THE LAWFULNESS OF MILITARY ASSISTANCE TO THE REPUBLIC OF VIET-NAM*

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The major thrust of contemporary international law is to restrict coercion in international relations as a modality of major change. The use of force as an instrument of change has always been wasteful, disruptive, and tragic. In the nuclear era the renunciation of force as a method of settlement of disputes has become an imperative. These necessities have resulted in a widely accepted distinction between lawful and unlawful uses of force in international relations which is embodied in the United Nations Charter. Force pursuant to the right of individual or collective defense or expressly authorized by the centralized peacekeeping machinery of the United Nations is lawful. Essentially all other major uses of force in international relations are unlawful.[1] These fundamental proscriptions are designed to protect self-determination of the peoples of the world and to achieve at least minimum world public order. As such, they reflect the basic expectations of the international community. Since they are aimed at prohibiting the unilateral use of force as a modality of major change, they have consistently authorized the use of force in individual or collective defense at least "until the Security Council has taken the measures necessary to maintain international peace and security." This defensive right is, at least at the present level of effectiveness of international peacekeeping machinery, necessary to the prevention of unilateral use of force as an instrument of change. The fundamental distinction between unlawful unilateral force to achieve major change and lawful force in individual or collective defense against such coercion is the structural steel for assessment of the lawfulness of the present military assistance to the Republic of Viet-Nam.

* This article draws heavily on a more comprehensive paper entitled "The Lawfulness of United States Assistance to the Republic of Viet Nam," written by the author and James L. Underwood in collaboration with Myres S. McDougal, and distributed to Congress by the American Bar Association. This joint study is summarized by Senator Javits at 112 Cong. Rec. 13232-33 (daily ed., June 22, 1966), and is reprinted in full at 112 Cong. Rec. 14943 (daily ed., July 14, 1966), and —— Philippine Int. Law J. —— (1967). The joint study also includes an analysis of the lawfulness of United States assistance under internal constitutional processes.

For different perspectives on the problem treated in this article, see Standard, "United States Intervention in Vietnam Is Not Legal," 52 A.B.A.J. 627 (1966); Wright, "Legal Aspects of the Viet-Nam Situation," 60 A.J.I.L. 750 (1966). See generally Finman and Macaulay, "Freedom to Dissent: The Vietnam Protests and the Words of Public Officials," 1966 Wis. Law Rev. 632.

[1] See generally McDougal and Feliciano, Law and Minimum World Public Order 121-260 (1961).

Assessed against this fundamental structure, defensive assistance to the Republic of Viet-Nam is lawful under the most widely accepted principles of customary international law and the United Nations Charter. The unilateral use of coercion by the Democratic Republic of Viet-Nam (the D.R.V.)—North Viet-Nam, against the territorial and political integrity of the Republic of Viet-Nam (the R.V.N.) is unlawful. Analysis placing principal emphasis on minimum world public order and genuine self-determination as basic community policies indicates that, for purposes of assessing the lawfulness of the use of force, the Republic of Viet-Nam and the Democratic Republic of Viet-Nam are separate international entities, that there is an unlawful armed attack on the R.V.N. by the D.R.V., that third states may lawfully assist in the collective defense of the R.V.N., and that the response of the R.V.N., the United States and other assisting nations is reasonably necessary to the defense of the R.V.N.

I. FOR PURPOSES OF ASSESSING THE LAWFULNESS OF THE USE OF FORCE THE REPUBLIC OF VIET-NAM AND THE DEMOCRATIC REPUBLIC OF VIET-NAM ARE SEPARATE INTERNATIONAL ENTITIES

It is often asserted that the Viet-Nam conflict is merely a civil war between North and South Viet-Nam, with the implication that North Viet-Nam may lawfully use the military instrument against South Viet-Nam and that defensive assistance to the R.V.N. is intervention in a civil war. Such arguments are not new. Similar assertions were made by the U.S.S.R. during the Korean conflict.[2] Although, as in Korea, there are a number of similarities between the Viet-Nam conflict and a civil war, for the purpose of assessing the lawfulness of the use of force by the D.R.V. against the R.V.N. and the lawfulness of responding defensive military assistance to the R.V.N. there can be no question but that the R.V.N. is a separate international entity. McDougal and Feliciano point out in their treatise *Law and Minimum World Public Order:*

> The decisions reached by the United Nations in the Palestine and Korean cases suggest that conflicts involving a newly organized territorial body politic, or conflicts between two distinct territorial units which the community expects to be relatively permanent, are, for purposes of policy about coercion, to be treated as conflicts between established states. Thus, the applicability of basic community policy about minimum public order in the world arena and competence to defend against unlawful violence are not dependent upon formal recognition of the technical statehood of the claimant-group by the opposing participant. . . .[3]
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> Our emphasis here is merely that rational community policy must be directed to the coercive interactions of territorially organized communities of consequential size, whatever the "lawfulness" of their origin and whatever the prior niceties in the presence or absence of the ceremony of recognition.[4]

[2] Kelsen, The Law of the United Nations 930, note 6 (1964); McDougal and Feliciano, *op. cit.* note 1 above, at 221.

[3] McDougal and Feliciano, *op. cit.* note 1 above, at 221.

[4] *Ibid.*, note 222.

Since disputes about the legality of the origin of territorial entities or exercises of authority over territory are common, it would greatly undermine the basic prohibition on unilateral use of force in international relations to allow unilateral resort to force to change a continuing *de facto* exercise of authority. The R.V.N. and the D.R.V. have at least been separate *de facto* international entities for the more than twelve-year period since the Geneva Accords of 1954. Professor Friedmann points out this reality when he says: "It may be conceded that North and South Viet-Nam are today *de facto* separate states, even though the Geneva Agreement of 1954 spoke of 'two zones.' "[5] In fact, the evidence indicates that the R.V.N. is a state under international law and that today there are substantial expectations that the D.R.V. and the R.V.N. are separate and independent states under international law.[6] On three separate occasions, once prior to the Accords, and twice since then, the General Assembly of the United Nations has found that the R.V.N. or its predecessor, the state of Viet-Nam, is a state entitled to admission to the United Nations. On each occasion the "veto" of the U.S.S.R. has defeated the Security Council resolution calling for admission.

The status of the R.V.N. as a state under international law is confirmed by the recognition presently accorded it by about 60 nations. It is also presently a member of at least 30 international organizations including 12 specialized agencies of the United Nations, has a permanent observer at the United Nations, and has participated in a large number of international conferences. The R.V.N. is a member of as many specialized agencies of the United Nations as is the Republic of Korea and is a member of more such agencies than are Albania, Cambodia, Cuba, Czechoslovakia, and the U.S.S.R., among others. With respect to the D.R.V., its claims to statehood are strengthened by the recognition presently accorded it by about 24 nations, and its participation in a number of international conferences. The substantial expectations that the D.R.V. and the R.V.N. are separate and independent states under international law are also evidenced by the package-deal proposal of the U.S.S.R. in 1957 to admit the D.R.V., the R.V.N. and both Koreas to the United Nations as four separate states.[7]

[5] Friedmann, "United States Policy and the Crisis of International Law," 59 A.J.I.L. 857, at 866 (1965).

[6] For more detailed treatment of the evidence, see McDougal, Moore and Underwood, "The Lawfulness of United States Assistance to the Republic of Viet Nam," 112 Cong. Rec. 14943, 14944-48 (daily ed., July 14, 1966).

[7] During the debates on this and the other draft resolutions calling for the admission of the R.V.N., the three Soviet delegates said between them:

"[B]oth in Korea and in Viet-Nam two separate States existed, which differed from one another in political and economic structure. . . .

"The fact was that there were two States in Korea and two States in Viet-Nam. . . .

"The realistic approach was to admit that there were two States with conflicting political systems in both Korea and Viet-Nam. In the circumstances, the only possible solution was the simultaneous admission of the four countries constituting Korea and Viet-Nam. . . .

"[T]wo completely separate and independent States had been established in each

Today, more than twelve years after the Geneva Accords of 1954, it denies reality to assert that there are not at least two continuing *de facto* international entities in Viet-Nam.[8] The D.R.V. and the R.V.N. unmistakably function as separate entities in the international arena. They have separate governments, separate international representation, separate constitutions, separate territories, separate populations, separate armies, and have developed for a substantial period of time along separate ideological lines. Whether or not the D.R.V. and the R.V.N. are full-fledged *de jure* states under international law, and there are substantial expectations that they are, they are at least separate international entities with respect to the lawfulness of the use of force. In these circumstances the D.R.V. may not unilaterally resort to force against the R.V.N. consistent with the vital expectations of the peoples of the world about the preservation of minimum world public order and the minimization of destructive modes of change.

A favorite argument of those who characterize the Viet-Nam conflict as a civil war is to invoke the language of the Accords to the effect that "the military demarcation line is provisional and should not in any way be interpreted as constituting a political or territorial boundary."[9] Under the Geneva Accords a principal purpose of the agreements was a military cease-fire making the use of force by one zone against the other unlawful. If nothing else, the two zones were at least intended as separate international entities with respect to the lawfulness of the use of force. To get

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of those countries, [Korea and Viet Nam] with different political, social and economic systems." *Ibid.* at 14947.

[8] Professor Lauterpacht listed both Viet-Minh and Viet-Nam as separate states under international law apparently even prior to the Accords. Under the heading "States At Present International Persons," Professor Lauterpacht listed among others "Viet-minh, Vietnam, North Korea and South Korea." 1 Oppenheim, International Law 255–258 (8th ed., Lauterpacht, 1955). See also Murti, Vietnam Divided 171–172, 172, note 7 (1964).

As Dr. B. S. N. Murti, an Indian scholar who was actively associated with the International Commission For Supervision and Control in Viet-Nam, has written in 1964: "Two independent sovereign States, claiming sovereignty over the whole country, came into existence in Viet Nam and the division of the country seems permanent. . . ." *Ibid.* at v. "Both the States are completely independent with full-fledged Governments of their own owing no allegiance to the other." *Ibid.* at 176.

[9] William Standard, in a recent article in the American Bar Association Journal invokes this language to indicate that "It cannot be asserted that South Vietnam is a separate 'country' so far as North Vietnam is concerned." Standard, "United States Intervention in Vietnam Is Not Legal," 52 A.B.A.J. 627, 630 (1966). The group known as the "Lawyers Committee on American Policy Toward Vietnam," of which Standard is Chairman, make much the same point. "Memorandum of Law of the Lawyers Committee on American Policy Toward Vietnam," 112 Cong. Rec. 2552, 2555–56 (daily ed., Feb. 9, 1966).

