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INTRODUCTION

One consequence of the "winding down" of the Vietnam War has been a lessening of interest in the legal issues raised by the conflict. But there are some recent reminders of the relevance of law to this great tragedy. The decision of the Supreme Court in *Gillette v. United States*[1] dramatically illustrates how the human conscience remains tortured by the war. Within Indochina, two major military operations: the Cambodian incursion, and the movement of troops into Laos, have posed new questions of law and policy for international lawyers.

From the general tenor of the scholarly reaction to these operations one can extract two fundamental issues: the lawfulness of the use of military force for defensive purposes, and the authoritative means for reaching a peaceful settlement of the war. The published writings indicate that there is no general agreement upon the legal criteria applicable to either issue.[2] In this article, I shall address myself to these

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1. 401 U.S. 437 (1971). The Court held that persons morally opposed to the Vietnam War, but unwilling to state their refusal to participate in all other armed conflicts, were not entitled to an exemption from the draft.

2. *Symposium On United States States Action in Cambodia*, 65 AM. J. INT'L L. (1971); Stevenson, *United States Military Actions in Cambodia: Questions of International Law*, 62 Dept. of State Bulletin 765 (1970); reprinted in 64 AM. J. INT'L L. 933 (1970). Hammarskjöld Forum: Expansion of the Vietnam War into Cambodia—The Legal Issues, 45 N.Y.U.L. REV. 625-759 (1970); Note, *Beyond Vietnam to Indochina—The Legal Implications of the United States' Incursions into Cambodia and Laos*, 3 CASE W. RES. J. INT'L L. 163 (1971); *The War in South East Asia: A Legal Position Paper*, 6 GONZAGA L. REV. 79 (1970).

two questions and endeavor to clarify the fundamental principles of international law applicable to each.

The Use of Force Across International Boundaries

It is generally agreed that modern international law places severe restrictions upon the defensive use of force. Yet there is considerable disagreement over what legal norms are to be used in evaluating defensive military operations; differences already reflected in the published writings dealing with the Cambodian incursion. The approach of the Legal Advisor to the Department of State places heavy reliance upon customary norms of warfare, especially those dealing with the consequences of a breach of neutrality.[3] Professor Falk's critique, on the other hand, focuses upon the limitations imposed by Charter Article 51,[4] arguing that the operation was unlawful because there was no "instant necessity" which could serve as a justification.[5] In a general sense, the same divergent analyses may be used in evaluating the Laotian operations. While not accepting in *toto* the arguments advanced to defend these operations, I shall direct my criticisms towards the Falkian thesis which I believe contains some profound misconceptions about the nature of international law.

Professor Falk quite properly insists that the joint American-South Vietnamese operations must pass muster before some international form of accountability. But to what international norms can we refer? Surely not to ideal standards of behavior arising solely from juristic reflection. We can only draw upon rules whose existence is traceable to the genuine consent of the international community. Unless this source of jural standards is kept clearly in mind, it is impossible to establish objective criteria by which one can make an authoritative judgment upon the conduct of states.

This distinction is obscured in Professor Falk's analysis, particularly in his invocation of Article 51 of the United Nations Charter. The

3. Stevenson, *supra* note 2.

4. Article 51 of the Charter of the United Nations provides:
Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken 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 in order to maintain or restore international peace and security.

5. Falk, *The Cambodian Operation and International Law*, 65 Am. J. Int'l L. 1 (1971).

interpretation which he attributes to this article is at variance with the general understanding of states. That it should differ from arbitrary exercises of power would not be a meaningful criticism. But the disparity lies between his postulated interpretation and the actual inability of member states, deliberating in an authoritative context, to reach a similar conclusion. For example, it is impossible to find within the reports of the United Nations Special Committee on the Question of Defining Aggression[6] a confirmation of Professor Falk's assertion that there exists a "general acknowledgment that the core meaning of self-defense relates to response against either an *actual armed attack* or a credible impression of *imminent armed attack*. . . ."[7] In fact, there is a clear division among states on this point. The official position of some is that self-defense is an inherent right existing prior to, and independent of, Article 51. Self-defense may be legitimate in any case where there exists a *real danger* of armed attack, and it is for the state concerned to determine whether the circumstances justify the use of force.[8] Other states approach the issue in substantially the same manner as Professor Falk.[9]

Professor Falk concedes that there is no agreed *definition* of self-defense; but it must be insisted that there is also no *consensus* on its limits. Without proof of a general acceptance of the projected norm, it can not qualify as a rule of the international community. While the suggested rule has been relied upon on particular occasions of crisis, it can only gain the status of an established prescription if it is confirmed by states on more deliberate occasions.

