RICHARD A. FALK

The Vietnam War and International Law, Volume 4

The Concluding Phase

PRINCETON LEGACY LIBRARY

THE VIETNAM WAR AND INTERNATIONAL LAW

Volume 4

The Vietnam War and International Law

The Concluding Phase

AMERICAN SOCIETY OF INTERNATIONAL LAW

EDITED BY

RICHARD A. FALK

Volume 4

Princeton University Press

Princeton, New Jersey

1976

L. C. Card: 67-31295
I.S.B.N.: 0-691-09230-3 (clothbound edition)
I.S.B.N.: 0-691-02756-0 (paperback edition)

Printed in the United States of America
by Princeton University Press

To the Memory
of
WOLFGANG FRIEDMANN
Jurist and Gentleman
par excellence

Note of Acknowledgments

THE PUBLICATION of this fourth and final volume was facilitated by the help and cooperation of many persons. I am particularly grateful to authors and publishers for granting us permission to reprint material. Detailed permissions appear in the back of the volume.

I would also like to thank members of the Civil War Panel of the American Society of International Law for their continuing interest and participation in this editorial venture, undertaken to assemble the critical materials bearing on legal aspects of the American involvement in the Vietnam War.

Once again, also, Princeton University Press has made it possible for us to bring this project to a natural conclusion. Sanford Thatcher of the Press has been helpful at every stage.

Andrea Praeger bore the main burden of detail in assembling the volume and Janet Lowenthal devoted some energy to preparing the final version of the manuscript for the publisher. It is a pleasure to thank both of these talented, vivacious research assistants of mine for so graciously coping with the frustrations of this kind of task, where for every detail dealt with three more emerge in its place. June Traube, as my secretary, contributed her multiple skills, also most graciously, to this endeavor. The work was rendered more pleasant and efficient by being carried out under the auspices of the Center of International Studies at Princeton University.

RICHARD A. FALK

Contents

THE VIETNAM WAR AND INTERNATIONAL LAW

Volume 4

Introduction*

OVER THE past several years the Civil War Panel of the American Society of International Law has devoted considerable attention to the legal issues presented by the Vietnam War. Because of the complex and controversial character of these legal issues, the Panel has emphasized the educational importance of a balanced presentation of conflicting interpretations by competent scholars and public officials. To this end the Panel has sponsored a series of volumes published under the general title *The Vietnam War and International Law*. This fourth volume brings the series, but not necessarily the work of the Panel, to a close. The Panel is also sponsoring a parallel set of volumes on *The Arab-Israeli Conflict* under the editorship of John Norton Moore. The first three of these volumes will be published by Princeton University Press in 1975, and a subsequent fourth volume is under active consideration.

As with earlier volumes the Panel has selected those writings on legal questions that are of high intellectual quality and that seem representative of the main positions in controversy. We have sought a balanced presentation of controversial material to the extent that the published literature allows it. In addition, we have solicited some new contributions for this final volume to achieve balance and to fill some gaps; but as is common in such a venture, not everything solicited was provided, even after written contributions had been promised. To some degree, imbalances in prior volumes are offset by opposite imbalances in this.

Section I contains five selections, two of which have not been previously published, that touch on general aspects of the relevance of international law to the Vietnam War. The initial selection by John Norton Moore, an active member of the Panel, seeks to assess the overall relevance of international law perspectives to the formation of national security policy; its approach clearly reflects the author's sense of the Vietnam experience. Edwin Brown Firmage, also a member of the Panel, has contributed a piece that explores the interplay of domestic and global legal perspectives vis-à-vis the sort of war/peace issues raised by the Vietnam War. Perry L. Pickert's study of "American Attitudes Toward International Law as Reflected in 'The Pentagon Papers'" is the first serious attempt to reconsider the international

* This Introduction was prepared for the Panel by the Editor of the volume.

law debate of the late 1960's in light of the new documentary material made available through the publication of the Pentagon Papers. Two further selections examine whether or not the United Nations system could play a more effective role in Vietnam-type conflicts.

Section II extends the consideration given in volumes 2 and 3 to special questions arising from interpretations of the laws of war. Some of these questions were provoked by specialized contexts, such as the use of herbicides and unofficial repatriation of prisoners of war; others involve perennial questions of the laws of war, such as treatment of prisoners of war or the law of air warfare, as reconsidered in the Vietnam context. Controversies over observation and violation of the laws of war are important concerns for the international lawyer. Monitoring the adequacy of these laws and interpreting the attitudes of governments toward compliance is especially necessary under modern conditions in which the technology and doctrines of warfare are undergoing such rapid and profound change. Internal warfare of the sort that took place in South Vietnam during the past decade presents a series of vital questions as to the adequacy and limits of international law under a variety of battlefield situations. Certainly, one impulse toward the modernization of the law of war, much of which dates back to the pre-World War I period, stems from perceived inadequacy in Vietnam-type settings.

Inquiry into the laws of war is intimately linked to the focus in Section III on issues of individual responsibility arising from their violation. A combat soldier is generally held criminally responsible for violations of the laws of war, and service field manuals confirm this responsibility. However, there is widespread disagreement on the corpus of applicable international law and on the extent to which legal responsibility should be imposed higher in the chain of civilian and military command. On the surface, this disagreement involves determining whether alleged violations of the laws of war are systematic and deliberate expressions of official policy. Underneath these arguments about facts and intentions are some elaborate juridical controversies that relate to the legal status and relevance of the Nuremberg experience, and to the assessment of individual responsibility of national leaders. In this context the Nuremberg experience refers both to the war-crimes trials held after World War II and to the International Law Commission's 1950 formulation of Principles embodied in the Nuremberg Judgment.

Section IV considers the legal issues surrounding the settlement of

the Vietnam War. There are important theoretical questions bearing on how wars end when neither side achieves a military victory, but the selections in Section IV are more closely focused upon the negotiations of the settlement, the documents of settlement, and the disappointing record of implementation. Given the background, which centrally includes the so-called Second Indochina War spawned by the insufficiency of the Geneva Accords of 1954, there is an understandable anxiety that failures to implement the 1973 Paris Agreement may generate yet another Indochina War. All parties to the Paris Agreement allege that their adversaries have acted in substantial and persistent violation of the obligations assumed. On the accuracy of this accusation, and on this alone, can one find unanimous agreement among the four original Paris signatories. Impartial observers also share the view that the bargain which took several years, considerable drama, and much anguish to negotiate in Paris has not been implemented. At the same time, the Paris Agreement was successful in bringing home American POW's and provisionally ending the direct combat role of the United States.

The debate of a decade over the legal propriety of the war provoked a major domestic reappraisal of the American constitutional system. Earlier in the war the controversy centered on the intentions of the framers, especially with respect to the role of Congress in authorizing hostilities. A major feature of the debate centered on whether the Gulf of Tonkin Resolution of 1964 satisfied the constitutional requirements or whether a formal Declaration of War was required after Vietnam hostilities expanded into full-scale warfare early in 1965. Had the President exceeded his powers under the Constitution? Had Congress been tricked? Had Congressional votes on appropriations for the war amounted to an endorsement of Presidential claims? What role, if any, should the courts play in fixing the relative war-related roles of the Presidency and the Congress and in determining which acts (e.g., appropriations) amounted to a fulfillment of these roles? In a sense, these grand constitutional issues have been left unresolved; academic controversy continues to flourish, as is evident in the various lines of interpretation offered in Section V.

The controversy took a new turn as the war itself began to wind down. The focus shifted from the constitutional system to legislative efforts by Congress to develop more precise allocation of responsibility and authority for war-making and to put rather clear limits on Presi-

dential discretion. The result of this new emphasis was the War Powers Act, a compromise enactment which won a large measure of mainstream support but which dissatisfied both those who supported the President's handling of the Vietnam War (see, for example, Eugene Rostow's article) and those who thought the war was waged in an unconstitutional manner. It is a peculiar kind of situation in which "the hawks" regard the War Powers Act as a shackle and "the doves" view it as an open-ended hunting license. Perhaps practical experience with the legislation will resolve the debate by generating some authoritative precedents. Much depends on the nature of future Presidential claims to use force abroad without benefit of either a Declaration of War or an authorization from the United Nations. Much will also depend on how Congress and the public react to these claims.

This volume concludes with a documentary appendix that presents the main materials related to the "settlement" of the Vietnam War, as well as the cognate efforts in Laos and Cambodia. Students of international law will probably devote considerable attention in the years ahead to an interpretation of these settlement materials. A second appendix provides a sampling of judicial decisions in cases arising out of the war; in addition, a text of the War Powers Act and President Nixon's veto message are included.

Just as the conflict in Vietnam (and in the whole of Indochina) persists, so the legal debates spawned by the war remain unresolved. In all probability, these debates have helped to sharpen an appreciation of what the international legal order will require in the future. Many of the selections in Volume 4 highlight shortcomings of the existing international legal order when it comes to war prevention or to the moderation and effective termination of warfare. These shortcomings are evident in any war setting, but become more salient as a consequence of the controversy generated by the American involvement in the Vietnam War. It should be noted that this controversy took place mainly within the United States, a tribute to the capacity of the society to tolerate dissent and engage in debate even while a major war was in progress. Such a domestic brake on national sovereignty is itself a significant factor, but unfortunately it is not generally present throughout world society.

Can the laws of war be revised? Can international procedures for peaceful settlement be strengthened? Can the motivation for large-scale involvement in foreign wars be diminished or even eliminated? Vir-

tually every international lawyer shares these concerns, regardless of his or her individual position on the arguments raised by U.S. involvement in the Vietnam War. From the beginning it has been these shared concerns which have encouraged the Civil War Panel to sustain its internal dialogue and to carry on with its work despite the difficulties.

This volume, you will note, is dedicated to Wolfgang Friedmann, a leading participant on the Civil War Panel since its inception and Chairman of the Panel at the time that Volume 3 in this series was published. Professor Friedmann's violent death on the streets of New York is a tragedy of great magnitude and one that deserves to be linked in the political imagination of our time with the more general tragedy that has befallen Vietnam.

Richard J. Barnet
Thomas Ehrlich
Tom J. Farer
Edwin Brown Firmage
G. W. Haight
Eliot D. Hawkins
Brunson MacChesney
Myres S. McDougal
John Norton Moore
Stephen M. Schwebel
Louis B. Sohn
John R. Stevenson
Howard J. Taubenfeld
Burns H. Weston
Richard A. Falk, Chairman

I. ROLE OF INTERNATIONAL LAW AND ORGANIZATION

Law and National Security

JOHN NORTON MOORE

THE role of law in the management of national security has been debated throughout American history. Traces of the debate may be found as long ago as 1793 in the exchange between Hamilton and Jefferson about the relative importance of "interests" and "morality" in deciding whether the United States should support France in the war with England. Jefferson found an obligation to support France under the 1778 treaty of alliance and urged that the treaty obligation was binding on the nation. Hamilton countered that there was no obligation but even if there were it did not require the United States to jeopardize its "essential interests."

At the turn of the century the debate achieved clearer focus in the writings of Alfred Thayer Mahan, the great sea power strategist, and Elihu Root, Secretary of State and a distinguished American jurist. The core of this second round was the importance of arbitration and other third-party machinery for the settlement of international disputes. Root and other jurists urged greater resort to international arbitration. Mahan countered that law, while sometimes useful, was incapable of dealing with questions of national expediency such as the Monroe Doctrine.

In the aftermath of World War II the debate was resumed more sharply and with a broader focus. On one side were international relations theorists such as Hans J. Morgenthau and George F. Kennan, who saw only a small role for international law and who opposed their "realist" position to what they believed were dangers of a "legalistic-moralistic" approach in dealing with national security issues. On the other side were jurists such as Hardy C. Dillard and Myres S. McDougal, who warned that the realists had an incomplete understanding of the role of international law and that their view, if influential, could be costly for American foreign policy.