Aside from the very considerable uncertainties as to whom the Geneva Accords bound and the reasonable expectations of the participants with respect to the Geneva settlement, Standard and the Lawyers Committee miss the point. The issue is not whether North and South Viet-Nam are separate countries, although there are substantial expectations today that they are, despite this language, but whether they are separate international entities for purposes of assessing the lawfulness of the use of force.

comfort from the Accords for the proposition that force by the D.R.V. against the R.V.N. is not unlawful is to stand the agreements on their head. The Geneva Accords of 1954 affirm for Viet-Nam the norm of customary international law that force by one international entity against another is unlawful as a method of settlement of political disputes. Clearly, the use of force as an instrument of political settlement across an international cease-fire line is not civil strife for purposes of assessing its lawfulness under international law.[10]

It is also not tenable to suggest that the use of force by the D.R.V. against the R.V.N. is civil strife on the theory that the Accords ceased to have legal validity when elections were not held in 1956. Regardless of the failure to hold elections in 1956, and whether or not the Accords have continuing validity, in reality there are two, at least *de facto,* separate international entities in Viet-Nam. If the major framework of contemporary international law as reflected in the United Nations Charter is to have efficacy, one such entity cannot resort to unilateral use of force to achieve settlement of a political dispute against another, regardless of asserted unlawfulness of its origin or continuation. The argument made by some, that the Accords ceased to function when elections were not held and that the D.R.V. could then lawfully employ force against the R.V.N., sanctions unilateral determination to resort to force against another at least *de facto* international entity to remedy an asserted political grievance or breach of treaty. As Lord McNair points out, a breach of treaty as such can never amount to an "armed attack" justifying the resort to force.[11] The argument also seems to assume that, if the Accords ceased to have legal validity, the situation would revert to the pre-Accords state. In view of the separate reality of two functioning international entities after—and to some extent even prior to—the Accords, it is at least equally credible to assume that cessation of legal validity of the Accords would sanction the *status quo* and provide yet another indication of two separate *de jure* states in Viet-Nam.

In any event, the evidence strongly indicates that the military demarcation line in Viet-Nam *is* of continuing validity despite the failure to hold elections in Viet-Nam in 1956. There is no provision in the

[10] As Professor Quincy Wright pointed out in the 1959 Proceedings of the American Society of International Law:

"Another complication may result from the protracted functioning of a cease-fire or armistice line within the territory of a state. While hostilities across such a line by the government in control of one side, claiming title to rule the entire state, seems on its face to be civil strife, if such lines have been long continued and widely recognized, as have those in Germany, Palestine, Kashmir, Korea, Viet Nam and the Straits of Formosa, they assume the character of international boundaries. Hostilities across them immediately constitute breaches of *international* peace, and justify "collective defense" measures by allies or friends of the attacked government, or "collective security" measures by the United Nations. If this were not so, armistice and cease-fire lines would have no meaning at all. . . ." Wright, "International Law and Civil Strife," 1959 Proceedings, American Society of International Law 145, 151.

[11] McNair, Law of Treaties 577, note 1 (1961). See also Bowett, Self-Defence in International Law 189 (1958).

Accords which indicates that the military cease-fire line would cease to have validity should the elections not be held. In fact, the continued functioning of the International Control Commission (I.C.C.) after 1956 and the official messages of the Co-Chairmen of the Conference suggest that the failure to hold elections did not affect the continuing legal validity of the international cease-fire line in Viet Nam.[12] Moreover, there is evidence that both the D.R.V. and the R.V.N. regard the Accords as having continuing legal validity, as their continuing complaints to the International Control Commission indicate.[13] As the "Four Point" proposals[14] of the D.R.V. aptly demonstrate, assertions that the Accords ceased to have legal validity when the 1956 elections were not held would seem to be more rationalization than accurate reflection of the D.R.V. attitude toward the Accords or of contemporary community expectations.[15]

To allow the D.R.V. to make the unilateral determination that the Accords are no longer in effect and that it may use force to aggressively achieve its objectives in a non-defense situation is a negation of the principal structure of contemporary international law as embodied in the United Nations Charter. The fundamental proscription prohibiting unilateral force as a modality of major change prohibits such use despite any number of political grievances, whether they be legitimate or illegitimate. Any justification of unilateral action because of asserted political grievances would substantially destroy the present structure of world public

[12] See McDougal, Moore and Underwood, note 6 above, at 14971, note 71. In an official message from the British and Soviet Co-Chairmen, which adverted to the possibility of non-implementation of the election provisions, the Co-Chairmen said: "Pending the holding of free general elections for the reunification of Viet-Nam, the two Co-Chairmen attach great importance to the maintenance of the cease-fire under the continued supervision of the International Commission for Viet-Nam." Documents relating to British Involvement in the Indo-China Conflict (Misc. No. 25 [1965], Command Paper 2834) 96–99, at 97.

[13] See McDougal, Moore and Underwood, note 6 above, at 14971, note 70. "The commission receives an average of one note daily from North Vietnam protesting alleged violations of the Geneva agreements. . . ." New York Times, Aug. 6, 1966, p. 3, col. 6 (city ed.).

[14] The "Four Points" state the public position of the D.R.V. with respect to negotiation of the Viet-Nam conflict. They rest heavily on unilateral U. S. compliance with the Geneva Accords of 1954 as interpreted by Hanoi. See the April 8, 1965, speech by Mr. Pham Van Dong excerpted in Recent Exchanges Concerning Attempts to Promote a Negotiated Settlement of the Conflict in Viet-Nam (Viet-Nam No. 3 [1965], Command Paper 2756), at 51.

[15] For the stress that the D.R.V. places on the Accords, see McDougal, Moore and Underwood, note 6 above, at 14978. Hanoi also invokes the Geneva Accords as the principal reason why United Nations "intervention" is inappropriate. *Ibid.* The D.R.V. position on whether Viet-Nam is one or two international entities is not the simple "civil war after elections were not held" argument put forward by some. By way of example, Ho Chi Minh's letter to heads of state on January 28, 1966, said: "U.S. imperialists have massively increased the strength of the U.S. expeditionary corps and sent in troops from a number of their satellites to wage direct aggression in South Vietnam. They have also launched air attacks on the D.R.V., Democratic Republic of Vietnam, an independent and sovereign country, and a member of the Socialist camp." New York Times, Jan. 29, 1966, p. K, col. 5 (city ed.).

order. The only condition for lawful unilateral use of force—and then only "until the Security Council has taken the measures necessary to maintain international peace and security"—is individual or collective defense. If that condition is absent, unilateral force by the D.R.V. against the territorial and political integrity of the R.V.N. is unlawful and an armed attack gives rise to appropriate defensive rights in the R.V.N. to meet that illegality. If there is an armed attack on the R.V.N. by the D.R.V., the R.V.N. may lawfully take measures to defend itself consistent with the right of individual or collective defense recognized under contemporary international law and the United Nations Charter.

II. THERE IS AN UNLAWFUL ARMED ATTACK ON THE REPUBLIC OF VIET-NAM BY THE DEMOCRATIC REPUBLIC OF VIET-NAM

In addition to the fundamental community proscription that unilateral resort to coercion is unlawful as an instrument of major change, the strong community interest in restricting coercion limits the right to use intense coercion in individual or collective defense to, generally speaking, very serious situations in which there is no reasonable alternative to the use of force for the protection of major values. This community policy is reflected in the famous "necessity" test of the *Caroline* case, and in the language of Article 51 of the United Nations Charter, which expressly reserves the right of individual and collective self-defense if there is an "armed attack." By such verbal tests, contemporary international law expresses the judgment that minor encroachments on sovereignty, political disputes, frontier incidents, the use of non-coercive modalities of interference, and generally aggression which does not threaten fundamental values, such as political and territorial integrity, may not be defended against by major resort to force against another entity. These tests are simply representative of the community interest in restricting intense responding coercion in individual or collective defense to those situations where fundamental values are seriously threatened by coercion. Such tests have few magic qualities for making these determinations, and decision must depend on the context. As McDougal and Feliciano indicate:

> [T]he coercion characterized as "permissible" and authorized by the general community in the cause of "self-defense," should be limited to responses to initiating coercion that is so intense as to have created in the target state reasonable expectations, as those expectations may be reviewed by others, that a military reaction was indispensably necessary to protect such consequential bases of power as "territorial integrity" and "political independence". . . .[16]

This is the real issue in making the characterization as to whether there is an "armed attack" on the R.V.N. by the D.R.V. or whether the responding coercion was "necessary."

In arguing that there is no "armed attack" against the R.V.N. justifying a defensive response by the R.V.N., William Standard and the group known

[16] McDougal and Feliciano, *op. cit.* note 1 above, at 259.

as the "Lawyers Committee on American Policy Toward Vietnam" apparently assume that the only right of defense under the United Nations Charter is spelled out in Article 51 and is limited by the "armed attack" test, presumably a somewhat more restrictive test.[17] There is a substantial body of opinion among international legal scholars, however, that the Charter was not intended to restrict the right to initially take defensive action in any way, and that Article 51, drafted for the purpose of accommodating regional security organizations, did not restrict that right, whether by an "armed attack" requirement or any other.[18] Even if the restrictive interpretation of the Charter is accepted, accurate characterization of the evidence with reference to the policy of this language indicates that there is unquestionably an "armed attack" by the D.R.V. against the R.V.N. Among other evidence of this "armed attack":

On June 2, 1962, the International Control Commission, composed of representatives from India, Canada and Poland and established pursuant to the Geneva Accords, issued a Special Report which considered allegations of aggression and subversion on the part of the D.R.V. against the R.V.N. In this Special Report, the first report so designated since the commencement of the I.C.C.'s reporting in 1954, the Commission, with the Polish representative dissenting, adopted the following findings of the Legal Committee:

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

[17] See references in note 9 above.

[18] See, *e.g.*, Bowett, Self-Defence in International Law 184–193 (1958); McDougal and Feliciano, *op. cit.* note 1 above, at 233–241; Stone, Aggression and World Order 92–101 (1958). The restrictive interpretation advocated by some scholars that the right of defense under the U.N. Charter is limited by the language of Art. 51 differs principally in practical effect from the above interpretation in assessing the lawfulness of anticipated defense and the lawfulness of response to attacks not involving the use of the military instrument. Since the D.R.V. aggression against the R.V.N. utilizes the military instrument as the principal strategy and since the response of the R.V.N. and the United States does not even remotely raise questions of anticipatory defense, there would seem to be little doubt that an "armed attack" has taken place even under this more restrictive view of the Charter. For scholars advocating the more restrictive view see, *e.g.*, Jessup, A Modern Law of Nations 165–167 (1948); Wright, "International Law and Civil Strife," 1959 Proceedings, American Society of International Law 145, 148, 152.

> of the D.R.V.] 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. . . .[19]

In adopting these findings of the Legal Committee, the Commission said: "The Commission accepts the conclusions reached by the Legal Committee that there is *sufficient evidence to show beyond reasonable doubt* that the PAVN has violated Articles 10, 19, 24 and 27 in specific instances." [20]

In a February, 1965, report, the Canadian representative to the I.C.C. said in a dissenting statement:

> It is the considered view of the Canadian Delegation that the events which have taken place in both North and South Vietnam since February 7 are the direct result of the intensification of the aggressive policy of the Government of North Vietnam. In the opinion of the Canadian Delegation, therefore, it should be the chief obligation of this Commission to focus all possible attention on the continuing fact that North Vietnam has increased its efforts to incite, encourage, and support hostile activities in South Vietnam, aimed at the overthrow of the South Vietnamese administration. These activities are in direct and grave violation of the Geneva Agreement and constitute the root cause of general instability in Vietnam, of which events since February 7 should be seen as dangerous manifestations. The cessation of hostile activities by North Vietnam is a prerequisite to the restoration of peace in Vietnam as foreseen by the participants in the Geneva Conference of 1954.[21]

A number of leading journalists have reported in the *New York Times* that the evidence indicates a high degree of initiation and control of the conflict from Hanoi. They also report that since late 1964 North Vietnamese regular army units have been moving into the R.V.N., a movement which has intensified since then and which has resulted in North Vietnamese regular army troops making up a substantial proportion of those fighting in the R.V.N.[22] According to the United States Department of State:

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

[20] *Ibid.* at 7 (emphasis added). The Commission also found after recording this armed aggression from the D.R.V. that the R.V.N. had violated Arts. 16, 17 and 19 of the Geneva Agreements by receiving military assistance. *Ibid.* at 10. It is erroneous to merely "balance" the violations recorded against both sides in this report. The kinds of violations recorded against the two sides are crucially different. For a fuller exploration of this point and a discussion placing the Commission findings in the broader context of the Geneva settlements and the norms regulating the use of coercion, see the discussion in Section VI below.