A more serious flaw in the Falkian analysis is his failure to consider the circumstances under which norms restricting defensive force become operative. Conceding that United Nations organs have been unable to control the Indochina conflict, Professor Falk nonetheless argues that Charter principles are the governing legal standards by which we must evaluate military operations in Indochina. But the norms of the Charter cannot be so easily separated from the effectiveness of the organization. In particular, Article 51 cannot be considered

6. 25 U.N. GAOR, Supp. 19, U.N. Doc. A/8019 (1970).
7. Falk, *supra* note 5, at 17.
8. Report of the Special Committee on the Question of Defining Aggression, 25 U.N. GAOR, Supp. 19, U.N. Doc. A/8019, para. 71 (1970). Some of the unique issues of defensive force in the Arab-Israeli conflict are discussed in Dinstein, *The Legal Issues of 'Para-War' and Peace in the Middle East*, 44 ST. JOHN'S L. REV. 466 (1971).
9. 25 U.N. GAOR, Supp. 19, U.N. Doc. A/8019, para. 72 (1970). Compare Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States, 24 U.N. GAOR, Supp. 19, U.N. Doc. A/7619 (1969).

in vacuo; its normative value depends, in large measure, upon the viability of the Security Council. The extreme limitations upon self-defense implicit in the concept "armed attack" are meaningful only upon assumption that a superior organ can effectively impede the threat of force. In municipal systems, self-help is restricted because of the availability of peaceful modes of redress;[10] the restrictive language in Article 51 must be subjected to comparable qualifications.

This is not to argue that any form of defensive violence is justified, nor should the point be taken as an approval of either the Cambodian or Laotian excursions. But it must be emphasized that the legitimacy of defensive force cannot be determined *a priori* upon the basis of abstract principles. The only rational way of proceeding is to determine the circumstances under which counter force was used and the nature of the defensive operation. With respect to circumstances, one must objectively ascertain the intensity and proximity of the threat on the one hand, and the availability of the United Nations as a restraining influence[11] on the other.

At one extreme are cases such as the Middle East conflict where threats with high degrees of immediacy have been experienced under circumstances of significant United Nations involvement. Because of this involvement, it is understood that there are severe limits upon the permissible reaction of the respective parties. At the other extreme, are situations such as the Cuban missile crisis, where the threat of force did not have the same proximity as that experienced by Israel (even conceding the unique danger of nuclear devices); yet the possibility of effective recourse to the United Nations, particularly in the form of Security Council jurisdiction, was more remote. Its "distance" lay in the fact that reference to the Council prior to taking preventive action would have been a futile gesture, given the Soviet Union's interest in the subject of controversy. Under such circumstances, a broader discretion legitimately prevailed, although the de-

10. *E.g.*, rules prohibiting the use of force by an owner to recapture property in the possession of another because ". . . any other rule would substitute the strong arm for the court of justice . . . ." Monson v. Lewis, 123 Wis. 583, 585, 101 N.W. 1094, 1095 (1905).

11. In trying to determine whether the ineffectiveness of the United Nations can ever be a justification for the use of defensive force, it is impossible to establish precise criteria of judgment. The subject is elusive because the concept of "effectiveness" must be given a broad interpretation to prevent violence as much as possible. If the United Nations has not formally assumed jurisdiction with respect to a threat of force—*e.g.*, if it is, for any number of reasons, not on the Security Council's agenda,—it does not follow that the target state is free to use any defensive violence. If the United Nations could exercise moral or political restraint upon the wrongdoer, or if it provides a forum for such influence, such circumstances would affect the lawfulness of defensive reaction to the threat.

fensive operations were themselves subject to the judgment of reason and proportion.

