking Peoples' Daily on the Declaration of the Seventeen Non-Aligned Countries (Extract). *Id.* at 66-67.

The Viet-Namese people will never agree to negotiations "without any preconditions." They have on more than one occasion made clear their stand. . . .

Frankly speaking, the 17-Nation "appeal" completely cater to the interests of United States imperialism and has become a shield in the hands of the Johnson Administration to ward off worldwide condemnation of and opposition to the United States crimes of aggression.

Why has the 17-Nation "appeal" catered so much to the needs of United States imperialism? Credit should be given to the Tito clique of Yugoslavia.

It is common knowledge that from beginning to end the document was masterminded and created by the Tito clique. As early as March 2 this year, Tito wrote to Johnson urging "negotiations" with "neither party putting forward any preconditions," and stressing that this would "directly benefit" the United States. Johnson immediately replied. He bestowed high praise upon Tito and added that "in your conversations and communications with the leaders of other countries, you will reflect this understanding." These instructions from the United States boss sent the Titoites scurrying everywhere, and soon the "appeal" was produced.

May 13: Statement to the House of Commons by the Foreign Secretary: Mr. Gordon Walker's Tour. *Id.* at 78-79.

It was a disappointment that the Chinese and North Vietnamese refused to see Mr. Gordon Walker. It is also regrettable that even the Soviet Government are, so far, only willing to contemplate negotiations on Cambodia rather than on Vietnam.

May 15: Note on a Meeting Between Mr. Gromyko and the Foreign Secretary in Vienna. *Id.* at 80.

The Foreign Secretary again raised with Mr. Gromyko the question of convening the Geneva Council on Indo-China, arguing that the sooner this took place the better, but Mr. Gromyko could not agree that the Soviet Union should take part in negotiations on this subject.

June 3: Statement in the House of Commons by the Foreign Secretary *id.* at 86-87.

. . . I must tell the House that at present a barrier is erected at the very beginning of the road. That barrier is the refusal of the Governments of North Vietnam, China and the Soviet Union to negotiate at all.

July 19: Prime Minister's Speech in the House of Commons (Extracts). *Id.* at 111-116.

On more than one occasion we have tried to use the good offices of the Secretary-General of the United Nations. His proposed peace tour secured the same result as the unofficial visit of Mr. Gordon Walker. The Indian representative was rebuffed, the seventeen non-aligned nations were rebuffed, and France was rebuffed. More recently we secured the almost unanimous Commonwealth support for a Commonwealth Mission on Vietnam, and again Peking and Hanoi refused to accept the Mission. . . .

. . . [T]o get a political solution means getting men round a table. Every effort to do this—whether through the Co-Chairmen, whether through the Secretary-General of the United Nations, whether through the French initiative, whether

through my right hon. Friend's message to the Heads of the Geneva Conference Governments, whether through the initiative of the 17 non-aligned countries, whether through the initiative of the Commonwealth Peace Mission and subsequent attempts to get acceptance of that Mission—has so far foundered on the unwillingness of Hanoi, and, to the extent to which China accepts responsibility for these matters, of Peking to agree to negotiations. I do not think that there will be any disagreement with that proposition.

. . . [A]ll these attempts have established the willingness of the United States, the Government of South Vietnam and of the majority of the Geneva parties to have negotiations. No further diplomatic approaches are necessary with them.

July 30: Text of a Letter on Viet-Nam Sent by Mr. Goldberg to the President of the Security Council of the United Nations. *Id.* at 124-25.

Members of the Council also are aware of the prolonged and repeated efforts of the United States Government to open a path to peaceful solution of the disputes of South East Asia, beginning with our acceptance of the terms of the Geneva Accords of 1954. These efforts have included:

various approaches to Hanoi, Peking and Moscow;

support of peaceful overtures by the United Kingdom, Canada, and the British Commonwealth of Nations;

favourable reactions to proposals made by seventeen non-aligned nations, and later by the Government of India;

approval of efforts by the Secretary-General of the United Nations to initiate peace talks;

endorsement of a larger role for the United Nations in South East Asia, including a United Nations Mission of Observers along the frontier between Viet Nam and Cambodia, a United Nations Mission to investigate alleged suppression of minority rights in Viet Nam, and a United Nations invitation to Hanoi to participate in Security Council discussions of the incident in the Gulf of Tonkin;

major participation, directly and through the United Nations, in economic and social development projects in South East Asia;

a direct appeal by the President of the United States to the members of the United Nations to use their influence in bringing all parties to the peace table;

repeated assertions on the highest authority that the United States is prepared to engage in negotiations or discussions of any character with no prior conditions whatever.

On at least fifteen occasions in the past four-and-a-half years, the United States has initiated or supported efforts to resolve the issues in South East Asia by peaceful negotiations.

I am sure that the other members of the Security Council share the deep regrets of my Government in the fact that none of these initiatives has met with any favourable response whatever. It is especially unfortunate that the régime in Hanoi, which, along with the Republic of Viet Nam, is most directly involved in the conflict, has denied the competence of the United Nations to concern itself with this dispute in any manner and has even refused to participate in the discussions in the Council.

See also the *Renmin Ribao* Observer editorials reprinted in SUPPORT THE PEOPLE OF VIET NAM, DEFEAT U.S. AGGRESSORS II (Foreign Languages Press Peking 1965).

. . . President Ho Chi Minh has solemnly declared to the world:

To settle the South Viet Nam question, the United States must, first of all, withdraw from South Viet Nam, let the South Vietnamese people decide for themselves their own affairs, and stop its provocative attacks against the Democratic Republic of Viet Nam.

The Chinese Government and people fully support President Ho Chi Minh's state-

further pause of 37 days took place beginning December 24, 1965.[234] During this period U.S. diplomatic missions to many of the world's states indicated the U.S. desire for negotiations.[235] This lengthy pause concluded on January 31, 1966 without having received a favorable response from Hanoi. On January 28, 1966, Hanoi, in letters to the heads of several states, reiterated its unwillingness to engage in unconditional negotiations.[236]

On January 31, 1966 the United States again sought the assistance of the United Nations in its peace keeping efforts.[237] Ambassador Goldberg

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ment. They are resolved, together with the Vietnamese people, to carry to the end the joint struggle to oust the U.S. aggressors from Viet Nam.

Renmin Ribao Editorial April 12, 1965, "Solemn Pledge of the Thirty Million Vietnamese People." *Id.* at 7-8.

Only the withdrawal of all U.S. armed forces from South Viet Nam can create the indispensable pre-condition for the peaceful settlement of the Viet Nam question in accordance with the Geneva agreements and provide a reliable guarantee for the Vietnamese people to settle their own affairs and to achieve the peaceful reunification of their motherland.

Renmin Ribao Editorial April 16, 1965, "People of the World, Act Now and Force the U.S. Aggressors to Get Out of Viet Nam!" *id.* at 29, 32.

234. N.Y. Times, Jan. 31, 1966, p. 1, col. 8.

235. N.Y. Times, Dec. 30, 1965, p. 1, col. 8; *id.* p. 7, col. 1; *id.* p. 6, col. 1; N.Y. Times, Dec. 31, 1965, p. 1, cols. 7-8.

For a recent indication of the continuing United States efforts to achieve a peaceful settlement see N.Y. Times, June 3, 1966, p. 1, col. 6 (city ed.).

Through Peking and other diplomatic channels, the Administration . . . has sent a new message to Hanoi pledging willingness to cease bombing if North Vietnam, under some form of international verification, stops infiltrating troops into South Vietnam. . . .

Thus far, according to highly placed officials, there has been no reaction from Peking or Hanoi to the two American initiatives.

Ibid.

236. See the N.Y. Times, Jan. 31, 1966, p. 1, col. 7, for a statement by D.R.V. President Ho Chi Minh rejecting U.S. offers to negotiate. See also note 233 *supra.*

237. N.Y. Times, Feb. 1, 1966, p. 1, col. 4, p. 12, cols. 2-6. Ambassador Goldberg's January 31, 1966, request that the Security Council consider the Vietnamese conflict and adopt the United States resolution calling for an international peace conference clearly complies with the requirements of Article 37 of the Charter. Article 37(1) states as follows:

Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that article, they shall refer it to the Security Council.

Article 33 states:

(1) The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. . . .

Thus the wording of Articles 37 and 33 would seem to require, or at the least permit, the parties to a dispute to attempt a diplomatic settlement among themselves before they refer the matter to the Security Council. Prior to January 31, 1966, the U.S. was engaged

placed formally before the Security Council a draft resolution calling for immediate negotiations without preconditions. The draft resolution provided that:

> The Security Council, deeply concerned at the continuation of hostilities in Vietnam,

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in extensive diplomatic efforts to interest the D.R.V. in negotiations. See note 233 *supra*. Thus it can not be said that the U.S. unlawfully delayed formally presenting the Viet Nam controversy to the U.N. for it was acting in compliance with the spirit of Articles 33 and 37 that settlement among the parties be first attempted before the dispute is referred to the Security Council. Moreover, there was some feeling that premature referral to the United Nations might inhibit the possibility of a negotiated settlement by freezing the positions of the parties in the resulting debate.

The United States presented evidence of the nature of the Viet Nam conflict on February 27, 1965, in the form of a paper entitled "Aggression from the North (S/6206)." The presentation of evidence not only satisfies the reporting requirement of Article 51, it goes beyond that requirement.

A clearer understanding of United States compliance with the requirements of the Charter can be gained if U.S. approaches to the U.N. are considered in tabular form. Opposite the U.S. approaches are found the articles of the Charter with which the acts comply. This list of *Public U.S. Communications to the Security Council and Secretary-General* is printed in *Hearings on S. 2793 Before the Senate Committee on Foreign Relations*, 89th Cong., 2nd Sess., pt. 1 at 634-35 (1966). The listing of the Charter Articles with which the acts comply represents the conclusions of the authors of this paper and is not to be found in the committee print.

