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The U.S. Commitment in Vietnam: Some Legal and Moral Questions

HON. ROBERT P. GRIFFIN

OF MICHIGAN

IN THE SENATE OF THE UNITED STATES

Monday, January 29, 1968

Mr. GRIFFIN. Mr. President, recently my attention was drawn to a cogent evaluation of our Government's policies in Vietnam.

In an article published in the Scandinavian Review of International Law, Mr. Allison L. Scafuri, a distinguished Michigan attorney, has explored the political and legal basis for our involvement in Vietnam.

While some may not agree with the conclusions in his presentation, entitled "Vietnam and Beyond: The Legal and Moral Commitment of the United States," I believe it represents an important contribution to the literature on the subject.

I ask unanimous consent that the article be printed in the Extensions of Remarks.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

VIETNAM AND BEYOND: THE LEGAL AND MORAL COMMITMENT OF THE UNITED STATES

(By Allison L. Scafuri)

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I. INTRODUCTION

The purpose of this paper is threefold: (1) To comment on the moralistic imperative in the United States approach to world power and responsibility which made the Vietnam commitment inevitable; (2) To explain the legal basis of the Vietnam commitment; and, (3) To suggest guidelines for approaches to international cooperation for dealing with Vietnam and other threats to the peace.

II. THE MORALISTIC IMPERATIVE IN THE UNITED STATES APPROACH TO WORLD POWER AND RESPONSIBILITY WHICH MADE THE VIETNAM COMMITMENT INEVITABLE

The dilemma of the United States in the Mid-Twentieth Century is that established international policies may have ceased to be completely valid in the face of evolving challenges. Southeast Asia is an exasperating proving ground for old and new policies; NATO is rearranging itself; balkanized Africa and Latin America show increasing signs of hostile ferment; and the United Nations, that great repository of hope, has not lived up to expectations. Therefore we know that we must attempt ever more zealously to constructively characterize and creatively analyze and solve our international problems if we are to prevent Western Civilization from becoming the embattled city of Lin Piao's parable. Yet no analysis of these problems is realistic unless it takes into account the moralistic imperative that underlies the American approach to international responsibility.

The agonizing trail of causes that has coursed America's history culminated philosophically early in this century in what might be called the Wilsonian Ethic, i.e., a belief that our escapades in the international arena must transcend mere national interest. Something manifest in this ethic has led us to predicate our actions upon stringent moral preconditions, e.g., that we fight our wars to end wars, to make the world safe for democracy—or to give Asian peasants the mere chance to choose what we call democracy. To these missionary ends we have sent generations of Americans to foreign shores to fight and die until now, seemingly, the white crosses of those who have fallen stretch around the world.

Even the so-called Realists who have had a hand in determining American policies since World War II have based their thinking upon a moralistic rationale. George F. Kennan, for example, who exhorted us in 1951 to "refrain from constant attempts at moral appraisal" and to stop "making ourselves slaves of the concepts of international law and morality,"[1] actually had in mind what any reasonable man would call a high order of morality when he asked Americans "to have the modesty to admit that our own national interest is all that we are really capable of knowing and understanding—and the courage to recognize that if our own purposes and undertakings here at home are decent ones, unsullied by arrogance, or hostility toward other people or delusions of superiority, then the pursuit of our national interest can never fail to be conducive to a better world."[2]

Similarly, McGeorge Bundy, who recently wrote about the Uses of Responsibility[3] in a manner decried by some as a lamentable brand of New Realism, has established an extremely high standard of moral conduct as a rein upon these uses. He said, in essence, that the elements of the continuing American attitude toward world affairs are: the acceptance by the United States of the responsibility of holding and using power; a permanent and passionate commitment to peace and an instinctive belief that the United States must manifest "an active assertion that the dreams of others must have room to come true and that American power must be responsive to that end";[4] and he came to the ultimate conclusion that the American people are always ready to judge their own actions and to be judged in terms of the effect of their behavior on others.[5]

These assesments by the Realists are little different from those of the pragmatic Idealists. Lincoln, for example, once said when speculating on what it was that had held the thirteen colonies together: "It was something in the Declaration . . . which had been drafted 85 years before . . . something which promised liberty 'not alone to the people of this country but also to the world . . .' something that promised in due time the weights should be lifted from the shoulders of all men."[6]

Those who saw the 1965 television program, "Europe Twenty Years Later,"[7] must have been impressed with a similar thesis presented by General Eisenhower. He reminded us that we mobilized America in 1941 and sent it into battle to make the world safe for democracy. This promise, to all who gave the last full measure of devotion and to all the people of the world, has not been fulfilled. Therefore, he concluded, it is our solemn obligation to continue our efforts to fulfill that promise with all its attendant sacrifices.

There is no basic philosophical difference beween American Realists and Idealists as regards morality as a standard of international conduct; they have marched to the same drums across the years.

This then is what American policy is all

Footnotes at end of article.

about in Vietnam. It is one more manifestation of that paradoxical conglomerate of reality, and self-interest and overriding morality that has become the categorical imperative in the international policies of the United States. It is often misunderstood, perhaps, because it is a complex and awesome base for the policies of mere Man. It is, however, a policy no more misunderstood than that of Lincoln when he brought America through the hellfire that molded its character forever.

The challenges in Southeast Asia are, of couse, difficult to assess—as were the challenges in Europe prior to World War II. When Neville Chamberlain said at a fateful moment in history: "War is a fearful thing, and we must be very clear before we embark upon it, that it is really the great issues that are at stake." [8] he said it all. Not many years later, the free world which had not been prepared at the time Chamberlain expressed his doubts to recognize the terrible challenge, was convinced in retrospect that the great issues had indeed been at stake all along and was ready to "accept the essential truth that peace is one and indivisible, that, in our efforts 'to seek peace and ensue it,' we must realize that a threat to the peace of any country is a threat to ourselves—and must be recognized as such." [9]

Vietnam, therefore, presents a cruel challenge to American morality. It is a clear and present test of whether or not the principles for which we have fought so long and hard are abiding ones. The responsible voices of the past cry out to us to be there to fight for the freedom of the Vietnamese people, for us as well as for them and all the free peoples of the world.[10]) The challenge is one, as all significant events are one in this dance to the music of time, with Valley Forge, Gettysburg, Belleau Wood, Normandy Beach and the Coral Sea, and the Yalu. The fact that we might fail, that the South Vietnamese themselves who sought our aid might ultimately not be grateful for our sacrifices, cannot deter us. This is the essence of the American moralistic imperative. It could, in the end, prove to be but a handful of dust; yet it is the stuff of which great dreams are made.

III. LEGALITY OF UNITED STATES IN ACTION IN VIETNAM

A. Introduction

The legality of United States participation in Vietnam under International Law and the domestic law of the United States is predicated upon a finding that it is legal pursuant to: (1) the Geneva Accords; (2) the SEATO treaty; (3) the United Nations Charter; and (4) the Constitution of the United Sates.

B. Legality pursuant to the Geneva Accords

1. The Basic Documents

a. The Agreement on the Cessation of Hostilities in Vietnam:

The only true agreement relative to Vietnam arising out of the Geneva Conference of 1953 was the Agreement on the Cessation of Hostilities in Viet-Nam, signed July 20, 1954, on behalf of the Democratic Republic of Viet-Nam (North Vietnam) and the French Union Forces in Indo-China.[11]

The Agreement established a demilitarized zone and demarcation line at approximately the 17th parallel and provided for withdrawal of military forces into the respective north and south zones by the contracting parties. Contrary to popular belief, there was no call for elections in the Agreement—only a vague allusion in Article 14(a) regarding conduct of civil administration in the respective zones "pending the general elections".

