

The Legality of the United States Position in Vietnam

Reviewing the history of developments in and concerning the Southeast Asia area since 1954, Mr. Deutsch demonstrates the soundness of the position taken by the House of Delegates of the American Bar Association last February—that the position of the United States in Vietnam is legal under international law and in accordance with the Charter of the United Nations and the Southeast Asia Treaty. The Committee of which Mr. Deutsch is chairman was one of the sponsors of the resolution the House adopted.

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BY THE GENEVA ACCORDS of 1954, the commanders in chief of the French Union Forces in Indochina, on the one hand, and of the People's Army of Vietnam, on the other, established the 17th parallel as the military demarcation line between North and South Vietnam, with a demilitarized zone on each side of the line. They stipulated that the armed forces of each party were to respect the demilitarized zone and the territory of the other zone, and that neither zone was to be used "for the resumption of hostilities or to further an aggressive policy".¹ The accords additionally provided for the creation of an International Commission, composed of India (chairman), Poland and Canada, to supervise the agreements.²

In 1962 the International Commission reported, with approval, findings of its Legal Committee to the effect that "there is evidence to show that arms, armed and unarmed personnel, munitions and other supplies have been sent from the Zone in the North to the Zone in the South with the ob-

jective of supporting, organizing and carrying out hostile activities, including armed attacks, directed against the Armed Forces and Administration of the Zone in the South", and that the People's Army of Vietnam "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".³

The evidence further demonstrates that the aggression by North Vietnam against South Vietnam (the Republic of Vietnam) had been going on unabashedly since the signing of the Geneva Accords and that North Vietnam had consistently violated those accords from their inception. An official State Department report recites:

While negotiating an end to the Indochina War at Geneva in 1954, the Communists were making plans to take over all former French territory in Southeast Asia. When Viet-Nam was partitioned, thousands of carefully selected party members were ordered to remain in place in the South and keep their secret apparatus intact to

help promote Hanoi's cause. Arms and ammunition were stored away for future use.⁴

It is important to bear in mind that neither the Republic of (South) Vietnam nor the United States is a party to the Geneva Accords, and that while the United States participated in the discussions leading up to the accords, it did not sign the final declaration. However, during the last plenary session of the Geneva Conference on July 21, 1954, Under Secretary of State Walter Bedell Smith, head of the United States delegation, said in an official statement that his Government "would view any renewal of the aggression in violation of the aforesaid agreements

1. Agreement on the Cessation of Hostilities in Viet Nam, IC/42/Rev. 2, July 20, 1954 (the first of the Geneva Accords. The others, not immediately relevant, dealt with Laos and Cambodia respectively). Art. 19.

2. *Id.*, Chap. VI, Arts. 29, 34 *et seq.*

3. *Special Report of the International Commission for Supervision and Control in Viet Nam*, Saigon, June 2, 1962, para. 9; reprinted in *Hearings Before the Senate Foreign Relations Committee on S. 2793*, 89th Cong., 2d Sess. 736 (1966), hereinafter cited as *Hearings*. The Polish delegation dissented.

4. *Aggression from the North*, 52 DEP'T STATE BULL. 404, 424 (1965).

with grave concern and as seriously threatening international peace and security".⁵

On September 8, 1954, just a few weeks after the Geneva Accords were executed, the Southeast Asia Collective Defense (SEATO) Treaty was signed. Parties to it were the United States, Great Britain, Australia, New Zealand, Thailand, Pakistan and the Philippines. The United States Senate ratified the treaty on February 1, 1955, by a vote of 82 to 1.⁶ It took effect on February 19, 1955.⁷

Paragraph 1 of Article IV of the SEATO Treaty provides that each party thereto "recognizes that aggression by means of armed attack in the treaty area⁸ against any of the Parties or against any State or territory which the Parties by unanimous agreement may hereafter designate, would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger in accordance with its constitutional processes".⁹ By a protocol to the treaty executed on the same day, the parties "unanimously designate[d] for the purposes of Article IV . . . the free territory under the jurisdiction of the State of Vietnam".¹⁰

The SEATO Treaty was made by the parties in a reiteration of "their faith in the purposes and principles set forth in the Charter of the United Nations",¹¹ nothing in which, according to Article 52 thereof, "precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action . . .". Article 53 of the charter provides that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council . . .". These two articles are at the head of Chapter VIII.

The preceding chapter (VII) deals with "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression". The first twelve articles (39 to 50, inclusive) of that chapter prescribe the measures to be taken by the Security Council to meet "any threat to the peace, breach

of the peace or act of aggression". By the last article (51) of that chapter, it is stipulated expressly that "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".

It was clearly with these provisions of Articles 51 and 52 of the Charter of the United Nations in mind that, in Article IV of the SEATO Treaty, each party thereto agreed that it would "act to meet the common danger" in the event of "aggression by means of armed attack [anywhere] in the treaty area" (Southeast Asia and the Southwest Pacific). "Enforcement action" is clearly action to enforce decisions of the Security Council under Articles 39 to 50 of Chapter VII of the charter. Equally clearly, "enforcement action" does not include measures of "individual or collective self-defense". So that when Article 53 of the charter provides that "no enforcement action shall be taken under regional arrangements . . . without the authorization of the Security Council", it does not refer to such measures of "self-defense" as are contemplated under the SEATO Treaty, particularly in light of the explicit recital of Article 51 of the charter that "nothing in the present Charter shall impair the inherent right of individual or collective self-defense".

Declaration States Purpose of Agreement

The "Final Declaration of the Geneva Conference", issued on July 21, 1954, the same day on which the Geneva Accords were signed, states:

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.¹²

It was by no means contemplated, however, that there was to be no ultimate partition of Vietnam. On the contrary, the very next article (7) of the final declaration provided express-



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ly that the political problems of "independence, unity and territorial integrity" were to be determined by free elections, internationally supervised. That article reads "that, so far as Vietnam is concerned, the settlement of political problems, effected on the basis of respect for the principles of independence, unity and territorial integrity, shall permit the Vietnamese people to enjoy the fundamental freedoms, guaranteed by democratic institutions established as a result of free general elections by secret ballot . . . under the supervision of an international commission . . .".¹³

It will be recalled that by the protocol to the SEATO Treaty, South Vietnam ("the free territory under the jurisdiction of the State of Viet

5. 31 DEP'T STATE BULL. 162-163 (1954).

6. 101 CONG. REC. 1060 (1955).

7. 6 U.S.T. & O.I.A. 81, T.I.A.S. No. 3170. The treaty is reproduced in 101 CONG. REC. 1049 (1955) and in STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 89th CONG., 2d SESS., BACKGROUND INFORMATION RELATING TO SOUTHEAST ASIA AND VIETNAM 70-74 (Comm. Print 1966).

8. Southeast Asia and the Southwest Pacific, Article VIII.

9. Execution of the treaty by the United States was "with the understanding that its recognition of the effect of aggression and armed attack and its agreement with reference thereto in Article IV, paragraph 1, apply only to communist aggression . . .". *Supra* note 7, signatory clause.

10. The protocol is annexed to the treaty.

11. Prefatory clause.

12. IC/43/Rev. 2, July 21, 1954; reprinted in BACKGROUND INFORMATION, *supra* note 7, page 66.

13. Because of the North Vietnamese aggression against South Vietnam, the contemplated elections were never held: "A nationwide election in these circumstances would have been a travesty." Memorandum, *The Legality of United States Participation in the Defense of Viet Nam*, Department of State, Office of the Legal Adviser, March 4, 1966, page 33.

Nam") was promised protection as such under the treaty. Reference has since been made to South Vietnam as a "protocol state".¹⁴

In addition to the reference in the contemporaneous protocol to the SEA-TO Treaty to "the State of Viet Nam", the Republic of (South) Vietnam "has been recognized as a separate international entity by approximately sixty governments around the world. It has been admitted as a member of several of the specialized agencies of the United Nations. In 1957, the General Assembly voted to recommend South Viet Nam for membership in the United Nations, and its admission was frustrated only by the veto of the Soviet Union in the Security Council."¹⁵

The right of self-defense under Article 51 of the Charter of the United Nations is expressed to be unimpaired "if an armed attack occurs against a Member of the United Nations", and it has been asserted by opponents of United States' policy in Vietnam that this amounts to explicit denial of such a right in the event of attacks against nonmembers of the United Nations. A thesis that members of the United Nations are not permitted to participate in collective self-defense to repel aggression, on the ground that the aggrieved nation is not a member of the United Nations, can hardly be supported on its face, in reason, logic or law.¹⁶ Would proponents of this doctrine suggest that members of the United Nations would have no right to assist Switzerland in self-defense against a foreign invader?