An authoritative assessment of either the Cambodian or Laotian operations must take these conditioning factors into account; otherwise, the evaluative process becomes an exercise in formalism. If the effective intervention of the United Nations could not have been anticipated, a defensive use of preventive force against the threat posed by North Vietnamese use of adjacent territory must be considered as at least provisionally lawful.[12] The United States is, of course, subject to the charge of being a cause of United Nations impotence, but the available evidence suggests that it was not solely responsible for the inaction.[13] The ineffectiveness of the United Nations organs precludes a literal application of Article 51 restrictions on defensive force; it also implies the necessity of drawing upon a broader range of legal norms in evaluating the operations. Consequently, customary norms derived from the situations of neutrality, and, in particular, the inability of a neutral country to prevent the use of its territory by foreign troops,[14] are relevant to a comprehensive analysis of both military operations.

Placing the issues within a broader frame of reference may still lead to conclusions of illegality. For example, it is arguable that the operations were disproportionate because of their escalatory consequences. But by avoiding *a priori* judgments of unlawfulness, it becomes possible to raise legal analysis above a level of contradictory argumentation. The scholarship expended upon the general topic of this war has too often given the impression of being justifications for

12. *Compare* the analysis in MCDOUGAL AND FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER (1961). The authors, conceding the high degree of necessity required for legitimate self-defense, insist that the true measure is "reasonableness in particular context" (*Id.* at 218), and that the meaning of the customary rule was understood in terms of a "whole continuum degrees of imminence or remoteness in future time . . . which, in the expectations of the claimant of self-defense, may characterize an expected attack . . . ." (*Id.* at 231). This normative standard was intended to limit legitimate anticipatory defensive force to those situations where the degree of imminence was so high "as to preclude effective resort by the intended victim to non-violent modalities of response" (*Id.*).

While this work does not address itself to the consequences of United Nations ineffectiveness, it insists that ". . . One index of the required condition of necessity is precisely the degree of opportunity for effective recourse to nonviolent modes of response and adjustment including invocation of the collective conciliation functions of the United States . . . ." (*Id.* at 237). For a contrary approach see HENKIN, *International Law and the Behavior of Nations*, RECUEIL DES COURS 171 (1965).

13. See the discussion in Bloomfield, *The U.N. and Vietnam*, 2 THE VIETNAM WAR AND INTERNATIONAL LAW 281 (Falk ed. 1969).

14. *See* Stevenson, *supra* note 2; Moore, *Legal Dimensions of the Decision to Intercede in Cambodia*, 65 AM. J. INT'L L. 38 (1971). *Cf.* CORBETT, *The Vietnam Struggle and International Law*, in THE INTERNATIONAL LAW OF CIVIL WAR (Falk ed. 1971).

preconceived opinion rather than an effort to understand an extremely complex issue of human relations.

The contentious quality of such scholarship has other adverse consequences. It tends to confine legal thought within a very narrow frame of reference. The published writings on the war suggest that international law is only concerned with the lawfulness of particular military operations. The long range purposes of law are obscured, since analysis is restricted to determinations of whether or not particular uses of force are lawful. Too little attention is given to the deeper policies and aspirations of the world community, especially those directed towards a reconciliation of the adversaries and the development of a durable political settlement.

The Obligation to Seek a Peaceful Settlement

The Charter of the United Nations imposes upon its members the duty to seek the peaceful settlement of major disputes.[15] This obligation is a logical collorary of other provisions of the Charter which prohibit the use or threat of force in interstate relations.[16] The Charter principles of pacific settlement also reflect widespread recognition of such a responsibility in state practice.[17] The obligation has been reaffirmed by the International Court of Justice in the recent *North Sea Continental Shelf Cases*.[18]

The development of this norm is of immense value to world order, since it requires the members of the international community to make nonviolent adjustments to change. Unfortunately, it is much easier to state the obligation than to determine how it shall be implemented.