[21] Special Report to the Co-Chairmen of the Geneva Conference on Indo-China, February 13, 1965 (Vietnam No. 1 [1965], Command Paper 2609), at 14–15.

[22] New York Times correspondent Neil Sheehan, in an article in the May 2, 1966, New York Times, points out that:

> In the three-year period from 1959–1961, North Viet Nam infiltrated an estimated 10,700 men into South Viet Nam. . . . The aggression by Hanoi became substantial in 1959 and had intensified to dangerous proportions by late 1961. . . .
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> It is now estimated that by the end of 1964 North Viet Nam had infiltrated over 40,000 men into South Viet Nam. Most of these men were infiltrated through the territory of Laos in plain violation of the

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"The available evidence strongly indicates that the war was actually initiated on orders from Hanoi. . . . The instrument for the renewal of guerrilla warfare was the clandestine organization that had been deliberately left behind when the bulk of the Communist-led Vietminh troops, who fought the French and were the predecessors of the Vietcong, were withdrawn to the North in 1954.

"The existence of such a clandestine Communist party organization in the South has been documented. In this regard, analysts also point out a fact often little understood in the West, that there is only one Communist party in Vietnam and that its organizational tentacles extend throughout both the North and the South. At no time since the mid-nineteen-forties, when the struggle against the Japanese, and then the French began, has the politburo of the party lost control over its branch in the South. . . .

"By 1960, the evidence indicates, Hanoi decided that some instrument was necessary to lend an aura of legitimacy and to disguise Communist control over the guerrilla warfare its cadres had fostered in the South [leading to a call for the formation of the N.L.F.]. . . .

"[T]he Liberation Front does not control the Vietcong armed forces, despite its claims to the contrary. Documentary evidence, interrogation of prisoners and other intelligence data indicate that the guerrilla units are directed by an organization known as the Central Office for South Vietnam, or Cosvin as it is commonly called here.

"Cosvin is believed to be the senior Communist headquarters in the South, reporting directly to the reunification department of the Communist party in Hanoi and thus to the politburo. Through its military affairs department, Cosvin acts as a high command for the Vietcong guerrilla units. . . ." New York Times, May 2, 1966, p. 1, col. 2 (city ed.).

Similarly, Takashi Oka, a former Far East correspondent for the Christian Science Monitor, who has been in Viet-Nam for the past two years, wrote recently in the New York Times Magazine:

"Ho Chi Minh's Laodong party, with the intense, single-minded Le Duan as secretary general, was the Communist party for all of Vietnam until the Geneva Accords of 1954 divided the country into Communist North and non-Communist South. It retained its clandestine network in the South, and began expanding party membership there in earnest soon after the Third Party Congress (Hanoi, September, 1960), which decided on the 'liberation' of South Vietnam. When it changed its name in the South to People's Revolutionary party, it was following the Communist scenario of an insurrection independent of Hanoi. . . .

"The Communist chain of command begins in Hanoi, where the Laodong party's central committee openly maintains a reunification department headed by Maj. Gen. Nguyen Van Vinh. Analysts in Saigon believe that the reunification department is an agency for transmitting orders from the Laodong politburo to the South. Policy-making is the sole prerogative of the politburo, with Le Duan himself probably playing a major role.

"From the reunification department in Hanoi, orders go out to C.O.S.V.N., which is at the same time the central committee of the People's Revolutionary party." Takashi Oka, "The Other Regime in South Vietnam," New York Times Magazine, July 31, 1966, p. 9, at 46.

In a recent article about General Vo Nguyen Giap, Commander of the North Vietnamese Army, the New York Times reported: "Late in 1964 General Giap ap-

> 1962 Geneva Agreement on the Neutrality of Laos. Native North Vietnamese began to appear in South Viet Nam in large numbers in early 1964, and in December 1964 full units of the regular North Vietnamese Army began to enter the South. The latest evidence indicates that elements of the 325th PAVN division began to prepare for the move south in April 1964. . . .[23]

Although there is certainly evidence that the conflict in the R.V.N. also has internal support, the totality of evidence—whether or not the above evidence is accepted in its entirety—strongly indicates that the campaign to overthrow the recognized government of the R.V.N. by intense coercion receives at least substantial military assistance and direction from the D.R.V. and suggests that prior to any significant increase in United States assistance, D.R.V. initiative was a critical element in the conflict. There can be little doubt from the evidence that this was so prior to the commencement of bombing of military targets in the D.R.V. in February, 1965, and the introduction of United States combat units in the spring of 1965. This use of the military instrument by the D.R.V. against the R.V.N. is not a minor aggression nor one effectuated by non-coercive means such as propaganda. It is not a mere political dispute and it is not a minor frontier incident. Nor does the attack raise questions of the right to prevent an armed attack before it occurs. Instead, the attack, whether initiated and controlled by the D.R.V. or merely substantially assisted by the D.R.V., is a serious, sustained and determined

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parently decided, with the concurrence of party leaders, to move to phase three [mobile warfare] in the war in South Vietnam. So he began moving North Vietnamese regular army units down the Ho Chi Minh Trail." New York Times, July 31, 1966, p. 2, col. 5 (city ed). According to the Mansfield Report, "Infiltration of men from North Vietnam through Laos has been going on for many years. It was confined primarily to political cadres and military leadership until about the end of 1964 when North Vietnam Regular Army troops began to enter South Vietnam by this route." Mansfield, Muskie, Inouye, Aiken and Boggs, The Vietnam Conflict: The Substance and the Shadow—Report to the Senate Committee on Foreign Relations, 112 Cong. Rec. 140, 141 (daily ed., Jan. 13, 1966). Times Saigon correspondent, Charles Mohr, recently reported that according to informed sources the latest intelligence estimates indicated that "of the 177 enemy combat battalions in South Vietnam, 81, or 46 per cent, are now North Vietnamese. . . ." New York Times, Aug. 10, 1966, p. 1, col. 4, at p. 5, col. 5 (city ed.).

These figures are not far from those released by General William Westmoreland at a press conference on Aug. 14, 1966, when he indicated that:

"At the present time there are approximately 280,000 Vietcong. This consists of about 110,000 main-force North Vietnamese regular army troops; approximately 112,000 militia or guerrilla forces; approximately 40,000 political cadre, and approximately 20,000 support troops. Regular troops have been, in recent months, moving down from North Vietnam to South Vietnam in great numbers.

"Since the first of the year, we estimate that at least 30,000 regular troops have moved down, and perhaps as many as 50,000. You are well aware that several weeks ago a regular army North Vietnamese division crossed the demilitarized zone. This is the latest intrusion." New York Times, Aug. 15, 1966, p. 2, col. 4, at col. 7 (city ed.).

[23] The Basis for United States Actions in Viet Nam Under International Law 5 (Mimeograph, U. S. Dept. of State).

attack on the territorial and political integrity of the R.V.N. The totality of the context, characterized by use of military force as the principal strategy, constitutes intense coercion creating in the target state reasonable expectations that it must use the military instrument to preserve its fundamental values.

Whether or not the "armed attack" language of Article 51 of the Charter places restrictions on the right of individual or collective self-defense, the intense and sustained attack aimed at the political and territorial integrity of the R.V.N. and employing the military instrument as the predominant strategy unquestionably gives rise to rights of individual and collective defense. As an analysis of the purpose of this "armed attack" language indicates, an "armed attack" is not limited to the overt Korean type of invasion. Professor Kelsen points out:

> Since the Charter of the United Nations does not define the term "armed attack" used in Article 51, the members of the United Nations in exercising their right of individual or collective self-defense may interpret "armed attack" to mean not only an action in which a state uses its own armed force but also a revolutionary movement which takes place in one state but which is initiated or supported by another state. In this case, the members could come to the assistance of the legitimate government against which the revolutionary movement is directed.[24]

And Professor Brownlie writes:

> [I]t might be argued that "armed attack" in Article 51 of the Charter refers to a trespass, a direct invasion, and not to activities described by some jurists as "indirect aggression." But providing there is a control by the principal, the aggressor state, and an actual use of force by its agents, there is an "armed attack."[25]

The evidence suggests that D.R.V. initiative in the use of the military instrument goes significantly beyond such descriptions.

This armed attack by the D.R.V. against the R.V.N. is unlawful. The actions of the D.R.V. are neither pursuant to authority of the United Nations nor individual or collective defense. A study of the I.C.C. reports with respect to the grievances asserted by the D.R.V. demonstrates that the D.R.V. has no legitimate claim to justify its aggression against the R.V.N. as defense. The principal D.R.V. allegations of R.V.N. breach of the Accords are failure to consult on the holding of elections in 1956, reprisals against resistance leaders, inadequate co-operation with I.C.C. controls, and entering into a military alliance with and receiving military assistance from the United States. Since none of these principal asserted grievances of the D.R.V. constitute a legitimate defense situation, even if all of these grievances were legally justified and the R.V.N. were bound by the applicable provisions of the Geneva Accords, the D.R.V. in its attack on the R.V.N. would still be acting contrary to the fundamental com-

[24] Kelsen, "Collective Security under International Law," 49 International Law Studies 88 (1956).

[25] Brownlie, International Law and the Use of Force By States 373 (1963).

munity norms on the regulation of coercion. Its activities constitute unilateral use of force as an instrument of political change and as such are unlawful.

In the perspective of the community framework for the regulation of coercion in international relations, the unilateral armed attack by the D.R.V. on the political and territorial integrity of the R.V.N. is unlawful and gives rise to the right of individual and collective self-defense.

III. THE UNITED STATES MAY LAWFULLY ASSIST IN THE COLLECTIVE DEFENSE OF THE REPUBLIC OF VIET-NAM

The right of collective defense is recognized under both customary international law and the United Nations Charter. That right is the right to assist or be assisted by another state on invitation of a state which is subjected to unlawful attack. In a world with only limited expectations as to the effective competence of the existing centralized peacekeeping machinery, such a right has been regarded as necessary to prevent weaker states from becoming the victims of more powerful states. Moreover, in a global era in which we may accurately speak of a "world community," interdependencies among states suggest real interests, defense and otherwise, in what transpires in other parts of the globe. Article 51 of the Charter recognizes these factors when it refers to "the inherent right of individual and collective self-defense."