But the right of self-defense has always existed independently of the charter,¹⁷ and that right is recognized expressly in Article 51. It is quite obvious that the charter merely confirms, as to members of the United Nations, the innate right of self-defense appertaining to both members and nonmembers. Article 51 expressly retains, unimpaired, the "inherent" right of both individual and collective self-defense, thus implicitly recognizing the independent existence of the right of members to come to the aid of nonmembers in collective self-defense against aggression, or attack "to maintain international peace and security"

—the very first purpose of the United Nations itself, as stated in the charter.¹⁸

On August 7, 1964, the Congress adopted, by a vote of 88 to 2 in the Senate and 416 to 0 in the House,¹⁹ the Joint Southeast Asia Resolution, in which the preambular clauses recite that "naval units of the Communist regime in Vietnam, in violation of the principles of the Charter of the United Nations and of international law, have deliberately and repeatedly attacked United States naval vessels lawfully present in international waters, and have thereby created a serious threat to international peace": "these attacks are part of a deliberate and systematic campaign of aggression" against the South Vietnamese "and the nations joined with them in the collective defense of their freedom".

The resolution then states "that the Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression"; that "the United States regards as vital to its national interest and to world peace the maintenance of international peace and security in Southeast Asia"; and that "consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom."²⁰

In an address delivered at Gettysburg, Pennsylvania, on April 4, 1959, President Eisenhower declared that his administration had reached "the inescapable conclusion that our own national interests demand some help from us in sustaining in Viet Nam the morale . . . and the military strength necessary to its continued existence in freedom".²¹ In a letter of December 14, 1961, to the President of the Republic of Vietnam, President Kennedy, recalling that the Communist regime of

North Vietnam had "violated the provisions of the Geneva Accords . . . to which they bound themselves in 1954" and that "at that time, the United States, although not a party to the Accords, declared that it 'would view any renewal of the aggression in violation of the agreements with grave concern and as seriously threatening international peace and security'", assured him that "in accordance with that declaration, and in response to your request, we are prepared to help the Republic of Viet Nam . . . to preserve its independence".²²

In President Johnson's message of August 5, 1964, to Congress, reporting the Communist attacks on United States' naval vessels in the international waters of the Gulf of Tonkin, he said:

. . . The North Vietnamese regime has constantly sought to take over South Vietnam and Laos. This Communist regime has violated the Geneva accords for Vietnam. It has systematically conducted a campaign of subversion, which includes the direction, training, and supply of personnel and arms for the conduct of guerilla warfare in South Vietnamese territory. . . . Our military and economic assistance to South Vietnam and Laos in particular has the purpose of helping these countries to repel aggression and strengthen their independence. The threat to the free nations of southeast Asia has long been clear.²³

The Lawyers Committee on American Policy Towards Vietnam questions whether President Johnson's deployment of United States forces to Vietnam can "be squared with our Constitution . . . for, contrary to widely held

14. See, for example, *Hearings* 463-465 and Joint Southeast Asia Resolution, 78 Stat. 384, approved August 10, 1964.

15. Memorandum, *supra* note 13, page 12. See also *Vietnamese-United States Relations*, a joint statement issued at Washington by the President of the United States and the President of Viet Nam, May 11, 1957, White House Press Release, 36 DEP'T STATE BULL. 851-852 (1957).

16. The principle that members of the United Nations are legally entitled to participate in collective self-defense of nonmembers is sustained by leading authorities on international law. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* 193-195 (1958); KELSEN, *THE LAW OF THE UNITED NATIONS* 793 (1950).

17. OPPENHEIM, *INTERNATIONAL LAW*, 297 *et seq.* (8th (Lauterpacht) ed. 1955); JESSUP, *A MODERN LAW OF NATIONS* 163 *et seq.* (1948).

18. See footnote 16, *supra*.

19. 110 CONG. REC. 18470-18471, 18555 (1964).

20. 78 Stat. 384, approved August 10, 1964.

21. 40 DEP'T STATE BULL. 579-581 (1959).

22. 46 DEP'T STATE BULL. 13-14 (1962).

23. 51 DEP'T STATE BULL. 261-263 (1964).

assumptions, the power to make and conduct foreign policy is not vested exclusively in the President, but is divided between him and Congress . . .".²⁴ In his message of August 5, 1964, to the Congress, President Johnson went on to say unequivocally that "as President of the United States I have concluded that I should now ask the Congress on its part, to join in affirming the national determination that all such attacks will be met, and that the United States will continue in its basic policy of assisting the free nations of the area to defend their freedom." And the President forthrightly requested that Congress adopt "a resolution expressing the support of the Congress for all necessary action to protect our armed forces . . . and to defend freedom and preserve peace in Southeast Asia in accordance with the obligations of the United States under the Southeast Asia Treaty."²⁵

Two days later, on August 7, in response to this message from the President, Congress adopted the resolution quoted above, and on August 10 the President signed it as Public Law 88-408.²⁵

Article 51 of the Charter of the United Nations, which provides that "nothing in the present Charter shall impair the inherent right of individual and collective self-defense", requires that "measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council . . .". That the Southeast Asia Collective Defense Treaty was made under and in accordance with the Charter of the United Nations, particularly Article 51, is evidenced by the provision of paragraph I of Article IV of the treaty (by which each party agreed to participate in defending acts of aggression in the treaty area), that "measures taken under this paragraph shall be immediately reported to the Security Council of the United Nations".

On August 5, 1964, Adlai E. Stevenson, United States Representative to the United Nations and the Security Council, advised the council formally of two "deliberate armed attacks" by North Vietnamese torpedo boats against a naval unit of the United

States on the high seas. He declared that "these wanton acts of violence and destruction" were simply part of "the sabotage of the international machinery established to keep the peace by the Geneva agreements—and the deliberate, systematic and flagrant violations of those agreements by two regimes which signed them and which by all tenets of decency, law and civilized practice are bound by their provisions", all of which, he said, "fit into the larger pattern of what has been going on in Southeast Asia for the past decade and a half".

Ambassador Stevenson assured the Security Council that "we are in Southeast Asia to help our friends preserve their own opportunity to be free of imported terror [and] alien assassination, managed by the North Viet-Nam Communists based in Hanoi and backed by the Chinese Communists from Peiping". He affirmed solemnly "that the deployments of additional U.S. forces to Southeast Asia are designed solely to deter further aggression".²⁶

On February 7, 1965, Ambassador Stevenson, by a letter to the President of the Security Council, informed that body of "attacks by the Viet Cong, which operates under the military orders of North Vietnamese authorities in Hanoi". He said the attacks were part of an over-all plan "to make war against the legitimate government of South Viet-Nam" in "violation of international law and the Geneva Accords of 1954". He stated also that, as required by paragraph 2 of Article IV of the Southeast Asia Treaty, the United States and Vietnamese Governments had consulted immediately and had agreed that it had become "necessary to take prompt defensive action" to resist "this continuing aggression". He reported further that the "counter measures . . . are a justified measure of self-defense" and that he was "reporting the measures which we have taken in accordance with our public commitment to assist the Republic of Viet-Nam against aggression from the North".²⁷

Of particular interest at this point is the reiterated assertion by the Lawyers Committee on American Policy To-

wards Vietnam, phrased variously throughout its submission, that "only the Security Council . . . is authorized to determine the existence of any . . . act of aggression and . . . the measures to be taken to maintain or restore international peace".²⁸ To the statements quoted above, which were made by Ambassador Stevenson in his letter of February 7, 1965, he added significantly: "We deeply regret that the Hanoi regime, in its statement of August 8, 1964, which was circulated in Security Council Document S-5888, explicitly denied the right of the Security Council to examine this problem."²⁹

Less than three weeks later, in another letter to the President of the Security Council, Ambassador Stevenson transmitted to that body an extensive State Department report entitled *Aggression from the North: The Record of North Viet-Nam's Campaign To Conquer South Viet-Nam*, the facts recited in which, Ambassador Stevenson submitted, "make it unmistakably clear that the character of that conflict is an aggressive war of conquest waged against a neighbor—and make nonsense of the cynical allegation that this is simply an indigenous insurrection".³⁰

Innumerable other reports, both formal and informal, were made to the Security Council by the representatives of the United States at the United Nations; and there was even one by President Johnson on July 28, 1965, bespeaking the continued efforts of

24. *Hearings*, Appendix 704-705.

25. *Supra* note 20.

26. 51 DEP'T STATE BULL. 272-274 *passim* (1964).

27. 52 DEP'T STATE BULL. 240-241 *passim* (1965).

28. *Hearings*, Appendix 695.

29. In a letter of July 30, 1965, from Arthur J. Goldberg, who succeeded Ambassador Stevenson as our Representative to the United Nations and the Security Council, to the President of the Security Council, he repeated, in substance, this statement. Ambassador Goldberg said: "It is especially unfortunate that the regime in Hanoi . . . 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." United States Mission to the United Nations, Press Release 4610, July 30, 1965.

30. 52 DEP'T STATE BULL. 403, 419 (1965). It is interesting to compare this statement by Ambassador Stevenson with the assertion of the Lawyers Committee on American Policy Towards Vietnam that "Ho Chi Minh can compare his position in demanding union of Vietnam with that of Lincoln, when Britain and France were threatening to intervene to assure the independence of the Confederacy". *Hearings*, Appendix 692.