Important provisions of the Agreement include:

1. Chapter VI, which sets up the International Commission for Supervision and Control in Viet-Nam.[12] The International Commission, which has come to be called the International Control Commission, or ICC, was composed of Canada, India and Poland, with India presiding, and was given the broad task of "control, observation, inspection and investigation" of all aspects of all actions of the parties relevant to the Agreement.[13]

2. Articles 10, 19, 24 and 27, because a 1962 special report of the ICC (to be discussed later) stated that the North Vietnamese had violated them. These articles state:

(a) *Article 10.* Commanders of the respective forces "shall order and enforce and complete cessation of all hostilities in Viet-Nam by all armed forces under their control . . ." [14]

(b) *Article 19.* ". . . the two parties shall ensure that the zones assigned to them do not adhere to any military alliance and are not used for the resumption of hostilities or to further an aggressive policy." [15]

(c) *Article 24.* ". . . the armed forces of each party shall respect the demilitarized zone and the territory under the military control of the other party, and shall commit no act and undertake no operation against the other party . . ." [16]

(d) *Article 27.* "The signatories . . . and their successors in their functions shall be responsible for ensuring and observance and enforcement of the terms and provisions thereof . . ." [17]

b. *Final Declaration of the Geneva Conference:* On July 21. 1954, the Geneva Conference issued a Final Declaration, so-called, that was not signed by any party to the Conference.[18] The statements in this nebulous document were prefaced with such phrases as "the Conference takes note of," "the Conference expresses satisfaction at," and "the Conference recognizes that." These statements coupled with the lack of signatures, when it is an acceptable practice under International Law to sign treaties, appear to relegate the declaration to the status of a list of fond hopes rather than a legal document.

It is in this Final Declaration that we find the oft-quoted statements relative to the Vietnam zone line and the prospective elections, i.e.:

1. *Paragraph 6.* "The Conference recognizes that . . . the military demarcation line is provisional and should not in any way be interpreted as constituting a political or territorial boundary . . ." [19]

2. *Paragraph 7.* ". . . the settlement of political problems, effected on the basis of respect for the principles of independence, unity and territorial integrity, shall permit the Viet-Namese people to enjoy the fundamental freedoms guaranteed by democratic institutions established as a result of free general elections by secret ballots . . . general elections shall be held in July 1956, under the supervision of an international commission . . . Consultations will be held on this subject between the competent representative authorities of the two zones from 20 July 1955 onwards." [20]

These provsions will be respectively considered herein in the context of the discussion of the "Political Status of South Vietnam" and "The Ancillary Question of 1956 Elections."

c. *The United States Statement:* The United States did not join in the Final Declaration of the Geneva Conference; instead on July 21, 1954, it made an unsigned unilateral declaration through Walter Bedell Smith, Undersecretary of State.[21] In this declaration, the United States "takes note" of the various Geneva Agreements, including the one regarding cessation of Viet-Nam hostilities.

The United States also declared that:

1. "it will refrain from the threat or use of force to disturb them (the Geneva Agreements), in accordance with Article 2(4) of the Charter of the United Nations dealing with the obligation of members to refrain in their international relations from the threat or use of force."

2. "it wonid view any renewal of the aggression in violation of the aforesaid agreements with grave concern and as seriously threatening international peace and security."

3. "it also reaffirmed its belief in self-determination of peoples and said that: "In the case of nations now divided against their will, we shall continue to seek to achieve unity through free elections supervised by the United Nations to insure that they are conducted fairly."

These were gratuitous statements. The obligations of the United States under the United Nations Charter spoke for themselves; they could be made neither greater nor smaller by a unilateral declaration. The fact that the United States was at Geneva at all was an expreison of its already well-known concern for the effect of the situation in Southeast Asia on peace and security. Unilateral adherence by the United States to the principles of self-determination and unity of divided uations is a nice expression of hope, but cannot be considered legally binding on others.

2. Political status of South Vietnam

Whether or not South Vietnam is a state or a zone, as it was characterized under the Geneva Agreement, would not appear to be determinative of its rights in the conflict with North Vietnam, or of the right of the United States to come to its aid since "the action of the United Nations in the Korean conflict of 1950 clearly established the principle that there is no greater license for one zone of a temporarily divided state to attack the other zone than there is for one state to attack another state." [22]

However, Vietnam can reasonably be concluded to be a state under the accepted standards of International Law.

A "state" is generally characterized as "a people permanently occupying a fixed territory, bound together by common laws and customs into a body politic, possessing an organized government, and capable of conducting relations with other states . . ." [23]

South Vietnam would appear to meet all the state tests as well as any nation. Leonard C. Meeker, Legal Adviser to the Department of State, has presented substantial evidence of this. I.e.

The Republic of Viet-Nam in the South has been reorganized as a separate international entity by approximately 60 governments the world over. It has been admitted as as a member of a number of the specialized agencies of the United Nations. The United Nations Generaly Assembly in 1957 voted to recommend South Viet-Nam for Membership in the organization, and its admission was frustrated only by the veto of the Soviet Union in the Security Council.[24]

France and Vietnam had signed agreements on June 4, 1954, whereby France reorganized the independence of Vietnam while the delegates at Geneva were preparing to cut Vietnam in two. Bao Dai, Chief of State of Vietnam, appointed Ngo Diem, who had been in exile (mainly in the United States) for four years, as Prime Minister of what would ultimately be non-Communist Vietnam. "He had scarcely formed his government when the Geneva Conference entered its final phase." [25] This government, in being at the time of the signing of the Geneva Agreement by North Vietnam and France, was, therefore, the successor in interest of France within the purview of Article 27 of the Agreement.

The recognition of 60 governments and the support for membership in the United Nations when it is required that all members be states [26] would appear to be conclusive of the fact that South Vietnam is a state, whatever it may have been called long ago by others at the Geneva Conference.

3. Aggressions by North Vietnam against South Vietnam

Critics of American action in Vietnam maintain that the unpleasantness in South Vietnam is "civil strife". Since South Vietnam must either be a state in its own right or a territory with rights equal to those of

Footnotes at end of article.

South Korea (or West Germany), the argument of these critics appears to be specious. They generally attempt to bolster their position by assuming that the Viet Cong are merely local South Vietnamese trying to make good in politics.