PUBLIC U.S. COMMUNICATIONS TO THE SECURITY COUNCIL AND SECRETARY-GENERAL

51 & 37—	1. August 5, 1964.—Letter from Ambassador Stevenson requesting a Security Council meeting on the Tonkin Gulf incidents (S/5849).
	2. September 9, 1964.—Ambassador Stevenson informed the Security Council President of U.S. views on the report of the Security Council Mission to Cambodia and Vietnam dated July 27, 1964. In particular, he commended the report's suggestions looking toward the establishment of a group of U.N. observers and the resumption of political relations between Cambodia and Vietnam. He concluded that implementation of the report's recommendations represented "practical, although limited, steps by which the U.N. can exercise its peace-keeping responsibilities and contribute to a reduction of tension in southeast Asia" (S/5955).
51—	3. February 7, 1965.—Letter from Ambassador Stevenson informing the Council members, in accordance with article 51 of the U.N. Charter, of the air attacks against military installations in North Vietnam which were undertaken by the United States and Government of Vietnam in response to increasing infiltration from the north and expanded attacks by Vietcong forces in the south (S/6174).
51—	4. February 27, 1965.—Ambassador Stevenson's letter to the Security Council President forwarding for the information of all U.N. members the text of the Department's paper entitled "Aggression from the North" (S/6206).
	5. April 2, 1965.—In a letter to the Security Council President, Ambassador Stevenson rejected a Soviet charge that U.S. forces were using "poisonous gases" in Vietnam. The U.S. letter attached excerpts from

Mindful of its responsibilities for the maintenance of international peace and security,

Noting that the provisions of the Geneva Accords of 1954 and 1962 have not been implemented,

Desirous of contributing to a peaceful and honorable settlement of the conflict in Vietnam,

Recognizing the right of all people, including those in Vietnam, to self-determination,

1. Calls for immediate discussions without preconditions at ——————on—————— date among the appropriate interested governments to arrange a conference looking toward the application of the Geneva Accords of 1954 and 1962 and the establishment of a durable peace in Southeast Asia.

Secretary Rusk's March 25, 1965, press conference on this subject (S/6270).

33 & 51— 6. April 9, 1965.—The text of President Johnson's April 7 address at Johns Hopkins University was transmitted to the Security Council President for the information of all U.N. members.

33—possibly 37 7. July 28, 1965.—President Johnson wrote Secretary-General U Thant expressing the hope that all the resources of the United Nations could be used to bring about peace in Vietnam.

33—possibly 37 8. July 30, 1965.—Ambassador Goldberg wrote the Security Council President informing U.N. members of U.S. efforts to find a peaceful solution in Vietnam and inviting the members of the Security Council to collaborate with the United States in the search for an acceptable formula to restore peace and security in southeast Asia. (S/6575).

33— 9. January 4, 1966.—Ambassador Goldberg informed the Secretary General of the purposes and content of the U.S. "peace offensive" and again urged members of the Security Council to give even more earnest thought to what they might do to achieve peace in Vietnam (S/7067).

51 & 37— 10. January 31, 1966.—Ambassador Goldberg requested the Security Council President to convene an urgent meeting of the Security Council to consider the situation in Vietnam (S/7105).

The text of these messages may be found *id.* at 635-47.

Despite these efforts, opposition to U.N. action continues on the part of some members. Because of the opposition of France and the U.S.S.R., Secretary-General U Thant recently said "I have to say that at least for the moment the U.N. cannot and should not be effectively involved in peace-keeping operations or any operations of the nature of the maintenance of international peace and security or law and order, in Vietnam." N.Y. Times, May 13, 1966, p. 2, col. 1.

On June 2, 1966, Nguyen Duy Lien, the Permanent Observer of the R.V.N. to the United Nations requested Secretary-General U Thant to provide United Nations observers at the September elections for a constituent assembly in the R.V.N. The proposal was welcomed by the United States and Britain. See "Saigon Asks U.N. to Observe Vote," N.Y. Times, June 3, 1966, p. c3, col. 1 (city ed.). The proposal, however, met opposition elsewhere within the United Nations. See "Saigon Bid to U.N. Meets Opposition," N.Y. Times, June 4, 1966, p. c3, col. 1 (city ed.), N.Y. Times; June 11, 1966, p. c5, col. 1 (city ed.).

2. Recommends that the first order of business of such a conference be arrangements for the cessation of hostilities under effective supervision,

3. Offers to assist in achieving the purpose of this resolution by all appropriate means including the provision of arbitrators or mediators,

4. Calls on all concerned to cooperate fully in the implementation of the resolution,

5. Requests the Secretary-General to assist as appropriate in the implementation of this resolution.[238]

The draft resolution presented by the United States was not adopted. In fact, there was little interest in discussing the matter, beyond that displayed by the United States. On January 21, 1966, shortly prior to the introduction of the resolution and during the second United States bombing pause "the Secretary-General said he did not think that an open debate in the Security Council would be useful."[239] In another statement made on the same day the Secretary-General stated that the United Nations Emergency Force and the United Nations Peace-Keeping Force in Cyprus "were in danger of being curtailed in the near future because of a lack of funds."[240] The same lack of funds would seem to be a factor precluding any U.N. peace-keeping activities in Viet Nam.

Despite these inauspicious signs the United States presented its resolution. So reluctant were many of the Security Council members to even discuss this peace effort that the United States barely achieved the requisite 9 votes (of 15 members) to have the resolution set for discussion.[241] Russia and Bulgaria voted against discussing the matter and France, among others, abstained.[242] The result of the discussion was the statement by the Security Council President with which this section began: that no agreement could be reached.

It should also be pointed out that under Article 35 of the Charter any

238. N.Y. Times, Feb. 1, 1966, p. 12, cols. 2-6.

239. United Nations Press Release WS/225, Jan. 21, 1966, at 2.

240. *Ibid.*

241. Wall Street Journal, Feb. 3, 1966, p. 1, col. 3.

242. *Ibid.*

For an indication of U.N. Ambassador Arthur J. Goldberg's emphasis on the processes of international law and the United Nations as essentials in the search for world peace, see "Goldberg Rebuts Acheson View That Peace by Law is 'Illusory,'" N.Y. Times, May 19, 1966, p. 6c, col. 4 (city ed.). "'The way to peace in this turbulent age is to keep to that national vision, to work with all our might for the establishment of a structure of law that will be reliable and just to all nations,' he continued.

"'For though law alone cannot assure world peace there can be no peace without it.'" *Id.* at col. 5.

member or even non-member of the United Nations could have brought the Viet Nam situation to the attention of the Security Council. And under Article 99: "The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security."

The United States and all of the other nations of the world must, of course, continually work to strengthen and assist the United Nations in undertaking solutions to problems such as Viet Nam. It is particularly important that every feasible effort continue to be made to maximize the potential of the United Nations to seek a solution to the Viet Nam situation. As United Nations Ambassador Goldberg has repeatedly indicated, the search for a peaceful negotiated solution must continue. The facts, however, indicate that the United States has met its obligations under the United Nations Charter.

THE GENEVA ACCORDS SUPPORT THE UNITED STATES' POSITION

Nothing in the Geneva Accords Requires the United States to Abstain from Resisting Aggression Against the Republic of Viet Nam

As has been seen, the Geneva Accords of 1954 with respect to Viet Nam consisted of an Agreement on the Cessation of Hostilities between the D.R.V. and the French Union forces, and a Final Declaration of the conference.[243] The United States did not sign or otherwise agree to be bound by either the Agreement on the Cessation of Hostilities or the Final Declaration and made this position clear at the Conference itself. It is a well accepted principle of international law that treaties ordinarily cannot impose obligations on states which are not parties to them. As Lord McNair, a former President of the International Court of Justice has written: "[N]o State can be bound by any treaty provision unless it has given its assent, and that principle is applicable equally to all types of treaty."[244] Similarly, Article 18 of the *Harvard Research Draft Convention on the Law of Treaties* provides: "A treaty may not impose obligations upon a State which is not a party thereto. . . ."[245] And Article 58 of the *International Law Commission 1964 Draft Articles on the Law of Treaties* provides:

> A treaty applies only between the parties and neither imposes any obligations nor confers any rights upon a State not party to it without its consent.[246]

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243. *Further Documents Relating to the Discussion of Indo-China at the Geneva Conference* (Miscellaneous No. 20 [1954], Command Paper 9239). Great Britain Parliamentary Sessional Papers, XXXI (1953/54), at 9-11, 27-38.

244. MCNAIR, THE LAW OF TREATIES 162 (1961).

245. 29 AM. J. INT'L L. 918 (Supp. 1935).

246. *Report of the International Law Commission on the work of its sixteenth session*

The commentary to this article said:

> There appears to be almost universal agreement that the rule laid down in this article—that a treaty applies only between the parties—is the fundamental rule governing the effect of a treaty upon States not parties. . . . There was complete agreement amongst the members that there is no exception in the case of obligations; a treaty never by its own force alone creates obligations for non-parties. The division of opinion related to the question whether a treaty may of its own force confer rights upon a non-party.[247]

There is some authority that so-called "law-making" treaties such as the Hague Conventions on the rules of land warfare or the United Nations Charter which are accepted as customary law may create expectations that may bind non-party states.[248] The detailed provisions of the Agreement on the Cessation of Hostilities or of the Final Declaration cannot be validly characterized as such, however, and in any event the proposition has less certainty in a context in which a state expressly refused to be bound at the time the so-called "law-making" treaty was entered into.[249]

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11 May-24 July 1964, U.N. GEN. ASS. OFF. REC. 19th Sess., Supp. No. 9, at 7 (A/5809) (1964).

247. *Id.* at 7-8.

248. See generally MCNAIR, THE LAW OF TREATIES 310, 255-71 (1961).

There is substantial authority for the proposition that even non-members of the U.N. are bound by the obligation to refrain from the use of force embodied in Article 2, section 4 of the Charter. See Comment, 50 CALIF. L. REV. 515, at 522 (1962). And see the address by Secretary of State Dean Rusk 1965 PROC., AM. SOC. INT'L L. 247.

> . . . [L]ast year, a United Nations Special Committee on Principles of International Law concerning Friendly Relations and Cooperation among States met in Mexico City. All shades of United Nations opinion were represented. The Committee's purpose was to study and possibly to elaborate certain of those principles. The Committee debated much and agreed on little. But on one point, it reached swift and unanimous agreement: that all states, and not only all Members of the United Nations, are bound to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state. Non-recognition of the statehood of a political entity was held not to affect the international application of this cardinal rule of general international law.

Id. at 249-50.

Whether or not a non-member is bound by the force of the provision as such, this would seem to be a strong rule of general international law today. See generally MCDOUGAL & FELICIANO, LAW & MINIMUM WORLD PUBLIC ORDER 129-31, 138-48 (1961). Moreover, Article 2, section 6 of the Charter certainly indicates an intention that even non-members be held to this standard. And since the D.R.V. has a pending application for United Nations membership, which under Article 4, section 1 of the Charter is an undertaking to accept the obligations of the Charter, it hardly seems harsh to judge its actions by the Charter. See notes 103 & 104 *supra*.