Secretary General U Thant to find a solution of the Vietnamese problem through the United Nations. In the last of these reports available as this article is written—two letters of January 31, 1966, from Ambassador Goldberg to the President of the Security Council—it is requested “that an urgent meeting of the Council be called promptly to consider the situation in Viet Nam”. A draft resolution, calling “for immediate discussions without preconditions . . . among the appropriate interested governments . . . looking toward the application of the Geneva accords . . . and the establishment of a durable peace in Southeast Asia”, was transmitted with the second of these letters for consideration by the council.³¹

“We are firmly convinced”, said Ambassador Goldberg, “that in light of its obligations under the Charter to maintain international peace and security . . . the Council should address itself urgently and positively to this situation and exert its most vigorous endeavors and its immense prestige to finding a prompt solution to it.”³² Despite all prior, and this formal, urgent submission of the Vietnamese problem to the Security Council, it has never taken any action of any kind looking toward the restoration of international peace and security to Southeast Asia. Neither has the council expressed the slightest criticism of any action taken by the United States in the SEATO area.³³

In its memorandum in opposition to the policy of the United States, the Lawyers Committee on American Policy Towards Vietnam asserts that “the conduct of the United States Government in Viet Nam appears plainly to violate the terms of the Geneva Accords”.³⁴ While the United States is not a party to the accords, it did by contemporaneous unilateral declaration agree, in effect, to respect them. But, as demonstrated above, the Geneva Accords since their inception have been violated continuously by the Hanoi regime. It is an accepted principle of international law that a material breach of a treaty by one of the parties thereto dissolves the obligations of the other parties, at least to the extent of withholding compliance until the de-

faulting party purges its breach.³⁵

It has been suggested that because the power to declare war is vested by the Constitution in the Congress alone, the deployment of United States forces to Vietnam by the President, without a formal Congressional declaration of war, violates the constitutional fiat. When the phrasing of this clause of the Constitution was being considered at the convention in 1787, its original form, vesting in Congress the power to “make” war, was changed to give it the power to “declare” war, “leaving to the Executive the power to repel sudden attacks”—“he should be able to repel and not to commence war” and “to ‘conduct’ it which was an Executive function”.³⁶

The President is, under Section 2 of Article II of the Constitution, the “Commander in Chief of the Army and Navy of the United States”. Throughout the history of the United States, he has been deemed to have authority to deploy the country’s military forces to trouble spots around the world, frequently in combat. The Department of State has a record of some 125 such instances.³⁷

In the last analysis, however, the exercise of the President’s power as Commander in Chief in deploying forces of the United States to Southeast Asia for the defense of the Republic of Vietnam has had the repeated sanction of the Senate, as well as of the Congress as a whole, so that, although the situation now seems unquestionably to constitute war in its technical sense, a formal Congressional verbal

declaration of war as such could not conceivably be essential to clothe the President’s conduct with constitutional validity. This Congressional sanction has been evidenced by overwhelming majorities in the Senate’s approval of the SEATO Treaty, in the adoption of the Joint Congressional Southeast Asia resolution of August 10, 1964, and in the passage of the appropriations necessary to carry on the defensive actions undertaken by the Executive.

First, as to the treaty. In it (paragraph 1, Article IV) each of the parties “recognizes that aggression by means of armed attack in the treaty area against” any of them or against the “free territory under the jurisdiction of the State of Viet-nam” (protocol) “would endanger its own peace and safety”.

The “treaty area”, under Article VIII, includes “the general area of the Southwest Pacific not . . . north of 21 degrees 30 minutes north latitude”. The United States has historically owned tremendously important and valuable strategic territorial interests in that area. Aside from its trusteeship over the Mariana (except Guam), Marshall and Caroline Islands, the United States owns Guam, Wake and the Samoan group. And yet the Lawyers Committee on American Policy Towards Vietnam has asserted that “SEATO is not a regional agency within the letter or spirit of the UN Charter”, because “Articles 51 and 53 . . . envisaged regional systems which historically and geographically developed into a regional community—not

31. United States Mission to the United Nations Press Releases 4798 and 4799, January 31, 1966.

32. *Id.*, No. 4798.

33. Memorandum, *supra* note 13, page 20. On February 2, 1966, the Security Council did put the Vietnam question on its agenda at the request of the United States. The vote was nine in favor (Argentina, China, Japan, Jordan, the Netherlands, New Zealand, United Kingdom, United States and Uruguay); two against (Bulgaria and the Soviet Union); four abstentions (France, Mali, Nigeria and Uganda).

Ambassadors Fedorenko of the Soviet Union and Tarabanov of Bulgaria stated that their governments “supported the position of” North Vietnam “that the question be settled within the Geneva Accords”, and the former added that the United States “was trying to throttle the struggle of the people of South Viet-Nam for freedom and independence”. Ambassador Seydoux of France insisted that the United Nations “was not the proper framework for achieving a peaceful solution”.

No further action has been taken by the

Security Council, but by a letter of February 26, 1966, the president of the council advised its members that the differences of opinion among them as to the problem of Vietnam had “given rise to a general feeling that it would be inopportune for the Council to hold further debate at this time”, but “that the Council, having decided on February 2 to place on its agenda the item contained in the letter of January 31 from the Permanent Representative of the United States, remained seized of the problem of Viet-Nam.” UN Monthly Chronicle, March, 1966, pages 3-10 *passim*.

34. *Hearings*, Appendix 702.

35. 2 OPPENHEIM, *op. cit. supra* note 17, at 136, 137. See draft Article 42 of the LAW OF TREATIES by the International Law Commission in the report of its fifteenth session, May 6 to July 12, 1963. U. N. GEN. ASS. OFF. REC. 18th Sess., Supp. No. 9, (A/5509).

36. 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION 318-319.

37. See *State Department Position Paper* prepared for the Senate Committee on Foreign Relations, November 19, 1965, BACKGROUND INFORMATION, *supra* note 7, at 254.

contemplating a regional system which fused . . . Southeast Asia with a country of the North American Continent"—"separated by oceans and thousands of miles from South East Asia".³⁸

In the cited paragraph of the treaty, the United States agreed that in the event of aggression in the treaty area it would "act to meet the common danger". In recommending ratification of the treaty to the Senate, its Foreign Relations Committee reported that "the committee is not impervious to the risks which this treaty entails. It fully appreciates that the acceptance of these obligations commits the United States to a course of action over a vast expanse of the Pacific. Yet these risks are consistent with our own highest interests."³⁹ The Senate ratified the treaty on February 1, 1955, by a vote of 82 to 1.⁴⁰

In light of all of the foregoing, it seems difficult to find anything in the nature of an adequate foundation for the *ipse dixit* of the Lawyers Committee on American Policy Towards Viet Nam that "the 'Southeast Asia Collective Defense Treaty'—connecting the United States with Southeast Asia, architected by Secretary of State Dulles, is a legalistic artificial formulation to circumvent the fundamental limitations placed by the United Nations Charter on unilateral actions by individual members".⁴¹

Undoubtedly the clearest and most unequivocal Congressional sanction of the President's deployment of United States forces for the defense of South Vietnam is contained in the Joint Southeast Asia resolution of August 10, 1964, reciting expressly "that the Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression", and that the United States is "prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom".⁴²

The Lawyers' Committee on Ameri-

can Policy Towards Viet Nam quotes a passage from an article in the *Washington Daily News* of June 4, 1965, by Richard Starnes, read into the *Congressional Record* by Senator Ernest Gruening of Alaska, which states that the joint resolution was "passed in the fever of indignation that followed" the Gulf of Tonkin attacks, and then, again as their own *ipse dixit*, assert that "there is no evidence that Congress thought or understood that it was declaring war".⁴³

This statement is simply incorrect. When the President sent his message to Congress on August 5, 1964, recommending passage of "a resolution expressing the support of Congress for all necessary action to protect our Armed Forces and to assist nations covered by the SEATO Treaty", he stated explicitly that he "should now ask the Congress on its part, to join in affirming the national determination that all such attacks will be met, and that the United States will continue in its basic policy of assisting the free nations of the area to defend their freedom".⁴⁴

In the course of a colloquy on the floor of the Senate on August 6, 1964, between Senator John Sherman Cooper of Kentucky and Senator J. William Fulbright of Arkansas, Chairman of the Foreign Relations Committee which recommended passage of the resolution,⁴⁵ the following discussion (excerpts) took place:

SENATOR COOPER: Are we now [by this resolution] giving the President advance authority to take whatever action he may deem necessary respecting South Viet-nam and its defense, or with respect to the defense of any other country included in the treaty?

SENATOR FULBRIGHT: I think that is correct.

SENATOR COOPER: Then, looking ahead, if the President decided that it was necessary to use such force as could lead us into war, we would give that authority by this resolution?