The fact of the matter, i.e., that North Vietnam is committing aggression against South Vietnam, has been amply expressed in three documents:

(a). In May, 1962, the International Control Commission, set up by the Geneva Agreement, filed a Special Report to the Co-Chairmen of the Geneva Conference on Indo-China." This report of members India and Canada, with Poland dissenting, stated that:

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

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

(b). In 1961, the Department of State had issued a report called *A Threat to the Peace*,[28] which detailed North Vietnam's program to seize South Vietnam and North Vietnam's breaches of the Geneva Agreement from the moment of its inception in 1954.[29] The material in this report was the evidence that was presented to the ICC by the Government of the Republic of (South) Vietnam and which was upheld by their report. As Brian Crozier has so aptly stated in his book, *Southeast Asia in Turmoil*, ". . . the ICC's report provided triumphant confirmation of its (*A Threat to the Peace*) accuracy." [30]

(c). In 1965, the Department of State issued an updated version of *A Threat to the Peace* entitled, *Aggression from the North—The Record of North Viet-Nam's Campaign to Conquer South Vietnam*.[31]

The evidence contained therein shows that:

1. *The hard-core of communist forces attacking South Viet-Nam were trained in the North and ordered into the South by Hanoi.* The key leadership of the Viet-Cong, the officers and much of the cadre, many of the technicians, political organizers and propagandists have come from the North under Hanoi's direction. The training of essential military personnel and the infiltration into the South is directed by the Military High Command in Hanoi. Subsequent reports from late 1965 to date, make clear that uniformed units of the North Vietnamese Army are operating in South Vietnam.[32]

Many lower level elements of Viet Cong forces are recruited within South Vietnam. "However, the thousands of reported cases of VC kidnappings and terrorism make it abundantly clear that threats and other pressures by the Viet Cong play a major part in such recruiting." [33]

2. *Many of the weapons and much of the ammunition and other supplies used by the Viet Cong have been sent into South Vietnam by Hanoi.* The VC now use many types of weapons for which all ammunition must come from outside sources. Communist China and other communist states have been the prime suppliers of these weapons and ammunition and they have primarily channeled them through North Vietnam.[34]

3. *The directing force behind the effort to conquer South Vietnam is the Communist Party in the North, the Lao Dong (Workers) Party, which is an integral part of the Hanoi regime.* Through its Central Committee, which controls the government of the North, the Lao Dong Party directs the total military and political effort of the VC. Military High Command in the North trains the men and sends them into South Vietnam. Central Research Agency, North Vietnam's central intelligence organization, directs the elaborate espionage and subversion effort.[35]

4. *Under Hanoi's overall direction the communists have established an extensive machine for carrying on the war within South Vietnam.* The focal point is the Central Office for South Viet-Nam with its political and military subsections, and other specialized agencies. A subordinate part of this Central Office is the Liberation Front for South Vietnam, which was formed at Hanoi's order in 1960. Its principle function is to influence opinion abroad and to create the false impression that North Vietnam's aggression in the South is an indigenous rebellion.[36]

The Geneva Agreement prohibited reinforcement of foreign military forces in Viet-Nam and the introduction of new military equipment, but allowed replacement of existing military personnel and equipment.[37] Prior to late 1961, South Vietnam received military equipment and supplies from the United States and the United States Military Assistance Advisory Group had enlarged to approximately 900 men. These actions, which constituted replacements for French training and advisory personnel withdrawn after 1954 and replacement for equipment in Vietnam in 1954, were justified under the Geneva Agreement [38] and were reported to the ICC.[39]

The intensification of North Vietnamese aggression during 1961, as documented in *A Threat to the Peace* and reported by the ICC as violations of the Geneva Agreement, brought greatly intensified American assistance. The governing principle of International Law is that material breach of a treaty by one party releases the other party from all obligation under the treaty [40] or at least entitles that party to withhold compliance equivalently until the defaulting party honors its obligations.[41]

The inescapable conclusion derivable from *Aggression from the North*, which is an updated version of *A Threat to the Peace*, which is, in turn, the evidence verified by the ICC in its 1962 Report, is that North Vietnam has committed direct and indirect aggression against South Vietnam and has been in continuing violation of the Geneva Agreement since 1954.[42]

4. The Ancillary Question of 1956 Elections

As previously stated, Vietnamese elections were vaguely alluded to in Article 14(a) of the Geneva Agreement on the Cessation of Hostilities; and the unsigned Final Declaration of the Geneva Conference expressed the fond hope that elections would be held in July, 1956.

Much has been made of the fact that these elections were not held, with some critics blaming South Vietnam and even the United States for the fact that they were not held.

Reference to the July 21, 1965 Unilateral Declaration of the United States, as previously noted, demonstrates: (1) that the United States had nothing to say on the point other than that it believed in self-determination; and (2) that it favored free elections "supervised by the United Nations" in the case of nations "divided against their will." The United States has no right to force any free country to agree to hold elections; therefore, the relevant question would appear to be what South Vietnam did about these elections.

At the 1954 Geneva Conference the representatives of what was to be non-Communist (South) Vietnam "vainly protested against the partition of the country and against the principle of general elections being agreed upon when more than half of the voters would be north of the 17th parallel. It vainly asked that the whole territory and population be placed under the control of the United Nations until reestablishment of peace and security would permit the holding of really free general elections." [43]

South Vietnam subsequently refused to acquiesce in the holding of elections. On July 16, 1955, Prime Minister Diem gave the basis for his Government's stand:

"We did not sign the Geneva agreements. We are not bound in any way by these agreements entered into against the will of the Vietnamese people. Our policy is a policy of peace, but nothing will divert us from our goal: the unity of our country—a unity in freedom and not in slavery.

"We do not reject the principle of elections as a peaceful and democratic means to achieve unity. But elections can be one of the foundations of true democracy only on the condition that they are absolutely free. And we shall be skeptical about the possibility of achieving the conditions of free elections in the north under the regime of oppression carried on by the Vietminh." [44]

The position of South Vietnam that there was no obligation to abide by terms of the nebulous Final Declaration was sustained by the United Kingdom, one of the Co-Chairmen of the Geneva Conference:

Her Majesty's government has always regarded it as a desirable thing that these elections should be held and advised the Government of the Republic of Vietnam to enter consultations with the Vietminh authorities in order to insure that all the necessary conditions obtained for a free expression of the national will as a preliminary to holding free general elections by secret ballot. Nevertheless, Her Majesty's government does not agree that (South Vietnam) is legally obliged to follow the course . . . It may be recalled that, at the final session of the Geneva Conference on Indo-China . . . the Vietnamese Government formally protested "against the hasty conclusion of the Armistice Agreements by the French and Vietminh high commands only" . . . and "against the fact that the French high command was pleased to take the right, without a preliminary agreement of the delegation of (South Vietnam), to set the date of future elections." [45]

Therefore it would appear that South Vietnam had no legal obligation to agree to the 1956 elections because:

(a) It was not a party to the Geneva Agreement or Final Declaration and had made a timely objection.

(b) The Final Declaration had no legal effect.

(c) The Final Declaration itself establishes unreconciled preconditions in Paragraph 7 to the holding of elections:

(1) That there be prior ". . . settlement of political problems, effected on the basis of respect for the principles of independence, unity and territorial integrity . . ."

(2) That it be assured that the elections be "free."

In the event they felt aggrieved at the resultant state of affairs, it would appear that North Vietnam's legal recourse would have been to the ICC under the Geneva Agreement; however, it also appears that her position would not have been tenable in the light of the evidence. North Vietnam's choice of remedies was aggression against South Vietnam.

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5. Conclusion

Since 1954, South Vietnam has been defending itself against aggression by North Vietnam. The right of individual and collective self defense is certainly an undeniable facet of sovereignty.[46] The Government of South Vietnam and the United States are collectively defending South Vietnam against North Vietnam, which has continuously breached the Geneva Agreement since its inception. Therefore, the joint action of South Vietnam and the United States is legally justified under the Geneva Agreement.