The fundamental community interest in restricting coercion has qualified the right of individual or collective defense by establishing an overriding competence in the centralized peacekeeping machinery of the United Nations to deal with the situation as it sees fit in the interest of world peace and security. But since the United Nations Security Council may be delayed in its response, may be paralyzed by the "veto" or may otherwise be unable to act for political reasons, the Charter clearly contemplates that the right of individual or collective defense exists in the first instance until qualified by the Security Council acting in a particular case. The language of Article 51 of the Charter reflects this understanding when it says "until the Security Council has taken the measures necessary to maintain international peace and security." In effect the structure of the Charter reaffirms the right of individual or collective defense but makes it subject to possible later community review by the existing, but unfortunately imperfect, centralized peacekeeping machinery. The initial determination as to when an attack justifies responsive measures in individual or collective defense has always been left for individual determination and nothing in the Charter was intended to or does vary this necessity.[26] Specifically, such defensive measures are not predicated on a

[26] Bowett, Self-Defence in International Law 193, 195 (1958); Brierly, The Law of Nations 319–320 (5th ed., 1955); Jessup, A Modern Law of Nations 164–165, 202 (1948); Kelsen, The Law of the United Nations 800, 804, 804, note 5 (1964); Kelsen, "Collective Security under International Law," 49 International Law Studies 61–62 (1956); McDougal and Feliciano, Law and Minimum World Public Order 218–219 (1961); Stone, Legal Controls of International Conflict 244 (1954); Thomas and Thomas,

finding by the Security Council of a breach of the peace or aggression or armed attack under Article 39 or 51 or any other provision of the Charter. The argument of William Standard and the Lawyers Committee that some such United Nations action is required before the United States may lawfully assist the R.V.N. is erroneous.[27] Neither the R.V.N., the D.R.V. nor the United States has the right to be final judge in its own case. But this is not the issue. Their action, of course, is properly subject to community review. But it is lawful for the United States to assist in the collective defense of the R.V.N. at least until, in the language of Article 51, "the Security Council has taken the measures necessary to maintain international peace and security." To date the Security Council has not taken the measures necessary to maintain international peace and security in Viet-Nam. In the absence of such measures, the right of the United States to participate in the collective defense of the R.V.N. continues unimpaired.

With major emphasis, Standard and the Lawyers Committee assert that, because Article 51 speaks of "an armed attack against a member of the United Nations," the United States may not lawfully assist in the collective defense of the R.V.N., a non-Member of the United Nations.[28] As has been pointed out, there is a substantial body of opinion among international legal scholars that the United Nations Charter was not intended to restrict the right to initially take defensive action in any way, and that Article 51 did not restrict that right. In any event, the above restrictive interpretation of Article 51 with respect to non-Members has been almost universally rejected by legal scholars. Professor Kelsen says that ". . . according to an almost generally accepted interpretation of Article 51, the right of collective self-defense may also be exercised in case of an armed attack against a non-member state."[29] Professor Brownlie points out:

> It has been suggested by some writers that a literal interpretation of Article 51 would permit members to act in collective defence only when another member state has been attacked. This hypothesis is of

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Non-Intervention 171 (1956); Kelsen, "Collective Security and Collective Self-Defense under the Charter of the United Nations," 42 A.J.I.L. 783, 791–795 (1948).

[27] Professor Kelsen indicates the correct doctrine when he says:

"Since within a more or less centralized system of international security the exercise of the right of individual and collective self-defense must be permitted because the central organ of the organization cannot interfere immediately after an illegal use of armed force has taken place, the question of whether or not the use of armed force which has actually taken place is illegal must be decided by the state which claims to be exercising the right of individual or collective self-defense. However, this is true only as long as the central organ of the security organization does not interfere. As soon as it does, this central organ must decide that question, and it may decide that question in another way than the state which claims to be exercising its right of self-defense." Kelsen, "Collective Security under International Law," *loc. cit.* note 24 above, at 61–62 (1956).

[28] Standard, *loc. cit.* note 9 above, at 628.

[29] Kelsen, "Collective Security under International Law," *loc. cit.* note 24 above, at 88.

> doubtful validity for several reasons. There is no evidence that this was the intended effect of the Charter provisions and many members of the United Nations have participated and still participate in mutual security pacts which include non-members. Kelsen asserts that such restriction of collective defence is inconsistent with Article 2, paragraph 6. Finally, the Security Council resolutions of 25 and 27 June and 7 July relating to the Korean hostilities employ wording reminiscent of Article 51 in the context of recommending states to give assistance to a non-member.[30]

Most, if not all, legal scholars who have answered this question have agreed that the United Nations Charter does not restrict a Member from participating in the collective defense of a non-Member.[31] Article 51 was drafted largely to reassure the Latin American delegates that collective defense pursuant to regional arrangements would not be disturbed. Since the principal concern was that of the Latin American states worried about the status of their right to receive collective defense under the Act of Chapultepec if they were to join the United Nations, the language of Article 51 quite naturally was concerned with preserving the rights of Members to receive collective defense protection. Nothing in the history of the article suggests that it was intended to restrict the rights of Members to collectively assist non-Members.[32]

[30] Brownlie, note 25 above, at 331.

[31] In addition to the discussion by Professors Kelsen and Brownlie cited in notes 29 and 30 above, see Bowett, *op. cit.* note 26 above, at 193–195; Brierly, Law of Nations 305 (6th ed., Waldock, 1963); Heindel, Kalijarvi and Wilcox, "The North Atlantic Treaty in the United States Senate," 43 A.J.I.L. 633, 657–658 (1949). See also McDougal and Feliciano, *op. cit.* note 26 above, at 233–241; Pompe, Aggressive War An International Crime 66 (1953); Thomas and Thomas, *op. cit.* note 26 above, at 171.

Scholars indicating in the context of the Viet-Nam debate that the U.N. Charter does not restrict a Member from participating in the collective defense of a non-Member include Professor Myres S. McDougal, Sterling Professor of Law at Yale, Professor Louis B. Sohn, Bemis Professor of International Law at Harvard, and Professor Quincy Wright, Professor of International Law at the University of Virginia.

The only authority cited by Standard and the Lawyer's Committee for the proposition that U.N. Members may not assist in the collective defense of non-Members is an excerpt from Stone, *op. cit.* note 26 above, at 244 to the effect that "the license of Article 51 does not apparently cover even an 'armed attack' against *a non-Member.*" Standard has not done his homework. Professor Stone is one of the scholars taking the position that the right of individual and collective defense under customary international law is not impaired by Art. 51. Although, as the quotation by Standard illustrates, Professor Stone does take a narrow view of the right of Members to assist in the collective defense of non-Members when acting under the license of Art. 51, he does not take the position, necessary for Standard's argument, that the U.N. Charter restricts a Member from participating in the collective defense of a non-Member. In fact, in his more recent book, Aggression and World Order, Professor Stone indicates that a consequence of the extreme restrictive interpretation of the U.N. Charter would be that a Member could not assist in the collective defense of a non-Member, and terms such a result an absurdity and injustice. He clearly opts against what he terms this "extreme" view. See Stone, Aggression and World Order 92–98, at 97 (1958). Professor Stone's interpretation of Art. 51 seems to be based solely on the literal text and is also open to the criticism discussed above.

[32] See, generally, McDougal and Feliciano, *op. cit.* note 26 above, at 235; Russell and Muther, A History of the United Nations Charter 688–712 (1958).

It should also be pointed out that such a restrictive interpretation of Article 51 is merely one interpretation, and is not logically required by the text of that article. If Article 51 is to be interpreted to prohibit the right of a Member state to assist a non-Member state, the phrase "if an armed attack occurs against a member of the United Nations" must be interpreted as meaning "if *and only if* an armed attack occurs against a member of the United Nations." Syntactically these interpretations are quite different. No plausible policy rationale has as yet been offered—much less any policies offered by the framers of Article 51—as to why Members should be permitted to assist in the collective defense of other Members but not of non-Members. The distinction is specious. It would mean, for example, that today, East Germany, West Germany, North Korea, South Korea, Switzerland and the People's Republic of China as well as the R.V.N. and the D.R.V. could not be collectively assisted by Members of the United Nations if subjected to attack. And in the past it would have raised doubts about collective assistance to Indonesia or Israel for example. Such an interpretation is unlikely to have wide appeal to any ideological grouping, as the practice of both East and West in concluding regional defense treaties with non-Members indicates. Since the major purpose of Article 51 was essentially to reaffirm the right of individual and collective defense, the verbal quibble restricting that right is contrary to the major purpose of the article. This argument, a favorite in the attack on the lawfulness of United States assistance to the R.V.N., is reminiscent of what Judge Jerome Frank called preoccupation with "word magic."[33] It cannot be taken seriously.

Collective defense, whether pursuant to Article 51 or not, does not require a pre-existing regional defense agreement.[34] This means that the United States may lawfully assist in the collective defense of the R.V.N. whether or not that action is taken by virtue of the SEATO Treaty. As has been discussed, collective defense under either customary international law or the United Nations Charter does not require prior United Nations authorization of any kind. This is so regardless of whether the collective defense measures are pursuant to a regional defense arrangement or not. Standard, however, asserts that "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."[35] The Lawyers Committee makes the same argument.[36] This argument, for which they cite no authority, is erroneous when applied to the Viet-Nam context. Although international legal scholars differ as to whether particular col-

[33] Frank, Law and the Modern Mind 24–82 (Anchor Book ed., 1963).

[34] See Kelsen, The Law of the United Nations 795–796 (1950); Pompe, Aggressive War An International Crime 66 (1953); Thomas and Thomas, Non-Intervention 172 (1956); Kunz, "Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations," 41 A.J.I.L. 872, 874 (1947).

[35] Standard, note 9 above, at 633.

[36] Memorandum of Law, note 9 above, at 2557.

lective defense treaties are "regional arrangements" within Chapter VIII of the Charter, they are in agreement that collective defense activities, whether termed pursuant to a regional arrangement, a collective defense treaty or something else, are not subject to the prior authorization and reporting requirements of Articles 53 and 54 of the Charter.[37] For the very purpose of Article 51 was principally to preserve the right of individual and collective defense when the Latin American countries were concerned lest the major Power "veto" in the Security Council would deprive them of that right. The clear understanding of the framers of the Charter was that action in individual or collective defense, whether pursuant to a regional arrangement or not, would not be subjected to a requirement of prior approval from the Security Council, although such action would be subject to later review by the United Nations. This understanding is evidenced not only in Western defense treaties such as NATO and SEATO, but also in the 1955 Warsaw Treaty of Friendship, Cooperation and Mutual Assistance between the Soviet Union and Communist East European nations, and the 1950 Joint Defense and Economic Cooperation Treaty of the Arab League. Senator Mansfield, a member of the United States Delegation to the conference which established SEATO, evidenced the relation of SEATO to Article 51 when he told the Senate:

> The Southeast Asia Collective Defense Treaty is consistent with the provisions of the United Nations Charter. The treaty would come under the provisions of Article 51, providing that nothing contained in the United Nations Charter shall deprive one of the states from the individual or collective right of self-defense.[38]

Senator Mansfield further noted in the same speech that measures taken under Article 51 "do not need prior approval of the Security Council. . . ."[39]

The United States at the request of the R.V.N. is assisting in the collective defense of the R.V.N. against armed attack. That assistance is lawful, whether taken by virtue of the SEATO Treaty or not. The actions of the United States, the R.V.N. and the D.R.V. are subject to later community

[37] See Jessup, A Modern Law of Nations 208 (1948); Kelsen, The Law of the United Nations 792–795, 921–927 (1950); Kelsen, "Collective Security under International Law," 49 International Law Studies 264 (1956); McDougal and Feliciano, Law and Minimum World Public Order 245 (1961); Stone, Legal Controls of International Conflict 248–251 (1954); Thomas and Thomas, Non-Intervention 187 (1956); Heindel, Kalijarvi and Wilcox, "The North Atlantic Treaty in the United States Senate," 43 A.J.I.L. 633, 639 (1949); Kelsen, "Is the North Atlantic Treaty a Regional Arrangement?", 45 A.J.I.L. 164–166 (1951).