SENATOR FULBRIGHT: That is the way I would interpret it.⁴⁶

Senator Morse himself called the resolution "a predated declaration of war",⁴⁷ which would, somewhat enigmatically, give "to the President what I honestly and sincerely believe is an unconstitutional power . . . to make

war without a declaration of war".⁴⁸ The enigma in this puzzling concept seems to arise from the rather simple and logical hypothesis that the function of a legislative "declaration of war" is to authorize the executive "to make war". Since, by Senator Morse's own statement, the resolution authorizes the President "to make war", it surely has the same legal effect as a Congressional "declaration of war" *in haec verba* would have had.⁴⁹

Actually, while two or three members of the Senate expressed doubt as to whether the resolution was intended to go as far as it did, there was no real question about it. Senator Morse himself made extended speeches against it, repeatedly warning his colleagues as to its dire import, in such words as that it "does go beyond the inherent authority of the President to act in the self-defense of our country and does vest in him authority to proceed to carry out a campaign that amounts in fact to the waging of war".⁵⁰

In the course of a recent debate on the floor of the Senate on a bill for an appropriation in support of the military forces in Vietnam, Senator Richard B. Russell of Georgia, Chairman of the Armed Forces Committee, said:

I knew that the joint resolution conferred a vast grant of power upon the President. It is written in terms that are not capable of misinterpretation, and about which it is difficult to become confused. . . . The language could not have been drawn more clearly. Personally, I would be ashamed to say that I did not realize what I was voting for when I voted for that joint

38. *Hearings*, Appendix 693.

39. S. REP., 84th Cong., 1st Sess. 15 (1955). Senator Wayne Morse of Oregon, as a member of the committee, concurred in this report.

40. *Supra* note 6. The negative vote was that of Senator William Langer of North Dakota. Senator Morse voted for ratification of the treaty on the floor of the Senate where he stated, after ratification of the treaty, that "there is no doubt in my mind that the treaty is in conformity with the United Nations Charter". 91 CONG. REC. 1060 (1965).

41. *Hearings*, Appendix 693.

42. *Supra* note 20.

43. *Hearings*, Appendix 710.

44. 51 DEP'T STATE BULL. 261-263 (1964).

45. S. REP., 88th Cong., 2d Sess. (1964).

46. 110 CONG. REC. 18409 (1964).

47. *Id.* at 18427.

48. *Id.* at 18443.

49. "When I use a word", Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean,—neither more nor less." CARROLL, THROUGH THE LOOKING-GLASS.

50. 110 CONG. REC. 18443 (1964).

resolution. It is only one page in length. It is clear. It is explicit. It contains a very great grant of power.⁵¹

During the hearings on that appropriation bill before the Senate Foreign Relations Committee on February 18, 1966, Senator Morse asked Secretary of State Rusk whether he thought that the vote on the Southeast Asia Resolution "would have been the same if my colleagues in the Senate had contemplated that it might lead to 200,000 or 400,000 or 600,000 American troops in South Viet Nam?" The Secretary replied: "I doubt very much that the vote would be substantially different."

In response to that, Senator Morse commented that there would be "a chance next week to find out. . . . I intend to offer [a rescission resolution] as an amendment to the pending business in the Senate."⁵² On March 1 Senator Morse offered his amendment to the military appropriation bill, to provide that the "Joint resolution to promote the maintenance of international peace and security in southeast Asia' . . . is hereby repealed."⁵³

To avoid any question as to the effect and meaning of a vote on his amendment, Senator Morse himself declared that it "would be a vote to make clear to the President that those who vote for the amendment disapprove of the continuation of the exercise of the power he has been exercising under the Tonkin Bay resolution."⁵⁴ Senator Russell said "that the defeat of the proposal of the Senator from Oregon by the Members of the Senate . . . will leave the original joint resolution . . . unimpaired, in full strength and vigor, and with Congress, except for two Members of the Senate who voted against the 1964 resolution, solemnly and solidly behind the President in the steps that he has taken in southeast Asia."⁵⁵

After full debate, Senator Mansfield of Montana, the majority leader, moved to table Senator Morse's amendment, and the motion was carried, 92 to 5.⁵⁶ After some further discussion, Senator Russell moved for passage of the appropriation bill, and his motion carried by a vote of 93 to 2.⁵⁷

One of the best means available to

the Congress for the control of executive action is through the power of the purse—the ultimate necessity of Congressional action for appropriations to provide funds to carry out executive functions. As stated by Senator Morse during the hearings on the military appropriation bill, "a vote on this pending piece of business in the Senate really is a vote as to whether or not we are going to continue to support this program, because the only check, one of the best checks we have, is to say we are not going to finance it."⁵⁸ As stated, the bill was passed in the Senate by a vote of 93 to 2. The vote in the House was 392 to 4.⁵⁹

The legal authority of the President of the United States to conduct the present war, for "the maintenance of international peace and security in Southeast Asia", which, as the Congress declared in its 1964 resolution, "the United States regards as vital to its national interest and to world peace", is surely sustained amply by the composite impact of that resolution, the terms of the SEATO Treaty ratified by the Senate and the appropriations made by the Congress to support the military actions in the treaty area.

That the memorandum of the Lawyers Committee on American Policy Towards Vietnam is grounded on an emotional attitude opposed to United States policy, rather than on law, is not only demonstrated by a look at the facts, but is emphasized by the memorandum's concluding paragraph:

Should we not, twenty years after President Roosevelt's hopeful dream—twenty years after the advent of the nuclear age with the awesome potentiality of incineration of our planet and the annihilation of our civilization and the culture of millenia—Should we not

"spell the end of the system of unilateral action . . . that has been tried for centuries—and has always failed"?⁶⁰

Contrasted with the tone and substance of that memorandum is the temperate statement of thirty-one professors of international law from leading law schools throughout the United States, which recites simply that they "wish to affirm that the presence of US forces in South Vietnam at the request of the Government of that country is lawful under general principles of international law and the United Nations Charter. The engagement of US forces in hostilities at the request of the Government of South Vietnam is a legitimate use of force in defense of South Vietnam against aggression."⁶¹

Contrasted also with the tone and temper of the memorandum of the Lawyers Committee on American Policy Towards Vietnam is the simple resolution adopted unanimously on February 21, 1966, by the House of Delegates of the American Bar Association on the joint recommendation of its Standing Committee on Peace and Law Through United Nations and its Section of International and Comparative Law.⁶² The resolution is supported by a brief report, which concludes "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 South-East Asia Treaty."⁶³

These conclusions as to the legality of the presence of the United States forces in Vietnam under the Constitution of the United States, as a question of domestic law, are those of the author. They were not included in the opinion of the thirty-one professors of international law or in the resolution of the American Bar Association.

51. 112 CONG. REC. 4192 (1966).

52. *Hearings* 591.

53. 112 CONG. REC. 4192 (1966).

54. *Id.* at 4217.

55. *Id.* at 4192.

56. *Id.* at 4226.

57. *Id.* at 4233. Only Senators Morse and Gruening voted against the appropriation. It was announced that five senators, necessarily absent, would each have voted "yea"; so that a full vote would have been 98 to 2. *Id.* at 4232.

58. *Hearings* 593. On May 4, 1965, President Johnson had requested "the Congress to appropriate, at the earliest possible moment, an additional \$700 million to meet mounting military requirements in Vietnam". He explained, in his message to the Congress, that "this is not a rou-

tine appropriation. For each Member of Congress who supports this request is also voting to persist in our effort to halt Communist aggression in South Vietnam. Each is saying that the Congress and the President stand united before the world in joint determination that the independence of South Vietnam shall be preserved and Communist attack will not succeed." H. R. Doc. No. 157, 89th Cong., 1st Sess. (1965). The appropriation bill (79 Stat. 109) was passed in the Senate, 88 to 3, and in the House, 408 to 7. 111 CONG. REC. 9210, 9435 (1965).

59. 112 CONG. REC. 4297-4298 (1966).

60. *Hearings*, Appendix 713.

61. 112 CONG. REC. A-410 (1966).

62. 52 A.B.A.J. 392 (1966).

63. 112 CONG. REC. 4853-4854 (1966).

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United States Intervention in Vietnam Is Not Legal

Responding to an article in the May issue of the *Journal*, Mr. Standard asserts that the United States intervention in Vietnam violates the Charter of the United Nations, the Geneva Accords of 1954, the SEATO treaty and our own Constitution. He urges a cease-fire of at least six months' duration, during which the 1954 accords should be renegotiated. If this should fail, he declares that "a great power may withdraw with honor when it admits that it judged poorly".

by William L. Standard • of the New York Bar (New York City)

SATIRE AND SARCASM often have been weapons of effective, if deluding, advocacy. The article by Eberhard P. Deutsch, "The Legality of the United States Position in Vietnam", in the May, 1966, issue of the *American Bar Association Journal* (page 436) is a classical demonstration of this technique. The author takes issue with the Lawyers Committee on American Policy Towards Vietnam, as expressed in its memorandum of law, on the following fundamental questions: (1) The right of self-defense under the United Nations Charter; (2) Violations of the Geneva Accords; (3) Sanctions by the SEATO treaty; and (4) Violations of our own Constitution.