B. Legality pursuant to the SEATO Treaty

1. The SEATO Treaty

The Southeast Asia Collective Defense Treaty was concluded at Manila, September 8, 1954 by Australia, France, New Zealand, Pakistan, the Republic of the Philippines, the Kingdom of Thailand, the United Kingdom and the United States to enter into force February 19, 1955.[47]

SEATO was concluded by the parties to "strengthen the fabric to peace and freedom and to uphold the principle of democracy, individual liberty and the rule of law, and to promote the economic well-being and development of all peoples in the treaty area . . . to declare publicly and formally their sense of unity, so that any potential aggressor will appreciate that the Parties stand together in the area, and . . . to coordinate their efforts for collective defense. . . ." [48] The treaty declares that it is operative in accordance with the Charter of the United Nations.[49]

An "Understanding of the United States of America" is incorporated in the treaty and provides, in part, that "aggression and armed attack . . . in Article IV, paragraph 1, apply only to communist aggression. . . ." [50]

Article IV, paragraph 1, states the *individual commitment* of parties, i.e., "Each Party recognizes that aggression by means of armed attack in the treaty area 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. Measures taken under this paragraph shall be immediately reported to the Security Council of the United Nations." [51]

The Protocol to the Southeast Asia Collective Defense Treaty also concluded by the parties at Manila, September 8, 1954, states that "The Parties to the Southeast Asia Collective Defense Treaty unanimously designate for the purposes of Article IV of the Treaty the States of Cambodia and Laos and the free territory under the jurisdiction of the State of Vietnam. . . ." [52]

The United States Senate ratified the SEATO Treaty on February 1, 1955, by a vote of 82 to 1.[53]

2. United States assistance to South Vietnam under the Seato Commitment

United States assistance to South Vietnam has, of course, been evolutionary. Specific requests to which the United States have responded, pursuant to the authority of Article IV, Paragraph 1, are contained in the:

(a) Message from President Eisenhower to the President of the Council of Foreign Ministers of Viet-Nam, October 23, 1954; [54] and the

(b) Exchange of Messages between President Kennedy and President Ngo Dinh Diem of the Republic of Viet-Nam, December 7 and December 14, 1961.[55]

There have been numerous other requests over the years for additional aid in order to meet the high order of North Vietnamese aggression. President Johnson summarized this point in his July 28, 1965 speech, "We Will Stand in Vietnam", when he said: ". . . we are in Viet-Nam to fulfill one of the most solemn pledges of the American nation. Three Presidents—President Eisenhower, President Kennedy, and your present President—over 11 years have committed themselves and have promised to help defend this small and valiant nation (South Vietnam)." [56]

3. Conclusion

The United States response to North Vietnamese aggression against South Vietnam is valid under the Southeast Asia Collective Defense Treaty because:

(a) South Vietnam is expressly covered by the Protocol to the Treaty;

(b) South Vietnam requested the assistance of the United States; and,

(c) The United States responded in accordance with Article IV, paragraph 1 of the Treaty.

C. Legality pursuant to the United Nations Charter

1. Legality of Seato Treaty under the Charter

(a) *Regions subject to collective arrangements:* The question of legality of American action in Vietnam would seem to be partially determined by the legality of the Southeast Asia Collective Defense Treaty under the United Nations Charter.

In spite of the North Atlantic Treaty (NATO) precedent, critics of America's Vietnam policy have revived an old argument unsuccesfully made by the Soviet Government against NATO on March 31, 1949; i.e.,

(1) The Soviet Government stated in 1949 that the North Atlantic Treaty "embraces states located in both hemispheres of the globe and has not as its aim settlement of any regional issues." [57]

(2) Current critics of SEATO have stated that: "The concept that the United States—a country separated by oceans and thousands of miles from Southeast Asia—could validly be considered a member of a regional system implanted in Southeast Asia is utterly alien to the regional systems envisaged in the charter." [58]

All Soviet objections to the North Atlantic Treaty, including the one based on the concept of regions, were rejected by the Foreign Ministers of the contracting parties;[58] and the United States Ambassador Austin replied to the Soviet charges, April 14, 1949, stating that the North Atlantic Treaty "is a formal acknowledgment of the repeatedly demonstrated fact that the nation on both sides of the North Atlantic have a national community of interest and of democratic ideals . . ." [59]

In the case of NATO it was obvious, as a result of two World Wars fought by the United States and European allies against a European enemy, that there was a valid community of interest.

As regards Southeast Asia, valid regional issues emanate from the role of the United States in the Korean Police Action, World War II and the Spanish American War, the Open Door Policy, the opening of Japan to Western trade, the presence of allies in Southeast Asia and the location of the State of Hawaii and American territories in the South Pacific.

The argument which was unconvincing as regard Europe and the United States in 1949 is equally unconvincing as regards Southeast Asia and the United States in 1966. Oceans, we have found by experience, do not make regional boundaries. Furthermore, since the SEATO Treaty was concluded in 1954, the effect of the doctrine of estoppel by laches might be considered.[61]

Other arguments made by current SEATO critics and past NATO critics on Charter grounds are the same or similar; [62] it would be most beneficial, therefore, to simply analyze how SEATO squares with the Charter. As a general proposition it might be stated at the outset (without intent to rely upon the proposition) that critics of American Vietnamese policy are incredibly eager to argue that the United Nations Charter—and the United States Constitution—mean *exactly* what the say, ignoring the fact that, for better or worse, they are growing documents that have been subjected to considerable interpretative change. For example, Article 47 of the Charter says "There shall be established a Military Staff Committee to advise and assist the Security Council on all question relating to . . . maintenance of international peace and security. . . ." There is no Military Staff Committee. Article 39 states that "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression . . ." yet we have the precedent of the Uniting for Peace Resolution, whereby the General Assembly assumed this duty on an important occasion.[63] Article 19 states that "A member . . . in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if two or more years' of contributions are unpaid unless delinquency is due to conditions beyond the control of the Member. Conditions beyond the control" of a member appear, as a result of a recent precedent, to mean a member (at least a powerful one) need not pay for things he does not like. The only point to be made here is that attempting strict construction of a constitutional document, however emotionally gratifying, is folly. The "States-Righters" in the United States unsuccessfully attempt to assert this type of Constitutional construction in the courts every day.

Chapter VII of the United Nations Charter, entitled, "Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression," commences with Article 39, which states that "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression . . ." and *ends* with Article 51 which states 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 the measures necessary to maintain international peace and security . . .

In the Vietnam instance we have two qualifying factors:

(a) A constructive attack against a member, the United States, as a member of a collective defense organization; and,

(b) Direct attacks against the United States by North Vietnamese forces in the Gulf of Tonkin. Notably, these attacks were immediately reported to the Security Council as required by Article 51,[64] and no United Nations machinery was rushed into being.

Chapter VIII of the Charter, entitled "Regional Arrangements" commences with Article 52 which states that "Nothing in the present Charter precludes the existence of regional arrangements . . . for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies are consistent with the Purposes and Principles of the United Nations."

Article 1, under Chapter I, Purposes and Principles, indicates first of all that the purpose of the United Nations is "To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace . . ."

Article 53, in reference to *enforcement of its own decisions*, states that "The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority . . ." This Article is often quoted as relevant; however, due to its sole application to enforce-

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ment of Security Council decisions, it is not at all relevant.

Clearly the SEATO Treaty, and action taken thereunder, is valid under the Charter because:

1. It fulfills the requirements of Article 151 in that it is an arrangement for collective self-defense.[65]

2. It fulfills the requirements of Articles 52 and 1 in that it is a regional arrangement for the collective maintenance of international peace and security.

Until such time as the Security Council chooses to act, the regional action is warranted, and may even be mandatory, under the United Nations Charter.