[38] 101 Cong. Rec. 1055 (1955).

[39] *Ibid.* Ruth Lawson has summarized this understanding:

"The relationship of contemporary regional and global organizations is worthy of special comment. The collective defense organizations based on the North Atlantic Treaty and the Rio, Manila, Baghdad, and Warsaw pacts are ultimately grounded in Article 51 of the United Nations Charter, which with notable prescience legitimized collective defense against armed attack without Security Council authorization." Lawson, International Regional Organization vi (1962).

review by the Security Council, which may take "measures necessary to maintain international peace and security" as it sees fit. The efforts of the United States and the R.V.N. to secure such review have to date been unsuccessful. They have been consistently opposed by the D.R.V. and the People's Republic of China, which continue to maintain that the United Nations has no right to examine the question.[40]

IV. THE RESPONSE OF THE UNITED STATES AND THE REPUBLIC OF VIET-NAM IS REASONABLY NECESSARY TO THE DEFENSE OF THE REPUBLIC OF VIET-NAM

The fundamental community interest in restricting coercion as a modality of change carries with it a requirement that defensive action should not involve greater coercion than is reasonably necessary for the defense of the fundamental values under attack. This is the issue often subsumed under the "proportionality" test.[41] Disciplined answer to whether a particular responsive coercion is reasonably necessary to the preservation of the fundamental values under attack will not be provided by a simple comparison of types of coercion used by both sides, or counting of units committed to the field by the opposing participants. Nor will it be solved by the verbal magic of the *Caroline* or "proportionality" tests. Instead, meaningful characterization must depend on all of the relevant features of the context, including the scope and intensity of the attack as well as the response.

There is little doubt that the scope and intensity of the attack on the R.V.N. has presented a grave threat to its territorial and political integrity. That attack has been characterized by widespread terror and assassination, guerrilla raids and sabotage, and more recently by mobile warfare involving large-size regular army units of the D.R.V. In its early stages it was principally characterized by infiltration of armed and unarmed personnel in support of guerrilla activities, and from about late 1964 it involved the use of regular PAVN army units in large-unit "mobile warfare." According to the Mansfield Report, by early 1965 the situation had become so serious that the R.V.N. was in imminent danger of total collapse.[42] Militarily, the situation had deteriorated to the point where there was serious concern that the R.V.N. would be cut in two.

The United States and R.V.N. response to this attack has been reasonable under the circumstances. That response divides imperfectly but most use-

[40] See McDougal, Moore and Underwood, note 6 above, at 14955–56, 14977–79.

[41] As McDougal and Feliciano indicate:

"Proportionality in coercion constitutes a requirement that responding coercion be limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objectives of self-defense. For present purposes, these objectives may be most comprehensively generalized as the conserving of important values by compelling the opposing participant to terminate the condition which necessitates responsive coercion. . . . Thus articulated, the principle of proportionality is seen as but one specific form of the more general principle of economy in coercion and as a logical corollary of the fundamental community policy against change by destructive modes." *Op. cit.* note 37 above, at 242–243.

[42] Mansfield, Muskie, Inouye, Aiken and Boggs, note 22 above, at 140.

fully into three major periods: prior to 1961, from mid-1961 to February, 1965, and from February, 1965, to the present.[43] Prior to 1961 the United States had no military casualties and had only a very limited Military Assistance Advisory Group in the R.V.N.—probably not more than about 800–900, with figures somewhat lower in earlier years. Infiltration and military assistance from the D.R.V. apparently were initiated as a significant factor during the latter part of this period. Beginning about mid-1961, in response to increased infiltration from the D.R.V., the United States began a moderate buildup of United States military advisory personnel, reaching roughly 12,000 by mid-1962 and about 23,000 by January 1965. An indication of the relatively minor combat exposure of United States advisory personnel during much of this period is evidenced by the fact that as late as September 2, 1963, President Kennedy indicated that as few as forty-seven Americans had been killed in combat in Viet-Nam. It was not until after the D.R.V. had significantly stepped up infiltration and other assistance and had begun the introduction of their regular army units into the R.V.N. pursuant to the escalation of the conflict to the third "mobile warfare" phase of guerrilla strategy, and after the R.V.N. had reached the stage of imminent collapse, that the United States and the R.V.N. in February, 1965, began regular air strikes against military objectives in the D.R.V., and that the United States in the spring of 1965 began an introduction of regular combat units.[44] Since then, both the attack and the response have intensified.

The air strikes against the D.R.V. have been focused on interdicting the use of the military instrument by the D.R.V. against the R.V.N. Air strikes have been narrowly limited to certain objectives chosen for their high military effect, principally transportation facilities, petroleum storage areas and facilities, military barracks, ammunition dumps, and anti-aircraft emplacements. Such strikes have been carefully controlled to minimize civilian casualties and are reasonably related to the permissible objective of interdicting the flow of arms and combat units into the R.V.N. They result in few civilian casualties and little unnecessary property destruction in relation to their military effect. The limited nature of the air strikes against the D.R.V. and the absence of other United States and R.V.N. defensive measures such as a commitment of ground forces to the D.R.V. strongly support the contention of the United States that it seeks only to interdict the D.R.V. attack on the R.V.N., that it seeks no wider war, that it is not attacking the territorial and political integrity of the D.R.V., and that it does not seek to punish the D.R.V. by militarily unnecessary or remote destruction. The air strikes have taken place in a context of two bombing pauses and a continuing United States position calling for unconditional negotiations, with the first order of business a stop to the hostilities.

[43] See McDougal, Moore and Underwood, note 6 above, at 14974, note 124.

[44] According to the Mansfield Report, as late as May, 1965, U. S. regular combat units were still not engaged on the ground. Mansfield, Muskie, Inouye, Aiken and Boggs, note 22 above, at 141.

Operations within the R.V.N. and most supporting air strikes have been carried out carefully and have been relevant to reasonably necessary military objectives. Air strikes on populated areas resulting in civilian casualties should not be undertaken in contexts in which civilian casualties may be out of proportion to the legitimate and reasonably proximate military effect. Some such incidents have occurred and every effort should be made to prevent them from recurring.

With respect to the use of the military instrument by the D.R.V.-Viet-Cong, the evidence suggests that the scope and intensity of the attack on the R.V.N. have increased and that the use of the military instrument is not primarily related to reasonably necessary defensive measures. The use of coercion by the D.R.V.-Viet-Cong has also been characterized by deliberate terrorism against civilian and political targets. In this context, the United States and R.V.N. response has been measured and reasonable. That response is necessitated by the continuing intense attack on the political and territorial integrity of the R.V.N. It has been gradual, limited and reasonably necessary to the permissible objective of the defense of the R.V.N.

V. VIET-NAM AND THE REQUIREMENTS OF MINIMUM WORLD PUBLIC ORDER

In the welter of charges and countercharges growing out of the Viet-Nam conflict it is easy to lose sight of fundamentals in a preoccupation with legalistic arguments or the ambiguities of the situation. Some are surprised and dismayed to learn that both sides assert grievances. It is easy to take another step and assume that both sides are responsible for initiating and continuing the use of the military instrument, or that the conflict is a just one because of the existence of grievances, or that questions of lawfulness are irrelevant. But probably most conflicts are fought over grievances which the parties consider just. The existence of asserted grievances, whether just or unjust, is not surprising and is not the point. The central issue facing the international community is the regulation of coercion. That issue has resulted in the outlawing of unilateral coercion as a modality of major change, regardless of asserted grievances. The policies behind this legal norm, the minimization of destructive modes of change, are fundamental to orderly relations in the international community and are by no means irrelevant to the Viet-Nam conflict. In fact, the dangers inherent in that conflict re-enforce the conviction that these norms for the maintenance of at least minimum world public order are the crucial policies in the situation. The principal inquiry for assessment of lawfulness must be appraisal of the activities of both sides in the light of the basic contemporary legal norms that force, pursuant to the right of individual or collective defense or expressly authorized by the centralized peacekeeping machinery of the United Nations, is lawful, and that essentially all other major uses of force in international relations are unlawful. These contemporary norms, also embodied in the United Nations Charter,

are binding alike on Members and non-Members of the United Nations.[45] Meaningful discussion of the lawfulness of United States assistance must relate to these fundamental expectations of the world community as to the lawfulness of the use of force.

Claims by the participants that their actions are lawful defensive actions and those of the opponents unlawful and aggressive must be evaluated by appraisal of the total context. Relevant features include the strategies employed, the arena of the conflict, and particularly the outcomes sought and objectives of the participants. So appraised, United States assistance is lawful and the attack of the D.R.V. is unlawful.

Any reasonably impartial analysis of the context must conclude that a major objective of the D.R.V. use of the military instrument against the R.V.N. is fundamental change of the existing and at least *de facto* situation in Viet-Nam. The context strongly suggests that the unilateral D.R.V. resort to force is aimed at the political and territorial integrity of the R.V.N. Principal D.R.V. objectives, sought through coercion, seem to be settlement of political disputes with the R.V.N., change in the political form of government in the R.V.N. in favor of one similar and closely related to, if not controlled by, the D.R.V., and probably also eventual if not immediate unification of Viet-Nam under the Communist government of Ho Chi Minh. In the process it seeks United States withdrawal from the R.V.N. The conflict was unmistakably not precipitated by any real threat to the political or territorial integrity of the D.R.V. D.R.V. use of the military instrument against the R.V.N. evidences this in that it does not have as its principal object interdiction of the use of the military instrument against the D.R.V. This use by the D.R.V. of military force as a modality of major change in Viet-Nam is the central feature of the conflict. It is evidenced by the South and not the North as the principal arena of the fighting, the stated objectives of the parties and their conditions of settlement, and the continuing aggressive, not defensive, strategies in the use of the military instrument by the D.R.V. This D.R.V. attempt at forceful extension of its values is neither defensive nor pursuant to United Nations authorization. Such a resort to coercion as a modality of major change is unlawful.

On the other hand, judged by the same framework, the United States response is not aimed at the territorial and political integrity of the D.R.V. The use of coercion against the D.R.V. is of a limited nature and designed to interdict the D.R.V. attack against the R.V.N. An acceptable outcome would leave the D.R.V. as a viable and continuing entity. In fact, assistance has even been offered for the economic development of the D.R.V. The United States does not seek to change by force the existing state of affairs in Viet-Nam and Southeast Asia. Its emphasis is on conservation, not extension, of values in its use of military force in that area. Such defensive action is lawful.

[45] See McDougal, Moore and Underwood, note 6 above, at 14980, note 248; Jessup, *op. cit.* note 37 above, at 167–168.