15. U.N. Charter art. 2, para. 3 provides that:
> All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

Chapter Six of the Charter is devoted to the Pacific Settlement of Disputes. The first article in that chapter, art. 33, para. 1 requires:
> 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, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

Paragraph 2 of this article empowers the Security Council to call upon the parties to settle their disputes by the stipulated procedures.

16. *E.g.*, U.N. Charter art. 2, para. 4.

17. Over two hundred treaties for the pacific settlement of disputes were concluded between 1928-1948, and there has been in general state practice numerous acknowledgments of a duty to pursue the peaceful resolutions of serious disputes. See Brownlie, International Law and the Use of Force by States (1963) (*passim*).

18. [1969] I.C.J. 3. For a scholarly application of the obligation to the Middle East War see Moore, *The Arab-Israeli Conflict and the Obligation to Pursue Peaceful Settlement of International Disputes*, 19 Kan. L. Rev. 403 (1971).

One difficulty with the principle lies in its normative generality, and in the large measure of discretion which it confers upon states in fulfilling the obligation. For example, under Article 33 of the Charter, parties to a dispute are free to utilize, as a method of settlement:

> [N]egotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.[19]

Given this range of options, it is arguable that the means adopted by the United States to pursue a peaceful settlement of the war is compatible with the duty stated in Article 33. The commencement of the Paris Peace Talks, a process of negotiation, was clearly within the authorized discretion. Moreover, the immediate parties to the Vietnam conflict have become participants in the Paris negotiations.

Yet such legalistic analysis is not responsive to the realities. Substantive talks began in Paris on May 13, 1968;[20] to date, they have failed to produce any significant results. One reason for the failure may be an unwillingness of some, or all, of the participants to negotiate in good faith.[21] But it is also possible that the very structure of the Paris Talks is not conducive to the achievement of positive agreement. The means of settlement is exclusively that of negotiation; a quadrilateral exchange pursued with the tacit assumption that the parties will themselves make the accommodations necessary for a durable peace. While (relatively) disinterested states have had some informal influence upon the course of the talks, there is no explicit recognition of any third party mediation. Yet given the profound antagonisms which permeate the confrontation, it is unreasonable to expect that any constructive, durable results will arise solely from a bargaining between the parties.

The procedure seems particularly bizarre when it is compared with the domestic analogy of labor disputes. Modern industrial societies do not expect the settlement of major labor disputes through the

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19. U.N. Charter art. 33, para. 1.

20. In announcing a bombing halt on March 31, 1968, President Johnson again expressed a desire for peace through negotiations, and stated that Ambassador Harriman would be available "at Geneva or any other suitable place just as soon as Hanoi agrees to a conference . . . ." 58 Department of State Bulletin 483 (U.S. 1968). At his news conference of May 3 President Johnson announced the agreement to meet in Paris on May 10, 1968. 58 Department of State Bulletin 629 (U.S. 1968). Substantive talks began in Paris on May 13. The Opening Statements of Ambassador Harriman are published in 58 Department of State Bulletin 701 (U.S. 1968).

21. *See* the discussion in Falk, *The Cambodian Operation and International Law*, 65 AM. J. INT'L L. 1, 22 (1971).

bargaining process alone; negotiation between the parties is supplemented by procedures of mediation and conciliation which are considered indispensible to a reconciliation of differences which may prevent or impede agreement. Even where the parties are not obliged to accept them, such services are integrated into the bargaining process in such a way as to virtually assure their utilization[22] if negotiations reach an impasse. By contrast, Chapter Six of the United Nations Charter seems to view mediation as a mode of settlement whose possible use is completely within the power of the parties to a dispute. Some authority is conferred upon the Security Council to recommend methods of settlement,[23] but the relevant Charter language is not responsive to the inherent need for some form of mediation once the parties have begun negotiations.[24]