Requirements of notice to the Security Council, pursuant to Article 51 of the Charter and Article IV, paragraph 1, of the SEATO Treaty have been met as follows:

1. The Security Council must be held to have had judicial notice of all actions in this age of instantaneous communications. Neither article states who must give the notice. In fact, pursuant to Charter Article 25 *any* member, or a non-member who is party to a dispute, could instigate action in the Security Council or General Assembly. No nation has seen fit to do anything.

2. United States reports to the Security Council of Article 51 responses to North Vietnamese aggression have been made as follows:

a. The August, 1964 report of the attacks on American ships in the Gulf of Tonkin.[66]

b. A February 7, 1965 letter of complaint to the President of the Security Council regarding attacks on Pleiku and Tuy Hoa bases, and other areas.[67]

c. A February 27, 1964 filing with the President of the Security Council of the special report, *Aggression from the North, the Record of North Viet-Nam's Campaign to Conquer South Viet-Nam.*[68]

d. The formal submission, in January, 1966, by the United States of the Vietnam question, together with a draft resolution calling for discussions seeking peaceful settlement on the basis of the Geneva accords.[69]

There have been numerous other reports, including one by President Johnson on July 29, 1965.[70]

The status of the matter in the Security Council has been summarized by Mr. Meeker as follows:

1. The Council has taken no action to restore peace and security in Southeast Asia; and

2. The Council has not expressed criticism of United States action.[71]

Secretary General U Thant has now stated that the reason the United Nations could not undertake a peace-keeping role in Vietnam is because the Soviet Union, France and probably Great Britain do not want it to do so. He has said that the reason there is no United Nations role in Vietnam now is the same as in 1954, i.e., that when the Southeast Asia issue went to the Geneva Conference most of the principal protagonists, including Communist China, were not members of the United Nations.[72] This statement gives a clear indication that the United Nations now considers peace-keeping in accordance with the United Nations Charter purposes and principles clearly up to some other authority than itself, at least when non-members are involved.

2. Conclusion

The United States, in performance of its SEATO commitment to South Vietnam is acting in accordance with its legal obligations to the United Nations.[73]

D. Legality pursuant to the United States Constitution

1. *Domestic legal basis for American action in Vietnam:* The action of the United States in Vietnam is predicated upon several acts of the Executive and the Congress:

(a) The SEATO Treaty entered into on Executive authority and advised and consented to by the United States Senate.

(b) The many appropriations for military and economic aid to Vietnam jointly approved by Congress and the President since 1954.[74]

(c) The Southeast Asia Resolution which 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 . . .

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 . . .[75]

The Southeast Asia Resolution was passed by a Senate vote of 88 to 2 and a House vote of 416 to 0.[76] Senator William J. Fulbright, in an exchange on the Senate floor with Senator John S. Cooper, August 6, 1964, stated that he felt the resolution would give the President advance authority to take whatever action he deemed necessary respecting South Vietnam and its defense or with respect to the defense of any other country, pursuant to Article IV, of the Southeast Asia Collective Defense Treaty, indicating that the manner of withdrawing this authority would be by concurrent resolution.[77]

The Southeast Asia Resolution is in effect today. Off-hand remarks by critics that Congress may not have known what it was doing when it voted for the Resolution are refuted by: (1) Senator Fulbright's expression of views previously noted; and, (2) the defeat, 94 to 2, of Senator Morse's amendment to the subsequent March 1, 1966 military appropriations bill to provide that the "'joint resolution to promote the maintenance of international peace and security in Southeast Asia' is hereby repealed."[78]

It seems academic in the face of joint Executive and Congressional approval of actions over the years relative to Vietnam to broadly discuss the separation of powers doctrine and related Constitutional issues. As to the Executive power to commit forces abroad without prior Congressional approval, it has been held repeatedly, as an adjunct to his Section 2, Article II power as Commander in Chief of the Army and Navy of the United States, that the President has the authority to deploy the country's military forces abroad and, in fact, into combat. Since the Constitution was adopted, there have been some 125 such instances, starting with the "undeclared war" with France from 1798–1800, and including President Truman's sending of 250,000 troops to Korea during the Police Action and President Eisenhower's sending of 14,000 troops to Lebanon in 1958.[79]

The ancillary question of the alleged necessity of a declaration of war to proceed as the United States is proceeding in Vietnam is equally untenable for the reasons that:

(1) As previously outlined, Executive authority has been held sufficient on all prior occasions, including the important and analagous precedent of Korea.

(2) Congress, by its Southeast Asia Resolution and other supporting acts, has given the equivalent of a declaration of war, i.e., carte blanche to act under the SEATO Treaty which as a Treaty is—the supreme law of the land—pursuant to Article VI of the United States Constitution.

Congress, it is true, has the power to declare war by Article I, Section 8; however, it is a virtue or curse resulting from the fact that the Constitution is an evolutionary document rather liberally construed over the years, that pragmatically this power has devolved in part upon the President via his powers as Commander in Chief and as the organ of communication with foreign powers.[80]

2. Conclusion

It must be concluded, therefore, that the actions taken by the President and the Congress relative to Vietnam are Constitutional.

IV. GUIDELINES FOR INTERNATIONAL COOPERATION IN DETERMINING VIABLE ACCOMMODATIONS AND INSTITUTIONS CAPABLE OF DEALING WITH VIETNAM AND OTHER THREATS TO THE PEACE

During October of 1965, the President of the United States held a White House Conference on International Cooperation "to search and explore and canvass and thoroughly discuss every conceivable approach and avenue of cooperation that could lead to peace." Pursuant to the Conference call, many organizations working in the field of international cooperation requested contributions of material from interested citizens for incorporation into reports to be presented to the President. In common with many others I received, and responded to, such a request from the Committee for Research on the Development of International Institutions of the National Citizens' Commission on International Cooperation.

The intervening months since the White House Conference have not brought the vast and spontaneous outpouring and interchange of intellectual product by governmental and private sources that many had envisioned. It might, therefore, prove beneficial for individuals who presented ideas for White House consideration to make them known publicly with a view to expediting the avowed goals of the Conference. For this purpose, my rudimentary answers to two questions posed by the Committee for Research and Development of International Institutions are presented. There was no specific reference to Vietnam in my remarks; however, their application to this inclusive problem should be obvious. The questions of the Committee and the answers given are:

A. *Is there a need to search, explore, examine, and discuss every avenue that could lead to peace?*

In answering the question it is assumed that honorable peace in the abstract is already a settled goal. It seems superfluous at this juncture in history to discuss the need and desire for peace. Peace is our unfulfilled promise to all who we have sent into battle since 1917 and to all the people of the world.

Since peace is such an elusive goal, the answer to the question as posed must be: Yes. Exhaustive, pragmatic intellectual endeavor is required for at least two reasons:

1. Although peace is a settled goal, it has never been adequately characterized. It can mean at least three things:

(a) Mere absence of war;

(b) Immunity from conditions reasonably calculated to result in war; or,

(c) An order whereby war is rendered impossible through control mechanisms.

2. Insufficient consideration has been given in contemplating and establishing international institutions to the non-universality of ideological, political, social, legal and moral values. Resultantly institutions such as the League of Nations, United Nations, and International Court of Justice do not appear to grow from the moment of their inception, but rather to gradually lose influence.

We must, therefore, precisely define our goal and atempt to ascertain which parts of our goal might be achieved through the instrumentality of broad institutions, and which parts might best be achieved on an ad hoc basis.