The realists have, throughout the debate, had an important message. Over-reliance on international law can be a prescription for disaster in a loosely organized and intensely competitive international system. If the disappointments with arbitration treaties and universal disarmament schemes during the interwar years did not drive this home, the advent of the cold war cer-

tainly did. All this, however, has led to an overly broad indictment of the legal tradition. For while we have been preoccupied with the dangers—some very real—of a "legalistic-moralistic" strain in American foreign policy, we have failed to see the cost resulting from the slender capacity of our national security process to take an international legal perspective into account.

II

National security decisions must consider a range of component issues. At a first stage these include: What are the national goals? Are they realizable in the context in which they must be pursued? If so, are they realizable at a cost-benefit ratio which makes their pursuit in the national interest? Are preferable alternatives available which will achieve the goals at a more favorable ratio? And how can policies, once chosen, be most effectively implemented and justified?

Legal considerations, like political, military and economic considerations, are relevant to each of these issues. Yet there are no international legal specialists on the increasingly important staff of the National Security Council even though that staff now comprises over 50 substantive officers. Similarly, there is virtually no reference in the Pentagon Papers to the legal dimensions of policy in the Vietnam War. These examples illustrate a structural weakness in the national security process which impedes the consideration of international—and sometimes constitutional—legal components of policy.

There are, of course, showcase examples of national security decisions in which legal considerations have played a constructive role. Chief among them are the Berlin crisis of 1948 and the Cuban missile crisis of 1962. The "Forrestal Diaries" indicate that Forrestal and President Truman discussed "the controlling legal rights and undertakings" as a starting point for policy in the Berlin crisis. The United Nations was also used extensively and helpfully during the crisis. Similarly, because of early involvement of the State Department's Legal Adviser's Office, international legal considerations played a significant role in shaping U.S. policy during the missile crisis. Legal initiatives included designation of the action as a quarantine—since a blockade might have been construed as an act of war—and collective authorization by the Organization of American States (OAS).

Much more abundant examples can be found of insensitivity

to international legal considerations. In order to justify the initiation of bombing of North Vietnam in February 1965, for instance, the raids were announced as reprisals for Vietcong attacks on the U.S. military advisers' compound at Pleiku. A case can be made that this bombing of the North, like U.S. participation in the War, was a lawful defensive response against a prior intervention by North Vietnam amounting to an armed attack under Article 51 of the U.N. Charter. But there is overwhelming authority that reprisal, which is a technical legal term for minor coercion in response to a breach of an international legal obligation not amounting to an armed attack, is barred by the Charter. By their unawareness of the relevant legal considerations or their unwillingness to take them into account, American policy-makers had chosen a public justification blatantly in violation of international law.

The April 1965 intervention in the Dominican Republic provides another example of insensitivity to legal considerations. The announced purpose of the first phase of the U.S. action in landing 400 marines was to protect U.S. nationals, a purpose which if carefully implemented would be lawful. But the action was neither implemented nor justified with the legal basis for such action in mind. And the second phase of the action, which committed more than 21,000 U.S. forces to an effort to end the Dominican civil strife, was undercut from the beginning by the failure to initiate the action under Article 6 of the Rio Treaty and by the overly broad rhetoric of President Johnson in proclaiming the inadmissibility of another Communist government anywhere in the hemisphere, a reason for the action which would make it in violation of Article 2(4) of the U.N. Charter. These failures subsequently obscured the real differences between the U.S. action in the Dominican Republic and the Soviet action in Czechoslovakia.

Still another, and poignant, example is the lack of vigorous effort in the Indochina War, at least during the early years, to implement the laws of war. The United States is party to a variety of treaties relating to the conduct of warfare, including the Fourth Hague Convention of 1907 Respecting the Laws and Customs of War on Land and the four Geneva Conventions of 1949. It also recognizes a substantial body of customary international law setting minimum humanitarian standards for the conduct of warfare.

As the Son My tragedy amply confirms, violation of these standards may undermine the national effort as well as offend moral sensibilities. But the Son My tragedy also raises broader problems concerning the present status and effectiveness of the laws of war, problems which have been insufficiently considered by U.S. policy-makers. First, officially defined restrictions on combat too frequently have not been understood or implemented in the field. For example, there seems to have been wide disparity in understanding among regional commands in Vietnam that the "body count" was to include prisoners of war as well as enemy casualties and that "specified strike zones" did not override the laws of war which hold that attacks on noncombatants are not permissible. Second, the manifest ambiguities and deficiencies of the law, in face of the complexities of a counterintervention-ary setting and newer military technology, have largely gone unattended. For instance, the principal legal analysis for the massive use of chemical herbicides in Vietnam seems to have been a memorandum prepared in March 1945 by Major-General Myron C. Cramer, then Judge Advocate General, concerning the possible use of chemical anti-crop agents against pockets of Japanese on the Pacific islands. This example is symptomatic of a lack of adequate legal review of newer weapons and tactics.

Most important, adequate national and international machinery that can deal with the full sweep of these problems has been lacking. Though army regulations require compliance with the laws of war and many military and other government advisers made significant individual efforts to ensure compliance in the field, the chances for a more vigorous and imaginative implementation would have been improved if an international legal perspective sensitive to the issues had been systematically structured into higher levels of the national security process. This might have been supplied by an interdepartmental group charged with responsibility for oversight and development of the laws of war.

A fourth example of insensitivity to legal considerations is in the recurring failure to prepare an adequate constitutional basis for major military actions abroad. The failure of President Truman to secure explicit congressional authorization for the Korean War was followed by President Johnson's unnecessary reliance on an ambiguous series of attacks on American ships in the Gulf of Tonkin as the occasion for obtaining congressional authorization for the Indochina War. In both cases the failure

to allow more adequately for the constitutional legal dimensions proved to be major weaknesses of policy.

The Cambodian incursion of April 30, 1970 provides a fifth example. There were at least three ways that more adequate consideration of international legal factors might have strengthened the U.S. response in the crisis.

First, North Vietnamese attacks on Cambodia might have been protested by the United States in the Security Council much as the Soviet actions in curtailing access to Berlin were taken to the Security Council to lay the groundwork for subsequent Allied action to reopen the city. The Cambodian complaint to the Security Council on April 22 would have seemed an opportune time to press such a complaint in the Council. And at a minimum, the incursion should have been immediately reported to the Security Council pursuant to the obligation under Article 51 of the U.N. Charter.

Second, the principal legal basis for the Cambodian incursion was that a belligerent state may take action to end serious violations of neutral territory by an opposing belligerent. Yet the important presidential address explaining the action to the nation did not mention the principle. This and other public pronouncements might have been more focused and carried greater weight had they emphasized the substantial international legal authority for the action.

Third, and most important, a prior understanding with Cambodia might have been obtained for public release at the time of the operation. In view of the requirement of Article IV, paragraph 3, of the SEATO Treaty, which provides that no action on the territory of a protocol state such as Cambodia "shall be taken except at the invitation or with the consent of the government concerned," such an advance agreement would have seemed particularly advisable.

Finally, and most recently, there is the example of the U.S. response to the Pakistan-Bangladesh-India war. Perhaps the lack of clarity in the U.S. position was attributable to the complexity of the situation. It is, after all, difficult to distinguish the damsel from the dragon when one side is engaged in mass murder of noncombatants and the other intervenes in a war of secession against a traditional rival. Nevertheless, America might have been more persuasive in focusing on the shortcomings of both sides if she had taken account of the legal aspects of the conflict.

Initially, the United States should have vigorously urged Pakistan to live up to the provisions of Article 3 of the Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War. Article 3 sets out a series of minimum standards for the protection of noncombatants "in the case of armed conflict not of an international character occurring in the territory" of a party to the Convention. In fact, the United States had an obligation under Article 1 of the Convention to undertake "to ensure respect for the . . . Convention in all circumstances."

With respect to the Indian action, the United States might have pointed out more specifically that the intervention violated a series of recent General Assembly Resolutions, including the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples and the 1965 Declaration on Inadmissibility of Intervention. The 1960 Declaration was particularly on point. Section 6 declares: "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."

The point is that the actions of both sides had their warts and that legal analysis could have helped to isolate the virus and prescribe the treatment.

The memoranda of the meetings of the Washington Special Action Group, made public by Jack Anderson, confirm that greater sensitivity to legal considerations was called for in the India-Pakistan crisis. These sources demonstrate that the National Security Council understood the advantages of utilizing the United Nations, a use which was helpful. But they evidence little awareness of international legal norms as a basis for appraisal of the Indian and Pakistani actions or for support of U.S. policy. For example, there was no mention of the General Assembly Resolutions condemning intervention in a war of secession—Resolutions which strongly supported U.S. opposition to the Indian intervention. Similarly, no mention was made of the 1949 Geneva Convention Relative to the Protection of Civilian Persons, despite a discussion of how best to ensure the safety of the Biharis in East Pakistan and the Bengalis in West Pakistan. More dramatically, although Henry Kissinger posed a question concerning the legal basis for the Indian naval blockade, there was no legal specialist present to answer it. The resulting discussion too easily suggested that there was no legal

basis for an Indian blockade and failed to consider whether incidents involving American ships subsumed violations of international law even if the Indian blockade were legal.

The legal tradition is important in making policy as well as for its implementation and justification. The 1960 Bay of Pigs invasion illustrates the cost of failing to take an international legal perspective into account in planning for U.S. action. There is no evidence that the U.S. planners weighed the effects of supplying illegal assistance to the insurgents. It should have been evident that the effort—successful or unsuccessful—would establish a precedent for external assistance to exile insurgents which would work strongly against the national interest when transferred to Indochina or the Middle East. The effort was also likely to contribute to a loss of national influence as a result of the associated violations of the charters of the Organization of American States and of the United Nations. It would probably overstate the case to say that the abortive invasion would not have taken place if the legal tradition had been adequately considered, but it might have been less likely had there been full and candid presentation of the international legal costs of the action.

Quite apart from the utility of an international legal perspective in crisis management there is also a need for more systematic representation of the legal tradition in formulating a coherent and intellectually powerful foreign policy. Under the pressures of the cold war the nation has drifted away from a consistent vision of world order. Yet a foreign policy which focuses on the importance of the stability of the system and coöperative solution of global problems seems strongly in the national interest.

Internationally, such a foreign policy may be the best strategy for the United States to recoup its leadership; and nationally it may be a prerequisite to adequate domestic support of foreign policy. The present neo-isolationist tendencies within the United States are qualitatively different from the isolationism of the "America first" movement preceding World War II. Then the predominant strain was to avoid involvement in the affairs of Europe, whatever the moral cost. In contrast, the predominant strain in the present movement seems to be a pronounced—though sometimes misplaced—concern for the moral dimensions of American foreign policy. If such concern can be channeled into a coherent vision of world order, it may revive domestic support for the more active international policy which the na-

tion must undertake in order to deal effectively with the myriad of problems in security, development and environment which lie ahead. The legal tradition has no monopoly of vision on world order; it does have a special contribution to make to the normative aspects of state conduct as well as global organization for solution of social problems.

III

The realist-jurist debate has done little to dispel widespread misperceptions about the value of the legal tradition in the management of national security. At least three such misperceptions continue to obscure its importance.

First, international law is thought of as saying what cannot be done, solely as a system for restraining and controlling national actions. No one proposes to exclude military or political considerations from planning simply because they do not always determine policy. Yet because of a misleading image of law as a system of negative restraint, we make such a judgment when it comes to law. In fact, the legal tradition can play a variety of important roles in planning and implementing national security decisions. These include, among others, focus on the long-run stability and quality of the international milieu; calculation of the costs and benefits resulting from violation of the law or compliance with it; focus on a range of international legal options for conflict management; concern with appraising and justifying national actions by reference to shared global interests; and supervision of the national interest in domestic operations that involve U.S. adherence to international agreements.