One reason for such a *lacuna* is that the principles of peaceful settle-

22. Under § 8(d)(3) of the National Labor Relations Act, the duty to bargain includes the obligation to notify Federal and State Mediation and Conciliation Services within thirty days following the initiation of the negotiation process. 29 U.S.C. § 158(d)(3) (1964). The statute obliges employer and employee representatives to negotiate, but § 8(d) of the Act (29 U.S.C. § 158) specifically provides that there is no obligation to agree to a proposal or to make a concession. The Supreme Court has held that the National Labor Relations Board does not have authority to compel the acceptance of any substantive contractual provision. Porter Co. v. NLRB, 397 U.S. 99 (1970). For a different use of the labor law analogy to the question of peaceful settlement of international disputes see Goldie, *The North Sea Continental Shelf Cases—A Ray of Hope for the International Court?*, 16 N.Y.L. F. 327, 362-365 (1970). In the international realm, it has been argued that there is no duty to settle disputes, the only obligation being to settle them peacefully, if they are to be settled at all. KUNZ, THE CHANGING LAW OF NATIONS 588 (1968). Such a view is logically attractive, but it runs counter to the imperative language of art. 2, para. 3, of the United Nations Charter. The language of art. 33, para. 1, requiring only the pursuit of a settlement, suggests an indeterminate obligation which is, like the labor analogy, subject to an appraisal of good faith effort. Such is the implication of art. 33, para. 2, which empowers the Security Council to remind the parties of their obligations. In the Soviet-Iranian Dispute of 1946, the Council requested the parties to inform it of the status of negotiations, and it retained the right to obtain information on their progress. See GOODRICH AND HAMBRO, CHARTER OF THE UNITED NATIONS, COMMENTARY AND DOCUMENTS 244 (Rev. ed. 1949). The question of the Council's power to dictate the terms of settlement has been considered by some scholars, but the freedom of decision retained by states under Article 33 nullifies such a possibility. See Eagleton, *The Jurisdiction of the Security Council Over Disputes*, 40 AM. J. INT'L L. 513 (1946). The avoidance of a dictated settlement is an important element in the Arab-Israeli controversy. See Dinstein, *Legal Issues of Para-War and Peace in the Middle East*, 44 ST. JOHN'S L. REV. 466 (1970).

23. U.N. CHARTER art. 36, para. 1; art. 33, para. 2. Under Article 38, the Security Council may make recommendations "if all the parties to any dispute so request . . . ."

24. *E.g.*, while the Security Council has under art. 36, para. 1, the authority to recommend methods of settlement, paragraph 2 of the same article requires the Council to take into account the procedures for settlement already adopted by the parties. The discretion of parties, conferred by art. 33, para. 1, is thus preserved.

Art. 35, para. 1, permits member states to bring disputes to the attention of either the Security Council or the General Assembly. It should also be remembered that the Hague Convention for the Pacific Settlement of International Disputes permits states which are not a party to a dispute to offer good offices or mediation; such an offer can not be regarded as an unfriendly act. These provisions have proved to be valuable for the peaceful settlement of disputes in the past. See II OPPENHEIM INTERNATIONAL LAW §§ 10, 11 (7th ed. Lauterpacht 1961).

ment in Chapter Six are primarily designed for the settlement of disputes which do not constitute a violent international conflict. The Chapter evidences a concern that disputes which fall short of armed conflict should be settled by the parties by pacific means.[25] The Security Council plays a subordinate role, since its primary authority lies within the realm of Chapter Seven;[26] that is, when disputes between states have reached a point where they have become "a threat to the peace, breach of the peace, or act of aggression."[27] In such circumstances, the Council has jurisdiction over the conflict under the terms of Article 39 of the Charter. By any realistic appraisal, the Indochina War is a situation which falls within the scope of Chapter Seven, since, at a minimum, it constitutes a "threat to the peace."

When the immediate parties to a violent conflict are members of the United Nations, the Council has been able to preserve the values of peaceful negotiation while simultaneously asserting its own authority under Chapter Seven. It has demanded a cession of armed conflict, while calling upon the parties involved to pursue a peaceful settlement under the terms of Article 33.[28] These procedures also afford the Security Council an opportunity to influence the processes of settlement. In addition to demanding a cease-fire, and calling upon the disputants to negotiate, the Council has called upon the Secretary General, or other United Nations officials, to facilitate settlement through some form of mediation.[29] To date, such an opportunity

25. The fact that recourse to the International Court of Justice is considered an integral part of the procedures of pacific settlement (art. 36, para. 3) emphasizes this purpose.