Because of the great community interest in restricting coercion, a particularly relevant feature of the total context is the stress placed by the participants on removing the conflict from the battlefield to the negotiating table. The emphasis on settlement of disputes by pacific means is a corollary of the community interest in restricting coercion and is incorporated in Chapter VI of the United Nations Charter. The context of the Viet-Nam conflict indicates a substantial dichotomy between the positions of the opposing participants with respect to willingness to adopt more rational procedures for conflict resolution. The United States, Britain, Canada, India, the R.V.N., seventeen non-aligned nations, and recently Thailand, Malaysia and the Philippines have called for unconditional negotiations or a reconvening of the Geneva or other peace conference on Southeast Asia .[46] These extensive efforts to achieve a peaceful solution pursuant to Article 33 of the Charter through negotiation, the machinery of the Geneva Accords and the machinery of the United Nations have been consistently refused by the D.R.V., the U.S.S.R., and the People's Republic of China.[47] Most recently, the efforts of Prime Minister Wilson of Great Britain, Prime Minister Indira Gandhi of India, and United Nations Secretary General U Thant to obtain a reconvening of the Geneva Conference on Viet-Nam have been rebuffed by the U.S.S.R.,[48] and the efforts of Thailand, Malaysia, and the Philippines to invoke an Asian peace conference have been rebuffed by Peking and Hanoi.[49] Two United States bombing pauses have underscored the United States search for peace but have been met by no announced interest in negotiation or reduction in hostilities by the D.R.V. In the face of this largely one-sided refusal to negotiate or substitute peaceful and more rational procedures for settlement of the Viet-Nam conflict, principal responsibility for the continuation of the conflict must rest with those opposing peaceful procedures and who seem determined to continue reliance on the use of force to achieve their objectives.

VI. NEW MYTHS AND OLD REALITIES

The Ambiguous Geneva Settlement

The election arguments from the text of the 1954 Geneva Accords are high on the list of aphorisms offering false certainty. Critics of United

[46] See McDougal, Moore and Underwood, note 6 above, at 14977–79, note 233; New York Times, Aug. 19, 1966, p. 2, col. 7 (city ed.); Aug. 7, 1966, p. 10, col. 1; Aug. 4, 1966, p. 4, col. 3 (city ed.).

[47] *Ibid.* See also *ibid.*, July 25, 1966, p. 3, col. 5 (city ed.). But U. N. Secretary General U Thant has indicated that in 1964 and early 1965 Hanoi may have had more interest in negotiations.

[48] *Ibid.*, July 31, 1966, p. 3, col. 5 (city ed.). British Foreign Secretary George Brown was equally unsuccessful in his efforts to convince the Soviets to convene a peace conference. See the New York Times, Nov. 26, 1966, p. 6, col. 4 (city ed.).

There have recently been some hints that the Soviet attitude on the Viet-Nam issue is thawing.

[49] See New York Times, Aug. 19, 1966, p. 2, col. 7 (city ed.); Aug. 11, 1966, p. 2, col. 4 (city ed.); Aug. 9, 1966, p. 2, col. 4 (city ed.).

States assistance point to the language of the Final Declaration with respect to the elections which were to be held in 1956 to indicate that the D.R.V. has been justly aggrieved by R.V.N. non-cooperation on such elections, and by implication that D.R.V. use of force against the R.V.N. is thereby justified. And they assert that the R.V.N. has widely violated the Accords by receiving military assistance from the United States, again with the implication that D.R.V. use of force is thereby justified. Although the use of force by the D.R.V. certainly does not follow, even if the D.R.V. were justly aggrieved on these issues, such assertions mask false certainty and largely ignore the totality of the Geneva settlement and its context in favor of a verbalistic microcosm. Similar difficulties arise in the invocation by all major participants of the Geneva Accords as the basis for settlement. Although such joint invocation would normally lead to expectations of immediate settlement, the positions of the major participants in the conflict are not close. The invocation of the Geneva Accords has masked fundamentally different objectives. The cause of all this obscurity is that the Geneva Accords themselves reflect a highly ambiguous settlement and conceal a number of fundamental problems with which the Conference—perhaps intentionally—did not come to grips. For example, although the Accords adverted briefly to elections to be held in 1956, they did not devote major attention to implementing unification and there is some evidence that at least some of the participants actually intended a semi-permanent partition of Viet-Nam at least until such time as there might be a *rapprochement* between the D.R.V. and the state of Viet-Nam, the predecessor government of the R.V.N.[50] Anthony Eden,

[50] For documentation with respect to the discussion in this section see McDougal, Moore and Underwood, "The Lawfulness of United States Assistance to the Republic of Viet-Nam," 112 Cong. Rec. 14943, 14972, notes 74 and 75 (daily ed., July 14, 1966). In a recent article in The Reporter, Victor Bator makes many of these same points with respect to the ambiguities of the 1954 Geneva settlement. See Bator, "Geneva, 1954: The Broken Mold," The Reporter 15 (June 30, 1966). According to Bator:

"The primary motivation of the Vietminh was to consolidate their rule somewhere, anywhere, in Vietnam. To accomplish this, Ho Chi Minh was willing to make political concessions from his militarily superior position. So it came about that, on May 25, the head of the Vietminh delegation first mentioned partition. It was to be based on a regrouping of forces on either side of a line of demarcation that would give both parties an area with a sufficiently large population to exist independently. . . .

"The contradictions and the equivocations in the documents that emerged from the Geneva Conference gain added emphasis by the procedure by which they were reached. As narrated in memoirs such as those of Anthony Eden, who presided at Geneva, or in the detailed accounts of Bernard B. Fall, Jean Lacouture, and Philippe Devillers, partition—so ambiguously treated in the documents—was the most important subject of bargaining, both in principle and in its geographical application. It was discussed continually, if confidentially, within each delegation, but for a time was carefully ignored when the delegations met.

"When at last partition was openly breached by the Vietminh, the French and British were elated. From that moment the location of the dividing line became the principal hurdle blocking the road to a settlement. Secretary of State Dulles, in order to underscore his insistence that it be drawn on the 17th parallel and to demonstrate western unity on this point, flew from Washington to Paris to meet with Eden and Premier Pierre Mendès-France. There were discussions even about the viability of the

who was apparently a chief proponent of partition, seems to have had more than merely provisional partition in mind, and President Eisenhower indicated that the settlement implied nothing else but partition. The state of Viet-Nam protested against the partition in the settlement and some of the provisions of the settlement, such as those for the transfer of civilians between zones, suggest longer-term partition was adverted to. Although it is likely that there will continue to be a dispute as to the "real" intention of the participants at Geneva, if in fact they shared any common intention, the fact was that the central feature of the settlement was the division of Viet-Nam between two essentially economically viable and at least *de facto* international entities. The election provisions, which obviously would be the key to unification, received only rather airy treatment.

Major difficulties were also papered over with respect to the position of the state of Viet-Nam, certainly a necessary participant in any future unification.[51] For the state of Viet-Nam objected and refused to be bound by the agreements prior to Geneva, at Geneva, and after Geneva, a position which was certainly clear to all of the participants at the Conference. Although the state of Viet-Nam indicated at the Conference that it would not use force to resist the cease-fire, it made it clear that it reserved to itself complete freedom of action. Since the French had to a substantial degree granted independence to the state of Viet-Nam prior to the signing of the Accords, and had in any event entered into a series of independence agreements with the state of Viet-Nam which would, under generally accepted principles of international law, take precedence over later inconsistent treaty obligations, there was at least substantial question whether France had capacity to bind the state of Viet-Nam. Moreover, there is little indication that France intended to bind the state of Viet-Nam by the Accords, and both the separate presence of the state of Viet-Nam at the Conference and the statements of the French delegates at the Conference suggest that France neither intended to bind nor felt itself legally capable of binding the state of Viet-Nam. As background to all of this, by the time of the Conference the state of Viet-Nam had been recognized by more than 30 states, was a member of a number of specialized agencies of the United Nations, and for the past two years had been endorsed by the General Assembly of the United Nations as a state qualified for membership. These factors greatly strengthen the consistent position of the R.V.N. that it was not bound by the provisions of the Accords other than to refrain from disturbing the cease-fire by force, and specifically lend credence to its position that it was not bound by the election provisions of the Accords. That the Conference tolerated such an independent po-

two parts. It is hard to believe that all this activity could have been devoted to the location of a temporary military demarcation line, a kind of billeting arrangement that would shortly disappear. The innocent-sounding text of the final agreement must have signified something of greater import." *Ibid.* at 17.

[51] For documentation with respect to discussion of this point, see McDougal, Moore and Underwood, note 50 above, at 14944–48, 14956–58, 14969–71, notes 22, 23, 24, 33, 34, 36, 37, 41, 44 and 49; 14980–82, notes 251, 252, 254, 261, 262, 267, 270, 274, 275, 276, and 278.

sition with respect to a major participant was a surprising failing of the hard-headed diplomats at the Conference, unless, of course, they adverted to semi-permanent partition as a possible basis for settlement, recognizing the fact that an unambiguous settlement was politically impossible at the time.

In addition to these major ambiguities in the Geneva settlement, the Accords were seriously lacking in provisions for an effectively policed cease-fire, and their military restrictions, which seemed to have a significantly greater impact on the state of Viet-Nam, were inadequate to ensure meaningful demilitarization or military supervision of both North and South. The principal military restriction in the Accords, other than the core provision making unlawful the use of force by one zone against the other, was a ban on *introduction* of troop reinforcements, additional military personnel, and reinforcements of armaments and munitions. Contrary to popular interpretations, the Accords did not prohibit build-up of indigenous forces, and as such the effectiveness of the Accords was reduced.[52] The Accords also prohibited military alliances. Since it was the state of Viet-Nam which depended most heavily upon outside assistance for its defense, these provisions of the Accords, while only doubtfully ensuring effective demilitarization of North and South Viet-Nam, seemed to fall most heavily on the defensive ability of the state of Viet-Nam, an entity that had expressly refused to accept the Accords except to respect the cease-fire. Moreover, the International Commission for Supervision and Control (the International Control Commission), which was composed of representatives of India, Canada, and Poland, had little real power, no real peacekeeping force, was chronically underfinanced, and was hampered by a requirement of unanimous action for most major decisions. It was also reduced in effectiveness by the consistent and understandable position of the R.V.N. that it was not bound by the agreements, although it would co-operate in maintaining the cease-fire. Under the circumstances, when the participants perceived non-co-operation as in their interest, the I.C.C. could do little but issue reports. Recent proposals to strengthen I.C.C. control over the Cambodian border and the demilitarized zone have been supported by the United States and the R.V.N.

There are in the ambiguous Viet-Nam context also arguments that the R.V.N. was bound by the Accords,[53] and evidence that the participants

[52] See McDougal, Moore and Underwood, note 50 above, at 14970, note 46.

[53] The principal argument seems to be based on Art. 27 of the Agreement on the Cessation of Hostilities, which says that: "The signatories of the present Agreement and their successors in their functions shall be responsible for ensuring the observance and enforcement of the terms and provisions thereof. . . ." It is argued that the R.V.N. succeeded to the obligations of the French Union Forces. But if the R.V.N. is not otherwise bound by the Agreement, there is little reason to suggest that it is bound by Art. 27. In light of the evidence suggesting that France considered the state of Viet-Nam independent prior to the signing of the Accords, that France did not intend to bind the state of Viet-Nam and that the state of Viet-Nam expressly refused to be bound by the Agreements, this argument from the text of Art. 27 is not persuasive. There remain among others the questions of whether France had legally granted independence to the state of Viet-Nam prior to the signing of the Accords and,

expected elections to be held in 1956. Limited military control was fairly effectively achieved by the Commission, at least in the early years. But the point is, though the separation of Viet-Nam between the D.R.V. and the R.V.N. is the central feature of the present context and the starting point for any settlement in Viet-Nam, the 1954 settlement in its totality always has been seriously ambiguous and inadequate. The text of the "agreements" concealed continuing serious *disagreements* among the people of Viet-Nam as well as between and among major East-West Powers. Provisions for implementation avoided the difficulties. The nebulous legal status of the unsigned Final Declaration of the Conference reflected them. Had it been otherwise, there would probably be no Viet-Nam conflict today. It is not helpful, then, that the D.R.V., while refusing to negotiate, can nevertheless righteously invoke immediate implementation of the text of the Accords—as interpreted by the D.R.V., of course, and ignoring D.R.V. encroachments of the text—as a precondition for negotiations.