Law is also useful for solving social problems and communicating intentions. Examples include the 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America, the recently signed Draft Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons, and the ongoing efforts to reach agreement on an international régime for the resources of the deep seabeds. To focus exclusively on the difficulties of international law in constraining international behavior is to miss the creative opportunities which the law provides.

There are, of course, dangers in simplistic legal approaches to national security issues. These include, among others, equating general goals with specific policies without assessing the

effectiveness of those policies, as for example, to urge that since we wish a warless world we should unilaterally disarm; pursuit of policies which are unrealistic in the present international system, as for example, to advocate submitting the Arab-Israeli or Indochina conflicts to the International Court of Justice; and over-reliance on the deterrent effect of international law or on formal legal arrangements divorced from power realities, as, for example, to rely solely on international law for the protection of the *Pueblo* despite the demonstrated willingness of North Korea to violate international law.

Though these dangers are real, none of them is inherent in a sophisticated legal approach. More important, the legal tradition complements the realist approach precisely where that approach is weakest, that is, in preoccupation with short-run goals at the expense of long-run interests in a healthy world order.

A second misperception is that a concern for international law is opposed to a concern for the national interest. But the "national interest" is not a self-defining concept. As it is understood by most theorists, it would include a strong interest in the stability and quality of the international system. Thus Raymond Aron says: ". . . the West must stand for an idea of an international order. The national interest of the United States, or even the collective interest of the Anglo-Saxon minority, will not win over any country nor will it cause any loyalties if it does not appear to be tied to an international order—the order of power as well as the order of law."[1]

International law may also help to elaborate the national interest in a variety of operational settings. For example, international law has distilled from centuries of experience a substantial body of norms for the conduct of hostilities. Not to comply with these is to risk breakdowns in military discipline, brutalization of participants with resultant social costs on return to civilian life, unnecessary escalation or continuation of conflict, reciprocal mistreatment of nationals, domestic loss of support and unnecessary destruction of human and material resources.

The real conflict between law and the national interest, when it arises, occurs in terms of the costs and benefits to the nation of pursuing a policy which is illegal. When the conflict arises,

[1] Raymond Aron, "The Quest for a Philosophy of Foreign Affairs," in Stanley Hoffmann, ed., "Contemporary Theory in International Relations." New York: Prentice-Hall, 1960.

too often the legal costs are not adequately appreciated. In the case of the Bay of Pigs invasion, for example, the probable benefits to the nation deriving from a successful action should have been weighed against the short-run cost in loss of U.S. influence resulting from a blatantly illegal policy and the long-run cost of undermining legal constraints contributing to the stability of the international system.

A third misperception comes in judging the utility of the legal tradition on an oversimplified model of law. A common error in this regard is to underestimate the importance of community perceptions of legality as a base for increase or decrease in national power. International law, particularly on issues of war and peace, does not always manifestly control the behavior of states. But it is not as widely perceived that even when international law does not control behavior, there are international norms—community expectations about the authority of national action which may in a variety of ways translate into power realties. For example, an action such as the Korean War, in which perceptions as to lawfulness are high, is likely to produce more allies than actions which are controversial such as the Indochina War or widely regarded as unlawful such as the British and French invasion of Suez.

If beliefs about the illegality of a nation's actions are intense and widespread there may be a generalized loss of national influence. The Soviet Union seems to have paid such a cost in the invasion of Czechoslovakia, as indicated by the disaffection of Soviet-oriented Communist parties and front organizations throughout the world. Perceptions about legality may also influence votes within international organizations such as the United Nations, the OAS Council of Ministers or even the International Committee of the Red Cross.

Another error resulting from an oversimplified model of law is the tendency to overestimate the indeterminacy of international legal norms. The lack of centralized legislative and adjudicative competence in the international system is a real factor contributing to gaps and tears in the legal fabric. But it is wrong to conclude that all international law is amorphous. International law has areas of clarity as well as of uncertainty and in this respect is not as qualitatively different from national law as one who has never suffered through the confusion of first-year law school might suspect. It is virtually undisputed among inter-

national lawyers that the U.S. role in the Bay of Pigs invasion, the Soviet role in the invasion of Czechoslovakia, and the British and French Suez intervention violated Article 2(4) of the U.N. Charter which proscribes "the threat or use of force against the territorial integrity or political independence of any state. . . ." It is also widely accepted that the allied intervention in the Korean conflict was a lawful exercise of collective defense under Article 51 of the Charter, that the Son My tragedy was in violation of Hague and Geneva rules and that the North Vietnamese mistreatment of allied prisoners is in violation of the Geneva Conventions. Many other examples of reasonably definite legal conclusions about war and peace issues could be given.

IV

One important reason for the failure to take legal perspectives into consideration in the management of national security is that the machinery, as presently structured, is inadequate to the task.

The principal international legal adviser to the government is the Legal Adviser of the Department of State. In addition, there are many other offices engaged to some extent in the process, including, among others, the Office of General Counsel of the Department of Defense, the General Counsel of the Arms Control and Disarmament Agency and the Office of Legal Counsel of the Department of Justice.

There are a number of structural problems which prevent full utilization of this plethora of legal offices. The most important is that there is little legal advice used by the important National Security Council and NSC staff portions of the security process. Since its creation in 1947, the NSC and its staff have played an increasing role in the management of national security. There are persuasive reasons for dividing the national security process between State and the NSC-White House. Unfortunately, a consequence of this division has been to minimize concern for international legal considerations since there are no international legal specialists on either the White House or NSC staffs.

A second structural problem is the lack of centralized responsibility for the general development and supervision of the international legal aspects of national security decisions. The press of day-to-day business within each legal office and the lack of clear lines of responsibility between offices have hindered vigorous efforts to strengthen and develop international law.

Although not to overemphasize the importance of structural change as such, certain changes might improve the present inadequate consideration of the legal component of policy:

First, make the Legal Adviser of the Department of State a regular member of the National Security Council. This would have the advantage of introducing international legal considerations into crisis management where they are most needed. It would also give the Legal Adviser, who is called upon to justify policy, a better opportunity to influence the making and implementation of policy. In his new capacity, the Legal Adviser would be available to advise the President as well as the Secretary of State. An obvious parallel to this dual advisory role is the dual role of the Chairman of the Joint Chiefs of Staff who advises both the President and the Secretary of Defense. As a corollary to this change the Legal Adviser might also be made a member of any NSC group dealing with security crises, such as the Washington Special Action Group.

Second, add a new position, which might be called Counselor on National Security Law, to the staff of the National Security Council. One of the important mechanisms for coördinated foreign policy planning is the National Security Study Memorandum supervised by the NSC staff. Of 138 such memoranda prepared from 1969 through October 2, 1971, some 20 to 30 have a significant legal component. These include memoranda on Indochina, Cyprus, the Middle East, southern Africa, the nonproliferation treaty, the Nuclear Test-Ban Treaty, tariff preferences, chemical-biological agents, toxins, the seabed treaty and U.N. China admission. Though legal considerations are undoubtedly present in many of these memoranda as a result of interdepartmental consideration, an in-house legal expert within the NSC staff could assist in recognizing and coördinating the legal components of such planning. The Counselor and his staff would also be available to the President to provide advice on the legal dimensions of national security issues when, for reasons of speed or secrecy, the President chose not to utilize the formal machinery of the National Security Council. Finally, the Counselor could serve as a liaison with other government legal advisers, particularly the Legal Adviser of the Department of State and the General Counsel of the Department of Defense. Indeed, the coördinating function might extend to many hitherto-domestic agencies. The U.N. Conference on the Human En-

vironment and the upcoming conference on the law of the sea are illustrative of a new global consciousness that promises both a multiplication of national obligations and an increase in the impact of international law on national life. In this respect, the creation of a Counselor on National Security Law would parallel the recent addition of an Assistant to the President for International Economic Affairs.

Third, create a permanent Interdepartmental Group on International Legal Affairs chaired by the Legal Adviser of the Department of State. Its purpose would be to coördinate and initiate government programs for the implementation and development of international law. More specifically, the Group would coördinate the executive position on issues with a substantial international legal component, for example the position on ratification of the 1925 Geneva Protocol on Gas and Bacteriological Warfare. It would also identify international legal problems in current U.S. foreign policy and prepare position papers for consideration by the National Security Council. An example would be the U.S. obligation under Article 25 of the Charter to accept and carry out the U.N. sanctions against Southern Rhodesia—sanctions which the United States supported and could have vetoed—by refusing to import Rhodesian chrome once such sanctions had been decided by the Security Council.

The Group would also have responsibility for assessing any government action against the legal obligations binding on the United States. This would include, for example, continuing appraisal of compliance with the laws of war during the course of hostilities. Another recent and practical example is the case of the Lithuanian defector, Simas Kudirka, who was hastily returned to Soviet custody on November 23, 1970, from the U.S. Coast Guard cutter *Vigilant* in violation of the U.N. Protocol Relating to the Status of Refugees. The incident might have been prevented if the Protocol had been previously incorporated in Coast Guard regulations (as it has been subsequently) by prohibiting the immediate return of defectors pending subsequent determination of status as required under the 1951 Convention Relating to the Status of Refugees.

Finally, the Group would have responsibility for promoting the progressive development of international law by the United States. In this capacity the Group might identify and promote areas in which U.S. leadership could strengthen international

law. It might also encourage greater training in international law for government officials, for example, by enlarging the programs in international law offered by the Foreign Service Institute, the National War College and the Naval War College or by instituting such programs elsewhere. Similarly, it might identify and sponsor research in areas of international law which are unclear and which are of potential concern.

In its composition, the new Interdepartmental Group would be chaired by the Legal Adviser of the Department of State and would include the General Counsel of the Department of Defense and (if the position of Counselor on National Security Law were created) the newly created Counselor as well. In addition, the Group would include any government legal counsel deemed important for its effective functioning. In some respects, it might be modeled after the highly successful Interagency Task Force on the Law of the Sea which is chaired by the State Department Legal Adviser and responsible to the National Security Council. It would, however, be structured as a permanent interdepartmental group.

Finally, consultants on international law should be added to the Senate Foreign Relations and House Foreign Affairs Committees. The simplest and most effective way of doing so is to regularize the consideration of international legal factors in the day-to-day work of the principal congressional committees dealing with national security issues.

In the consideration of these proposals it should be remembered that the question is not whether international law will be controlling but the more modest one of whether it will be taken into account. As Stanley Hoffmann observes, "a comprehensive analysis of world politics and foreign policy cannot afford to neglect the law, both because of its *actual* importance and because of its *potential* importance for a better order. . . ."[2] By strengthening the national security machinery to take law more systematically into account America could lead in promoting the development of international law as well as in implementing President Nixon's statement in his 1970 World Law Day message that it "is not enough that we merely defend the law as we have known it in the past: we must also work to . . . extend its influence in international affairs as well as in our national life."

[2] Stanley Hoffmann, "Henkin and Falk: Mild Reformist and Mild Revolutionary," *Journal of International Affairs*, v. 24, 1970.

Law and the Indochina War: A Retrospective View

EDWIN BROWN FIRMAGE

> We are mad, not only individually, but nationally. We check manslaughter and isolated murders; but what of war and the much vaunted crime of slaughtering whole peoples?
>
> Seneca: *Ad Lucilim* XCV.