249. This is not to suggest that the nations of the world not expressly agreeing to the Geneva Accords are free to assist either the D.R.V. or the R.V.N. in an aggressive attack

The Agreement on the Cessation of Hostilities was signed only by representatives of the D.R.V. and the French Union Forces[250] and it is clear that the United States, not being a party to it, was not bound by it. With respect to the Final Declaration of the Conference, as has been pointed out, it was not signed by any state, but was orally agreed to by France, Britain, Cambodia, the D.R.V., Laos, the People's Republic of China, and the U.S.S.R. It was, however, expressly rejected as a binding obligation by the United States and was not agreed to by the State of Viet Nam. This United States' position, clearly enunciated at the conference, that it was not prepared to join in the Final Declaration of the Conference including the Agreement on the Cessation of Hostilities in Viet Nam has so often been misstated that the pertinent extracts from the official verbatim record of the Final Plenary Session of the Conference are here set out in full.

> *The Chairman* (Mr. Eden): . . . Finally, gentlemen, there is the Draft Declaration by the Conference, which takes note of all these documents [Including the Agreement on the Cessation of Hostilities in Viet Nam]. I think all my colleagues have copies of this Draft Declaration before them. I will ask my colleagues in turn to express themselves upon this Declaration.
>
> The Representative of France.
>
> *M. Mendès-France* (France): Mr. Chairman, the French Delegation approves the terms of this Declaration. . . .
>
> *The Chairman:* The Representative of the People's Republic of China.
>
> *Mr. Chou En-Lai* (People's Republic of China): We agree.
>
> *The Chairman:* On behalf of Her Majesty's Government in the United Kingdom, I associate myself with the final Declaration of this Conference.
>
> Union of Soviet Socialist Republics.
>
> *Mr. Molotov* (U.S.S.R.): The Soviet Delegation agrees. . . .
>
> *The Chairman:* . . . The Representative of the Democratic Republic of Viet Nam.
>
> *Mr. Pham van Dong* (Democratic Republic of Viet Nam):

aimed at the political and territorial integrity of the other state. Such an attack across an international cease-fire line, if not pursuant to the right of individual or collective self-defense or collective action expressly authorized by the United Nations, would clearly constitute a violation of the customary international law prohibition against the use of force in international relations embodied in Article 2, sections 3 & 4 of the United Nations Charter.

250. See note 44 *supra.*

Mr. Chairman, I agree completely with the words pronounced by you. . . .

The Chairman: . . . I will continue calling upon countries to speak on the subject of the Declaration. I call upon the United States of America.

Mr. Bedell Smith (United States): Mr. Chairman, Fellow Delegates, as I stated to my colleagues during our meeting on July 18, my Government is not prepared to join in a Declaration by the Conference such as is submitted. However, the United States makes this unilateral declaration of its position in these matters:

DECLARATION

The Government of the United States being resolved to devote its efforts to the strengthening of peace in accordance with the principles and purposes of the United Nations.

Takes Note

of the Agreements concluded at Geneva on July 20 and 21, 1954, between (a) the Franco-Laotian Command and the Command of the People's Army of Viet Nam; (b) the Royal Khmer Army Command and the Command of the People's Army of Viet Nam; (c) Franco-Vietnamese Command and the Command of the People's Army of Viet Nam, and paragraphs 1 to 12 of the Declaration presented to the Geneva Conference on 21st July, 1954.

The Government of the United States of America

Declares with regard to the aforesaid Agreements and paragraphs that (i) it will refrain from the threat or the use of force to disturb them, in accordance with Article 2 (Section 4) of the Charter of the United Nations dealing with the obligation of Members to refrain in their international relations from the threat or use of force; and (ii) it would view any renewal of the aggression in violation of the aforesaid Agreements with grave concern and as seriously threatening international peace and security.

In connection with the statement in the Declaration concerning free elections in Viet Nam, my Government wishes to make clear its position which it has expressed in a Declaration made in Washington on 29th June, 1954, as follows:

> In the case of nations now divided against their will, we shall continue to seek to achieve unity through free

> elections, supervised by the United Nations to ensure that they are conducted fairly.
>
> With respect to the statement made by the Representative of the State of Viet Nam, the United States reiterates its traditional position that peoples are entitled to determine their own future and that it will not join in an arrangement which would hinder this. Nothing in its declaration just made is intended to or does indicate any departure from this traditional position.
>
> We share the hope that the agreement will permit Cambodia, Laos and Viet Nam to play their part in full independence and sovereignty, in the peaceful community of nations, and will enable the peoples of that area to determine their own future.
>
> Thank you, Mr. Chairman.
>
> *The Chairman:* The Conference will, I think, wish to take note of the statement of the Representative of the United States of America.[251]

Mr. Bedell Smith's statements for the United States made it evident to all concerned that the United States would not consent to be bound by the provisions of the Agreement on the Cessation of Hostilities or the Final Declaration of the Conference, a position with which all of the delegations were already aware. Before making the United States' unilateral declaration Mr. Bedell Smith unequivocally stated that the United States was not prepared to join in the Final Declaration of the Conference. This statement is sometimes omitted by those adverting to whether the United States approved or consented to be bound by the provisions of the Agreement on the Cessation of Hostilities or the Final Declaration of the Conference.[252] Moreover, the United States' statement

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251. *Further Documents Relating to the Discussion of Indo-China at the Geneva Conference* (Miscellaneous No. 20 [1954] Command Paper 9239). Great Britain Parliamentary Sessional Papers XXXI (1953/54), at 5-7.

In this unilateral declaration the United States refused even to take note of paragraph 13, the last paragraph of the Final Declaration of the Conference. Paragraph 13 provides:

> The members of the Conference agree to consult one another on any question which may be referred to them by the International Supervisory Commission, in order to study such measures as may prove necessary to ensure that the Agreements on the cessation of hostilities in Cambodia, Laos and Viet-Nam are respected.

In refusing even to take note of this agreement to consult between members of the Conference, the United States was indicating in yet another way its separateness from the Conference decisions.

252. See for example APTHEKER, MISSION TO HANOI 98 (1966). SCHEER, HOW THE UNITED STATES GOT INVOLVED IN VIETNAM 18 (1965). Scheer asserts:

> The United States and the Diem government were later to claim that they were not bound by the agreement because they had not signed it. However, the United States, for its part, had implied approval when it returned Walter Bedell Smith to the conference, from which he had earlier been withdrawn, at the in-

which followed was not inconsistent with this unequivocal statement but merely took note of a substantial part of the agreements reached at Geneva, made an express unilateral two point declaration, and ended with a statement of position. Nothing in this statement indicates United States' consent to be bound by the provisions of the Agreement on the Cessation of Hostilities or the Final Declaration of the Conference. Point one of the two point express declaration merely indicated that the United States would act in accordance with its existing obligations under the United Nations Charter with respect to refraining from disturbing the agreement by threats or use of force. This statement that the United States "will refrain from the threat or the use of force to disturb them, in accordance with Article 2 (Section 4) of the Charter of the United Nations dealing with the obligation of Members to refrain in their international relations from the threat or use of force" is, even standing alone, clearly not an agreement to be bound by the provisions of the Agreement on the Cessation of Hostilities or the Final Declaration of the Conference. For being bound not to disturb the agreements by force in accordance with pre-existing United Nations obligations as to when force is and when it is not permissible is quite a different thing from subscribing to all of the provisions of the Agreement on the Cessation of Hostilities or the Final Declaration of the Conference, including provisions such as limitations on the introduction of military equipment into Viet Nam, etc.[253] And taken together with Mr. Bedell Smith's unequivocal statement that the

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sistence of the English and the French. Eisenhower acknowledged in his *Mandate for Change*: "Our direct interest in these negotiations arose out of the assumption that the United States would be expected to act as one of the guarantors of whatever agreement should be achieved." He also wrote: "By and large, the settlement obtained by the French Union at Geneva in 1954 was the best it could get under the circumstances."

As to the United States feelings about the Conference and the reasons for Bedell Smith's return see SURVEY OF INTERNATIONAL AFFAIRS 1954 62-64 (Royal Institute of International Affairs 1957); THE UNITED STATES IN WORLD AFFAIRS 1954 248-49 (Council on Foreign Relations 1956).

> There was no formal guarantee of the agreements. The Conference Powers, except for the U.S.A. and Viet Nam, issued a Final Declaration taking note of the agreements. The U.S.A. issued a unilateral declaration that it would 'refrain from the use or threat of force to disturb' the agreements and 'would view any renewal of the aggression in violation of the aforesaid agreements with grave concern.' The Vietnamese government undertook not to use force to resist the carrying of the cease-fire into effect though it maintained its reservations on the settlement.

SURVEY OF INTERNATIONAL AFFAIRS 1954, *supra*, at 67.

With respect to Scheer's quotations from MANDATE FOR CHANGE see also pp. 447-48 where former President Eisenhower pointed out that the United States was refusing to participate in the resolution and that in a news conference on July 21, 1954—the day of the Final Declaration of the Conference—he had indicated that the United States was "not a party to or bound by the decisions taken at the conference . . . ." MANDATE FOR CHANGE, 447-48.

253. See notes 46, 112 & 124 *supra*.

United States would not join in the Final Declaration of the Conference, there can be no doubt that the United States did not consent to be bound by the provisions of the Agreement on the Cessation of Hostilities or the Final Declaration of the Conference.

It should also be noted that there were only two points to the express declaration paragraph of the United States' statement issued at Geneva. Point one of the declaration which declared that the United States would act in accordance with Article 2, Section 4 of the United Nations Charter, and point two of the declaration which declared that the United States would view aggression in violation of the agreements as seriously threatening international peace and security. The statement of position which followed this express two point declaration does not seem a part of the formal declaration as such, since it was neither numbered (iii) nor a continuation of point (ii) in the same paragraph with the declaration. Regardless of the effect of this discussion of position in the statement,[254] which in any event does not effect the conclusions of this paper, it is clear that the heart of the United States' unilateral declaration at Geneva was its two point formal declaration. Nothing in this formal declaration, or anything else in the United States' statement at the final plenary session of the Conference indicated that the United States consented to be bound by the provisions of the Agreement on the Cessation of Hostilities or the Final Declaration of the Conference.

As was pointed out in a Comment in the *California Law Review* in 1962:

> Since the United States was not obligated to become a party to the Accords and did not become a party, it hardly seems arguable that it is bound by them. . . . By restating adherence to the charter and by warning against renewal of aggression the United States cannot be said to have become a party to the Accords. The unilateral declaration of the United States does not constitute a binding obligation. Those who have stated or implied that the Accords and unilateral declaration bind the United States have offered no legal reasons to support their position. Their only possible support comes from the United States denunciations of Communist violations of the Accords. It might be argued that by relying on the Accords the United States has

254. The United States in reiterating that it "shall continue to seek to achieve unity through free elections, supervised by the United Nations to ensure that they are conducted fairly," was calling for a proposal which had been rejected by the Communist delegations.