26. Within Chapter Six, the Council may, under art. 33, para. 2, call upon the parties to settle their dispute by the procedures enumerated in that article; under Article 34, it may investigate a dispute which might lead to international friction. Under art. 37, para. 1 of the Chapter, parties have a duty to refer their dispute to the Council if they are unable to reach an Article 33 settlement. Under art. 37, para. 2, the Council may make recommendations for settlement if a continuance of the dispute ". . . is in fact likely to endanger the maintenance of international peace and security . . . ," and under Article 38, it may make recommendations for settlement, if requested to do so by all the parties.

27. U.N. CHARTER art. 39. Because of its importance the article deserves to be quoted in full:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

28. *E.g.*, the armed conflict between India and Pakistan S/RES/211 (1965); 4 INT'L LEG. MAT. 1193 (1965).

29. Resolution 211, para. 5 requests the Secretary General "to exert every possible effort to give effect to this resolution, to seek a peaceful solution, and to report to the Security Council thereon." In the Middle East Conflict, the Council, in its famous resolution of November 22, 1967, requested the Secretary General to appoint a special representative to make contacts with the parties in order to "promote agreement and assert

has not been afforded the Council with respect to the Indochina War, both because of the nonmembership of some of the participants and the fact that it has been deemed inadvisable to place the matter on the Council's agenda.[30] It remains to be seen whether changes now occurring in international affairs may make mediatorial intervention by the Security Council opportune.

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A second major difficulty surrounds the scope of negotiations. If there is a duty to seek a peaceful settlement of international disputes, how broadly should the area of conflict be defined? The pending negotiations are premised upon an assumption that the conflict is confined to Vietnam. The Paris Talks involve only the immediate adversaries: the United States and South Vietnam on one side, the Viet Cong and the North Vietnamese on the other. There are reasons of domestic policy which encourage a narrow definition of the controversy. Public opinion in America is insisting upon a rapid withdrawal of troops and material support; it is anxious for a quick political settlement. But a *lasting* peace is not possible within the frame of reference created by the Paris Talks. The armed conflict has spread beyond the borders of Vietnam; it now rages in Cambodia and Laos and may soon engulf Thailand. It is an Indochina war; and unless the conflict is seen in this dimension, no durable peace is possible in Southeast Asia.

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efforts to achieve a peaceful and accepted settlement in accordance with the provisions and principles in this resolution." S.C./Res./242, para. 3 (1967). For the general importance of this resolution see Murphy, *The Middle East Crisis*, 44 ST. JOHN'S L. REV. 390 (1970). It has been argued that this resolution was adopted under Chapter Six of the Charter. See Shapira, *The Security Council Resolution of November 22, 1967—Its Legal Nature and Implications*, 4 ISRAELI L. REV. 229 (1969). This position was taken to avoid an inference that the parties were obliged to settle the dispute according to the norms expressed in the resolution. The circumstances surrounding the bargaining are summarized in a paper delivered by Professor Rostow. Rostow, *Legal Aspects of the Search to Peace in the Middle East*, 64 AM. J. INT'L L. 64 (Supp. 1970). Under Chapter Six, the Council's power is limited to recommendations, while in Chapter Seven it can both recommend and decide, especially under Article 39. Whatever may have been the parties understanding for purposes of a consensus to support the resolution, the resolution itself includes Chapter Seven elements. The preconditions of violent conflict needed for Article 39 jurisdiction were clearly present, especially in view of the resolutions of Council in June demanding a cease-fire. It is unreasonable to contend that the Council was required to make a specific finding that there existed a "threat to the peace" before any Chapter Seven jurisdiction existed. However, this is not to imply that the freedom of negotiation has been extinguished. An understanding of Chapter Seven authority highlights mediation functions of the United Nations which may be obscured by an excessive emphasis on Chapter Six. Compare Shapira, *supra*. The Council, in adopting resolution 242, did not indicate under which chapter of the Charter it was acting.

30. See the discussion in Bloomfield, *The U.N. and Vietnam*, 2 THE VIETNAM WAR AND INTERNATIONAL LAW 281 (Falk ed. 1969).