> How small, of all that human hearts endure,
> That part which laws or Kings can cause or cure.
>
> Oliver Goldsmith: *The Traveller*

I. Introduction

This century, from the Hague Conferences through the Vietnam War, has seen a profound change in attitudes toward the role of law as a constraint upon foreign policy. The Hague Conferences [1] represented at once an attempt, however feeble, by men of mixed motives to emplace fledgling prophylactic legal institutions upon the tendencies of the nation-states to resolve disputes by war, and at the same time to limit war's destructiveness if prevention failed. World War I destroyed not only most of this superstructure, but also massive portions of the more fundamental institutions of the dynastic state system of the time. When European balance of power politics failed to maintain peace and preserve social order, the ad hoc systems of the Hague Conventions were replaced by the League of Nations, which provided a weak form of collective security and a standing conference system of dispute resolution.

The controversy in this country over our participation in the League of Nations was not merely a debate between advocates of the geopolitics of power and proponents of a stronger role for legal institutions in international relations. Both proponents and opponents of the League recognized the need for development of dispute resolution institutions to displace balance of power politics in the maintenance of peace. Woodrow Wilson favored the League for precisely the same reason that Philander

---

[1] *See* Firmage, *Fact-Finding in the Resolution of International Disputes — From the Hague Peace Conference to the United Nations,* 1971 Utah L. Rev. 421 (an analysis of the evolution of fact-finding, peace-keeping, and dispute resolution techniques through the media of the Hague Conference, the League of Nations, the Bryan treaties, and the United Nations).

Knox, Senator Borah, and J. Reuben Clark, Jr.,[2] opposed it; all were reacting against European balance of power politics. Wilson viewed the League system as the way to conduct foreign policy on a foundation of collective security, if not parliamentary politics. Knox, Clark, and others saw the League — inextricably tied to the Versailles settlement as the price Wilson paid for the world body — simply as an institutional means by which France and Britain might maintain a dominant position over Germany. In their view, the League amounted to European power politics in institutional disguise. Clark, far from opposing the concept of a standing conference system as a means of dispute resolution, proposed such a plan of his own.[3] The arbitration treaties of William Jennings Bryan, our participation in the Permanent Court of International Justice supported by Harding, the Kellogg-Briand Pact (defended by proponents and opponents of the League), the reliance upon arbitration as a means of dispute resolution by Elihu Root, Charles Evans Hughes, and J. Reuben Clark, Jr., and the disarmament conferences (sustained by leading proponents and opponents of the League) represent some degree of support for a legal or institutional approach to foreign policy — an approach excoriated by Acheson,[4] Kennan, and others after World War II.

Kennan's book, consisting of lectures delivered at the University of Chicago in 1951, became one of the most popular and influential writings on foreign policy. His criticism of excessive legalism in foreign policy was based upon his examination of American foreign policy from the Civil War to World War II:

> . . . I see the most serious fault of our past policy formulation to lie in something that I might call the legalistic-moralistic approach to international problems. . . .
>
> It is the belief that it should be possible to suppress the chaotic and dangerous aspirations of governments in the international field by the acceptance of some system of legal rules and restraints. This belief undoubtedly represents in part an attempt to transpose the Anglo-Saxon concept of individual law into the international field

---

[2] *See* Firmage & Blakesley, *J. Reuben Clark, Jr.: Law and International Order,* in J. REUBEN CLARK, JR. — DIPLOMAT AND STATESMAN 43, 54 *et seq.* (R. Hillam ed. 1973).

[3] *See id.* at 61–62 & n.46, *citing* Clark, *System of Pacific Settlement of International Disputes: A Program,* UNITY (Oct. 4, 1923). Clark proposed that there be created a world judiciary and world deliberative body, with quasi-legislative functions, which he called a "World Congress." *Id.* at 61.

[4] Mr. George Kennan complains, I think justly, of the disservice which lawyer secretaries of state did to American foreign policy during the years when they directed most of our effort to the negotiation of nearly a hundred treaties of arbitration, only two of which were ever invoked. He is, of course, quite right that all this misguided effort sprang from a complete failure to see the enormous threat to world stability which the Germans were so soon to carry into action. Even after the First World War, the realities of power were still obscured to us by our peculiar American belief that salvation lies in institutional mechanisms.

D. ACHESON, MORNING AND NOON 147 (1965). *See also* Acheson, *The Arrogance of International Lawyers,* 2 INT'L LAWYER 591 (1968); McDougal & Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern,* 62 AM. J. INT'L L. 1 (1968).

> and to make it applicable to governments as it is applicable . . . to individuals.[5]

Elaborating upon these early observations, Kennan in his memoirs described our foreign policy between 1865 and 1939 as "utopian in its expectations, legalistic in its concept of methodology, moralistic in the demands it seemed to place on others, and self-righteous in the degree of high-mindedness and rectitude it imputed to ourselves." [6] He also criticized our

> inordinate preoccupation with arbitration treaties, the efforts towards world disarmament, the attempt to outlaw war by the simple verbiage of the Kellogg Pact, and illusions about the possibilities of achieving a peaceful world through international organization and multilateral diplomacy, as illustrated in the hopes addressed to the League of Nations and the United Nations.[7]

Kennan's penetrating criticism of our legalistic, institutional approach to foreign policy during the century preceding World War II was far more than a simple commentary on the limitations of one trained in the law to serve as Secretary of State. Rather, Kennan indicated an entire approach to foreign policy,[8] an approach shared not only by lawyers, but also by political scientists and historians, presidents and their advisors, and proponents and opponents of the League. To Kennan, this approach ignored the inevitable role of power in politics.

> The conception of law in international life should certainly receive every support and encouragement that our country can give it. But it cannot yet replace power as the vital force for a large part of the world. And the realities of power will soon seep into any legalistic structure which we erect to govern international life. They will permeate it. They will become the content of it; and the structure will

---

[5] G. KENNAN, AMERICAN DIPLOMACY 1900–1950, at 95–96 (1951).

[6] G. KENNAN, MEMOIRS: 1950–1963, at 71 (1972).

[7] *Id.*

[8] Kennan recorded in 1944 his reaction to the press reports of the Dumbarton Oaks discussions:

> Underlying the whole conception of an organization for international security is the simple reasoning that if only the status quo could be rigidly preserved, there could be no further wars in Europe, and the European problem, as far as our country is concerned, would be solved. This reasoning, which mistakes the symptoms for the disease, is not new. It underlay the Holy Alliance, the League of Nations, and numerous other political structures set up by nations which were, for the moment, satisfied with the international setup and did not wish to see it changed. These structures have always served the purpose for which they were designed just so long as the interests of the great powers gave substance and reality to their existence. The moment this situation changed, the moment it became in the interests of one or the other of the great powers to alter the status quo, none of these treaty structures ever stood in the way of such alteration.
>
> International political life is something organic, not something mechanical. Its essence is change; and the only systems for the regulation of international life which can be effective over long periods of time are ones sufficiently subtle, sufficiently pliable, to adjust themselves to constant change in the interests and power of the various countries involved.

G. KENNAN, MEMOIRS: 1925–1950, at 218 (1967).

> remain only the form. International security will depend on *them*: on the realities of power — not on the structure in which they are clothed. We are being almost criminally negligent of the interests of our people if we allow our plans for an international organization to be an excuse for failing to occupy ourselves seriously and minutely with the sheer power relationships of the European peoples.[9]

The League's ultimate failure[10] to meet the challenge of the aggressor states in the 1930's, although in part due to its inherent institutional weakness, was more basically due to the failure of traditional balance of power diplomacy. The seeds of World War II were clearly sown at Versailles; the blame for the inability of the League to prevent the harvest must also be borne by those European states that refused to support the League at critical points and by the United States, which refused to participate. Basic power remained within the states, and they continued to make fundamental decisions that were translated by traditional means into action within the international sphere. In other words, the debacle of World War II represents not only a failure of legal institutions, but also the more basic failure of traditional balance of power diplomacy.

The United Nations and the League are alike in that both have had impressive success in preventing certain types of violence and in restoring and maintaining at least a short lived peace between belligerents, while both have had very little success in resolving the underlying causes of such violence.[11] Senator Fulbright, however, argues that the United Nations has not failed, because it has never been tried.[12] Certainly we retreated with undue and perhaps tragic haste from initial attempts to use this institution in the place of traditional alliance diplomacy.[13] Nevertheless,

---

[9] *Id.* at 218–19.

[10] Critics of the League of Nations often overlook its substantial achievements in maintaining the peace for over a decade after World War I, during which time the European map was redrawn. On at least one occasion, the League performed a crucial role in preventing a Balkan conflagration that could well have resulted in a European or world-wide war. *See* Firmage, *supra* note 1.

> The dispute of Albania against Yugoslavia and Greece in 1921 might well have resulted in substantial territorial losses, if not the disappearance of Albania, but for the actions of the Council of the League and its commission of inquiry which helped to establish the Albanian government and to settle that state's frontiers. Again, the Demir-Kapu frontier dispute between Greece and Bulgaria in 1925 might well have resulted in another Balkan war but for the forceful demands of Aristide Briand, President of the Council of the League. Greece, prepared to invade Bulgarian territory, pulled back after reception of Briand's telegram demanding that neither side resort to war. A commission of inquiry sponsored by the Council was later instrumental in settling the dispute. The eventual failure of the League has made it all too possible to forget its impressive successes in dealing with disputes of lesser magnitude than Manchuria or Spain, but still quite sufficient to have resulted in war in the absence of effective regimes of settlement.

Firmage, Book Review, 1972 AM. POL. SCI. REV. 1088.

[11] For analysis of fact-finding and peace-keeping efforts by the United Nations see Firmage, *supra* note 1, at 432 *et seq.*

[12] Address by William Fulbright before the Pacem in Terris III Conference, Oct. 8, 1973, in 119 CONG. REC. 18,830 (daily ed. Oct. 9, 1973).

[13] It is interesting to note that the current revisionist writing on the origins of the Cold War, coming in part from the New Left, was preceded by twenty years not only by the Old Left, epitomized by Henry Wallace, but also by the Old Right. J. Reuben

it is begging the question to assert that the United Nations — and the entire institutional approach to foreign policy that it represents — has not failed because it has never been used. Such an assertion must be followed by an inquiry into the reasons why the powerful nations have not used the United Nations as the primary vehicle for accomplishing their goals.

Beginning with the Cold War and the creation of NATO, and continuing in some degree until late 1972, when the United States ended its participation in the Vietnam War, the world has been gripped by an ideological struggle, the ferocity of which has not been matched since the Wars of Religion. This struggle has frozen international politics into a bipolar structure that has prevented the application of either traditional balance of power diplomacy or its more sophisticated alternative, legal institutionalism. The watershed years in international relations, beginning in the late sixties and extending to the present, have brought the opportunity for another beginning. As in 1815, 1918, and 1945, we now must reexamine the international community and the means by which its roots may be deepened. This Article will focus on the contributions that law — both municipal and international — can realistically make toward attaining the goal of a world community governed more by law and less by force.

II. Legal Obligation and Community

In evaluating the role of law in foreign affairs, a critical examination of Kennan's indictment of excessive legalism may be appropriate. Kennan perceived a relationship between a community and its institutions that determines the effectiveness of legal obligation. He therefore distrusted attempts by institutionalists to transplant the legal structure of a hierarchically ordered municipal system based upon a mature and somewhat homogeneous community into the highly decentralized and heterogeneous international community.

Kennan's criticism, however, ignored the mutual cause and effect relationship between a community and its institutions. That is, although a

---

Clark, Jr., a conservative Republican who served as Solicitor of the Department of State under Hoover and who adamantly opposed our participation in both the League and the United Nations, also opposed the creation of NATO and the polarization of the world into opposing armed camps which it represented:

> "It would hardly do to form an open alliance against Russia; and both Britain and ourselves should be wary of an alliance with her. So the device is conceived as a 'union' of states, which, however, would tie the nations together more securely than an alliance and be a greater threat to Russia.
>
> "But such an alliance would lead, and such a 'union' will lead, sooner or later, to a counter-alliance by the other nations that would challenge the power of such a 'union,' so meaning either constant war for supremacy or a war of absolute conquest by the one or the other and a consequent enslavement of the conquered. Peace without liberty spells a stalemate in civilization and spiritual development. 'Union now' has far more ill than good in it. Nor must America ever become a party to an attempted military domination of the world."