It should also be pointed out that the United States is not bound by the Geneva Accords of 1954 other than to refrain from disturbing the agreements by force in accordance with pre-existing obligations under the United Nations Charter. Bedell Smith, the United States delegate to the Geneva Conference made it evident to all concerned that the United States would not be bound by the Agreement on the Cessation of Hostilities or the Final Declaration of the Conference. President Eisenhower, in a statement issued the day of the Final Declaration of the Conference, also affirmed that the United States was not a "party to or bound by the decisions taken by the Conference."[54] Nothing in the United States assistance is inconsistent with its unilateral declaration at Geneva, which pointed out 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."

Perhaps most importantly, the legal relevance of the Accords to the present conflict must be analyzed in the context of community norms with respect to the lawfulness of the use of force. Wide publication of I.C.C. reports indicating "violations" of the Accords against both sides and indicating R.V.N. objections to the "agreements" has been popularly interpreted as proof that the United States position is unlawful. These reports, like any others, must be viewed in their total context; that means awareness of the ambiguities and limitations of the Geneva settlement,

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even if not, whether the independence agreements entered into by France with the state of Viet-Nam prior to the Accords would take precedence over any later inconsistent agreements entered into by France. Moreover, it is not clear from this provision that the parties adverted to the R.V.N. as a successor "in their functions"; for example, it is also open to the interpretation that they were referring to successive Commanders-in-Chief of the PAVN and French Union Forces. Nor would this argument solve the question of whether the R.V.N. was bound by the Final Declaration. Attempts to find certainty in the basic outline of the Geneva settlement, whether from the language of Art. 27 or any other, oversimplify the case.

[54] Background Information Relating to Southeast Asia and Vietnam, Committee on Foreign Relations, United States Senate (Rev. ed., Comm. Print, June 16, 1965), at 60.

the broader context of fundamental community norms as to the lawfulness of the use of force, and the rôle and function of the International Control Commission. The I.C.C., established pursuant to the Agreement on the Cessation of Hostilities, was given the task of supervising application "of the provisions of the agreement." [55] As such, it has been principally concerned with certain control tasks assigned to it, and with investigation and report on implementation of the text of the Accords. Because of this emphasis on application "of the provisions of the agreement," the I.C.C. reports are a useful indication of factual breaches of that text by both sides, and of interpretation of the text. But the I.C.C. has not reconciled the fundamental ambiguities in the Geneva settlement and has quite naturally concentrated on textual "violations." Consequently, in the context of the evidence suggesting that the R.V.N. was not bound by the Accords and their continuing refusal to be bound other than to respect the cease-fire, I.C.C. criticism of R.V.N. objections is hardly surprising. Moreover, the I.C.C. is not an international tribunal which either has authority, or which has attempted, to evaluate the over-all lawfulness of the actions of the participants in the Viet-Nam conflict. It has been principally concerned with securing implementation of the Accords and to that end has been interested in pointing out "violations" of the text without effectively relating the actions of the parties to asserted justifications or attempting to assess the lawfulness of those claims by reference to fundamental community proscriptions. Even this function has been carried out with restraint and concern lest the Commission jeopardize its usefulness as a neutral body. An example of this approach is the 1962 Special Report of the Commission, which cautiously reported "violations" by the D.R.V. for its use of force against the R.V.N. and then continued to record "violations" by the R.V.N. for its receiving defensive military assistance from the United States. The Polish delegate even dissented from these cautious conclusions, feeling that it emphasized D.R.V. violations too much rather than receipt of assistance by the R.V.N. This dissent and others suggest, perhaps not surprisingly, that not all the members of the I.C.C. can be said to be truly disinterested participants. But as a factual report and an interpretation of the text of the Accords, the 1962 Special Report is authoritative. The D.R.V. *was* using force against the R.V.N., the United States *was* providing defensive assistance to meet that attack, and both actions *were* interpreted by the Commission as "violations" of the text of the Accords. Meaningful assessment of the lawfulness of United States assistance to the R.V.N., however, must relate these actions to the broader community norms with respect to the lawfulness of the use of force. Judged in this total context, the D.R.V. attack on a separate international entity documented in this report was unlawful, and the defensive response of the United States indicated by this report was entirely lawful and justified departure from the text, even if the United States and the R.V.N. were bound by the agreement. Judged by com-

[55] Arts. 34 and 36 of the Agreement on the Cessation of Hostilities.

munity standards as to the lawfulness of the use of force, there are profound differences between the aggressive "violations" recorded against the D.R.V. and the defensive "violations" recorded against the R.V.N., and these aggressive actions of the D.R.V. justify the responding defensive assistance. There is no question but that such defensive assistance does not justify the aggressive actions of the D.R.V. This application of the fundamental community norms with respect to the use of force in international relations to the facts of the situation in Viet-Nam is the central task in ascertaining the lawfulness of United States assistance and is one with which the I.C.C. was *not* concerned. That the United States defensive assistance is lawful is also supported in this context by the conventional legal norm that material breach of agreement permits suspension of any corresponding obligations.[56]

An examination of the major ambiguities and limitations of the Geneva settlement re-enforces for the Viet-Nam context the importance of the fundamental community expectation that asserted breach of agreement or political grievances which do not present defense situations do not justify resort to unilateral coercion. The progress of implementation of those Accords must be viewed in the total context of the Geneva settlement and the community norms relating to the lawfulness of the use of force. The inherent ambiguities of the Geneva settlement cast doubt on the reasonableness of asserted D.R.V. expectations with respect to short-range unification of Viet-Nam. The use of force to assert such D.R.V. interpretations is unequivocally unlawful. Any other conclusion sanctions unilateral determination to resort to force as an instrument of major change and, as has been aptly demonstrated in the Viet-Nam conflict, endangers minimum world public order.

Civil War and "Intervention"—The Sound and the Fury

Popularly the Viet-Nam conflict is often referred to as a civil war, and critics of United States assistance argue that by assisting the R.V.N. the United States has unlawfully "intervened" in a civil war. The Lawyer's Committee even sees a close analogy to the United States Civil War.[57] Interestingly, critics differ as to whether they view the conflict as a civil war within the R.V.N. or as a civil war between the R.V.N. and the D.R.V. Although they may characterize the Viet-Nam conflict a civil war in either of these two senses, and sometimes shift back and forth between them, such characterizations mask the real issues at stake, which are the lawfulness of the use of force by the D.R.V. against the R.V.N. and the lawfulness of responding United States assistance. Characterization of the Viet-Nam conflict as a civil war in either of these senses for the purpose of assessing the lawfulness of the use of force and the lawfulness of responding defensive assistance is misleading. For, although the Viet-

[56] See authorities cited in McDougal, Moore and Underwood, note 50 above, at 14959, 14982, notes 289 and 290.

[57] Memorandum of Law of Lawyers Committee on American Policy Toward Vietnam, reprinted in 112 Cong. Rec. 2552, at 2554 (daily ed. Feb. 9, 1966).

Nam conflict does have some features of a civil war, the context is substantially different for purposes of assessing the lawfulness of the use of force. Features such as an international military demarcation line between the D.R.V. and the R.V.N., substantial international recognition of both entities, prolonged separate development, division between major contending ideological systems of the world, and substantial outside influence and assistance to the rebels in the R.V.N., set the Viet-Nam conflict apart. In this context, as discussed in section I, force by the D.R.V. against the R.V.N. as a modality of major change is unlawful. The use of force by one such entity against the other is too disruptive of minimum world public order. In these circumstances, it is perfectly lawful for the R.V.N. to receive defensive assistance for the purpose of preserving its territorial and political integrity against unlawful armed attack from the D.R.V.

Similarly, for purposes of assessing the lawfulness of the use of force, it is misleading, or at least obscures the issue, to characterize the conflict *within* the R.V.N. as a civil war. For whether or not the Viet-Cong are militarily controlled by Hanoi, and whether or not the major conflict was precipitated by Hanoi, there can be little doubt that substantial military assistance and direction is supplied by Hanoi. Such assistance and direction, which is in violation of the international cease-fire line separating the D.R.V. and the R.V.N., is unlawful. In its totality it unmistakably constitutes an armed attack aimed at the political and territorial integrity of the R.V.N. In these circumstances it is entirely lawful for the R.V.N. to receive defensive assistance for the purpose of preserving its integrity against unlawful armed attack. Invocation of authorities concerned with civil wars and talk of intervention substantially miss the point in the complex context of the Viet-Nam conflict. Discussion in this context of norms governing the right to assist one or another of the parties in a context characterized by unaided indigenous revolt, while fascinating, is not very helpful. In fact, even in the classic civil war of an essentially indigenous revolt unaided significantly by outside assistance, the prevailing expectation, although controversial, seems to be that the recognized government may receive assistance but the insurgents may not.[58] A principal policy with respect to such norms is the ensuring of self-determination to the peoples of the entity in question. When the insurgents are at least significantly aided by third parties, as in the Viet-Nam conflict, it is difficult to see how self-determination can be invoked to prohibit offsetting defensive assistance to the recognized government. Not surprisingly, the authorities are essentially unanimous in recognizing the right of assistance to the recognized government to offset unlawful outside assistance to the rebels.[59] The direction and assistance from the D.R.V. is at least substantial enough

[58] See, *e.g.*, authorities collected in McDougal, Moore and Underwood, note 50 above, at 14975–76, notes 176 and 179. But see, *e.g.*, Wright, "International Law and Civil Strife," 1959 Proceedings, American Society of International Law 145, 149.