The fact that the war is a struggle over the future of Indochina has not been overlooked by the Administration. On October 7, 1970, President Nixon acknowledged that violence had spread to neighboring countries, and he called for an all Indochina Peace Conference.[31] The conference proposal was directed primarily towards the North Vietnamese; it was clearly part of the negotiating strategy of that period. There was no indication that the United States was willing to deal with the People's Republic of China in the convening of such a conference. Given the official policy of nonrecognition then prevailing, such meetings were probably impossible. However, the Peking regimé had already been diplomatically involved in the Indochina question. It was a major participant in the Geneva Conferences of 1954 and 1962, which were held for the precise purpose of creating stability in Southeast Asia.[32] And it is the view of some responsible diplomats that the conflict in Indochina is, from the perspective of world politics, essentially a confrontation between the United States and Communist China.[33]

Two important international events: the dramatic change in Sino-American relations, and the recognition by the United Nations that the Peking government is entitled to represent China in the organization, have substantially altered the status of the Indochina question. Among the myriad issues raised by these changes, Chinese attitudes towards Southeast Asia are of paramount importance. Peking has viewed American involvement in that area as a threat to her existence; and it can be expected that it will demand the complete withdrawal of American troops and material from Indochina. But complete withdrawal, however attractive, would be irresponsible, unless there is

31. A New Peace Initiative For All Indochina, television and radio address of October 7, 1970, in 63 Department of State Bulletin 465 (1970). The proposal was promptly rejected by the Soviet Union and North Vietnam, N.Y. Times, Oct. 11, 1970, at 1, col. 1; at 8, col. 1; and by the People's Republic of China, N.Y. Times, Oct. 17, 1970, at 8, col. 1.

32. A major objective of the Communist bloc at Geneva in 1954 was to use the conferences as a means of obtaining Great Power status for the People's Republic of China. Chou En-Lai played a major role in the negotiations and was convinced that his efforts greatly improved the international position of Communist China. Hannon, *A Political Settlement for Vietnam: The 1954 Geneva Conference and Its Current Implications*, 8 VA. J. INT'L L. 1, 19 (1967) reprinted in 2 THE VIETNAM WAR AND INTERNATIONAL LAW 871, 889 (Falk ed. 1969). See also RANDLE, GENEVA, 1954 (1969).

The 1954 Conference also involved discussions of the Korean question. For documentation, see The Korean Problem at the Geneva Conference, Department of State Pub. No. 5609 (1954). The documentation of the Vietnam phases of the Conference can be found in American Foreign Policy 1950-1955, Basic doc., Vol. 1, Department of State Pub. 6446 pps. 750 *et seq.* and in 1 THE VIETNAM WAR AND INTERNATIONAL LAW 543-567 (Falk ed. 1968).

33. *See* A. EDEN, TOWARDS PEACE IN INDO CHINA (1966).

some assurance that the pervasive violence will be replaced by peaceful methods of change. A mutually acceptable formula of transition can only be accomplished through a negotiated settlement of the Indochina War; a negotiation in which the People's Republic of China, the United States, and other interested states and parties are active participants.

It has been reported that the People's Republic of China rejects any plan to reconvene the Geneva Conference as a method of settling the Indochina War.[34] But if such a position is clear as a matter of foreign policy, it remains to be determined whether it is compatible with Peking's obligations under international law and as a member of the United Nations. China is, from the perspective of world politics, clearly a party in interest: her geographical position, encouragement of the insurgent movement throughout the area, material support of North Vietnam, and, most importantly, her involvement in the earlier Geneva Conferences, impose upon this Great Power serious responsibilities with respect to peace in Southeast Asia. The precise form of the prior Conferences need not necessarily be revived,[35] but the People's Republic has an obligation to participate in some viable process which is committed to the pursuit of a peaceful, permanent settlement of this terrible tragedy.