> The communist delegations have also rejected United Nations supervision of an armistice, favored by a number of delegations. In a proposal for reestablishing peace throughout the national territory of Vietnam, the Vietnam representative [the State of Viet Nam] asked that elections be held there under the auspices of the United Nations.

"The News In Review," *United Nations Review* 2 (Vol. 1, July 1954).

> obligated itself to observe them. But it would be anomalous to say that a nonsignatory state must observe an agreement merely because it has protested against violations of the agreement by a signatory. There appear to be no rules of international law leading to such a result, and a contrary result is indicated by the rule that the violation of essential provisions of an agreement creates a right for the other party to cancel the agreement.[255]

The contemporaneous declarations of the then United States President and Secretary of State reinforce the clear indication to all concerned made at the Geneva Conference that the United States was not bound by the Final Declaration of the conference. Thus, President Eisenhower indicated in a statement on July 21, 1954, the day of the Final Declaration of the Geneva Conference, that the United States was not a party to or bound by the Geneva Accords:

> The United States has not been a belligerent in the war. The primary responsibility for the settlement in Indochina rested with those nations which participated in the fighting. Our role at Geneva has been at all times to try to be helpful where desired and to aid France and Cambodia, Laos, and Viet-Nam to obtain a just and honorable settlement which will take into account the needs of the interested people. Accordingly, *the United States has not itself been party to or bound by the decisions taken by the Conference*, but it is our hope that it will lead to the establishment of peace consistent with the rights and the needs of the countries concerned. The agreement contains features which we do not like, but a great deal depends on how they work in practice.
>
> The United States is issuing at Geneva a statement to the effect that it is not prepared to join in the Conference declaration, but, as loyal members of the United Nations, we also say that, in compliance with the obligations and principles contained in article 2 of the United Nations Charter, the United States will not use force to disturb the settlement. We also say that any renewal of Communist aggression would be viewed by us as a matter of grave concern. . . .
>
> The United States is actively pursuing discussions with other free nations with a view to the rapid organization of a collective defense in Southeast Asia in order to prevent further direct or indirect Communist aggression in that general area.[256]

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255. Comment, 50 CALIF. L. REV. 515, at 519 (1962).

256. *Background Information Relating to Southeast Asia and Vietnam*, Committee on Foreign Relations, United States Senate (Rev. ed. Comm. Print June 16, 1965), at 60. (Emphasis added.)

In his *Mandate for Change*, President Eisenhower again emphasized that the United States was not bound by the decisions taken at the Conference[257] and also pointed out that on July 20, 1954, the day before the final settlement:

> The Russians were pressing for a conference resolution and for us to join in adopting all the provisos. We, of course, were refusing to participate in the resolution but were authorizing Bedell to make a declaration which would note the conference decisions and state that we would not use force to disturb them.[258]

And at a news conference on July 23, 1954, Secretary of State John Foster Dulles said:

> [S]ince the United States itself was neither a belligerent in Indochina nor subject to compulsions which applied to others, we did not become a party to the conference results. We merely noted them and said that, in accordance with the United Nations Charter, we would not seek by force to overthrow the settlement. . . .[259]

These conference records and contemporaneous statements demonstrate unequivocally that the United States did not join in the Agreement on the Cessation of Hostilities or the Final Declaration of the 1954 Geneva Conference. Moreover, this conclusion does not rest on a mere technicality as to whether the United States did or did not sign the agreement at Geneva, as has been implied by some,[260] but reflects the fundamental proposition that the United States clearly never consented to be bound by the provisions of the Agreement on the Cessation of Hostilities or the Final Declaration of the Conference, a position which was even at the time of the Conference made abundantly evident to all concerned. The only United States obligation stemming from the Conference itself, if a new obligation at all, was that expressed in the United States unilateral declaration. As has been seen, in its formal declaration at the Conference the United States declared:

> (i) it will refrain from the threat or the use of force to disturb them, [the Geneva Accords] in accordance with Article 2 (Section 4) of the Charter of the United Nations dealing with the obligations of Members to refrain in their international relations from the threat or use of force; and (ii) it would view any renewal of the aggression in violation of the aforesaid Agree-

257. MANDATE FOR CHANGE 448.
258. *Id.* at 447.
259. SCHEER 19.
260. See *Id.* at 18.

> ments with grave concern and as seriously threatening international peace and security. . . .

The first point of this declaration was declaratory of the already existing obligations of the United States under the United Nations Charter. For since the United States was a member of the United Nations it was, of course, already bound by Article 2 of the United Nations Charter. But as has been shown, collective defense action taken pursuant to Article 51 of the Charter is in accordance with Article 2, Section 4 of the Charter. That is, Article 2 is subject to the self-defense exceptions also written into the Charter. Thus, the United States may assist the R.V.N. pursuant to the right of self-defense consistent with even its first point in its unilateral declaration at Geneva as well as consistent with the United Nations Charter and general principles of customary international law. Moreover, the second point of the declaration, to the effect that aggression in violation of the agreements would be viewed with grave concern and as seriously threatening international peace and security indicates the United States interest in assisting the Republic of Viet Nam against future aggression. The present aggression of the D.R.V. against the R.V.N. constitutes such future aggression, the threat of which was unmistakably adverted to by the United States in its Geneva declaration. Assistance to the R.V.N. in these circumstances is entirely consistent with the unilateral declaration of the United States.

The present United States assistance to the Republic of Viet Nam is entirely consistent with the expectations created by the United States actions at the Geneva Conference of 1954. This assistance to the Republic of Viet Nam cannot violate the Geneva Accords because the United States was never legally bound by either the Agreement on the Cessation of Hostilities or the Final Declaration of the Conference. And similarly, this assistance is consistent with the unilateral declaration of the United States with respect to the Geneva Accords since the United States assistance is authorized under Article 51 of the United Nations Charter and the declaration expressly indicated the United States interest in protecting the Republic of Viet Nam against aggression.

Although a separate issue, it should also be pointed out that there are some reasons for suggesting that the Republic of Viet Nam was never bound by the provisions of the final settlement of the Conference, including the election provisions, although its nearly twelve year acceptance of the cease fire and partition pending elections would suggest that today it is either obligated by *these* provisions or the *de facto* separation largely resulting from them.[261] For like the United States, the State of Viet Nam

261. Whether bound or not, an aggressive attack by the R.V.N. on the D.R.V. across the internationally set cease-fire line in Viet Nam would seem to be a violation of the rule of customary international law embodied in Article 2, sections 3 & 4 of the U.N. Charter

was not a signatory to the Geneva Accords and has consistently protested substantially all but the cease-fire provisions of the final settlement.[262]

Thus, prior to the Indo-China phase of the Conference, on April 25, 1954 the Government of the State of Viet Nam issued a communique that:

> With regard to Viet-Namese unity, it is known that various plans have been drawn up which would entail a partition of Viet-Nam. Such solutions may offer certain specious advantages of a diplomatic nature, but their adoption would present extremely grave disadvantages and dangers for the future. . . . Viet-

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against the use of force in international relations, unless the action was taken in lawful individual or collective defense or pursuant to collective action expressly authorized by the United Nations. The same principle would also apply to the D.R.V. See note 249 *supra*.

See also Comment, 50 CALIF. L. REV. 515, at 520 (1962).

> The agreement was signed by North Vietnam and France, but not by South Nietnam [sic]. It therefore can be argued that South Vietnam acquired no rights under the agreement. The question of Vietnam's right under the agreement is really irrelevant since, whether the Vietminh obligation is owed to Vietnam or not, there is a Vietminh obligation owed at least to France. By sending troops into Vietnam the Vietminh have violated article 24 of the agreement.

Ibid.

Although Article 27 of the Agreement on the Cessation of Hostilities says that: "The signatories of the present Agreement and their successors in their functions shall be responsible for ensuring and observance and enforcement of the terms and provisions thereof . . . ," if the R.V.N. is not otherwise bound by the provisions of the agreement there is little reason to suggest that it is bound by this provision. Moreover, it is not clear from this provision that the parties adverted to the R.V.N. as a successor "in their functions"; for example, it is also open to the interpretation that they were referring to successive Commanders-in-Chief of the PAVN and French Union Forces.

262. For an account of the Geneva Conference see SURVEY OF INTERNATIONAL AFFAIRS 1954, 42-73 (Royal Institute of International Affairs 1957).

> Reactions to the agreement, and to the end of the marathon conference, ranged from that of Mr. Chou, who called it all "a tremendous success" (which from his point of view it certainly was) to that of Mr. Tran Van Do, the Vietnamese Foreign Minister, [the State of Viet Nam] who resigned on the spot.

Id. at 67.

For objections raised during the Conference by the State of Viet Nam which did not participate in the drafting of the Final Declaration see *Id.* at 48 & 64.

See also DO VANG LY, AGGRESSIONS BY CHINA 104, 110-11, 114, 150 (2d ed. 1960).

> The Geneva agreement was arrived at on July 20. Mr. Ngo Dinh Diem, who had assumed office by this time not only did not recognize the agreement but vehemently protested against it.

Id. at 104.

> But the armistice agreement, it may be mentioned, was a bilateral military accord between a French general and the Vietminh Commander-in-Chief. The French general did not have the legal sanction to negotiate an armistice—he had no delegation of powers from Mr. Diem's Government, from where alone he could have got it. In 1949, the French had returned Vietnam's sovereignty by a solemn treaty signed with Emperor Bao Dai; and Bao Dai had delegated full civil and military powers to Mr. Ngo Dinh Diem in 1954. Mr. Diem's representative alone could have negotiated for Vietnam.

Id. at 110-11.