Quoted in Firmage & Blakesley, *supra* note 2, at 56.

certain critical mass of "community-ness" must exist before a legal structure will naturally emerge and be accepted as obligatory, legal institution may profoundly change and deepen community ties through its accommodation of successful experiences. The lesson then is not that we draft a utopian world constitution and invite the world to ratify and accede, but rather that we perceive embryonic legal institutions within the international system as possible contributors to the development of an emerging international community.

Ascertaining the relationship between power, morality, law, and community begins with an analysis of the nature of legal obligation. Proponents of Natural Law maintain that legal obligation can be objectively derived from the principles of justice; in contrast, Positivists focus on the role of the sovereign state, rather than the principles of justice, in formulating legal obligation. Our recent preoccupation with institutional systems and disregard of moral principles as constraints on sovereign authority reflect a theoretical dependence upon the tenets of Positivism. Although Natural Law is theoretically deficient because it fails properly to consider the role of power in developing legal obligation, Positivism is equally deficient because it is excessively preoccupied with the same. Accordingly, a return to Naturalist considerations, tempered by Positivist realism, may contribute substantially to the effectiveness of law in accomplishing international peace.

John Rawls recently stated in a neo-Naturalist thesis [14] that legal obligation first arises from a disposition to support efforts to improve social interaction through fair laws and fair institutional procedures.[15] Thus, although institutions might reinforce legal obligations and even create legal duties pursuant to fair procedures, the content of the law would forever remain the primary source of obligation. According to Naturalist theory, one may be obligated conscientiously to object to or civilly disobey laws dictated by the formal institutions, where such laws violate the primary principles of justice or are enacted in violation of fair procedures.[16] Thus, the Naturalist conception of law as voluntarily obligatory lends itself well to the international sphere, since institutional systems are often incapable of enforcing legal rules without voluntary compliance.

Positivists, in contrast, reject any objective constraints, such as principles of fairness, upon the sovereign's authority to make law. Although the sovereign may consent to being obligated — both internally by constitutional constraints and externally by treaties and voluntary participation in international institutions — such obligation, being self-imposed, need not be based on any principles of justice or fairness. Thus, Positivists contend that adherence to law in the international sphere is discretionary with the sovereign. Their reliance in foreign affairs on power politics,

---

[14] J. RAWLS, A THEORY OF JUSTICE (1971).

[15] *Id.* at 11–17.

[16] *Id.* at 371–82.

rather than objective legal norms, grows out of this contention. Legal realists in this country, including the McDougal school of thought, urge that legal institutions should be manipulatively used to promote national interests in international affairs. So interpreted, law is mere superstructure controlled by the power forces of the state. Thus, where states are ideologically opposed, law can provide at best a temporary truce, but it cannot establish ultimate peace.

Although adherence to either the Naturalist or the Positivist theory of obligation can assist in achieving international order, reliance on either theory in isolation may ultimately be reactionary. For example, the Positivists' excessive reliance on institutions partially justified a reversion to power politics when the institutions seemingly failed. Had the Positivists better understood the limited role that formal structure plays in the development of legal obligation, then the partial success of the institutions could have been appreciated and their ultimate inadequacy anticipated.

Thus, our earlier mistake was optimistically to assume that a complex superstructure sitting uncomfortably atop an embryonic community could resolve fundamental intracommunity conflicts. But Kennan's blanket indictment of the institutional approach to foreign policy, based on the weaknesses inherent in the early development of international institutions, also missed the mark. The problem was not that legal institutions were wholly ineffective, but only that they were not totally adequate. Further, nascent existence and use of legal institutions, even at first limited to peripheral international problems, would have been helpful in developing a community of greater depth, which might in turn have supported yet stronger institutions.

An institutional approach to foreign policy must begin with a proper assessment of the level of community that exists within the international system and the corresponding capacity of community members voluntarily to accept as obligatory rules emanating from community institutions. Stated differently, experience suggests that legal institutions absent the requisite foundation of community cannot yield world peace.

Yet there is nothing inherent in man's nature, nor in his cultural or national divisions, that precludes the development of a communal base sufficient to support a legitimate normative order. It is suggested that there exist as innate propensities within man a sense of fairness and a sense of community, which in combination provide a base sufficient to support a universal normative structure. Further, if law is to be obligatory, it is suggested that *any* legal system must accommodate this normative structure, at least to a minimal extent; thus, this normative structure would perform a critical role in maintaining both internal and external peace among sovereign states. This theory is impliedly supported by recent research in language learning by Noam Chomsky, by studies of moral development by psychologists Lawrence Kohlberg and June Tapp, and by research in comparative law by Rudolph Schlesinger.

Chomsky's research in language learning suggests that there exists in man an unconscious knowledge of innate principles of universal grammar. This innate mental structure allows successful experience to confirm a prior disposition "that there is a primitive, neurologically given analytic system which may degenerate if not stimulated at an appropriate critical period, but which otherwise provides a specific interpretation of experience . . . ." [17]

Thus, contrary to radical empiricism, which rejects the theory of innate forms of knowledge, Chomsky theorizes a system of belief not entirely dependent on environmental circumstances, but instead erected upon innate principles of mind: "A system of knowledge and belief results from the interplay of innate mechanisms, genetically determined maturational processes, and interaction with the social and physical environment." [18] Extrapolated to a theory of law, Chomsky's theory suggests that legal rules are possibly constructed on the basis of distinct innate schemata, or a universal normative structure, much like the universal structure of language.[19] Indeed, both the uniformity of legal principles and the regularity with which people accept rules of social interaction as obligatory are inconsistent with the empiricist's view that obligation arises from experience. Thus, abstract normative principles may be inherent in human nature and may impose limits on what the mind will accept as legally obligatory.

The notion that there may be innate principles of mind that determine a universal normative structure should be no surprise to students of comparative law. The concept of Jus Gentium — principles of law common to all nations by virtue of their being intrinsically consonant with right reason — existed historically under Roman law and survives today in article 38(1)(c) of the statute of the International Court of Justice. "These 'general principles of law' are not . . . peculiar to any legal system but are inherent in, and common to, them all. They constitute the common foundation of every system of law." [20]

Rudolph Schlesinger, in the Cornell Project,[21] recently attempted to define the "common core" of legal principles. Although the scope of

---

[17] N. CHOMSKY, PROBLEMS OF KNOWLEDGE AND FREEDOM: THE RUSSELL LECTURES 13 (1971).

[18] *Id.* at 21.

[19] Although Chomsky's investigation is presently limited to language, he suggests an investigation of other systems of belief as a natural further step: "I see no reason why other domains of human intelligence might not be amenable to such investigation. Perhaps, in this way, we can characterize the structure of various systems of human knowledge and belief, various systems of performance and interaction." *Id.* at 47.

[20] Jalet, *The Quest for the General Principles of Law Recognized by Civilized Nations — A Study*, 10 U.C.L.A.L. REV. 1041 (1963), *quoting* Cheng, *The Meaning and Scope of Article 38(1)(c) of the Statute of the International Court of Justice*, in 38 GROTIUS SOCIETY: TRANSACTIONS FOR THE YEAR 1952, at 125, 129 (1953).

[21] Financed by a grant from the Ford Foundation, the purpose of the Project as initially formulated was to determine "whether there are, in fact, any basic 'core' legal principles of private law generally recognized by civilized nations." Davis, *Comparative Law Contributions to the International Legal Order: Common Core Research*, 37 GEO. WASH. L. REV. 615, 616 (1969).

research was limited to contract law, the noticeable uniformity of contract principles discovered by the research supports the theory of a universal normative structure. Although legal realists have criticized the theory of common core research, their criticism has focused on the alleged pointlessness of discovering common core principles, not upon the fact of their existence.[22]

Further support for a universal normative structure theory is found in recent research by psychologists Kohlberg and Tapp. Their national, cross-national, and cross-cultural studies of the effects of moral and legal attitudes on behavior suggest that moral and legal development toward order and justice follows a universal sequence of distinct stages.[23] Kohlberg's research indicates that "[t]he development of moral thought follows a universal sequence of distinct stages." [24] Similarly, Tapp's research relates legal concepts to Kohlberg's moral levels.

Kohlberg's studies identify three general levels of moral judgment and two intermediate stages within each level. At level I, the "Preconventional Level," man interprets moral labels in terms of physical consequences. At the "Physical Power" stage of level I, superior power or prestige determines morality in terms of physical consequences. At the "Instrumental Relativism" stage of level I, moral acts are hedonistically characterized in terms of satisfying one's own needs; equitable considerations are present, but they are interpreted pragmatically. At level II, the "Conventional Level," morality is characterized by active support of the status quo. At the "Interpersonal Concordance" stage of level II, conformity to majority behavior determines morality. At the "Law and Order" stage of level II, one's moral duty is to obey fixed rules to maintain the given social order. Level III, the "Post Conventional" level, is marked by the appearance of autonomous moral principles. At the "Social Contract" stage of level III, morality is determined in terms of individual rights agreed upon by the society in the form of a hypothetical constitution. In this stage, procedural rules for reaching consensus opinions are critical, and possibility of social change is determined by social utility. The "Universal Ethic" stage of level III is characterized by universal, consistent,

---

[22] Even if comprehensive impressions of commonly accepted positive legal principles, attitudes and consistencies of decision making were somehow reduced to a manageable common denominator of core premises arguably constituting an extranational common law of mankind, the fabric of this law is so easily rent or so clearly vulnerable to unretributable alteration, change or even obliteration by those exercising raw political power within the territories of national enclaves that such a comprehensive project would be manifestly pointless.
Id. at 626.

[23] Kohlberg & Tapp, *Developing Senses of Law and Legal Justice*, 27 J. Soc. Issues at 89 (1971). The theoretical bases for Kohlberg's model are represented by John Dewey's genetic, experiential, and purposive reasoning (1910, 1916, and 1930), Jean Piaget's structural approach to moral development and cognitive thought (1928, 1929, and 1932), and Immanuel Kant's ethical analysis (1849). *Id.* at 67.

[24] *Id.* at 67.

and comprehensive moral decisions. Individual ethical principles prevail.[25]

Tapp's levels of legal development, which correspond to Kohlberg's levels of moral development, progress from prohibitive laws supported by threat of punishment, to prescriptive or neutral regulatory laws supported by vested interests, to rationally, beneficial laws supported by principled obedience.[26]

The implications of the Tapp and Kohlberg studies are that a universal normative structure exists and that movement toward full realization of that structure contributes to peace and justice within the community. Movement between stages, however, follows an incremental pattern requiring stimulation and assimilation, and the absence of either element tends to retard or even arrest community development to higher levels. To facilitate growth, therefore, the stimulator must encourage "[e]xperience-based activity involving conflict resolution, problem solving and participation in decision making," all of which promote voluntary compliance through perfecting a sense of responsibility, obligation, and justice. Tapp and Kohlberg observe:

> The match problem for affecting change in legal development is one of presenting stimuli sufficiently incongruous to stimulate conflict in the individual's cognitive schema, and sufficiently congruous to be assimilated with some accommodative effort.[27]

The relevance to the international sphere of data relating to the normative development of the individual obviously raises complex questions; nevertheless, several hypotheses will be suggested. The first hypothesis is that the individuals who ultimately are affected and bound by decisions, including the decision-makers themselves, must be willing to live with the results; this is not to say that the individuals who participate in the decision-making process can develop a corporate legal conscience through corporate experiences in conflict resolution. Rather, the degree to which the individuals have developed their legal consciousness bears directly on what decisions they will accept as obligatory. The second hypothesis is that the level of legal consciousness which the individual decision-makers have accommodated will necessarily limit the alternatives for decision available to them. Furthermore, the bounds of the alternatives certainly must be circumscribed by the limits that the participants are willing to accept. It follows that institutional structures and individual legal consciousness can reinforce each other in the accomplishment of peace.