But the author concludes with the statement that the memorandum of the Lawyers Committee "is grounded on an emotional attitude opposed to United States policy, rather than on law". He seeks to demonstrate this by quoting the concluding paragraph of a 26-page, carefully documented statement of the applicable law, which in peroration states in the very last sentence: "Should we not spell the end of the system of unilateral action . . . that has

been tried for centuries—and has always failed?"

The author then wields the weapon of sarcasm by contrasting the Lawyers Committee memorandum with the "temperate statement of thirty-one professors of law from leading law schools throughout the United States". The statement of these professors appears in the *Congressional Record* of January 27, 1966 (page A410), and the entirety of that statement is:

As teachers of international law we wish to affirm that the presence of U. S. forces in South Vietnam at the request of the Government of that country is lawful under general principles of international law and the United Nations Charter. The engagement of U. S. forces in hostilities at the request of the Government of South Vietnam is a legitimate use of force in defense of South Vietnam against aggression. We believe that the evidence indicates that the United States and South Vietnam are taking action that attacks neither the territorial integrity nor the political independence of the People's Republic of Vietnam—action that seeks only to terminate aggression originating in North Vietnam.

This one-paragraph "temperate state-

ment" is not buttressed by a single citation or authority. What is particularly deplorable is that it was issued in November of 1965 as a rebuttal to the committee's memorandum, which was issued in late September, 1965.

The author of the "legality position" article then contrasts the Lawyers Committee memorandum with "the simple resolution adopted unanimously on February 21, 1966, by the House of Delegates of the American Bar Association". This resolution, in a concluding one-sentence statement, asserts 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 South-East Asia Treaty". The House of Delegates' resolution, too, does not support its conclusion with a single citation or authority.

When the *Harvard Law Record* on March 10 contrasted the memorandum of law of the Lawyers Committee with the "simple resolution" adopted by the House of Delegates, it had this to say: "Viewed against the background of the sober and erudite Lawyers Committee brief and Arthur Krock's research, the ABA resolution contributes little to the

national dialogue on Vietnam" (emphasis supplied).

The satirical technique of the author of the "legality position" article is worthy of an undergraduate debater, but not of the respected Chairman of the American Bar Association Committee on Peace and Law Through United Nations. He does, indeed, wrestle earnestly with four basic propositions discussed by the Lawyers Committee, and it is to these propositions that I shall address myself.

I. Unilateral Intervention Violates U.N. Charter

The writer of the "legality position" article discusses the first exception of Article 51 of the Charter of the United Nations, which reads: "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 the measures necessary to maintain international peace and security" (emphasis supplied).

He asserts that "A thesis that members of the United Nations are not permitted to participate in collective self-defense to repel aggression, on the ground that the aggrieved nation is not a member of the United Nations, can hardly be supported on its face, in reason, logic or law." He cites as authority two distinguished writers.¹

The Lawyers Committee in its memorandum concludes that Article 51 does not permit the United States to act unilaterally in the "collective self-defense" of Vietnam because Article 51 applies only if an armed attack occurs against a member of the United Nations.

This limitation was not inadvertent. It was the result of careful draftsmanship by Senator Arthur H. Vandenberg, who "was the principal negotiator in the formulation of this text" of Article 51.² In a statement of June 13, 1945, before the United Nations Commission that drafted Article 51, Senator Vandenberg said: "... [W]e have here recognized the inherent right of self-defense, whether individual or collective, which permits any sovereign state among us [*i.e.*, members of the

United Nations] or any qualified regional group of states to ward off attack...".³

Secretary of State Edward R. Stettinius, Jr., noted the following on May 21, 1945: "The parties to any dispute... should obligate themselves first of all to seek a solution by negotiation, mediation, conciliation, arbitration or judicial settlement, *resort to regional agencies or arrangement* or other peaceful means of their own choice" (emphasis in original).⁴

Professor Julius Stone states: "The license [of individual and collective self-defense] does not apparently cover even an 'armed attack' against a *non-Member*" (emphasis in original).⁵

Furthermore, the United States has acknowledged that the right of "collective self-defense" applies to Vietnam only if it becomes a member of the United Nations. On September 9, 1957, in arguing before the Security Council for the admission of Vietnam to the United Nations, Henry Cabot Lodge, our representative, stated: "The people of Vietnam... ask now only... to enjoy the benefits of collective security, the mutual help which membership in the... United Nations offers."⁶

This does not mean, of course, that a nonmember state or entity does not have the "inherent" right of self-defense or that nonmember states may be attacked with impunity. But it does mean that in case of an attack upon a nonmember state it is for the United Nations to decide upon the necessary measures to be taken by its member states and not for any state to decide for itself that it will employ arms for "collective self-defense".

During the Suez crisis President Eisenhower said: "The United Nations is *alone* charged with the responsibility of securing the peace in the Middle

East and throughout the world" (emphasis supplied).⁷

And at the same time, Secretary of State John Foster Dulles characterized as "unthinkable" a proposal that the United States and the Soviet Union act jointly to restore the peace in that area, saying that that was the function of the United Nations. He said:

Any intervention by the United States and/or Russia or any other action, except by a duly constituted United Nations peace force would be counter to everything the General Assembly and the Secretary-General of the United Nations were charged by the Charter to do in order to secure a United Nations police cease fire.⁸

The author of the "legality position" article confuses the right of an attacked nonmember state to defend itself with the lack of right of a member state to participate in that defense in the absence of United Nations' authorization.

The issue is the lawfulness of the actions of the United States, which is both a nonattacked state and a member of the United Nations. It does not follow that because Vietnam has an "inherent" right to defend itself, the United States has an "inherent" right to decide for itself to participate unilaterally in that defense. Professor Hans Kelsen, one of the principal authorities relied upon by Mr. Deutch, has pointed out this critical distinction: "It is hardly possible to consider the right or the duty of a non-attacked state to assist an attacked state as an 'inherent' right, that is to say, a right established by natural law."⁹

The argument also makes the United States its own judge to determine the occurrence of an "armed attack" in Vietnam, whereas Article 39 of the United Nations Charter provides that "The Security Council shall determine the existence of any threat to the peace,

1. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 193-195 (1958); KELSEN, THE LAW OF THE UNITED NATIONS 793 (1950).

2. The quoted words are from a memorandum, "Participation in the North Atlantic Treaty of States Not Members of the United Nations", dated April 13, 1949, prepared by the Office of the Legal Adviser, Department of State, and reproduced in 5 WHITEMAN, DIGEST OF INTERNATIONAL LAW 1063.

3. Memorandum, *op. cit. supra* note 2, in 5 WHITEMAN, DIGEST OF INTERNATIONAL LAW 1063,

1072.

4. 12 Dep't. State Bull. 949-950 (1945).

5. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 244 (1954).

6. U. N. SECURITY COUNCIL OFF. REC., 790th meeting 5.

7. 4 UNITED NATIONS ACTION IN THE SUEZ CRISIS: INTERNATIONAL LAW IN THE MIDDLE EAST CRISIS—(Tulane Studies in Political Science, Vol. IV (1956)).

8. New York Times, November 6, 1956.

9. KELSEN, *op. cit. supra* note 1, at 797.

breach of the peace, or act of aggression . . .". But as Philip C. Jessup, now a Judge of the International Court of Justice, has noted:

It would be *disastrous* to agree that every State may decide for itself which of the two contestants is in the right and may govern its conduct according to its own decision. . . . The ensuing conflict would be destructive to the ordered world community which the Charter and any modern law of nations must seek to preserve. State C would be shipping . . . war supplies to A, while State A would be assisting State B . . . and it would not be long before C and D would be enmeshed in the struggle out of "self-defense" [emphasis supplied].¹⁰

Acceptance of Mr. Deutsch's argument would destroy the concept of collective peacekeeping, which the Charter embodies, in the case of non-member states or areas.

No Armed Attack Within Meaning of the Charter

The author of the "legality position" article also seeks to justify the United States' intervention in Vietnam on the ground that "these attacks [against United States' naval vessels] are part of a deliberate and systematic campaign of aggression", to quote the Congressional Joint Southeast Asia resolution of August, 1964. The Lawyers Committee on American Policy Towards Vietnam takes the position that the occurrence of an armed attack within the meaning of the United Nations Charter has not been established.

Under the clear text of Article 51 of the charter, the right of self-defense arises only if an "armed attack" has occurred. The phrase "armed attack" has an established meaning in the charter and in international law. It was deliberately employed because it does not easily lend itself to expedient elasticity or to arbitrary ambiguity.