> Nam would never be prepared to consider the possibility of negotiations in which France, violating the basic principles of the French Union from which her authority is derived, were to negotiate with those who are in rebellion against the Viet-Namese nation or with hostile Powers, thereby disregarding or sacrificing her partner.
>
> Whatever may happen, neither the Head of the State nor the Viet-Namese Government will consider themselves bound by decisions which by running counter to national independence and unity would violate the rights of peoples and reward aggression, contrary to the ideals of the United Nations Charter and to democratic ideals.[263]

And on July 18, 1954, Dr. Tran Van Do, the Representative of the State of Viet Nam said at the Geneva Conference:

> The Viet-Namese Delegate said that he must categorically dissociate himself from any discussion on either the French or the Soviet draft of the proposed final conference resolution on the grounds that he could not accept the principle of partition on which the cease-fire in Viet-Nam was to be based. He reserved the right to make known the views of his Government at a subsequent session. The Viet-Namese Delegation formally protested against partition and therefore rejected both French and Soviet drafts.[264]

And at the final plenary session of the conference Dr. Tran Van Do did not agree to the Final Declaration of the conference but instead offered an amendment to it:

> *The Chairman:* . . . I call on the Representative of the State of Viet Nam.
>
> *Mr. Tran Van Do* (State of Viet Nam): Mr. Chairman, as regards the final Declaration of the Conference, the Vietnamese Delegation requests the Conference to incorporate in this Declaration after Article 10, the following text:
>
> "The Conference takes note of the Declaration of the Government of the State of Viet Nam undertaking:
>
> "to make and support every effort to re-establish a real and lasting peace in Viet Nam;
>
> "not to use force to resist the procedures for carrying the cease-fire into effect, in spite of the objections and res-

263. *Documents relating to British Involvement in the Indo-China Conflict 1945-1965* (Miscellaneous No. 25 [1965], Command Paper 2834), at 87.

264. *Ibid.*

> ervations that the State of Viet Nam has expressed, especially in its final statement."
>
> *The Chairman:* I shall be glad to hear any views that my colleagues may wish to express. But, as I understand the position, the final Declaration has already been drafted and this additional paragraph has only just now been received; indeed, it has been amended since I received the text a few minutes ago. In all the circumstances, I suggest that the best course we can take is that the Conference should take note of the Declaration of the State of Viet Nam in this respect. If any of my colleagues has a contrary view, perhaps they would be good enough to say so. (None.). . . .[265]
>
> *Mr. Tran Van Do* (State of Viet Nam): Mr. Chairman, I expressed the view of the Delegation of the State of Viet Nam in my statement and I would have this Conference take note of it in its final act.
>
> *The Chairman:* As I think I explained, we cannot now amend our final act, which is the statement of the Conference as a whole, but the Declaration of the Representative of the State of Viet Nam will be taken note of. . . .
>
> Any other observations? (None.). . . .[266]

Moreover, it is clear from this exchange that the Conference was aware of the reservations of the State of Viet Nam but made no objections to them.

In his final statement for the State of Viet Nam, made at the concluding Plenary Session of the Conference on July 21, Foreign Minister Tran Van Do proposed provisional control by the United Nations over the entire territory pending free elections and said:

> [T]he Government of the State of Vietnam requests that note be made of its solemn protest against the manner in which the armistice has been concluded and against the conditions of the armistice which take no account of the profound aspirations of the Vietnamese people, and of the fact that it reserves to itself complete freedom of action to guarantee the sacred right of the Vietnamese people to territorial unity, national independence and freedom.[267]

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265. *Further Documents Relating to the Discussion of Indo-China at the Geneva Conference* (Miscellaneous No. 20 [1954] Command Paper 9239). Great Britain Parliamentary Sessional Papers XXXI (1953/54), at 7-8.

266. *Id.* at 9.

267. DOCUMENTS ON AMERICAN FOREIGN RELATIONS 1954 315-316, 318 (Council on Foreign Relations). The statement provides in full:

> The delegation of the State of Vietnam has presented a proposal designed to

Nor can it be validly maintained that the French delegation agreed to the Final Declaration on behalf of the State of Viet Nam, for the French delegation responded in the name of France only, and there is no suggestion in their acceptance that they were also binding the State of Viet Nam. Both the separate presence and participation of the delegation from the State of Viet Nam and the statements of the French delegation at the Conference indicated that the French neither intended to nor were legally capable of binding the State of Viet Nam. Thus in the opening statement on the Indo-China phase of the Geneva Conference on May 8, 1954, M. Bidault, the then French Foreign Minister said:

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obtain an armistice without division, even provisional, of the territory of Vietnam, through the disarmament of all the belligerent forces after their withdrawal to the smallest possible zones of regroupment and the institutions of a provisional control by the United Nations over the entire territory, pending the reestablishment of peace and arrangements permitting the Vietnamese people to determine its destiny through free elections. The delegation protests the summary rejection of this proposal, the only one which respects the aspirations of the Vietnamese people. It insists that, at least, the demilitarization and neutralization of the Catholic religious communities in the delta of Northern Vietnam be accepted by the Conference.

It protests solemnly: (a) the hasty conclusion of the armistice agreement, contracted only by the high authority of France and the Vietminh notwithstanding the fact that many clauses of this agreement are of such a nature as gravely to compromise the political future of the Vietnamese people; (b) the fact that this armistice agreement abandons to the Vietminh territories, many of which are still in the possession of Vietnamese troops, and thus essential to the defense of Vietnam in opposing a larger expansion of Communism and virtually deprives Vietnam of the imprescriptible right to organize its defense otherwise than by the maintenance of a foreign army on its territory; (c) the fact that the French High Command has arrogated to itself without preliminary agreement with the delegation of the State of Vietnam the right to fix the date of future elections, notwithstanding that a matter of a clearly political character is concerned.

Consequently, the Government of the State of Vietnam requests that note be made of its solemn protest against the manner in which the armistice has been concluded and against the conditions of the armistice which take no account of the profound aspirations of the Vietnamese people, and of the fact that it reserves to itself complete freedom of action to guarantee the sacred right of the Vietnamese people to territorial unity, national independence and freedom.

(Copy supplied by the Permanent Observer of the Republic of Viet Nam to the United Nations).

See also THE UNITED STATES IN WORLD AFFAIRS *1954* 252-53 (Council on Foreign Relations 1956).

The agreement on Vietnam was signed by the Commander-in-Chief of the Vietminh ("People's Army of Vietnam") and the Commander-in-Chief of the French Union forces in Indochina, but lacked the signature of any representative of the state of Vietnam. In fact, the Vietnamese delegation not only refused to sign but entered a solemn protest against the "hasty conclusion" of the armistice, the abandonment to the Vietminh of territories still in possession of Vietnamese troops, and the intrusion of the French High Command in political matters without preliminary Vietnamese agreement. In view of these facts, it stated, the Government of Vietnam reserved "complete freedom of action to guarantee the sacred right of the Vietnamese people to territorial unity, national independence and freedom."

Ibid.

> [I]ndependence has already been completed. . . .
>
> In Viet Nam, and in spite of the war, France has been able to keep its promises and full independence has been recognized and has become effective. Thirty-five free countries, by recognising those three states [Viet Nam, Cambodia and Laos], and a number of international organizations by accepting them in their midst, have consecrated that independence. The national Government of Viet Nam has been able to set up an administration to organize its finance, to develop its economy, to establish diplomatic relations with the main free countries. It built up an army. All those elements mean sovereignty.[268]

And in this opening statement he also said that the French Government has recognized: "fully and unreservedly the independence of Viet Nam. . . ."[269] And on May 14, at the Fourth Plenary Session of the Conference, Bidault said:

> [T]here does exist a Government of the State of Viet Nam. That Government is the Government of His Majesty, Bao Dai. . . . This Government [Bao Dai's State of Viet Nam] is fully and solely competent to commit Viet Nam.[270]

French Prime Minister Mendès-France's only request to the United States shortly after taking office on June 18th indicates that there was

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268. See note 37 *supra*.

269. See note 37 *supra*.

270. See note 37 *supra*. See also notes 33 & 36 *supra*.

Since France had entered into a treaty with the State of Viet Nam granting it independence prior to French approval of the Accords, there is a strong case that France was not legally capable of binding the State of Viet Nam by its agreement to the Accords. Article 22(c) of the *Harvard Research Draft Convention on the Law of Treaties* provides:

> If a State assumes by a treaty with another State an obligation which is in conflict with an obligation which it has assumed by an earlier treaty with a third State, the obligation assumed by the earlier treaty takes priority over the obligation assumed by the later treaty.

The Comment to Article 22(c) says:

> What a State gives by treaty to another State it cannot take away by a treaty subsequently concluded with a third State, at least not without the consent of the first-mentioned State. Manifestly that would be in contravention of the rule *pacta sunt servanda*. . . .
>
> Writers on international law seem to be unanimous in opinion as to the general principle that the obligations assumed by a State in a treaty with another State should prevail over those assumed by the same State under a later treaty with a third State. . . .
>
> Apparently in no case in practice has the general principle of the priority of the obligations previously assumed by a State over those subsequently assumed by it with a third State, ever been seriously denied, and no decision of an international tribunal is known in which the contrary principle has been sustained.

29 AM. J. INT'L L. 1024, 1025, 1029 (Supp. 1935).

some truth politically in the independence of the State of Viet Nam at the Conference. As Eisenhower reported in his memoirs:

> Mendès-France had only one request: that we use our influence with the Vietnamese Premier, Ngo Dinh Diem—newly appointed by Bao Dai—to prevent him for needlessly obstructing any honorable truce which the French might reach with the Vietminh.[271]

Anthony Eden's memoirs bear out this fear of Prime Minister Mendès-France of Vietnamese opposition to the Accords.[272] As has been shown in the discussion on the statehood of the R.V.N., there were also significant expectations that the State of Viet Nam was independent under international law prior to the July 21st conclusion of the Accords.[273] There are some reasons for suggesting then, that since the Republic of Viet Nam never consented to be bound by the Geneva Accords, except not to use force to resist the carrying of the cease fire into effect,[274] it was never legally bound by the other provisions of the final settlement. This has, in fact, been the unequivocal position of the Republic of Viet Nam and their predecessor the State of Viet Nam from even prior to the Accords to the present. Both in their public statements[275] and in their relationship with the International Control Commission[276] this position has been con-

271. MANDATE FOR CHANGE 442. See also note 36 *supra*.

272. See EDEN, FULL CIRCLE 146 (1960).

273. See notes 33, 36, 37 & 270 and accompanying text *supra*.

274. See SURVEY OF INTERNATIONAL AFFAIRS 1954 67 (Royal Institute of International Affairs 1957). "The Vietnamese government undertook not to use force to resist the carrying of the cease-fire into effect though it maintained its reservations on the settlement." *Ibid.*

See also the note delivered by the Government of Viet-Nam to H. M. Ambassador, Saigon, 3 April 1956 in *Documents Relating to British Involvement in the Indo-China Conflict 1945-1965* (Miscellaneous No. 25 [1965] Command Paper 2834), at 95.