The interplay between institutional structures and individual legal consciousness can contribute to international peace and justice in at least four areas. First, the degree to which a government conforms to its own legal constraints, constitutional or otherwise, bears directly on international

---

[25] *Id.* at 73–77.

[26] *Id.* at 84.

[27] *Id.* at 87.

peace. Second, the degree to which the government's decisional processes conform to international legal constraints also affects international order. Third, the extent to which a government promotes and sustains international institutions contributes to international order. Fourth, the level of legal consciousness attained by the world public actually constrains governments that would otherwise act contrary to international order.

A government's strict compliance with its own laws contributes to international order in several ways: (1) A government that has incorporated international law into its own civil or common law is obligated to international order by its own legal structure, apart from international constraints. (2) A state must habitually obey its domestic legal constraints before it can successfully accommodate international legal principles. A government, for example, that disregards its own legal procedures will likely act similarly in its relations with other states. Accordingly, strict compliance with domestic constitutional procedures benefits not only domestic order, but also international order, and vice versa. A comparison of our government's conduct in the Watergate affair and its unconstitutional acts in Indochina supports this proposition.[28]

This concept should not be viewed solely through the glasses of Western liberal thought. It is not asserted that progressive democratic societies will be peaceful and totalitarian states will be war-like; rather, it is asserted that states, regardless of their ideology, that adhere to internal legal constraints and abide their own rules of municipal order are less likely to violate international norms; conversely, violation of international norms may similarly predispose a government to violate municipal law.

The extent to which a government's formal decision-making machinery operates under international legal constraints necessarily affects international order. For example, efforts in establishing treaties and regulating conflicts between international actors substantially aid in preserving international order, notwithstanding the rationalist power politics theory to the contrary. Abram Chayes recognizes this view in an analysis of the working of arms control agreements.[29] Chayes asserts that the bureaucratic inertia of perpetuating and maintaining "organizational health . . . in terms of bodies assigned and dollars appropriated" [30] can be channelled in a normative direction by the processes of treaty negotiation and ratification.[31]

---

[28] Our participation in the Vietnam War was initiated and later maintained in violation of both constitutional and international law. In turn, later violations of municipal and constitutional law, known generically as Watergate, were in part caused by factors stemming from our involvement in Vietnam.

[29] Chayes, *An Inquiry into the Workings of Arms Control Agreements*, 85 HARV. L. REV. 905 (1972).

[30] *Id.* at 916, *quoting* G. ALLISON, ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS 82 (1971).

[31] [T]his very process of negotiation and ratification tends to generate powerful pressures for compliance, if and when the treaty is adopted. At least three interrelated phenomena contribute to these pressures: (1) by the time the treaty is adopted, a broad consensus within governmental and political circles

International institutions may substantially contribute to international order both by successfully resolving conflicts and by stimulating international community growth. Although Kennan's criticism of excessive institutionalism possesses penetrating insight, the growth of supernational entities has rendered his criticism increasingly less valid and more reactionary. Institutional structure, however, cannot replace a lack of consensus on critical issues. Obligations arising out of supra-national institutions will be binding only insofar as they comport with the level of legal development achieved by the participating states.

Finally, the growing consciousness of the universality of human experience contributes to the development of law and peace:

> There is a new realism emerging out of the need to adapt the state system to the multiple challenges of war, population pressure, global pollution, resource depletion, and human alienation. It is this new political consciousness that insists upon regarding America's involvement in the Indochina War as illegal and immoral *from the beginning* . . . .[32]

Our involvement in the Vietnam War offers an excellent vehicle for a detailed analysis of the significance to international peace and justice of governmental adherence to constitutional and international laws.

A. Vietnam and Constitutionalism

This country, along with other states, can influence the growth of legal consciousness by force of example; a particularly potent example would be a return to the basic precepts of our own charter, thereby fostering an understanding of constitutionalism. Those exercising sovereign prerogatives are considered to be circumscribed by *leges imperii* — the laws of government. These laws normally antedate the exercise of sovereign power and determine the identity and the limits of persons that exercise such power. Contrary to those who perceive from the Vietnam experience a failure of our constitutional structure and the accompanying need for a convention to produce a new constitutional document,[33] it would seem at once more sound and more attainable to return to the basic prescriptions of the Constitution. Detailed analyses of the constitutional implications of our Vietnam involvement have been accomplished [34] and will not be re-

---

> will be arrayed in support of the decision; (2) meanwhile, principal centers of potential continuing opposition will have been neutralized or assuaged, though often by means of concessions that significantly modify the substance of the policy; and (3) many officials, leaders of the administration or regime and opponents as well, will have been personally and publicly committed to the treaty, creating a kind of political imperative for the success of the policy.

Id. at 920.

[32] Falk, *Nuremberg: Past, Present, and Future,* 80 YALE L.J. 1501, 1510–11 (1971) (footnote omitted).

[33] R. TUGWELL, A MODEL CONSTITUTION FOR A UNITED REPUBLICS OF AMERICA (1970).

[34] Berger, *War-Making by the President,* 121 U. PA. L. REV. 29 (1972); Fulbright, *Congress, The President and the War Power,* 25 ARK. L. REV. 71 (1971); Goldwater,

peated here; rather, only conclusions of law will be advanced. As will be seen, obedience to these most basic constitutional principles would at once restrain our own predilections toward the unlawful use of force, and would serve as an example to be followed by other states.

First, it is apparent that the war powers, although divided between the executive and the legislative branches, were deposited dominantly within the latter branch.[35] The deliberative branch was purposely given preponderant power as a check upon the impulsive use of military force. The logic of James Madison is as compelling now as it was during the battle over the ratification of the Constitution:

> Those who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether *a war ought to be commenced, continued or concluded.* They are barred from the latter function by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws.[36]

Madison further noted the axiom that "the executive is the department of power most distinguished by its propensity to war: hence it is the practice of all states, in proportion as they are free, to disarm this propensity of its influence." [37]

Thomas Jefferson also indicated his pleasure in the decision to endow the Congress rather than the President with the war power; he wrote to Madison: "We have already given . . . one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay." [38]

The President's Constitutional Primacy in Foreign Relations and National Defense, 13 VA. J. INT'L. L. 463 (1973); Lofgren, *War-Making Under the Constitution: The Original Understanding,* 81 YALE L.J. 672 (1972); Rostow, *Great Cases Make Bad Law: The War Powers Act,* 50 TEX. L. REV. 833 (1972); Van Alstyne, *Congress, The President, and the Power to Declare War: A Requiem for Vietnam,* 121 U. PA. L. REV. 1 (1972); Wormuth, *The Nixon Theory of the War Power: A Critique,* 60 CALIF. L. REV. 623 (1972).

[35] Lofgren, *supra* note 34, at 688. Lofgren has carefully analysed the Convention, state ratification debates, trends in theory, and English influence. He concludes that the men of the day probably conceived of the President's war-making role in exceptionally narrow terms.

James Wilson, perhaps the leading legal theoretician of the Convention, said:

> The power of declaring war, and the other powers naturally connected with it, are vested in Congress. To provide and maintain a navy — to make rules for its government — to grant letters of marque and reprisal — to make rules concerning captures — to raise and support armies — to establish rules for their regulation — to provide for organizing . . . the militia, and for calling them forth in the service of the Union — all these are powers naturally connected with the power of declaring war. All these powers, therefore, are vested in Congress.

1 J. WILSON, WORKS 433 (R. McCloskey ed. 1967).

[36] Berger, *supra* note 34, at 39, *quoting* J. MADISON, *Letters of Helvidius,* in WRITINGS 148 (G. Hunt ed. 1906).

[37] *Id.* at 38, *quoting* 6 J. MADISON, *Letters of Helvidius,* in WRITINGS 138, 174 (G. Hunt ed. 1906).

[38] Fulbright, *supra* note 34, at 74, *quoting* 15 THE PAPERS OF THOMAS JEFFERSON 397 (J. Boyd ed. 1955).

Congress's powers to "provide for the common defence," [39] to "raise and support armies," [40] "to provide and maintain a navy," [41] "to regulate commerce with foreign nations," [42] "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations,"[43] to "grant letters of marque and reprisal," [44] to "make rules concerning captures on land and water," [45] "to make rules for the government and regulation of land and naval forces," [46] "to provide for calling forth the militia to execute the laws of the union," [47] to "suppress insurrections and repel invasions," [48] "to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States," [49] "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," [50] and, most importantly, "to declare war," [51] clearly leave the Executive only ministerial war power prerogatives, and these he may exercise only within parameters determined largely by Congress.

Congress's textual grant of power to "declare war" provides, with only one qualification, the exclusive power to initiate war,[52] whether declared or undeclared.[53] The sole qualification upon Congress's exclusive power

---

James Wilson, recognized as a proponent of a "strong Executive," referred to the "declare war" provision in ratification debates in Pennsylvania:

> This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man . . . to involve us in such distress; for the important power of declaring war is vested in the legislature at large . . . from this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into a war.

2 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (1937).

[39] U.S. CONST. art. I, § 8, cl. 1.

[40] *Id.* cl. 12.

[41] *Id.* cl. 13.

[42] *Id.* cl. 3.

[43] *Id.* cl. 10.

[44] *Id.* cl. 11.

[45] *Id.*

[46] *Id.* cl. 14.

[47] *Id.* cl. 15.

[48] *Id.*

[49] *Id.* cl. 16.

[50] *Id.* cl. 18.

[51] *Id.* cl. 11.

[52] See Wilson's statement in 2 J. ELLIOT, *supra* note 38. Secretary of State Daniel Webster said (in 1851):

> . . . I have to say that the war-making power in this Government rests entirely with Congress; and that the President can authorize belligerent operations only in the cases expressly provided for by the Constitution and the laws. By these no power is given to the Executive to oppose an attack by one independent nation on the possessions of another. . . . [I]f this interference be an act of hostile force, it is not within the constitutional power of the President . . . .

Quoted in Van Alstyne, *Congress, The President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1, 11 (1972), *quoting* 7 DIGEST OF INTERNATIONAL LAW 163–64 (J. Moore ed. 1906).

[53] The Congress possesses all war-making powers of the United States. Those powers not specifically falling within the "declare war" provision most assuredly were residual in the "grant letters of marque and reprisal" clause. U.S. CONST. art. I, § 8, cl. 11.

to initiate war is the presidential prerogative to use military force to repel sudden attack upon the United States [54] and, after the War Powers Amendment, upon its forces.[55] James Madison and Elbridge Gerry made joint motion to change Congress's power from *make* war (the original wording of the clause as proposed by the Committee on Detail) to *declare* war, for the purpose as recorded by the notes of the convention kept by Madison, of "leaving to the Executive the power to repel sudden attacks." [56] Congress's war powers also extend to the circumstances of war's termination.[57]

As Commander-in-Chief, the President has substantial though not unlimited power to direct a war once it has been initiated by Congress. Hamilton, the powerful advocate of presidential prerogatives, outlined the limits of the President's power as Commander-in-Chief in *The Federalist Papers*:

> The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends

---

See Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 696 (1972).