"Self-defense" is not justified by every aggression or hostile act, but only in the case of an "armed attack", when the necessity for action is "instant, overwhelming, and leaving no moment for deliberation". This definition was classically stated by Secretary of State Daniel Webster in *The Caroline*¹¹ and affirmed in the Nuremberg judgment. It was codified in the

charter by unanimous vote of the General Assembly at its first session.¹²

This strict limitation of permissible self-defense to cases of an "armed attack" was at the time of the framing of the charter being pressed by the United States, the Soviet Union and Great Britain in the Nuremberg trials. The defense was offered that Germany was compelled to attack Norway to forestall an Allied invasion. In reply, the tribunal said: "It must be remembered that preventive action in foreign territory is justified only in case of 'an instant and overwhelming necessity for defense, leaving no choice of means, and no moment for deliberation.' (The *Caroline Case*, Moore's Digest of International Law, II 412.)"¹³

Thus, while any hostile act may be an aggression, not every aggression is an "armed attack", and forceful self-defense is not a permissible response unless there is an "armed attack".

On March 4, 1966, the Department of State issued "The Legality of United States Participation in the Defense of Vietnam". This 52-page memorandum acknowledges that an "armed attack" is an essential condition precedent to the use of force in self-defense and that aggression is not enough. Astonishingly, however, it glosses over the crucial distinction between the two. While it alleges the occurrence of an armed attack "before February 1965", it fails to furnish any facts or details concerning such an attack. Indeed, it admits that it is unable to do so. This is not like the situation in Korea, where the Security Council found that an actual, visible, forcible invasion beyond the demarcation line had occurred at a specific time and place by large forces. This memorandum states that because of the "guerilla war in Viet Nam" (i.e., the indigenous character of the conflict) the State Department is unable to indicate when or where the "armed attack" began. It also admits that "the critical military element of the insurgency . . . is unacknowledged by North Viet Nam". The memorandum contends that acts of externally supported subversion, the clandestine supply of arms and the infiltration of armed personnel over the "years" preceding the direct intervention of the United States, "clearly constitutes an



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"armed attack" under any reasonable definition".

These allegations, even if true (as appears below), indicate acts of aggression, but they do not show the occurrence of an armed attack "leaving no choice of means, and no moment for deliberation".¹⁴

Such acts were well known as forms of aggression when the charter was drawn and long before. Nevertheless, the framers of the charter rejected them as inadequate to justify the unilateral use of force. Except in the limited instance of an armed attack "leaving no choice of means, and no moment for deliberation", they left nations to the peacekeeping procedures of the

10. JESSUP, A MODERN LAW OF NATIONS 205 (1948).

11. 7 MOORE, DIGEST OF INTERNATIONAL LAW 219 (1906).

12. U. N. GEN. ASS. OFF. REC. 1st Sess., RES. 95(I).

13. INTERNATIONAL MILITARY TRIBUNAL (NUREMBERG) 171 (1946); BIN CHANG, GENERAL PRINCIPLES OF LAW 84 (1953).

14. See the report of Senators Mike Mansfield, Edmund S. Muskie, Daniel K. Inouye, George D. Aiken and L. Caleb Boggs to the Senate Committee on Foreign Relations, dated January 6, 1966, entitled "The Vietnam Conflict: The Substance and the Shadow", hereafter referred to as the Mansfield report. It is reprinted in 112 CONG. REC. 140 (1966).

United Nations for collective redress against aggression.

Furthermore, the State Department memorandum refutes its own charge of the occurrence of an "armed attack". The long-smoldering conditions of unrest, subversion and infiltration cited in the memorandum are not acts that gave rise to such a need for an immediate response that "no choice of means, and no moment for deliberation" remained.

The memorandum does not sustain its charge of external aggression. It indicates that prior to 1964 the "infiltrators" from the North were South Vietnamese who were returning to the South. The lumping of "40,000 armed and unarmed guerrillas" is not meaningful. Unarmed Vietnamese have an inherent right to move about in their own country. In the absence of the functioning of the International Control Commission, the subsequent movement of Vietnamese from one zone in Vietnam to another zone in Vietnam would appear to be an internal matter, not a violation of international law.

The Mansfield report (cited in footnote 14) shows that prior to 1965 infiltration of men from North Vietnam had been going on "for many years", but that this "was confined primarily to political cadres and military leadership until about the end of 1964". On the other hand, it notes, "In 1962, U.S. military advisers and service forces in South Vietnam totaled approximately 10,000 men." The Mansfield report makes plain that significant armed personnel were introduced from the North only after the United States had intervened to avoid the "total collapse of the Saigon government's authority [which] appeared imminent in the early months of 1965". The report states:

U.S. combat troops in strength arrived at that point in response to the appeal of the Saigon authorities. The Vietcong counter response was to increase their military activity with forces strengthened by intensified local recruitment and infiltration of regular North Vietnamese troops. With the change in the composition of the opposing forces the character of the war also changed sharply [emphasis supplied].¹⁵

The introduction of North Vietnamese forces as a counter response is also emphasized by the observation in the Mansfield report that by May, 1965, about 34,000 United States service forces were in Vietnam and that "Beginning in June [1965] an estimated 1,500 North Vietnamese troops per month have entered South Vietnam . . .". Significant forces from the North thus followed and did not precede the direct involvement of the United States.

Intervention Not Justified by "Collective Self-Defense"

The State Department memorandum is structured on the wholly untenable assumption that the conflict in South Vietnam is the result of external aggression ("an armed attack from the North") and is not a civil war. For if it is a civil war, the intervention of the United States is a violation of its solemn undertaking not to interfere in the internal affairs of other countries.

It is hardly open to dispute that the present conflict in South Vietnam is essentially a civil war among what James Reston has described as a "tangle of competing individuals, regions, religions and sects . . . [among] a people who have been torn apart by war and dominated and exploited by Saigon for generations".¹⁶

The State Department memorandum itself shows that before 1964 the so-called infiltration was of South Vietnamese returning to their homeland. Even if they were returning for the purpose of participating in the fighting in South Vietnam, that still constitutes civil war by any definition.

The Declaration of Honolulu also implicitly concedes that the conflict had its origin in the internal situation in Vietnam and not in an external armed attack. The stress which the declaration places on the urgent need for basic social reform is an acknowledgment that the war is essentially a revolt against domestic conditions. To this may be added the existence of a desperate desire for peace and independence from foreign intervention, which all neutral reporters have observed.

The author of the "legality position" article also argues that the conflict

arises from an external aggression. This is contradicted by his failure to consider the role played by the National Liberation Front: yet it does exist and is unquestionably in actual control of most of South Vietnam and the government in those areas. The only conceivable justification for the refusal of the United States to acknowledge the existence or the belligerent status of the National Liberation Front is that the front consists of rebels or insurgents. If that be so, then they are fighting their own government in a civil strife and are not foreign aggressors.

As stated by Benjamin V. Cohen in the Niles memorial lecture, "The United Nations in Its 20th Year": "True, the charter does not forbid civil war or deny the right to revolt. But it does not sanction the right of an outside state to participate in another state's civil war."¹⁷

It cannot be asserted that South Vietnam is a separate "country" so far as North Vietnam is concerned. The Geneva Accords recognized Vietnam as but one country, of which South Vietnam is only an organic part. The accords declared that the temporary military line that established the north and south military zones at the seventeenth parallel pending the elections "should not in any way be interpreted as a political or territorial boundary" (Section 6). And Section 7 stated that the political settlement should be effected on the basis of "the independence, unity, and territorial integrity" of Vietnam.

But even if North Vietnam and South Vietnam are deemed separate entities in international law, the United States may not respond to the intervention of North Vietnam in the civil war in the South by bombing the North. There is no legal basis to respond to an intervention of one state in a civil war by a military attack on the territory of the intervening state. It is sobering to reflect that not even Germany under Hitler or Italy under Mussolini claimed that their intervention in be-

15. Mansfield report, 112 CONG. REC. 140, 141 (1966).

16. New York Times, April 3, 1966.

17. 111 CONG. REC. 2473 (1965). He cites COHEN, THE UNITED NATIONS, CONSTITUTIONAL DEVELOPMENTS, GROWTH AND POSSIBILITIES 53-54 (1961).

half of France during the Spanish Civil War would have vindicated their use of military force upon the territory of another state intervening in behalf of the loyalists. And no country intervening in behalf of Spain's legitimate government asserted a right to respond by military force against Germany or Italy.

Therefore, even if North Vietnam were an intervening state so far as South Vietnam is concerned, under the legal position advanced by Mr. Deutsch, the bombing of the United States by North Vietnam would have as much legitimacy as does the bombing of North Vietnam by the United States.

II. U.S. Military Presence Violates Geneva Accords

The author of the "legality position" article suggests that United States intervention in Vietnam is not in violation of the Geneva Accords on the ground that "since their inception these accords have been violated continuously by Hanoi". He states that "It is an accepted principle of international law that a material breach of a treaty by one of the parties thereto dissolves the obligation of the other party, at least to the extent of withholding compliance until the defaulting party purges itself."

The Lawyers Committee takes the position that United States intervention is not justified by the purported breach of the Geneva Accords by Hanoi. The accords embody two central principles: (1) recognition of the independence and freedom of Vietnam from foreign control and (2) the unification in the elections set in the accords for 1956.