> [T]he Government of the Republic of Viet-Nam will not have recourse to violence to resolve its problems and will uphold existing conditions of the present state of peace (Maintiendra les donnees de fait de l'etat actual de paix). It will not seek to violate the demarcation line and the demilitarised zone, as they have resulted from the situation of facts existing at the present time in Viet-Nam.

Id. at 96.

275. See text at notes 263 & 267 *supra*. "[N]ot being a signatory of these Agreements, the Government of Viet-Nam has declared on several occasions that it does not consider itself as bound by their provisions." Note delivered by the Government of Viet-Nam to H.M. Ambassador, Saigon, 3 April, 1956 in *Documents Relating to British Involvement in the Indo-China Conflict 1945-1965*. (Miscellaneous No. 25 [1965] Command Paper 2834), at 95. "We have not signed the Geneva Agreements. We are not bound in any way by these agreements, signed against the will of the Viet-Namese people." Declaration broadcast by M. Ngo Dinh Diem, Saigon, 16 July, 1955, *id.* at 107. "The Government [the State of Viet Nam] does not consider itself in any way bound by the Geneva Agreements, of which it was not a signatory." Statement by the Government of Viet-Nam, Saigon, 12 August, 1955, *id.* at 109. See also "Vietnam in World Affairs" 73-84 (June 1956, Review published by the Secretariat of State for Foreign Affairs of the Republic of Vietnam.)

276. As civil and military administration in the zone south of the provisional demar-

sistently reasserted. Again, the point is that the position of the Republic of Viet Nam that it is not bound by the provisions of the Agreement on the Cessation of Hostilities or the Final Declaration is not merely a later asserted technicality based on an accident that they had not signed the Accords,[277] but stems from their continuing objections and refusal to be bound by the Geneva settlements prior to Geneva, at Geneva, and after Geneva, a position which was certainly clear to all of the participants at the Conference. These continuing objections to the Geneva Accords specifically lend credence to the R.V.N.'s position that it is not bound by the election provisions of the Accords.[278]

Both the United States and R.V.N. declarations at the Conference and their subsequent conduct do give rise, though, to expectations that neither state will attack the integrity of the D.R.V. as a sovereign entity, except in lawful self-defense. The present United States assistance to the R.V.N.

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cation line has been passing into the hands of the Government of the State of Vietnam, which has not signed and is according to its repeated public declarations opposed to both the Geneva Agreement and the Final Declaration, further continuance of the Commission's activities and the effective discharge of its responsibilities are in serious jeopardy as the Commission, established under Article 44 of the Agreement, can only draw its authority from the Agreement itself and has no other sanction. We would like to add in this connexion that during our discussions with the Government of the State of Vietnam, we have been told that it will give full protection and practical co-operation to the Commission as an International Peace Commission but will not make a formal or public declaration to that effect in view of the position taken up by it with reference to the Geneva Agreement and the Final Declaration.

Fourth Interim Report of the International Commission for Supervision and Control in Vietnam. (Vietnam No. 3 [1955] Command Paper 9654). Great Britain Parliamentary Sessional Papers, XLV (1955/56), at 17. "[T]he Government of the Republic of Vietnam had stated that it was prepared to offer effective cooperation to the Commission but that it was not prepared to assume responsibility for the implementation of the Geneva Agreements in Vietnam." *Seventh Interim Report of the International Commission for Supervision and Control in Vietnam* (Vietnam No. 2 [1957] Command Paper 335). Great Britain Parliamentary Sessional Papers, XXX (1957/58), at 19.

277. See the implication in SCHEER 18.

278. For the position of the R.V.N. toward the I.C.C. and elections see SURVEY OF INTERNATIONAL AFFAIRS 1955-56, 18-19 (Royal Institute of International Affairs 1960).

Great Britain—a Co-Chairman of the Geneva Conference—agrees that the election provisions of the Accords are not legally binding on the R.V.N.

> Her Majesty's Government have always regarded it as desirable that these elections should be held and have advised the Government of the Republic of Viet-Nam to enter into consultations with the Viet Minh authorities in order to ensure that all the necessary conditions obtain for a free expression of the national will as a preliminary to holding free general elections by secret ballot. Nevertheless, Her Majesty's Government do not agree that the Government of the Republic of Viet-Nam were legally obliged to follow this course. . . .

Note delivered by H.M. Embassy, Moscow, to the Foreign Ministry of the Soviet Union, 9 April, 1956, in *Documents relating to British Involvement in the Indo-China Conflict 1945-1965* (Miscellaneous No. 25 [1965] Command Paper 2834), at 124-25.

with its narrowly defined aims of interdicting the D.R.V. aggression against the R.V.N. is consistent with those expectations.

It should be pointed out, however, that for these reasons discussed below, even if the United States and the R.V.N. were bound by all of the provisions of the Agreement on the Cessation of Hostilities and the Final Declaration it would not detract from the lawfulness of the present United States assistance.

Aggression by the D.R.V. Against the R.V.N. Violates the Geneva Accords and Fundamental Principles of the United Nations Charter: This Material Breach of Agreement Permits Suspension of Any Corresponding Obligations Which May be Binding on the United States or the R.V.N.

The D.R.V. was one of the two principal parties to the Geneva Accords on Viet Nam, having signed the Agreement on the Cessation of Hostilities in Viet Nam and having consented to the Final Declaration of the Conference. Since a major purpose of the Geneva Accords on Viet Nam, as indicated by the signed Agreement on the Cessation of Hostilities, was a military cease fire and a withdrawal of the combatant forces to the North and South, any armed aggression by the D.R.V. against the R.V.N. is a fundamental violation of the Geneva Accords. This serious violation of the Geneva Accords by the D.R.V. is, among other evidence, documented by the findings of the International Commission for Supervision and Control:

> The Agreement on the Cessation of Hostilities in Viet-Nam proceeds on the principle of the complete cessation of all hostilities in Viet-Nam, respect by either Party of the Zone assigned to the other, and the inescapable responsibility of the Parties for the fulfilment of the obligations resulting therefrom.
>
> Article 10 of the Agreement states expressly the obligation of the two Parties to order and *enforce* the *complete* cessation of all hostilities in Viet-Nam.
>
> Article 19 of the Agreement casts the obligation on the two Parties to ensure that the Zones assigned to them are not used for the resumption of hostilities or to further an aggressive policy.
>
> Article 24 of the Agreement proceeds on the principle of the inviolability of the Demilitarized Zone and the territories assigned to the two Parties and states expressly that the armed forces of each Party shall respect the territory under the military control of the other Party and shall commit no act and undertake no operation against the other Party.

> Article 27 of the Agreement affirms expressly the responsibility of the Commanders of the Forces of the two Parties of ensuring full compliance with all the provisions of the Agreement by *all elements* and military personnel under their Command.
>
> It follows that the using of one Zone for the organisation or the carrying out of any hostile activities in the other Zone, violations by members of the Armed Forces of one Party of the territory of the other Party, or the commission by any element under the control of one Party, or the commission by any element under the control of one party of any act directed against the other Party, would be contrary to the fundamental provisions of the Agreement which enjoin mutual respect for the territories assigned to the two Parties. . . .
>
> The Commission accepts the conclusions reached by the Legal Committee that there is sufficient evidence to show beyond reasonable doubt that the PAVN [the army of the D.R.V.] has violated Articles 10, 19, 24 and 27 in specific instances . . . .[279]

Because this aggression by the D.R.V. against the R.V.N. is a continuing violation of a major provision of the Geneva Accords, the situation under international law is not comparable to that of a civil war. And this is true even if the D.R.V. and the R.V.N. were to be regarded as merely separate "temporary zones" not qualifying as states. For the cease fire provisions violated by this aggression have been agreed to by the D.R.V. and have been set by an international conference. Moreover, as has been discussed in section I there are substantial expectations that the D.R.V. and the R.V.N. are separate states under international law.

The major thrust of contemporary international law as reflected in the United Nations Charter is to outlaw the use of force by individual states unless required by self-defense. International grievances that fall short of self-defense, such as political grievances, no matter how serious must be settled without the use of force by individual states. Thus, Article 2 of the United Nations Charter, which is in this respect substantially reflective of a long series of major international understandings,[280] provides:

> § 3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

279. *Special Report to the Co-Chairmen of the Geneva Conference on Indo-China*, (Vietnam No. 1 [1962], Command Paper 1755). Great Britain Parliamentary Sessional Papers, XXXIX(1961/62), at 6-7.

280. See McDougal & Feliciano, Law & Minimum World Public Order 129-31, 138-48 (1961); Briggs, The Law of Nations 968-72, 980 (2nd ed. 1952).

> § 4. All Members shall 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 renunciation of the use of force to settle disputes is reflected in the well-recognized principle that even breach of treaty may not be remedied by unilateral resort to force, provided, of course, that the breach does not also present a self-defense situation.[281] Moreover, by its pending application for membership in the United Nations the D.R.V. is itself holding out, pursuant to Article 4 of the Charter which sets forth qualifications for membership, that it is a state and that it accepts the obligations contained in the Charter.[282]

There is no question but that the D.R.V. is not acting in self-defense in its armed aggression against the R.V.N.[283] For the explicit findings of the Legal Committee of the I.C.C. that the D.R.V. was in violation of the Geneva Accords in its armed aggression against the R.V.N. occurred several years prior to the United States and R.V.N. bombing of military targets in the D.R.V.[284] In addition, the United States and the Republic of Viet Nam have repeatedly made clear that the bombing of the D.R.V. will cease when the aggression of the D.R.V. against the R.V.N. is halted, and that their objective is not an attack on the political and territorial integrity of the D.R.V. As a result, regardless of the validity of its political grievances against the R.V.N., the D.R.V. is not only violating the Geneva Accords in its aggression against the R.V.N. but in doing so is acting contra to one of the most fundamental provisions of the United Nations Charter which is itself largely declaratory of customary international law. Such a resort to the use of force in a non self-defense situation is clearly unlawful even assuming that the principal allegations of the D.R.V. against the R.V.N. were all legally justified. A study of the International Control Commission Reports with respect to the grievances asserted by the D.R.V. demonstrates that the D.R.V. has no legitimate claim to justify its aggression against the R.V.N. as self-defense. The principal

281. See MCNAIR, LAW OF TREATIES 576-78 (1961). "It need hardly be said that the breach of a treaty is not in itself an 'armed attack' within the meaning of Article 51 of the Charter." *Id.* at 577 n.1.

282. See notes 103 and 104 *supra*. For the proposition that even non-members of the U.N. are bound by the obligation to refrain from the use of force embodied in Article 2, section 4 of the Charter see note 248 *supra*.