Thomas Jefferson, as Secretary of State, analyzed the "undeclared war" element of reprisal:

> [A] reprisal on a nation is a very serious thing. . . . [W]hen reprisal follows, it is considered an act of war, and never failed to produce it in the case of a nation able to make war; besides, if the case were important and ripe for that step, *Congress must be called upon to take it;* the right of reprisal being expressly lodged with them by the Constitution, *and not with the Executive.*

Quoted in 7 INTERNATIONAL LAW DIGEST § 1095, at 123 (J. Moore ed. 1906) (emphasis added).

Pierce Butler, a Convention delegate from South Carolina, stated:

> It is improbable that a single member of the Convention have signed his name to the Constitution if he had supposed that the instrument might be construed as authorizing the President to initiate a war, either general or partial, without the express authorization of Congress.

Quoted in Fulbright, *Congress, the President and the War Power*, 25 ARK. L. REV. 71, 74 (1971). Early cases decided by the Supreme Court also left little doubt about the power of Congress over both "declared" and "undeclared" wars. The word "war" was not confined to mean only general ("declared") war. The Supreme Court furthermore found that the President must abide by the limitations set by Congress. Little v. Barreme, 6 U.S. (2 Cranch.) 170 (1804); Talbot v. Seeman, 5 U.S. (1 Cranch.) 1 (1801); Bas v. Tingy, 4 U.S. (4 Dall.) 36 (1800).

[54] The records of the constitutional convention leave little doubt that it was the intent of the Framers to provide an exception to the congressional war powers enabling the President to repel sudden attacks upon the United States. "Mr. MADISON and Mr. GERRY moved to insert *'declare,'* striking out *'make'* war; leaving to the Executive the power to repel sudden attacks." Van Alstyne, *supra* note 34, at 6, *quoting* 2 RECORDS OF THE FEDERAL CONVENTION OF 1789, at 318–19 (M. Farrand ed. 1911).

[55] S. 440, 93d Cong., 1st Sess. § 3 (1973), provides:

> To repel an armed attack against the Armed Forces of the United States located outside of the United States, its territories and possessions, and to forestall the direct and imminent threat of such an attack.

See 50 U.S.C.A. §§ 1541–48 (Supp. 1974).

[56] Van Alstyne, *supra* note 34, at 6, *quoting* 2 RECORDS OF THE FEDERAL CONVENTION OF 1789 (M. Farrand ed. 1911).

[57] Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948).

> to the *declaring* of war and to the *raising* and *regulating* of fleets and armies, — all which, by the Constitution under consideration, would appertain to the legislature.[58]

The President, possessing no power to initiate or wage executive war other than the power to repel sudden attacks, has been further limited by Congress in his exercise of the powers of Commander-in-Chief.[59] Congress has statutorily circumscribed presidential prerogatives to use troops for particular purposes and in certain areas of the world.[60] He may not raise armies without congressional authorization,[61] nor may he violate the Laws of War as determined by Congress.[62] Congress's power to issue letters of marque and reprisal, coupled with the original understanding of congressional power to declare war, should mean that Congress has complete power over the commencement of war, whether declared or undeclared ("imperfect").[63] The vast majority of Executive wars cited [64] as precedents for the legality of the Executive origin of the Vietnam War based upon Commander-in-Chief powers of the President are distinguishable on their face as minor events, often involving the landing of troops to protect American civilians abroad.[65] The only valid precedent for the constitutional prerogative of the President to initiate war, though clearly distin-

---

[58] THE FEDERALIST No. 69, at 448 (Modern Library ed. 1937) (A. Hamilton).

[59] *See* Wormuth, *supra* note 34, at 652 *et seq.*

[60] *Id.* at 639–40. Congressional acts have regulated or forbidden the use of troops to accomplish the return of fugitive slaves and have forbidden the use of troops at polling places and as posse comitatus, or marines on shore. Other acts have provided for selective service and training limitations, and termination of activities in Indochina.

[61] *Id.* at 642. For example, Abraham Lincoln's use of volunteers at the beginning of the Civil War was dependent upon subsequent congressional legislation. United States v. Hosmer, 76 U.S. (9 Wall.) 432 (1870).

[62] Wormuth, *supra* note 34, at 645.

[63] Lofgren, *supra* note 34, at 699–700. Lofgren concludes:

> Since the old Congress held blanket power to "determine" on war, and since undeclared war was hardly unknown in fact and theory in the late eighteenth century, it therefore seems a reasonable conclusion that the new Congress' power "to declare War" was not understood in a narrow technical sense but rather as meaning the power to commence war, whether declared or not. To the extent that the power was more narrowly interpreted, however, the new Congress' control over letters of marque and reprisal must have suggested to contemporaries that it would still control "imperfect" — that is, undeclared — war.

Id.

[64] 117 CONG. REC. 11,913–24 (1971) (remarks of Senator Goldwater); Goldwater, *The President's Constitutional Primacy in Foreign Relations and National Defense,* 13 VA. J. INT'L L. 463 (1973); Rostow, *Great Cases Make Bad Law: The War Powers Act,* 50 TEX L. REV. 833 (1972).

[65] Of the 137 cases of Executive action claimed by the State Department, forty-eight had clear congressional authorization, one was in self-defense, six were mere demonstrations, some others were trespass or spontaneous, unsanctioned acts by lower commanders, and several were clearly unconstitutional acts by the President. Wormuth, *supra* note 34, at 660 *et. seq.* "Even were these incidents to be regarded as equivalent to executive waging of war, the last precedent would stand no better than the first; illegality is not legitimized by repetition." Berger, *War-Making by the President,* 121 U. PA. L. REV. 29, 60 (1972).

guishable in terms of international law,[66] is the Korean War. In that regard, it must simply be affirmed that violation by a President of a clear and exclusive textual grant of authority to Congress must not be taken to legitimate similar subsequent violations.[67]

The Tonkin Gulf Resolution, though not a congressional authorization for war,[68] may reasonably be interpreted as an attempt by Congress to delegate its war powers to the President[69] and directly to authorize his acts in the nature of reprisals.[70] Even though the Supreme Court has not stricken a delegation of congressional powers to the Executive since the 1930's,[71] the specificity of the textual grant of the war power to Congress, together with its profound impact upon the entire conception of separation of powers, suggests that delegation of such powers should not be tolerated. In any event, whatever authority the President derived from the Tonkin Gulf Resolution was terminated with its repeal in 1971. At least after that time, the United States fought an unconstitutional war in Southeast Asia.

It seems clear that the war powers cannot be delegated by treaty, specifically by the provisions of the Southeast Asian Treaty,[72] without participa-

[66] Within the context of international law, two highly significant factors distinguish our participation in the Korean War from our role in Vietnam. First, the United Nations by Security Council resolution had determined the existence of an armed attack by the forces of North Korea upon South Korea. The resolution called upon all member states to provide military forces under a unified United Nations command to repel the attack. 5 U.N. SCOR, 476th meeting 5, U.N. Doc S/1588 (1950). Second, the massive, completely unambiguous nature of the armed attack verified by United Nations fact-finding at the time of the assault, contrasts sharply with the indirect aggression that characterized the early years of the Vietnam War. *See* Firmage, *Fact-Finding in the Resolution of International Disputes — From the Hague Peace Conference to the United Nations,* 1971 UTAH L. REV. 421, 445–46.

[67] Many writers who are critical of the several lists of "Executive wars" because of the insignificance of the examples set forth find little problem in accepting the Korean conflict and the Vietnam action as examples of "Executive wars." The Senate Foreign Relations Committee has issued a statement that "only since 1950 have Presidents regarded themselves as having authority to commit the armed forces to full scale and sustained warfare." S. REP. No. 707, 90th Cong., 1st Sess. 24 (1967).

President Johnson, in much the same way as President Truman handled the Security Council resolution, did not place primary legal reliance upon the Tonkin Gulf Resolution. Instead, he repeatedly asserted a constitutional, presidential power to conduct war in Southeast-Asia.

[68] Wormuth finds four differences between the Tonkin Gulf Resolution and initiation of war by Congress: (1) The Resolution did not initiate hostilities, but only authorized the President to do so; (2) The Resolution did not define our legal status, *i.e.,* general or limited war; (3) The Resolution defined no adversary state; and (4) No treaty of peace requiring Senate concurrence was demanded; accordingly, the President could freely conclude a peace as well as authorize a war. Wormuth concludes that since the Tonkin Gulf Resolution performed none of the functions of a declared war, it could not operate as a declaration of war. It was an outright presentation of the war power to the President and, as such, was an unconstitutional delegation of congressional power. Wormuth, *supra* note 34, at 691–92. *See also* Van Alstyne, *supra* note 34, at 20.

[69] Wormuth, *supra* note 34, at 692.

[70] See Tonkin Gulf Resolution, H.R.J. Res. 1145, 88th Cong., 2d Sess., 78 Stat. 384 (1964), wherein the President is authorized to repel an attack against United States forces and to "prevent further aggression."

[71] Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 292 U.S. 388 (1935).

[72] *See* Firmage, *International Law and the Response of the United States to "Internal War,"* in 2 THE VIETNAM WAR AND INTERNATIONAL LAW 89, 116–17 (R. Falk ed. 1969). Article four, paragraph one, of the Southeast Asia Collective defense Treaty (SEATO) states:

tion by the House of Representatives in the treaty-making process.[73] SEATO requires that its member states act only "in accordance with [their] constitutional process." [74] The President must not be allowed the ultimate bootstrap of initiating an international agreement (SEATO), claiming the constitutional mandate to see "that the laws be faithfully executed," [75] and then waging a war — otherwise proscribed by the Constitution — upon the argument that it is required by the international agreement. Neither presidential power to initiate war nor congressional authority to delegate its war powers can be accomplished by international agreement contrary to constitutional restraints. In *Reid v. Covert,* the Supreme Court stated that

> no agreement with a foreign nation can confer power on Congress, or on any other branch of Government, which is free from the restraints of the Constitution.
>
> . . . It would be manifestly contrary to the objectives of those who created the Constitution [and] alien to our entire constitutional history and tradition . . . to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions.[76]

Covert mercifully lays to rest the question whether the power to make international agreements somehow releases the federal government from constitutional constraints, a question raised in part by a broad reading of *Missouri v. Holland* [77] and in part by Mr. Justice Sutherland's tortured history of the origin of national power to conduct foreign policy.[78]

> Each party recognizes that aggression by means of armed attack in the treaty area against any of the parties or against any state or territory which the parties by unanimous agreement may hereafter designate, would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger (1955) *in accordance with its constitutional processes.*

6 U.S.T. 81, T.I.A.S. No. 3170, *reprinted in* 60 AM. J. INT'L L. 647 (1966) (emphasis added).

> [T]he treaty commitment, rather than empowering the President to undertake the use of military force, sets an international contractual obligation — obliging Congress to make the declaration of war if it intends to fulfill the treaty commitment.

Van Alstyne, *supra* note 34, at 14.

[73] The Constitution vests the war powers in both Houses of Congress, and not in the President and the Senate, as with the treaty power. The alternative — granting to the President the power to initiate war with Senate concurrence — was specifically considered and rejected at the Convention. *See* 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 292, 300 (M. Farrand ed. 1911).

[74] SEATO Treaty, art. 4, ¶ 4, 6 U.S.T. 81, T.I.A.S. No. 3170, *reprinted in* 60 AM. J. INT'L L. 647 (1966).

[75] U.S. CONST. art. II, § 3.

[76] Reid v. Covert, 354 U.S. 1, 16–17 (1957).

[77] 252 U.S. 416 (1920).