The same definitive effort is required to resolve ultimate questions such as:

1. What is the range of permissible intra-

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national and international conduct in attempting to change governmental form?

2. What are the universal minimum standards of government?

3. What is aggression?

4. What are the limits of legitimate national self-interest and spheres of influence?

5. Under what conditions may one or more states acquire property rights in the territory of another state?

6. What are the rights of terrestrial states in space and relative to territorial rights of states over air space?

7. What are the reasonable limitations upon the doctrine of self-determination?

8. What are the distinctions between peaceful and non-peaceful activities?

It would seem that the continuum of sacrifice required of each generation and each individual in preserving our free society would require that we make every effort to mount an intellectual offensive calculated to achieve honorable peace. If we can be instrumental in such an endeavor we will certainly not have lived entirely in vain.

B. *If so, how can the United States, in the public or private sector, best organize a broad research program designed to develop institutions with sufficient resources, techniques and brainpower to work continually toward the fulfillment of these objectives?*

In dealing with a problem so complex as the achievement of honorable peace it is necessary to think in terms of total mobilization of resources. Therefore, a vast governmentally-based project like the Manhattan District of World War II which developed the atom bomb is proposed. However, to give it a degree of operational independence, the project might be set up in the quasi-governmental manner of the Rand Corporation.

Capability criteria would have to be established for a broad-gauge, interprofessional project of board of directors which would report directly to the President of the United States. The project would be funded by the United States but authorized to solicit and accept public contributions on a tax-free basis.

Thereafter, there would be three primary project goals:

1. *Information Retrieval.* A great deal of random research effort has been, and is being, expended in the United States and elsewhere in the fields of public international law and international cooperation.[21]

The product of this research, which might be deemed the basic research product, must be collected, analyzed, correlated and reduced to a form whereby it can be readily found and utilized.[22]

A research staff would have to attack the vast information retrieval problem on a computer program basis.

2. *Brainpower Mobilization.* The problems to be solved cut across many disciplines. Objective criteria for inclusion of individuals and organizations in a brain pool would have to be set; and these individuals would have to be identified and classified. Various governmental and professional organizations could be enlisted in this effort.

The brain pool would also be computerized. Every qualified individual would be on file and could be instantaneously searched out by a computer on the basis of his qualifications.

3. *Problem Characterization.* A problem-identification questionnaire would be prepared under project auspices and sent to all members of the brain pool. Answers would be analyzed and problems characterized using computer techniques.

We would now have all prerequisites for launching the applied research systems effort, i.e., organization, funds, basic research product, brain pool, and the requisite set of problems. The next step would be to utilize the computer technique to: (1) retrieve all basic research materials relevant to each problem; and (2) identify all brain pool members qualified to contribute to the solution of the problems.

A project staff could be built from many of the brain pool members. Others would be utilized on a project basis. Wherever possible, the people required would be brought together for a full-time effort. Others could work on research projects as they now do, i.e., individually or on a group basis. Procedures would have to be set up to enable individuals to meet and report inter se as required. At any rate, all existing valid research techniques would be adopted and sophisticated.

Promulgation of proposed action plans would, of course, be ancillary to many research projects. Further effort along these lines would be effectuated pursuant to secondary research projects. The over-all project board could also be given a policy role at this level.

The project applied research product would be reported to the President of the United States for action and also be made a matter of public record.

In the event of success in these various research endeavors, it is hoped that viable international peacekeeping machinery could be promulgated.

A pilot study of the proposed problem solving approach has been conducted by the Special Committee on Space Law of the State Bar of Michigan. The author and G. Vernon Leopold, Esq., of that committee, relying upon backgrounds in international law and the sciences, elicited two ultimate questions relative to space jurisdictional problems: (1) Are there readily identifiable physical characteristics of space flight, so-called, that render it capable of differentiation from non-space flight for jurisdictional purposes? and, (2) If so, by what means and by what authority might space flight be controlled?

A survey was made of all existing literature upon the subject; and the inter-disciplinary brainpower requirement was determined. Contact was made with: the American Rocket Society (now the American Institute of Aeronautics and Astronautics); research and development corporations; and, universities.

The necessary brainpower was thereby identified and an interdisciplinary committee of lawyers, scientists and engineers was set up on a voluntary basis. The problems were proposed and refined and research project assignments were delineated. The technique, which we came to call the Technolegal Approach, required close, inter-professional effort at the working level. Ultimately it resulted in several fruitful interim studies.[23]

It is in essence, the Technolegal Approach that is recommended herein for the broad intellectual assault upon the barriers to honorable peace.

V. CONCLUSION

Admittedly it is difficult at this juncture, after the War to End Wars, the War to Make the World Safe for Democracy, the formation of the United Nations and the prosecution of the Korean police action in the name of the United Nations to find ourselves not much closer to the goal of eternal peace. We are faced, it seems, with the somber possibility that our sacrifice is a continuum; and that we may never be finished paying for our liberty, or for the liberty we want others to have. If this is so, I hope we are as firm in our determination to prevail as all who went before. Let us keep in mind, however, that our greatest challenge is to seek more and more bases for accommodations and viable institutions aimed at greater international cooperation.

FOOTNOTES

[1] George F. Kennan, *American Diplomacy, 1900–1950*, U. of Chicago Press, Chicago, 1951, 53–54.

[2] *ibid*, 103.

[3] McGeorge Bundy, "The Uses of Responsibility," Saturday Review, July 3, 1965, reprinted at Detroit News, July 11, 1965, pp. 1–2F.

[4] *ibid*, 1 F.

[5] *ibid*, 2 F.

[6] Archibald MacLeish, "What is Realism Doing to American History?" Saturday Review, July 3, 1965, reprinted at Detroit News, July 11, 1965, pp. 1–2 F, 1 F.

[7] CBS Television news special, 1965.

[8] John W. Wheeler-Bennet, *Munich: Prologue to Tragedy*, Duell, Sloan & Pearce, N.Y., 1948, 3.

[9] *ibid*, 437.

[10] cf. Jean Paul Sartre, ". . . As long as they (my fellow men) are alive I'll haunt them, unnamed, inperceptible, present in every one of them just as the billions of dead are unknown to me and whom I preserve from annihilation are present in me."

[11] *Background Information Relating to Southeast Asia and Vietnam*, Committee on Foreign Relations, United States Senate, June 16, 1965, U.S. Government Printing Office, Washington, 1965 (cited hereinafter as *Background*), pp. 28–42.

[12] *Background*, 37–40.

[13] Article 36, *ibid*, 38.

[14] *ibid*, 30.

[15] *ibid*, 35.

[16] *ibid*, 36.

[17] *ibid*, 37.

[18] *ibid*, 58–60. See also, Brian Crozier, *Southeast Asia in Turmoil*, Penguin Books, Baltimore, 1965 (cited hereinafter as *Turmoil*) who states: "But the so-called 'Geneva Agreements', as they are loosely called, included a number of unilateral declarations, and a final 'declaration,' which were supposed to represent the concensus of the conference, but which were unsigned, and therefore not, strictly speaking, binding on the participants."

[19] *Background*, 59.

[20] *ibid*, 60.

[21] *ibid*, 81.

[22] Leonard C. Meeker, "The Legality of United States Participation in the Defense of Viet-Nam," (cited hereinsfter as Meeker) LIV Dept. of State Bull, No. 1396, March 28, 1966, 474, 477.

[23] 1 Hackworth, *Digest of International Law*, 47, cited at William W. Bishop, Jr., *International Cases and Materials*, Prentice-Hall, Inc., N.Y., 1953, 170.