283. For the proposition that the Vietminh activities against the R.V.N. "unquestionably violate international law" see Comment, 50 CALIF. L. REV. 515, at 520 (1962).

284. The Special Report making these findings was issued on June 2, 1962 and apparently reflected evidence of aggression accruing during the preceding years. See *Special Report to the Co-Chairmen of the Geneva Conference on Indo-China*, (Vietnam No. 1 [1962], Command Paper 1755). Great Britain Parliamentary Sessional Papers, XXXIX (1961/62), at paragraphs 5, 8 & 9.

D.R.V. allegations of R.V.N. breach of the Accords are failure to consult on the holding of elections in 1956, reprisals against resistance leaders, inadequate cooperation with I.C.C. controls, and entering into a military alliance with and receiving military assistance from the United States.[285] Since none of these principal asserted grievances of the D.R.V. constitute an "armed attack" on the D.R.V. within the meaning of Article 51 of the United Nations Charter,[286] or otherwise constitute a self-defense situation,[287] even if all of these grievances were legally justified and the R.V.N. were bound by the applicable provisions of the Geneva Accords, the D.R.V., in its aggression against the R.V.N. would still clearly be acting contra to a fundamental principle of the United Nations which is also part of customary international law and which is binding on the D.R.V. This fundamental principle is that disputes be settled by peaceful means

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285. See the First through Eleventh *Interim Reports of the International Commission for Supervision and Control in Vietnam* and the *1962 Special Report to the Co-Chairmen of the Geneva Conference on Indo-China. First and Second Reports* (Vietnam No. 1 [1955], Command Paper 9461). Great Britain Parliamentary Sessional Papers XIX (1954/55); *Third Report* (Vietnam No. 2 [1955], Command Paper 9499). Great Britain Parliamentary Sessional Papers XLV (1955/56); *Fourth Report* (Vietnam No. 3 [1955], Command Paper 9654). Great Britain Parliamentary Sessional Papers XLV (1955/56); *Fifth Report* (Vietnam No. 1 [1956], Command Paper 9706). Great Britain Parliamentary Sessional Papers XLV (1955/56); *Sixth Report* (Vietnam No. 1 [1957], Command Paper 31). Great Britain Parliamentary Sessional Papers XXXIII (1956/57); *Seventh Report* (Vietnam No. 2 [1957], Command Paper 335). Great Britain Parliamentary Sessional Papers XXX (1957/58); *Eighth Report* (Vietnam No. 1 [1958], Command Paper 509). Great Britain Parliamentary Sessional Papers XXX (1957/58); *Ninth Report* (Vietnam No. 1 [1959], Command Paper 726). Great Britain Parliamentary Sessional Papers XXXIV (1958/59); *Tenth Report* (Vietnam No. 1 [1960], Command Paper 1040). Great Britain Parliamentary Sessional Papers XXXVI (1959/60); *Eleventh Report* (Vietnam No. 1 [1961], Command Paper 1551). Great Britain Parliamentary Sessional Papers XXXIX (1961/62); *1962 Special Report* (Vietnam No. 1 [1962], Command Paper 1755). Great Britain Parliamentary Sessional Papers XXXIX (1961/62).

The principal grievances asserted by the R.V.N. against the D.R.V. are failure to properly implement provisions initially allowing refugees to freely transfer zones, inadequate cooperation with I.C.C. controls, and armed aggression against the R.V.N. *Ibid.*

It might be noted that in the *Eleventh Interim Report* the Commission said:

> The Indian and Canadian Delegations are convinced that there have been many instances of non-co-operation by both Parties which have impeded the work of the Commission and its Teams. These have not in all cases reached the stage of formal citations because of evasions and lack of cooperation on the part of the Party concerned. For this reason the two Delegations agree that, in the experience of the Commission, the number of formal citations in itself is no fair measure of the degree of co-operation received from either party.

Id. at 25.

286. See note 281 *supra.*

287. See generally McDougal & Feliciano, Law & Minimum World Public Order 121-260 (1961).

Even today in Viet Nam there can be little question that the intense D.R.V.—Viet-Cong attack is aimed at the political and territorial integrity of the R.V.N. and that the R.V.N.—United States response is directed at interdicting that attack.

and that political grievances do no justify resort to the use of force. The D.R.V. may not lawfully seek to remedy asserted breach of treaty by the use of force in this situation, which, even assuming all of the grievances of the D.R.V. to be legally justified, clearly falls short of permissible self-defense. Moreover, a characterization of self-defense broad enough to justify the present armed attack by the D.R.V. on the R.V.N. would probably sanction armed aggression by one or the other of the separate governments in Germany, China, and Korea against the other. Such a spurious characterization not only fails to come within the accepted meaning of self-defense in international law but is clearly too disruptive of minimum world public order.

The R.V.N., on the other hand, has made it clear that it has requested substantial United States military assistance to offset outside aggression and that when that aggression halts, the United States military presence will no longer be required.[288] It is a generally recognized principle of international law that a material breach of an international agreement by one of the parties entitles any other party to suspend the operation of corresponding obligations in the agreement in whole or in part. Article 42 of the *International Law Commission 1966 Draft Articles on the Law of Treaties* provides:

> *Termination or suspension of the operation of a treaty as a consequence of its breach*
>
> 1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.
>
> 2. A material breach of a multilateral treaty by one of the parties entitles:
>
> (b) A party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;
>
> (c) Any other party to suspend the operation of the treaty with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

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288. See, *e.g.*, the communication from the Liason Mission of the R.V.N. to the I.C.C. on December 9, 1961, in *Special Report to the Co-Chairmen of the Geneva Conference on Indo-China* (Vietnam No. 1 [1962], Command Paper 1755). Great Britain Parliamentary Sessional Papers XXXIX (1961/62), at paragraph 13, set out in text at note 122 supra.

See also the Statement of Adlai E. Stevenson to the Security Council on August 5, 1964, in *Background Information Relating to Southeast Asia and Vietnam*, Committee on Foreign Relations, United States Senate (Rev. ed. Comm. Print June 16, 1965), at 124-27.

> 3. A material breach of a treaty, for the purpose of the present article, consists in:
>
> (a) A repudiation of the treaty not sanctioned by the present articles; or
>
> (b) the violation of a provision essential to the accomplishment of any of the objects or purposes of the treaty.[289]

It would be hard to posit a violation of a more essential treaty provision than the D.R.V.'s documented violation by armed aggression of the military cease-fire provisions of the Accords. Since this continuing aggression of the D.R.V. against the R.V.N. is a material breach of the Accords, even if the United States and the R.V.N. were bound by the limitations on the introduction of military arms and personnel and other corresponding provisions contained in the Geneva Accords, this breach certainly justifies a suspension of the pertinent treaty terms consistent with the right of self-defense of the R.V.N. Finally, regardless of rules as to suspension of treaty as a consequence of breach, the right of self-defense is an inherent right of sovereignty and there is authority that it "is implicit in every treaty."[290]

To summarize, the documented armed aggression of the D.R.V. in violation of the Geneva Accords is clearly neither justified by alleged breach of treaty nor is otherwise lawful, even if the D.R.V.'s principal grievances against the R.V.N., including the failure to hold elections, were all legally justified grievances. This armed aggression by the D.R.V. is a fundamental violation of the agreements which presents a self-defense

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289. *Report of the International Law Commission on the Work of the Second Part of its Seventeenth Session*, U.N. Doc. No. A/CN. 4/184 (Jan. 1966), at Annex, p. 5.

> The great majority of writers recognize that the violation of a treaty by one party may give rise to a right in the other party to abrogate the treaty or to suspend the performance of its own obligations under the treaty. A violation of a treaty obligation, as of any other obligation, may give rise to a right in the other party to take non-forcible reprisals and these reprisals may properly relate to the defaulting party's rights under the treaty. . . .

Commentary to Article 42 of the *International Law Commission 1963 Draft Articles on the Law of Treaties, Report of the International Law Commission on the Work of its Fifteenth Session*, U.N. GEN. ASS. OFF. REC. 18th Sess., Supp. No. 9, at 17 (A/5509) (1963).

See generally authorities cited in *The Legality of U.S. Participation In the Defense of Viet-Nam* 10 n. 22 (Reprint from the March 28, 1966 Department of State Bulletin—Department of State publication 8062, Far Eastern Series 147).

290. See the statement of Secretary of State Frank B. Kellogg during the negotiations in 1928 leading to the conclusion of the Briand-Kellogg Pact in BRIGGS, THE LAW OF NATIONS 977-78 (2d ed. 1952). In any event, it is difficult to see how anything in the Geneva Accords could bind the R.V.N. or the United States to refrain from appropriate defensive measures in a context in which the R.V.N. is subjected to D.R.V. aggression in violation of those Accords.

situation clearly permitting suspension of any corresponding obligation which may be binding on the United States or the R.V.N.

With respect to the United States, not only is the United States not bound by these provisions of the Geneva Accords, but it would seem that by rendering assistance to the R.V.N. to defend against aggression from the D.R.V., the United States is acting to preserve and guarantee a major provision of the Geneva Accords, as well as to uphold the principles of the United Nations; action which is certainly consistent with its 1954 Geneva declaration.

Furthermore, the I.C.C. has impliedly recognized the greater seriousness of D.R.V. aggression against the R.V.N. as compared with the responding military assistance from the United States. For in its 1962 Special Report it significantly discusses the D.R.V. aggression before it discusses the responding United States military assistance, an order of discussion which is considered important enough by the Polish Delegation to protest it in its dissenting statement to the report.[291]

In addition to D.R.V. violations of the 1954 Geneva Accords and fundamental principles of the United Nations, there is evidence that the D.R.V. has been infiltrating troops into the R.V.N. through Laos and has been using Laotian territory to conduct hostilities against the R.V.N.[292] Such actions are in clear violation of the fourteen power 1962 Geneva Agreements on the Neutrality of Laos which were signed by the D.R.V.[293]

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291. The majority report wrongly admitted unfounded allegation of aggression and subversion brought by the Republic of Viet-Nam against the Democratic Republic of Viet-Nam in spite of the fact that they do not find any legal justification in the stipulation of the Geneva Agreement and furthermore are not substantial and based on any evidence. These artificial allegations have been advanced in the report as a most important item before a problem described in insignificant terms of receiving military aid from the United States of America.

Special Report to the Co-Chairmen of the Geneva Conference on Indo-China (Vietnam No. 1 [1962], Command Paper 1755). Great Britain Parliamentary Sessional Papers XXXIX (1961/62), at 21.