In its own pledge to observe the Geneva Accords, the United States recognized that the military participation in Vietnam was temporary and that, in any case, it was not political or geographic. Insofar as the United States referred to that country, it designated it as "Vietnam", not "South Vietnam" or "North Vietnam". The elections thus were to determine not whether North and South Vietnam should be united, but what the government of the single state of Vietnam should be. As the time for the arrangements for the elections approached,

however, the Diem regime, which was then in control of South Vietnam, announced on July 16, 1955, that not only would it defy the provisions calling for national elections, but would not engage even in negotiations for modalities.

The reasons for not agreeing to the elections of 1956 are quite understandable. President Eisenhower has told us that the actual reason the elections were not held was because "persons knowledgeable in Indo-Chinese affairs" believed that "possibly 80 per cent of the population would have voted for the Communist Ho Chi Minh".¹⁸

Under the Geneva Accords, the undertaking to hold the elections within two years was unconditional. The refusal of Saigon to hold the elections plainly violated one of the two central conditions that had made the Geneva Accords acceptable to all parties. That the Vietnam conflict ultimately did resume is, therefore, not surprising. For, as George McT. Kahin and John W. Lewis, professors of government at Cornell University, asked in a question wholly ignored by our State Department, "When the military struggle for power ends on the agreed condition that the competition will be transferred to the political level, can the side which violates the agreed conditions ultimately expect the military struggle will not be resumed?"¹⁹

The military involvement of the United States in Vietnam also violates the second essential provision of the accords—the prohibition against the introduction of foreign troops and the establishment of military bases. Article 4 of the Geneva Accords prohibits the "introduction into Vietnam of foreign troops and military personnel", and Article 5 prohibits in Vietnam any "military base under the control of a foreign power". Therefore, it is the presence of 250,000 American troops and the installation in Vietnam of massive military bases under the control of the United States that violate these agreements, not the presence of North Vietnamese in Vietnam.

III. U.S. Intervention Violates SEATO Treaty

Mr. Deutsch also challenges the conclusion of the Lawyers Committee

with respect to sanctions under the SEATO treaty, which was adopted in September, 1954. Article I of the treaty provides:

The parties undertake, as set forth in the United Nations Charter, to settle any international disputes in which they may be involved, by peaceful means . . . and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations.

It must be pointed out that Article 53 of the United Nations Charter provides that "No enforcement action shall be taken under regional arrangements or by regional agencies, without the authority of the Security Council." Furthermore, Article 103 of the charter provides:

In the event of a conflict between the members of the United Nations under the present charter and their obligations under any other international agreement, their obligations under the present charter shall prevail.

The use of our ground forces since the spring of 1965 is sought to be justified under the provisions of the SEATO treaty. But extracts from the 1954 Senate debate on the treaty demonstrate the fragility of this claim. In explaining the commitments under the SEATO treaty to the Senate, Walter F. George, Chairman of the Senate Committee on Foreign Relations, made the following statements:

The treaty does not call for automatic action; it calls for consolidation with other signatories. If any course of action shall be agreed . . . or decided upon, then that action must have the approval of Congress, because the constitutional process of each signatory government is provided for . . . it is clear that the threat to territorial integrity and political independence also encompasses acts of subversion . . . but even in that event the United States would not be bound to put it down. I cannot emphasize too strongly that we have no obligation . . . to take positive measures of any kind. All we are obligated to do is consult together about it.²⁰

18. EISENHOWER, WHITE HOUSE YEARS: MANDATE FOR CHANGE, 1953-1956, 372 (1963).

19. Bulletin of the Atomic Scientists, "The United States in Vietnam", June, 1965, page 28.

20. 101 CONG. REC. 1051-1052 (1955).

Richard N. Goodwin, a former Deputy Assistant Secretary of State, in a recent article discussing the significance of our reliance upon the SEATO agreement as the basis for our intervention in Vietnam, states in part:

One can search the many statements of Presidents and diplomats in vain for any mention of the SEATO Treaty. Time after time, President Johnson set forth the reasons for our presence in Vietnam, but he never spoke of the requirements of the treaty, nor did anyone at the State Department suggest that he should, even though they surely reviewed every draft statement. The treaty argument is, in truth, something a clever advocate conceived a few months ago.²¹

Furthermore, the SEATO treaty also clearly pledges the parties to respect the Geneva Declaration of 1954, which was agreed upon only a few months before the SEATO treaty. The State Department memorandum of March 4, 1966, referred to above, significantly misquotes the SEATO treaty on essential points. It asserts (Section IV B) that Article 4(1) of SEATO creates an "obligation to meet the common danger in the event of armed aggression". The term "armed aggression" is not to be found in the treaty. Article 4(1) speaks of "aggression by means of armed attack". In case of such "armed attack", "each Party recognizes" that it "would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger in accordance with its constitutional processes".

Hence, only in case of an "armed attack" (in the meaning of Article 51 of the United Nations Charter) would the United States have, at most, the right, but no obligation, to assist the "Free Territory of Vietnam" until it was to be unified by July, 1956.

The invocation of the SEATO treaty is the latest of the evershifting grounds which the State Department has advanced to sustain the lawfulness of its position. Arthur Schlesinger, Jr., has characterized this argument as an "intellectual disgrace". Arthur Krock has described its origin as follows:

The President had utilized the provocation of the Tonkin Gulf attack on the Seventh Fleet by North Vietnam

ese gunboats to get a generalized expression of support from Congress. This worked well enough until it was argued, against the public record, as approval by Congress of any expansion of the war the President might make in an unforeseeable future. Then Rusk shifted the major basis for the claim to the SEATO compact.

But extracts from the 1954 Senate debate on the treaty demonstrate the fragility of this claim.²²

The credibility of the argument that the SEATO treaty furnished a legal justification for the President's action is also refuted by the fact that the State Department in its March, 1965, memorandum, entitled "Legal Basis for United States Actions Against North Vietnam", did not even mention SEATO. Significantly, too, President Johnson in a press conference statement on July 28, 1965, explaining "why we are in Vietnam", made no mention of SEATO. This can hardly be squared with the present belated claim that the treaty imposed an obligation upon the President to intervene in Vietnam.

Moreover, the invocation of SEATO does not advance the State Department's case. In the first place, Article 1 of the treaty is expressly subordinate to the provisions of the United Nations Charter and Article 6 expressly acknowledges the supremacy of the charter. Article 103 of the charter, quoted above, subordinates all regional treaty compacts to the charter, and Article 53 is explicit that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council . . .".

The United States is not obliged by SEATO to engage in any military undertaking in Vietnam even if it were otherwise permitted to do so under the charter. As noted by Representative Melvin R. Laird, the SEATO treaty was "not a commitment to send American troops to fight in southeast Asia. It carefully avoided the kind of automatic response to aggression embodied in the NATO agreement . . .".²³

Representative Laird pointed out that in soliciting the advice and consent of the Senate to the treaty, Senator H. Alexander Smith of New Jersey, who was a member of the United

States delegation to the Manila Conference at which the treaty was negotiated and who was one of the signers of the treaty for the United States, emphasized that "Nothing in this treaty calls for the use of American ground forces . . .". On the floor of the Senate on February 1, 1955, he said:

Some of the participants came to Manila with the intention of establishing . . . a compulsory arrangement for our military participation in case of any attack. Such an organization might have required the commitment of American ground forces to the Asian mainland. We carefully avoided any possible implication regarding an arrangement of that kind.

We have no purpose of following any such policy as that of having our forces involved in a ground war. . . .

For ourselves, the arrangement means that we will have avoided the impracticable overcommitment which would have been involved if we attempted to place American ground forces around the perimeter of the area of potential Chinese ingress into southeast Asia. Nothing in this treaty calls for the use of American ground forces in that fashion.²⁴

Article 4, Section 2, is explicit that if South Vietnam were threatened "in any way other than by armed attack", "the [SEATO] Parties shall consult immediately in order to agree on the measures which should be taken for the common defense".

SEATO therefore prohibits unilateral assistance action. Indeed, the treaty originally required previous agreement among the other seven partners before any SEATO power could take any "measures", including nonmilitary measures, not to mention combat assistance. In 1964 the unanimity requirement was reinterpreted to mean that "measures" could be taken in the absence of a dissenting vote among the SEATO partners. The United States has not convened the SEATO powers because of the certainty of such a dissent. It can hardly claim, therefore, that SEATO obligates it to pursue its present course when in fact it is evading its treaty obligation to obtain col-

21 The New Yorker, "Reflections on Vietnam", April 16, 1966, page 57, at page 70.

22 The New York Times, "The Sudden Rediscovery of SEATO", March 6, 1966.

23 112 Cong. Rec. 5558 (1966).

24 101 Cons. Rec. 1052-1054 (1955).

lective permission for "collective defense", as even the name of the treaty indicates.

Finally, the United States actions also violate Article 53 of the United Nations Charter, quoted above, which unequivocally prohibits enforcement action under regional arrangements except with *previous* Security Council authorization. Hence, even if the United States had obtained the required consent from its SEATO partners, it would still need the authorization of the Security Council to make its "measures" legal.