[59] *Ibid.* Also see Brownlie, International Law and the Use of Force by States 327 (1963).

to create grave doubt that, if offsetting United States assistance were not provided to the recognized government, the resulting outcome would reflect majority sentiment within the R.V.N. And even in the absence of a military nose-count or weapons-count with respect to D.R.V. control and assistance of the insurgency in the R.V.N., the evidence that the D.R.V. has always exercised substantial control of the Communist Party apparatus within the R.V.N. casts serious doubt on assertions that the N.L.F. and Viet-Cong apparatus are meaningfully representative of indigenous sentiment. Even in the absence of such aid, direction or initiation, there is little reason to accept the seemingly neutral absolute advanced by some that self-determination requires that outside assistance never be given to any faction in another international entity. The judgment that self-determination requires that neither the recognized government nor insurgents can ever be aided disarmingly conceals the naïve assumption that whatever takes place within the confines of a territorial entity is pursuant to genuine self-determination of peoples and that outside "intervention" is necessarily disruptive of self-determination. One suspects that advocates of this "neutral principle" confuse self-determination of entities with genuine self-determination of peoples. As the reapportionment decisions should remind us, people, not territory, are the relevant standard.[60] Assistance to the recognized government is a prominent feature of the contemporary international scene and such assistance need not be contrary to genuine self-determination. Professor Sohn has pointed out a number of such examples:

> [S]ince the early days of the United Nations the practice has developed that military assistance to a recognized government is permitted, even if its purpose is to assist in suppressing civil strife. . . . When objections were raised in 1946 to the presence of British troops in Indonesia and Greece, the defense that they were there on invitation was accepted by a majority of the Security Council. . . . When military revolts tried to overthrow the Governments of Kenya, Uganda and Tanganyika in 1964, these Governments asked for British assistance and no objection was raised by anybody to it, though attempts were made later to replace the British troops with African troops. . . . Similarly, when revolts started in Gabon and other French-speaking West African States in 1964, French troops were invited to restore peace.[61]

Assistance to a recognized government to prevent take-over by an armed minority employing terrorist tactics is not inconsistent with a meaningful

[60] The frequent emphasis on Viet-Cong control of territory in the popular literature also evidences this misconception. Although it is questionable what "control" means in this context, and whether military "control" is a particularly relevant standard in any sense, if "control" of people is looked to rather than trees or acres, the Saigon government has substantially better credentials than the N.L.F.-Viet-Cong. According to the Mansfield Report the Saigon government controls about 60% of the population compared with only 22% for the rebels. The remainder is disputed. See Mansfield, Muskie, Inouye, Aiken and Boggs, note 22 above, at 142.

[61] Letter from Louis B. Sohn, Bemis Professor of International Law, Harvard, to John Norton Moore, April 21, 1966.

right of self-determination. Nothing in the United Nations Charter requires license for armed minority take-over in the name of an all-encompassing right to revolution nor guarantees recognized governments the right to oppress their peoples. Lawfulness of assistance to either faction must be determined in reference to genuine self-determination and the requirements of minimum world public order, not in blind reliance on black-letter rules as to which side, if any, can be aided in a civil war and sometimes suggesting an Alice-in-Wonderland search for neutral principles. The truth of the matter is that outside assistance to one or another faction may or may not be in the interest of genuine self-determination. The only answer to whether it is or not is careful analysis of the relevant features of the context, particularly the objectives of the participants. Self-determination, of course, is not the only important policy in deciding the lawfulness of such assistance. The requirements of minimum world public order are also vital policies at stake and may sometimes reflect more important values than self-determination. The requirements of minimum world public order, that is, the avoidance of unilateral coercion as a modality of major change, would in most contexts seem more strongly applicable to assistance to insurgent groups than to assistance to the recognized government. Perhaps it is not surprising, then, that prevailing international law seems to permit assistance to the recognized government but not to the insurgents. It is precisely by slighting these fundamental requirements of minimum world public order, as well as by self-serving characterizations of self-determination that the Communist concept of just wars of national liberation is deficient. Such slogans, whether intended to be "neutral principles" or to foster a particular ideology, dangerously obfuscate meaningful appraisal of the real policies at stake. The point is that the abstract norms regarding the lawfulness of assistance to the recognized government in a civil war are not only not applicable to the Viet-Nam conflict but are of only limited usefulness anyway. And even if the Viet-Nam conflict is simplistically characterized as a civil war, prevailing norms as to the lawfulness of assistance to the recognized government support the lawfulness of military assistance to the R.V.N. In the Viet-Nam conflict, the principal policies for assessing lawfulness are reflected in the structure for the preservation of minimum world public order, *i.e.*, the minimization of destructive modes of change, and the requirements of genuine self-determination. United States assistance to the R.V.N. is both consistent with fundamental community expectations respecting the lawfulness of the use of force, and with self-determination of the people of the R.V.N.

Neither polity in Viet-Nam is a happy one with respect to ideal operation of the principle of self-determination. Neither party has a government meaningfully responsive to the electorate through democratic processes. These difficulties are shared by many emerging nations and the context of a major conflict has made it particularly difficult for the R.V.N. to improve. The situation does not convince, however, that the D.R.V.-Viet-Cong offer the people of the R.V.N. a more meaningful chance for self-determina-

tion. Despite the often-quoted dictum of President Eisenhower writing in a different context about a different issue some twelve years ago,[62] the repeated assertions of most South Vietnamese leaders, including those opposing the present government, indicate that they share no illusion that the N.L.F. stands for their right of self-determination. It is extremely doubtful that a scientific observer could fairly conclude from the evidence today that the majority of the South Vietnamese feel that they are represented by the N.L.F. Even if the recognized government assisted is not the happiest example of operation of the democratic process, if lack of such assistance would result in take-over by an even more undemocratic regime which does not convince that it is representative of indigenous majority sentiment and which holds no hope for meaningful democratic processes, there is little reason to suggest that self-determination prohibits such assistance. If the unhappy fact of a non-democratically elected government prohibits assistance to prevent minority take-over by the destructive modality of wars of national liberation, much of the underdeveloped areas of the world lie vulnerable. Minimum world public order would be largely illusory. Non-democratically based governments must be encouraged to yield to more democratic and socially sensitive processes, but a requirement that they cannot be assisted against coercive take-over by even more undemocratic regimes is an overkill. Such a requirement would seriously impair minimum world public order while not enhancing genuine self-determination. Each case should depend on evaluation of the relevant features of the context, assessing the impact on self-determination and minimum world public order of the possible alternatives. In the ambiguous context of the Viet-Nam conflict, this question of the impact of the probable outcome on genuine self-determination, should defensive military assistance not be provided, is a particularly relevant question. Criticism of support to the present government must take cognizance of the effect on self-determination of effectuating an alternative which would withdraw such assistance, as well as the potentialities of the major contending systems to implement genuine self-determination in the sense of the widest possible participation in decision-making. Certainly a principal goal of the United States must be the genuine self-determination of the people of the R.V.N. and it is to be hoped that the United States will make every effort to promote alternatives which maximize the freedom of choice of the people of the R.V.N. and encourage truly democratic government. There are some indications that the present government of the R.V.N. is trying to move in this direction. But it is not unreasonable to recognize that today the people of the R.V.N. are entitled to their own self-determination free from D.R.V. or Communist coercion. That means the freedom to choose their own form of government and social institutions and to decide for themselves whether they wish unification with the North at some future time. That is the reality in Viet-Nam and one which the D.R.V. is seeking to alter by force. Such an attempt is unlawful and may properly be opposed by defensive assistance.

[62] See Eisenhower, Mandate for Change 449 (Signet ed., 1963).

VII. LAWFULNESS AND BEYOND—POLITICAL INITIATIVES AND THE SEARCH FOR PEACE

An analysis of the principal policies underlying the relevant legal norms indicates that providing defensive military assistance to the Republic of Viet-Nam is a lawful policy alternative. That lawfulness means compliance with existing structures of international law and the United Nations.

The conflict in Viet-Nam continues because of wide differences between the objectives of the participants and the willingness of the D.R.V. aggressively to pursue its aims by force. Until that willingness is changed or unless the United States abandons the Republic of Viet-Nam, the conflict is likely to continue. In this context, proposals for a sweeping unilateral cease-fire by United States forces "to create conditions for negotiations" [63] are unrealistic. The evidence suggests that the D.R.V. objectives remain unchanged and seriously pursued. But the capacity of the situation for international expansion does indicate a strong interest of the United States and the world community in moderation in response. Limitation rather than expansion of the response against the territory of the D.R.V. would seem a surer and less hazardous path to eventual willingness of the D.R.V. to adopt more rational procedures for conflict resolution. Short of a major threat to the integrity of the D.R.V., it seems probable that, contrary to their public statements, they will not fight forever when it becomes evident that their objectives cannot be achieved by force. Their continued escalation of the attack against the R.V.N. suggests that they have not yet reached that conclusion. The point when they will is not in sight and may require increases in defensive forces within the R.V.N. But a threat to the political and territorial integrity of the D.R.V. should be avoided. Such a threat seems certain to contribute to continuation and international expansion of the conflict. Unlimited expansion to the D.R.V. or other bizarre proposals may become more popular if the conflict drags on. Such solutions are likely to be the surest path to a much longer and more serious conflict. Although perhaps the most unpopular course, the response both North and South should continue to be a measured defensive response to D.R.V.-Viet-Cong initiatives.

This unhappy prognosis underscores the tremendous importance of the search for a negotiated settlement. The search for peace in Viet-Nam must be pursued as aggressively politically as it is pressed on the battlefield. The strong United States efforts to obtain a peaceful solution to the conflict should be continued and intensified. It may be useful in this regard to continue to underscore United States willingness to achieve a peaceful solution by periodic scaledowns or bombing pauses, the continuation of which is announced to be conditioned on some reciprocal reduction of hostilities. Initiation and support of proposals for strengthening I.C.C. effectiveness should be stressed.[64] Any responsibility for failure to adopt such proposals should be assessed and publicized. The search for peace

[63] See Standard, note 9 above, at 634.

[64] See, generally, New York Times, Aug. 23, 1966, p. 1, col. 1 (city ed.).

might also be aided by greater emphasis on clarification of long-run United States goals in Viet-Nam. Such emphasis on goal clarification might be coupled with comprehensive alternative solutions which would be acceptable to the United States and the R.V.N. If specific compromise solutions are placed before the international community by the United States and the R.V.N., world opinion might contribute to greater pressure on Hanoi to negotiate a settlement. Such clarification should not mean abandonment of United States willingness to hold unconditional negotiations, which should be continually sought and stressed. Such clarification would mean offering as additional bases for negotiation specific long-run solutions to the Viet-Nam conflict which would be satisfactory to the United States and the R.V.N. without prejudice to future negotiation on alternative plans. Such alternatives should preserve the basic integrity of the R.V.N. as an entity whose peoples are entitled to self-determination. Consistent with that goal, such alternatives should also provide opportunity for elements opposed to the government of the R.V.N. to express their preferences democratically rather than militarily. Much of the uneasiness among members of the world community about United States policies in Viet-Nam is caused by their concern in the ambiguous Viet-Nam context with whether the United States actions are conducive to genuine self-determination of the people of the R.V.N. That the United States is acting in the interest of self-determination could be clarified by proposing specific plans for meaningfully supervised elections allowing participation of all factions within the R.V.N. Such plans might be conditioned on cessation of hostilities. They would affirm that the principal goal of the United States in Viet-Nam, as in the rest of the world, must be human dignity and meaningful self-determination.

There is nothing concrete nor uniquely creative about these suggestions. Their purpose is simply to indicate that there may be value in the United States proposing positive plans for solution to the Viet-Nam conflict in addition to maintaining its position in favor of unconditional negotiations. Should Hanoi continue to refuse publicly offered reciprocal reduction of hostilities or reject publicly proposed compromise solutions, the world must not mistake which side refuses to adopt rational procedures for conflict resolution. These and other political initiatives are an important technique for discouraging D.R.V. aggression in Viet-Nam and should continue to be pressed. The political initiatives endorsed here may or may not be practical, but the important point is that political initiatives should play a major rôle in the United States response. Such initiatives have a substantial capacity for increasing the pressure on Hanoi to seek a non-military solution. If the present D.R.V. determination to achieve its objectives by the use of force continues, such measures are unlikely to achieve a short-term settlement of the Viet-Nam conflict. But they may aid in clarifying the United States position in Viet-Nam and increase the pressure on Hanoi to limit its aggression and seek a rational solution. As such, they may hasten the day when the use of force will yield to more rational processes.