The United Nations, especially through the Security Council, will have a positive role to play in the construction of an Indochina peace. Not only must it encourage negotiations, but it must also insist upon a form of settlement which will endure. It is well known that the prior Indochina diplomacy, in the form of the Geneva Conferences, was gravely ineffective.[36] International negotiations are indispensible,

34. See the article by Tad Szulc in the New York Times, August 7, 1971, in which the Chinese are reported as determined not to reconvene the Conference, insisting instead that the United States accept Vietcong peace plans. Earlier efforts by U. Thant to revive the Conferences were rebuffed by Peking on the grounds that the matter is outside United Nations jurisdiction. *See, e.g.*, the rejection of the proposal of 14 March 1967 in N.Y. Times, March 31, 1967, at 5, col. 1.

35. The Soviet Union and Great Britain were co-chairmen of the Geneva Conferences. Sino-Soviet antagonisms are a serious obstacle to a formal call for talks at Geneva.

36. On the inadequacies of the Geneva Accords of 1954, see HANNON, *supra* note 32; Comment, *Canada's Role in the International Commission for Supervision and Control in Vietnam*, CANADIAN YEARBOOK OF INTERNATIONAL LAW 161 (1966). See also the remarks of Ambassador Stevenson made before the Security Council, 19 U.N. SCOR, Meeting 3, 1122 (1964).

Canada, Poland and India were "neutral" countries chosen to participate as members of the International Control Commission established by the 1954 agreements for the Cessation of Hostilities in Vietnam, Laos, and Cambodia. See A. EDEN, FULL CIRCLE 141 (1960). The texts establishing the commission can be found in Am. Foreign Policy, 1950-1955 Basic doc. Vol. 1, no. 6446 pps. 750-775. The Commission members were technically neutral, *i.e.*, they were not participants in the hostilities; but Canada and Poland were

but when they occur beyond the supervision of world authority they can be inconclusive. They are done in a spirit of compromise which often fails to create stable forms of substantive order.[37] If the Security Council will assert its legitimate authority, it can demand a stable agreement.[38] With its resources of impartial mediation, and its general supervision of the negotiation process, the Council will, in the near future, have an opportunity to promote permanent peace in Indochina.

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ideologically partial, one to the viewpoint of Western Democracy, the other towards the Socialist Bloc.

For a discussion of the establishment of the Commission to implement the 1962 Agreements see Czyzak and Salans, *The International Conference on the Settlement of the Laotian Question and the Geneva Agreements of 1962*, 57 AM. J. INT'L L. 300, 308-317 (1963). The optimism of the drafters was quickly shattered by events.

The conferences established no standing machinery through which it could discharge its responsibilities and required unanimity as the means for putting its most important decisions into effect. See the authorities quoted *supra* and CORBETT, *The Vietnam Struggle and International Law* in THE INTERNATIONAL LAW OF CIVIL WAR (Falk ed. 1971).

37. For the distinction between compromise and genuinely impartial third party law making see FRANCK, THE STRUCTURE OF IMPARTIALITY (1968). This book contains some valuable reflections which are relevant to the law making capacities of an international conference operating outside the framework of the United Nations.

38. See the commentary to art. 33, para. 2, in GOODRICH AND HAMBRO, CHARTER OF THE UNITED NATIONS, 243, 244 (Rev. ed. 1949). See also the discussion in note 29, *supra*. The fact that the United States and the People's Republic of China are members of the Security Council is not an impediment to jurisdiction if it is remembered that the purpose of Council jurisdiction is to promote a peaceful settlement rather than reach a substantive decision. The Berlin Blockade of 1948 provides an interesting precedent. For a discussion of the involvement of the Security Council in that crisis see Jessup, *The Berlin's Blockade and the Use of the United Nations*, 50 FOREIGN AFFAIRS 163 (October, 1971).

As for the participation of entities such as the Viet Cong in negotiations, compare the Indonesian case, U.N. SCOR, July-August 1947, at 215-25. The present analysis proceeds on the assumption that the Security Council is the proper United Nations organ for supervision of an Indochina Peace Settlement. The General Assembly may, of course, have responsibilities with respect to this issue.

These pages were written before the intervention of India into East Pakistan and the creation of Bangladesh. Security Council impotence during these events need not be construed as an intrinsic weakness in the organization; it was as much a subordination of the Council to the political purposes and perspectives of its most powerful members.