292. See the finding of the SEATO COUNCIL to this effect in note 138 *supra*. See also the recent Laotian accusation against the D.R.V. to the effect that it is guilty of "repeated aggression" against Laos. "Hanoi Aggression is Charged By Laos," N.Y. Times, Feb. 24, 1966, p. 6c, col. 4 (city ed.), excerpts at note 298 *infra*; and President Johnson's Message to Congress, August 5, 1964, in *Background Information Relating to Southeast Asia and Vietnam*, Committee on Foreign Relations, United States Senate (Rev. ed. Comm. Print June 16, 1965), at 122-24.

293. For the complete text of the 1962 Declaration and Protocol on the Neutrality of Laos see *Declaration and Protocol on the Neutrality of Laos: Geneva, July 23, 1962*, (Treaty Series No. 27 [1963], Command Paper 2025). Great Britain Parliamentary Sessional Papers XXXVII (1962/63).

For the Conference documents as well as the complete text of the 1962 Declaration and Protocol see *International Conference on the Settlement of the Laotian Question, Geneva,*

Articles 4 and 6 of the Protocol to the Declaration on the Neutrality of Laos provide:

> The introduction of foreign regular and irregular troops, foreign paramilitary formations and foreign military personnel into Laos is prohibited.
>
> The introduction into Laos of armaments, munitions and war material generally, except such quantities of conventional armaments as the Royal Government of Laos may consider necessary for the national defence of Laos, is prohibited.[294]

And the Declaration on the Neutrality of Laos makes it even more explicit:

> (g) [T]hey [the signatories] will not introduce into the Kingdom of Laos foreign troops or military personnel in any form whatsoever, nor will they in any way facilitate or connive at the introduction of any foreign troops or military personnel;
>
> (h) [T]hey will not establish nor will they in any way facilitate or connive at the establishment in the Kingdom of Laos of any foreign military base, foreign strong point or other foreign military installation of any kind;
>
> (i) [T]hey will not use the territory of the Kingdom of Laos for interference in the internal affairs of other countries . . . .[295]

Moreover, by her own statement of neutrality which explicitly became part of the international agreement on Laos,[296] not even the Government of Laos could authorize such D.R.V. actions on Laotian territory.[297] In

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May 12, 1961-July 23, 1962 (Laos No. 1 [1962], Command Paper 1828). Great Britain Parliamentary Sessional Papers XXXVII (1961/62). For the participation of the D.R.V. in the Conference and their signature of the Declaration and the Protocol see Command Paper 2025, *supra* note 2, 22, 26 & 60.

294. Command Paper 2025, *supra* note 293, at 27; Command Paper 1828, *supra* note 293, at 20.

295. Command Paper 2025, *supra* note 293, at 4; Command Paper 1828, *supra* note 293, at 17.

296. Command Paper 2025, *supra* note 293, at 2, 4; Command Paper 1828, *supra* note 293, at 15, 17-18.

297. The statement of neutrality by the Royal Government of Laos which became an integral part of the Conference Declaration provides:

> (3) It [Laos] will not resort to the use or threat of force in any way which might impair the peace of other countries, and will not interfere in the internal affairs of other countries;
>
> (4) It will not enter into any military alliance or into any agreement, whether military or otherwise, which is inconsistent with the neutrality of the Kingdom of Laos; it will not allow the establishment of any foreign military base on Laotian territory, nor allow any country to use Laotian territory for military purposes

any event, the government of Laos has given no such authorization.[298] Insofar as the D.R.V. forces make use of Laotian territory in their aggression against the R.V.N., then, they also violate the 1962 Geneva Agreements on Laos.

Senator Fulbright, the Chairman of the Senate Foreign Relations Committee, has indicated his understanding that the D.R.V. has engaged in hostilities against the R.V.N. in violation of the 1954 and 1962 Geneva Accords and the United Nations Charter. In supporting the passage of the 1964 Tonkin Gulf Resolution Senator Fulbright said:

> Certainly supported and quite possibly incited by Communist China, North Vietnam has persistently engaged in subversion and more direct hostilities against the duly constituted governments of both Laos and South Vietnam. It has done these things in gross violation of the Geneva Agreement of 1954 and of the Geneva Agreement of 1962 pertaining to Laos. It has done these things in violation of international law, in contempt of the United Nations Charter, in malice toward its neighbors, and in reckless disregard of the requirements of peace in southeast Asia.[299]

An analysis of the Geneva Accords of 1954 and 1962 and fundamental principles of general international law embodied in Article 2 of the United Nations Charter supports the lawfulness of the present United States assistance to the Republic of Viet Nam and unmistakably demonstrates the unlawfulness of the D.R.V. aggression against the R.V.N.

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or for the purpose of interference in the internal affairs of other countries, nor recognize the protection of any alliance or military coalition, including SEATO. . . .

(6) . . . [I]t will require the withdrawal from Laos of all foreign troops and military personnel, and will not allow any foreign troops or military personnel to be introduced into Laos . . . .

Command Paper 2025, *supra* note 293, at 2; Command Paper 1828, *supra* note 293, at 16.

298. This would seem fairly to be implied from the recent Laotian Government accusations against the D.R.V. to the effect that it is guilty of "repeated aggression" against Laos. See "Hanoi Aggression Is Charged by Laos," N.Y. Times, Feb. 24, 1966, p. 6c, col. 4 (city ed.).

> A spokesman for the Laotian Government, Phagna Bouasy, denounced the North Vietnamese government today, accusing it of 'repeated aggression' against Laos.
>
> We hold the Government of Hanoi responsible for all the aggression, all the dead, all the bad things that have happened to our Kingdom since that Govuernment [sic] took the decision to aid the Neo Lao Hak Sat [the pro-Communist parent grop [sic]of the Pathet Lao] in nourishing, adding to and spreading disorder in this country, he said. . . .
>
> Mr. Bouasy said that 20,000 North Vietnamese were fighting in Laos, but reliable military sources here estimate the figure at 'not more than 10,000.'

Ibid.

299. 110 CONG. REC. 18400 (1964).

D.R.V. Aggression Against the R.V.N. Is a Fundamental Change in Conditions, Constituting Grounds for Suspending Any Corresponding Obligation Which May Be Binding on the United States or the R.V.N.

Even if the United States were bound by the provisions of the 1954 Geneva Accords, and even if the D.R.V. aggression was not a material breach of the Accords, the aggression against the R.V.N. is a fundamental change in conditions constituting grounds for suspending any treaty provisions with respect to prohibitions on military assistance and related conditions.

Article 44 of the *International Law Commission 1966 Draft Articles on the Law of Treaties*, which is essentially declaratory of general international law in this respect provides:

> A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
>
> (a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
>
> (b) the effect of the change is radically to transform the scope of obligations still to be performed under the treaty. . . .[300]

With respect to the Geneva Accords, few changes could be a more fundamental change in circumstances constituting an essential basis for consent and radically transforming the scope of any obligations undertaken, than the D.R.V.'s disregard of the cease-fire provisions of the Accords. For the military cease-fire was the very essence of the understanding of all the states participating in the Conference. Point two of the United States unilateral declaration, to the effect that the United States would view any renewal of aggression in violation of the agreements with grave concern, even makes this explicit as far as the United States is concerned. In fact, point two of the United States declaration greatly strengthens the case under this rule of general international law as it indicates that the possibility of future aggression was adverted to as important by the United States at the time of the 1954 Geneva Conference

300. *Report of the International Law Commission on the Work of the Second Part of its Seventeenth Session* U.N. Doc. No. A/CN. 4/184 (Jan. 28, 1966), at Annex, p. 6.

For a general discussion of this principle see the *Commentary* to Article 44 of the *International Law Commission 1963 Draft Articles on the Law of Treaties. Report of the International Law Commission on the Work of its Fifteenth Session*, U.N. GEN. ASS. OFF. REC. 18th Sess., Supp. No. 9, at 20-23 (A/5509) (1963).

itself. In a situation of armed aggression of the D.R.V. against the R.V.N. in violation of a major principle of the agreements, any obligation to refrain from rendering military assistance to the R.V.N. in the absence of such aggression is inapplicable after the occurrence of such aggression. The present situation, involving aggression by the D.R.V. against the R.V.N. in clear violation of the Geneva agreements, coupled with the continuing inability of the International Control Commission to deal with the problem,[301] constitutes beyond question a fundamental change in essential conditions contemplated by the participants at the Geneva Conference. As a result, even if the United States were bound by the provisions of the 1954 Accords, and was not justified in suspending obligations because of D.R.V. breach, aggression against the R.V.N. is a fundamental change in essential conditions existing at the time of agreement and constitutes grounds for suspending any corresponding treaty obligations in order to meet such aggression.

CONCLUSION

United Nations Ambassador Arthur Goldberg recently said:

> Our nation derives its great influence in the world not only from great physical power, but also from the fact that our basic law and our national outlook are premised on the equality and dignity of all men.
>
> The way to peace in this turbulent age is to keep to that national vision, to work with all our might for the establishment of a structure of law that will be reliable and just to all nations.
>
> 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.[302]

The United States assistance to the Republic of Viet Nam is a lawful policy alternative. That lawfulness means compliance within the spirit of Ambassador Goldberg's words with the basic structures of international law and the United Nations; structures designed to promote self-determination and world public order. In carrying out policies within

301. Even when functioning at maximum potential, the Commission can not be rated as well suited to the task of policing the peace in Viet Nam. It is evident from the Reports of the Commission, however, that there has been an increasing breakdown in its effectiveness, particularly in its later years. In its Eleventh Interim Report, for example, the Commission invited the attention of the Co-Chairmen to its deteriorating financial position. *Eleventh Interim Report of the International Commission for Supervision and Control in Vietnam* (Vietnam No. 1 [1961], Command Paper 1551). Great Britain Parliamentary Sessional Papers XXXIX (1961/62), at 27.

302. N.Y. Times, May 19, 1966, p. 6, col. 4 (city ed.), at col. 5. (Typographical errors corrected).

these structures "our national power and all our energies" must continue to be used to maximize the prospects for peace and secure self-determination and economic and social progress to the people of the Republic of Viet Nam.†

Editor's footnote. This paper as originally submitted to Congress included substantial material on the lawfulness of United States assistance under internal constitutional processes. Unfortunately space limitations precluded our printing this material. For development of the executive-congressional authorization for assistance to the Republic of Viet Nam and its constitutional basis see the discussion in Moore & Underwood, *The Lawfulness of United States Assistance to the Republic of Vietnam*, 112 CONG. REC. 14943, 14960-67, 14983-89 (daily ed. July 14, 1966).