[24] Meeker, 477. Note also: "For about 200 years, until the close of the eighteenth century, Vietnam was divided into mutually hostile halves roughly coinciding with the present division," *Turmoil*, 135.

[25] *Turmoil*, 93–94.

[26] United Nations Charter, Chapter II. Membership.

[27] *Aggression from the North—The Record of North Viet-Nam's Campaign to Conquer South Viet-Nam*, February, 1965, Dept. of State 7839, Far Eastern Series 130 (cited hereinafter as *Aggression*), appendix A, 30; also quoted at *Turmoil*, 140. The full text published by Bureau of Far Eastern Affairs of the Dept. of State, July 2, 1962.

[28] *A Threat to the Peace—North Vietnam's Effort to Conquer South Viet-Nam*, Part I and Part II, The Appendices. Department of State, Public No. 7308 Far Eastern Series 110, released December, 1961.

[29] "Even as they were negotiating the Geneva Accords . . . Trained and well-disciplined party members were picked to remain in the South to promote Hanoi's cause. Arms and ammunition were cached in hundreds of carefully selected spots throughout Vietnam. During the months after the Geneva Agreement went into affect . . . some of the best trained guerilla units moved to remote and inaccessible regions in the South . . . Individual agents and many members of Communist cells were told to stay in place, to lead normal

lives, and to wait until they received orders to carry out party assignments." *ibid*, 3.

[29] *Turmoil*, 141.

[31] *Aggression*, see footnote 15 *supra*.

[32] *ibid*, 1, summarizing evidence at pp. 3–14; "Most recently, Hanoi has begun to infiltrate elements of the North Vietnamese army in increasingly large numbers. Today, there is evidence that nine regimenta of regular North Vietnamese forces are fighting in organized units in the South," Meeker 475.

[33] *ibid*, 3–4.

[34] *ibid*, 3, summarizing evidence at pp. 14–20.

[35] *ibid*, 1–2, summarizing evidence at pp. 20–25.

[36] *ibid*, 2, summarizing evidence at pp. 22–25.

[37] Agreement on the Cessation of Hostilities in Viet-Nam, Chapter III—Ban on Introduction of Fresh Troops, Military Personnel, Arms and Munitions, Military Bases, *Background*, 33–35. See also Meeker's discussion of this point, 483.

[38] *ibid*, Geneva Agreement, Chapter III.

[39] Meeker, 483.

[40] J. L. Brierly, *The Law of Nations*, 4th ed., Oxford, 1949, 236–237.

[41] Meeker 483, relying on the numerous citations appearing at Fourth Report on the Law of Treaties by Sir Gerald Fitzmaurice, articles 18, 20 (U.N. doc. A/CN.4/120 (1959) II Yearbook of the International Law Commission 37 (U.N. doc. A/CN.4/SER.A/1959/Add.1) and in the report by Sir Humphrey Waldock, article 20 (U.N. doc. A/CN.4/156 and Add. 1–3 (1963)).

[42] The most limited definition of aggression would appear to be that of traditional, direct aggression such as found in the Act of Chapultepec as adopted by the Inter-American Conference at Mexico City, March, 1945, i.e., ". . . invasion by armed forces of one state into the territory of another, trespassing boundaries established by treaty, and demarcated in accordance therewith shall constitute an act of aggression." Dept. of State Bull., March 4, 1945, quoted at Felix Morley, *The Foreign Policy of the United States*, Knopf, N.Y., 1951, 64. North Vietnam's actions are aggressive under this most conservative definition.

[43] "Vietnam at the Crossroads at Asia." Embassy of Vietnam, D.C., 1960, 17, quoted at *Vietnam; Some Neglected Aspects of the Historical Record*, Congress of the United States, Republican Conference, House of Representatives, August 1965 (cited hereinafter as *GOP*), 8.

[44] *GOP*, 9, quoting Francis J. Corley, "Vietnam Since Geneva," "Thought," Vol. 33, No. 131 (Winter 1958–59), 564.

[45] *GOP*, 9, quoting "Vietnam and the Geneva Agreements," London, May, 1956, 9.

[46] The inherent right of self-defense was memoralized in Article 51 of the United Nations Charter. "Article 51 refers . . . only to states which are members of the United Nations. However, it is clear that the right of individual and collective self-defense . . . was not created by the Charter . . . The right existed in international law before the Charter, available to all states . . . Naturally this right of self-defense remains available to non-members." William W. Bishop, Jr., at *Bishop*, 589, quoting a Department of State memorandum entitled, "Participation in the North Atlantic Treaty of States not members of the United Nations," North Atlantic Treaty, *Hearings before Senate Committee on Foreign Relations*, PA, I, p. 102, 81st Cong., 1st sess. (1949). See also, Meeker, 476–479.

[47] Text of SEATO Treaty, *Background* 62–65.

[48] *ibid*, 62.

[49] *ibid*, 62, 63.

[50] *ibid*, 65.

[51] *ibid*, 63. "As Secretary Dulles pointed out when transmitting the treaty to the President, the commitments in article IV, paragraph I, 'leave to the judgment of each country the type of action to be taken in the event an armed attack occurs.'" Meeker 481. On March 6, the Thailand Foreign Minister, Thanat Khoman, and Secretary of State Dean Rusk issued a joint statement at Washington, D.C., restating that "this (SEATO) treaty obligation is individual as well as collective." On May 6, 1962, when General Phoumis forces were routed in Laos, the United States unilaterally dispatched Marine and Army forces to Thailand. Within a few days, British Australian, New Zealand and Phillipine units joined them. *Crozier*, 107.

[52] *ibid*, 66.

[53] 101 Cong. Rec. 1060 (1955), cited at Eberhard P. Deutsch, "The legality of the United States Position in Vietnam," 52. Amer. Bar Assn. J. No. 5, May, 1966, 436, 437 (cited hereinafter as *Deutsch*); "The (Senate) committee (on Foreign Relations) is not impervious to the risks which this treaty entails. It fully appreciates that 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." Quoted at Meeker, 481.

[54] *Background*, 67–68.

[55] *Background*, 84–86. Specific reference is made in President Kennedy's letter to the atatement in the Unilateral Declaration at Geneva that the United States "would view any renewal of the aggression in violation of the (Geneva) agreements with grave concern and as seriously threatening international peace and security." p. 84.

[56] Department of State Public. 7937, Far Eastern Series 137, released August, 1965.

[57] Bishop, 587, reprinting Soviet memorandum to seven sponsoring governments of NATO from U.S. Senate, For. Rel. Comm., 81st Cong., 1st session, *Documents Relating to the North Atlantic Treaty*, p. 112 (1949).

[58] "American Policy Vis-A-Vis Vietnam, in light of Our Constitution, the United Nations Charter, the 1954 Geneva Accords, and the Southeast Asia Collective Defense Treaty," Lawyers Committee on American Policy Toward Vietnam, p. 3 (cited hereinafter as *Committee*). As an aside, note that "the Committee" relies on what it considers to be favorable precedents at pp. 2–3; however, on p. 7 where precedents appear unruly, they are somehow reminded of a passage in *Gulliver's Travels* that states precedents merely justify "iniquitous (sic) opinions" and should apparently not be considered by fairminded men.

[59] Bishop, 588.

[60] *ibid*, 589.