Therefore, the United States, far from being obligated, is not permitted by SEATO or by the charter to engage in its military undertaking in Vietnam.

IV. U.S. Intervention Violates the Constitution

The President has repeatedly stated and acknowledged that the United States is at war in Vietnam.²⁵ The Lawyers Committee on American Policy Towards Vietnam in its memorandum of law took the position that our intervention is violative of our own Constitution. The committee predicated its conclusion on the provisions of Article I, Section 8, Clause 11, in which the power to declare war is confided exclusively to the Congress. Congress alone can make that solemn commitment. The clause granting this power does not read "on the recommendation of the President" or that the "President with the advice and consent of Congress may declare war". As former Assistant Secretary of State James Grafton Rogers has observed, "The omission is significant. There was to be no war unless Congress took the initiative."²⁶

The Supreme Court has held that

Nothing in our Constitution is plainer than that declaration of war is entrusted only to Congress. . . . With all its defects, delays, and inconveniences, men have discovered no technique for long preserving free government except that the executive be under the law, and that the law be made by parliamentary deliberation.²⁷

President Woodrow Wilson underscored the President's lack of power to declare war in his historic statement to

a joint session of Congress on April 2, 1917:

I have called the Congress into extraordinary session because there are serious, very serious, choices of policy to be made, and made immediately, which it was neither right nor constitutionally permissible that I should assume the responsibility of making.

Congress has not declared war in Vietnam and the President does not claim that any declaration of war supports his actions in Vietnam. In fact, the President has been reported to be extremely reluctant to ask Congress to declare war.²⁸

The writer of the "legality position" article, however, takes the position that the Southeast Asia resolution (Tonkin resolution) of August 10, 1964, is "undoubtedly the, clearest and most unequivocal Congressional sanction of the President's deployment of United States forces for the defense of South Vietnam". The writer then quotes Senators John Sherman Cooper, J. William Fulbright and Wayne Morse during the debates on the Tonkin resolution, and he concludes that since "the resolution authorizes the President 'to make war', it surely has the same legal effect as a Congressional 'declaration of war' *in haec verba* would have had".

It would seem that the action of Congress under the conditions that prevailed when the Tonkin resolution was submitted constitutes, at most, an ultimatum and not a declaration of war.

Senator Fulbright in a recent article stated:

The joint resolution was a blank check signed by the Congress in an atmosphere of urgency that seemed at the time to preclude debate. . . .

I myself, as chairman of the Foreign Relations Committee, served as floor manager of the Southeast Asia resolution and did all I could to bring about its prompt and overwhelming adoption. I did so because I was confident that President Johnson would use our endorsement with wisdom and restraint. I was also influenced by partisanship; an election campaign was in progress and I had no wish to make any difficulties for the President in his race against a Republican candidate whose election I thought would be a

disaster for the country. My role in the adoption of the resolution of Aug. 7, 1964 is a source of neither pleasure nor pride to me today.²⁹

There have been instances when the President has sent United States forces abroad without a declaration of war by Congress. These have ranged from minor engagements between pirates and American ships on the high seas to the dispatch of our Armed Forces to Latin American countries and our involvement in Korea. But, except for the Korean War, none of these instances remotely involved so massive and dangerous a military undertaking as the war in Vietnam. And in the Korean War the United States fought under the aegis of the United Nations.

Since Mr. Deutch assumes that the Tonkin resolution does constitute a "Congressional declaration of war *in haec verba*", empowering the President to act, it is fitting to recall that on May 6, 1954, at a time when the fall of Dien Bien Phu was imminent, then Senator Lyndon B. Johnson criticized the President in these terms:

We will insist upon clear explanations of the policies in which we are asked to cooperate. We will insist that we and the American people be treated as adults—that we have the facts without sugar coating.

The function of Congress is not simply to appropriate money and leave the problem of national security at that.³⁰

Congress should, therefore, exercise its constitutional responsibility as a co-equal branch of government of checks and balances to determine whether this country shall continue to be involved in the war in Vietnam. Under the rule of law, compliance with the forms and procedures of law are as imperative as compliance with the substance of law.

25. 52 DEPT STATE BULL. 606, 838 (1965). Arthur Krock, "By Any Other Name, It's Still War", The New York Times, June 10, 1965.

26. ROGERS, WORLD POLICING AND THE CONSTITUTION 21 (1945).

27. *Youngstown Sheet & Tube Company v. Sawyer*, 343 U. S. 579, 642, 655 (1952) (Jackson, J.).

28. The Wall Street Journal, "The U. S. May Become More Candid on Rising Land-War Involvement", June 17, 1965, page 1.

29. The New York Times Magazine, "The Fatal Arrogance of Power", May 15, 1966, page 28. This article was based on an address at the Johns Hopkins School of Advanced Studies.

30. Jackson, The Role and Problems of Congress with Reference to Atomic War, Publication No. L 54-435, Industrial College of the Armed Forces (1954).

What Action To Take in This Solemn Hour

This is a solemn hour in history. We have a moral obligation to history to return to the high purposes and principles of the United Nations. We may be on the threshold of a further involvement in Asia. The United Nations Charter forbids our unilateral intervention in the circumstances which exist in Vietnam.

It may be that the world could be brought closer to peace if we agreed to the following:

1. Declaration of a six months' (or more) cease-fire to create conditions

for negotiations.

2. That during the cease-fire period the Soviet Union and Great Britain (the co-chairmen of the Geneva Conference in 1954) be requested to reconvene the 1954 conference and invite all the nations which participated at the "Final Declaration" of the Geneva Conference on July 21, 1954, to renegotiate the 1954 accord.

3. If efforts to negotiate prove inconclusive, we should resort to the candor urged by an eminent political scientist, Emmet John Hughes, after a searching recent visit to Vietnam, details his views of the conditions in that

country and concludes his report as follows:

... And it means the wisdom to sense that American repute in Asia is not dignified but diminished by untiring war for the unattainable victory . . . and American honor is not tarnished but brightened when so great a power can say, with quiet assurance: we have judged poorly, fought splendidly, and survive confidently.

I can think of no other way that the leaders of the United States might match the courage of the soldiers they have dispatched.³¹

31. Newsweek, May 30, 1966, pages 22-23

Informal Decisions of the Committee on Professional Ethics

889. There is no ethical impropriety in an attorney donating the cost of his services as well as expenses in the filing of an *amicus curiae* brief on behalf of a nonprofit organization, provided the attorney has no financial interest in the organization or the litigation.

890. There is no ethical impropriety in an attorney appropriately displaying the United States flag in front of his office building.

891. While an attorney may accept a case in which there is the possibility of liability ultimately falling on a past client, all parties must be completely satisfied with the representation and consent thereto after complete disclosure by the attorney of "all circumstances of his relations to the parties, and any interest in or connection with the controversy" (Canon 6).

892. There is no ethical impropriety in the defense attorney interviewing the plaintiff's attending physician without the presence of the plaintiff's attorney.

893. The Committee affirms its position taken in Formal Opinions 297 and 305 with respect to the dual practice of law and accountancy.

894. It is not ethically improper for a bar association to accept commercial sponsorship of a bar-produced public service radio series. However, the bar

association should maintain control over the type of advertising to assure that it is consistent with the dignity and responsibility of the profession.

896. The Committee is not prepared to state at this time that medicine and law are so closely related that a lawyer cannot engage in both. However, a lawyer so practicing must exercise extreme care to assure that his medical practice does not feed his law practice and should refuse to associate himself as a lawyer in a case involving one of his medical patients. A lawyer so practicing may announce to local lawyers *only* his availability to associate in medicolegal matters. However, such announcement may not show degrees, the fact that he is a physician or that he limits his practice to medicolegal matters, nor may his letterhead include any of the foregoing.

897. It is not ethically improper for an attorney to consent to the inclusion of his name on a building plaque as counsel to the water commission erecting the building.

899. It is not necessarily improper for an attorney to represent himself and others in the same lawsuit, but he should avoid doing so when there is a possible conflict of interest or when there is the possibility that he might become a witness in the proceedings.

900. It would be inappropriate for a

group of attorneys, formed only for the purpose of soliciting funds for the painting of a portrait of a judge to be hung in his courtroom, to raise funds for such purpose, and it would be inappropriate for a judge to accept the portrait under such circumstances. However, such a project could with propriety be undertaken and carried out by a pre-existing legitimate legal organization or group, or by an *ad hoc* committee sponsored by an established bar association.

901. Canon 27 of the Canons of Professional Ethics prohibits designating a firm member "Tax Counsel" on a firm's letterhead but does not prohibit listing a firm member as "Counsel" or "of Counsel" on the firm letterhead.

902. It is ethically improper for an attorney to add the words "tax service" or a like phrase to his professional card.

903. Advertising by bar associations is not considered unprofessional when it adheres strictly to the principles set forth in Formal Opinions 179, 191, 205, 227 and 259 of the Committee, but when advertisements and letters are so phrased as to imply that the principal objective is to secure professional employment for the members of the association rather than to perform an obligation to aid and instruct the public, it is improper.