[61] Doctrines of estoppel are not foreign to International Law; see e.g., *The Chorzow Factory Case*, Perm. Ct. of Intl. Just. 1927, P.C.I.J., Series A, No. 9, P. 31; and, The "Tinoco Claims Arbitrations": *Great Britain vs. Costa Rica*, Chief J. Taft, Sole Arbitrator, Oct. 18, 1923, Intl. Arbitral Awards 369.

[62] See e.g.; (1) arguments in 1949 Soviet memorandum protesting the North Atlantic Treaty as violative of Charter Articles 51, 52 and 3; (2) rejection of the Soviet position by the 12 foreign ministers signing the treaty on the grounds that the treaty is clearly defensive and directed only against armed aggression; and, (3) the reply of Ambassador Austin to the charges in the General Assembly wherein he states that the treaty is designed to "coordinate the exercise of the right of self-defense specifically recognized in Article 51" and that "Articles 52 and 53 deal with enforcement action and not action for self-defense . . ." Bishop, 587–589, see footnotes 59, 60 and 61, for original citations. The Soviet arguments were obviously rejected; NATO has been in force from 1949 to date.

[63] U.N. Gen. Assembly Off. Rec. 5th Sess., Supplement No. 20 (A/1775) (1950).

[64] Security Council Hears U.S. Charges of North Viet-Namese Attacks: Statement by Adlai E. Stevenson, U.S. Representative in the Security Council, August 5, 1964, 124–127, from Dept. of State *Bulletin*, August 24, 1964, 272–274, detailing August 2, 1964 attack on *Maddox* and August 4, 1964 attack on *Maddox* and *C. Turner Joy*, all in international waters.

[65] See footnotes 46 re obvious inherent right of self-defense of non-member of U.N.

[66] See footnote 64. The Council debated but adopted no resolutions, Meeker, 479.

[67] *Background*, 140, Dept. of State Bulletin., February 22, 1965, 240–241. Mr. Stevenson stated therein: "We deeply regret that the Hanoi regime, in its statement of August 8, 1964 . . . explicitly denied the right of the Security Council to examine this problem." p. 150.

[68] *Background*, 190; Dept. of State Bulletin, March 22, 1965, 419.

[69] Meeker, 479; Dept. of State Bulletin, February 14, 1966, 231. Ambassador Goldberg stated: "We are firmly convinced 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" Deutsch, 439–440, United States Mission to the U.N. Press Releases 4798 and 4799, January 31, 1966.

[70] Deutsch, 439–440.

[71] Meeker, 479.

[72] Detroit News, May 12, 1966, P. 1–A, New York, UPI dispatch.

[73] See the Resolution unanimously adopted 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 Section of International and Comparative Law to the effect "that the position of the United States in Vietnam is legal under international law, and is in accordance with (Articles 51 and 52 of) the Charter of the United Nations and the Southeast Asia Treaty." 112 Cong. Rec. 4852–4853 (1966); Deutsch, 442.

[74] e.g., May, 1965 Congress approved an appropriation of $700 million to meet Vietnam military requirements. Meeker, 487; Public Law 89–18—79 Stat. 109; March 1, 1966, Congress approved a $4.8 billion supplemental military authorization by votes of 392–4 and 93–2; an amendment that would have limited Presidential authority to commit forces to Vietnam was rejected by the Senate 94–2. *ibid*, 487–488.

[75] *Background*, *128*; Text of Public Law 88–408 (H.J. Res. 1145), 78 Stat. 384, approved August 10, 1964.

[76] Meeker, 485.

[77] Meeker, 487; 110 Cong. Rec. 18409 (Aug. 6, 1964) Senator Morse agreed, with regrets that this would be the case. Meeker, 487; 110 Cong. Rec. 18426–7 (Aug. 6, 1964).

[78] Deutsch, 442; 112 Cong. Rec. 4192 (1966). Motion to table Morse amendment carried 92–5; motion to approve appropriation bill carried, 93–2, *ibid*., 4226, and 4233 respectively. (It was announced that 5 absent Senators would have voted "yea." Ibid, 4232).

[79] Meeker, 484–85, (and 484–488 on general point of presidential power to commit United States Forces); Deutsch, 440, quoting *State Department Position Paper* prepared for Senate Committee on Foreign Relations, Nov. 19, 1965, (and 440–442 on general point of constitutionality).

[80] Meeker, 488; Deutsch, 440, differentiating the President's broad power to "make" and "conduct" war; Edward S. Corwin, *The President: Office and Powers 1787–1957*, N.Y.U. Press, N.Y., 1957, 225; "It is true that the Congress, by the Constitution alone has the power to declare war. But the President, by virtue of his duty to take care that the laws be faithfully executed, and by reason of the fact that he is Commander in Chief of the Army and Navy, may resist force by force, where war in fact exists. He need not wait 'for Congress to baptize it with a name.'" *The Prize Cases*, 2 Black, 635, 669 (1863).

[81] These well-known sources, include: (a)

university-centered research projects; (b) national, state and local bar association committees; (c) individual experts; (d) projects directed by private, public and quasi-public institutions.

[18] Indications of how this might ultimately be accomplished include: (1) The Massachusetts Institute of Technology INTREX (information transfer experiments) study of methods of making all knowledge instantly available, e.g., by telephone communication between computer and user, film projection and xerography; (2) Professor Naughton's (of Pittsburgh) conceptual refinements of the INTREX scheme, i.e., a computer that would compare a reader's punchcard profile of his vocation and interests with the output of published materials and then alert him to whatever is relevant to his field. As a further step, the reader-profile system could be connected to an electrostatic copier that would reproduce selected materials at the reader's desk; and, (3) NASA's existent reader profile system (Selective Dissemination of Information); whereby an IBM 7090 computer matches professional literature profiles of scientists with key words from technical abstracts and sends out punch cards notifying the reader of what is available. Discussed generally at *Newsweek*, January 24, 1966, pp. 85–88.

[19] Reports on various phases of the pilot study appear at:

(a) Leopold & Scafuri, "Law for the Space Age," 38 Michigan State Bar Journal 12.

(b) Space Law Forum, "Technolegal Aspects of Space Exploration," sponsored by Michigan State Bar, American Rocket Society and Institute on Aeronautical Sciences, March 12, 1959. Rackham Building, Detroit, Michigan (proceedings unpublished).

(c) Leopold & Scafuri, "Orbital and Super-Orbital Space Flight Trajectories-Jurisdictional Touchstones for a United Nations Space Authority," 36 University of Detroit Law Journal, 515. Reprinted at *Legal Problems of Space Exploration; A Symposium* prepared for the use of the Committee on Aeronautical and Space Sciences, United States Senate, 87th Cong., 1st Sess., Document No. 26, p. 520 et seq.

(d) Leopold & Safuri, "Orbital Space Flight Under International Law," 19 Federal Bar Journal 227.

(e) Leopold, Scafuri, Lawrence, Hoeppner, "Jurisdictional Characterization of Cosmic Flight by Orbital Parameters: Technolegal Evaluation and Recommendations" ARS Paper No. 2202, Presented at American Rocket Society "Space Flight Report to the Nation", Coliseum, New York City, October 10, 1961.

(f) Leopold, "Cosmic Surveillance by Space Flight Momentum," 6 Wayne Law Review 311.

(g) Scafuri, "Space Law: A plea for the Technolegal Approach", 41 Michigan State Bar Journal 42.

(h) See also: Annual Reports of the Special Committee on Space Law, appearing in September issues of Michigan State Bar Journal, 1959 to date.