[78] United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). According to Mr. Justice Sutherland, power to conduct foreign policy was somehow transferred directly from the Crown to the federal government and does not inhere to the federal government through grant from the Constitutional Convention. Justice Sutherland wrote for the Court: "As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the

The constitutional mandate that the "executive power shall be vested" [79] in the President is not a grant of inherent power, much less an executive authorization to do all things "necessary and proper" to accomplish delegated prerogatives. Rather, it is simply the power ministerially to execute laws enacted by Congress. The President's constitutional mandate to execute the laws in no way authorizes the President to perform the legislative task of creating the laws to be executed. When considered in the context of the war power, the President's executive power does not in any way increase his enumerated power as "Commander-in-Chief." This is the meaning of the *Steel Seizure* and *New York Times* cases.[80] An acknowledgment of inherent presidential power would constitute a giant stride toward eliminating the distinction between republican government and imperial presidency.

Finally, it is quite proper that foreign affairs remain dominantly the domain of the political branches of government. Foreign affairs has constituted the "hard core" of the political question doctrine from the beginning. Even so, the courts have often spoken on vital issues of foreign policy.[81] As the communal roots of a society deepen and the community matures, it would seem reasonable that decisions could increasingly be made more in accordance with rules of law and somewhat less by political accommodation. Accordingly, one might expect to see a gradual but steady constriction of the scope of the political question doctrine. But where the Constitution accomplishes a clear textual grant of power to one political branch, it would seem entirely proper for the Court to reject the political question argument and reach the merits of a controversy. Under *Baker v. Carr*,[82] a "textually demonstrable constitutional commitment of the issue to a coordinate political department" qualifies as a political question. However, the branch to which such power has been granted must stay within its constitutional mandate; whether a branch exceeds such mandate is justiciable, according to *Powell v. McCormack*.[83] Whether we should be at war at a given time, with whom, and for what reason are political questions rightly reserved to the political branches. But the issue

---

United States of America." *Id.* at 316; *see* Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1 (1973); Wormuth, *supra* note 34, at 694.

[79] U.S. CONST. art. II, § 1, cl. 1.

[80] *See* New York Times Co. v. United States, 403 U.S. 713 (1971); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[81] In keeping with the intentions of the framers, the Court has held that the President may repel a sudden attack, whether by invasion or by insurrection, that Congress may institute either general or limited war, and that the President in waging war may not exceed his statutory authority. The rank, status, duties, and discipline of members of the armed forces are fixed by Congress. The recruitment of the armed forces, the draft, the confiscation of enemy property, the appropriation of factories, the suspension of the writ of habeas corpus — all these and other topics have been adjudicated and held to belong to Congress.

Wormuth, *supra* note 34, at 678–79 (footnotes omitted).

[82] 369 U.S. 186 (1962).

[83] 396 U.S. 486, 514 (1969). *See also* Bond v. Floyd, 385 U.S. 116 (1966).

whether war was initiated in accordance with the Constitution's clear textual mandate to Congress is justiciable and should be decided by the Court.[84]

The concept of separated powers, properly checked and balanced, has too long been allowed to atrophy because of a tilt toward the Executive branch. This trend, too frequently advanced by Executive action during times of war, must be reversed, and a condition of equilibrium reestablished. Perhaps the causally related shocks of Vietnam and Watergate will generate currents of opinion sufficiently strong and enduring to facilitate institutional reform capable of returning us to old moorings.[85]

In addition to the constitutional constraints upon Executive action, extra-constitutional constraints must be preserved and in some cases revitalized. Although these concepts cannot be developed here, such constraints upon arbitrary presidential action include a strong political party structure to which the President would in some degree be accountable; a White House staff with seniors committed to republican government and the rule of law and juniors sufficiently beyond identity crises to avoid seduction; a Cabinet composed of members of sufficient independent political or professional base to allow private if not public dissent from presidential policies; and a presidential schedule that would allow leading politicians of both parties access to the presidential ear. Finally, a free press, though not formally a part of the system of checks

---

[84] In 1821, Chief Justice Marshall, in Cohens v. Virginia, 19 U.S. (6 Wheat) 264 (1821), stated:

> It is most true, that this court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution. . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.

Id. at 404.

The abstention and political question doctrines are exceptions to Marshall's dictum, and perhaps rightly so. But the goal recognized in the statement remains valid, particularly as it relates to the question of a clear textual grant of power to one branch of government that is usurped by another without the necessity of a struggle.

See also Massachusetts v. Laird, 400 U.S. 886 (1970) (Harlan & Stewart, J.J., dissenting); Hart v. United States, 391 U.S. 956 (1968) (Douglas, J., dissenting); Holmes v. United States, 391 U.S. 936 (1968) (Douglas, J., dissenting); Mora v. McNamara, 389 U.S. 934 (1967) (Stewart & Douglas, J.J., dissenting); Orlando v. Laird, 443 F.2d 1039 (2d Cir.), *cert. denied,* 404 U.S. 869 (1971) (court found a justiciable question and reached the merits of the case concerning United States military activity in Vietnam).

[85] George Washington said:

> The necessity of reciprocal checks of political power . . . has been evinced. . . . To preserve them must be as necessary as to institute them. If in the opinion of the people, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way in which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.

35 G. WASHINGTON, WRITINGS 228–29 (Fitzpatrick ed. 1940).

and balances, provides the life fluid — from a position shielded by the first amendment — without which the entire constitutional structure would be impotent. A conditional privilege for newsmen's sources of information is essential.

B. International Law and Vietnam

The existence of nuclear weapons has made massive warfare between nuclear-weapon states highly unlikely and has also precipitated increasingly strong customary legal constraints upon such forms of warfare. Similarly, the trauma of the Vietnam War, by force of its ghastly impact upon all participants, may affect certain international rules of behavior. The norms most likely to be affected are those governing the conditions under which nations go to war and the means by which war is fought.

Within the traditional norm [86] governing third party participation in civil strife, third parties could aid the incumbent government at least initially, they could not aid the insurgent faction at least until a status of belligerency was attained, and they were required to be neutral after such status was attained; this norm has been seriously undercut. A fundamental justification for a rule favoring the incumbent has been the accuracy of perceiving the valued roles performed by the incumbent in society. Thus, a legal presumption favoring the incumbent was defensible because its very existence strongly suggested its legitimacy. The term "legitimacy" is not used here in the legalistic sense of the acquisition of power by formally orthodox or proper means; rather, it is used, as the political scientist or sociologist would use it, to connote a sufficient affinity between the people and the institutions of government, based upon the preexistence of a cultural harmony between them, that allegiance naturally results without coercion.[87] Because of this affinity between the people and their government, the government could perform essential functions such as the maintenance of order, the collection of taxes, and the performance of other basic tasks. In those parts of the so-called Third World that have experienced colonial rule, the emergence of governing elites possessing the characteristics of political legitimacy has not occurred immediately, nor has it always taken the direction preferred by the former colonial ruler. Often, several factions have contended for dominance, or former colonial rulers have attempted to impose their choice for native leadership upon the society.

The result has been a blurred distinction between incumbent and insurgent. Most incumbents have lacked many if not all of the traditional characteristics of incumbency. In such a situation the underpinnings of the

[86] *See* Firmage, *Summary and Interpretation,* in THE INTERNATIONAL LAW OF CIVIL WAR 405 (R. Falk ed. 1970).

[87] *See* Firmage, *The War of National Liberation and the Third World,* in LAW AND CIVIL WAR IN THE MODERN WORLD (Moore ed. 1974). Lipset has defined legitimacy as the capacity of a political system to advance and maintain the belief that existing political institutions were the most appropriate for the community. Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy* 53 AM. POL. SCI. REV. 69 (1959).

traditional rule, with its presumption of incumbent legitimacy, have been largely destroyed. The traditional rule cannot survive in those areas with a colonial past, at least until traditional elites emerge possessing sufficient legitimacy to govern.

It follows that a new norm governing third party involvement will develop; that rule will either allow unrestricted military aid to both incumbent and insurgent without distinction, or it will proscribe military assistance to any faction in a state experiencing civil strife, or it will allow some forms of aid under restrictions falling somewhere between the two pole positions. The first possibility would permit unrestrained intervention and is best described as the absence of a norm rather than the creation of a new one. The second possibility, proscribing any form of third party military aid, would probably be at once the most desirable and the least likely of accomplishment. Modified versions of this norm, sufficiently realistic to be acceptable to most powerful states, have been suggested and analyzed by Farer and Moore.[88] Our experience in Vietnam clearly demonstrates the illegality, the immorality, and the hopelessness of intervention in support of an incumbent regime that lacks sufficient legitimacy to govern without outside assistance.

World-wide offense at American participation in the Vietnam War stemmed not only from the perceived illegitimacy of our intervention, but also from the strategy and the weaponry employed. A clear absence of proportionality existed from the beginning; it was made apparent to the world because of television, and it was made more damning upon release of the Pentagon Papers, which revealed no serious debate on the moral and legal questions involved in waging modern war against a native society. A strategy necessitating free-fire zones, forced depopulation of major areas, carpet bombing, bombing of major urban areas, and use of the most sophisticated weaponry with massive firepower obliterates any distinction between combatant and non-combatant. The moral and legal consequences resulting from the needless deaths of hundreds of thousands of people should be enough to deter other states from similar conduct. But if this is not enough, the spectacle of our political fabric being more seriously rent by our involvement in Vietnam (followed both chronologically and causally by Watergate) than by any other event since the Civil War should give pause to states considering similar policies of intervention into post-colonial wars of separation and revolution.

III. Conclusion

The end of American participation in the Vietnamese war, rapprochement with the Soviet Union, and normalization of relations with China effectively conclude the ideological binge that the world has enjoyed since

[88] Farer, *Harnessing Rogue Elephants: A Short Discourse on Intervention in Civil Strife*, in 2 The Vietnam War and International Law 1089 (R. Falk ed. 1969); Moore, *The Control of Foreign Intervention in International Conflict*, 9 Va. J. Int'l L. 205 (1969).

the political fossilization of the military conclusion of World War II. Traditional balance of power politics can now be indulged with more actors than two. This condition represents a giant step forward from that of the Cold War. In many respects, however, this places us back on square one — circa 1918 or perhaps 1945 — with the alternative of attempting in perpetuity a balance of power sufficient to ensure the peace or, in recognition of the inherent instability of such a system, attempting a deepened international community sufficient to support legitimate institutions for cooperation and dispute resolution. Law can contribute to the deepening of international community to the extent that it is acknowledged to be more than the superstructure of community and actually part of its warp and woof.

Reactionary foreign policy could result from two conditions. First, an attempt to return simply to the politics of classic balance of power, without recognizing the need for an increased role for institutions of law, would represent a tragic waste of this foreign policy watershed. Kissinger and Kennan can no more hope to control perpetually the multiple variables in such a system of inherent instability than could Metternich and Bismark. Second, premature or unjustified reliance upon legal institutions could result in a disillusioned reaction against them and could cause total reliance upon geopolitics and force.

To reiterate, international order can be furthered by introjecting legal constraints on decisional processes in four suggested areas. First, the degree to which a government adheres to its own legal constraints, constitutional or otherwise, bears directly on international peace. Second, the degree to which a government's decisional processes adhere to international legal constraints also affects international order. Third, the extent to which a government promotes and sustains international institutions contributes to international order. And fourth, the level of legal consciousness that the world public has realized acts as a real constraint on governments that would otherwise act in disruption of international order.

In earlier times, when men were perhaps closer to the truth than later generations may care to admit, sovereign discretion was considered to be limited by four levels of law: the laws of God; the laws of nature; *leges imperii,* or the laws of government — in our day, constitutional law; and finally, laws common to all nations, or international law. Today we accomplish the first by a well publicized prayer breakfast, deny the existence of the second, ravage the third by claiming our own past violations as precedent for continued violations, and use the fourth to rationalize a course of conduct determined largely by other motives. The first contribution of law to the accomplishment of peace might well consist of an attempt to control our own illegal predilections toward violence, recognizing that in recent years we have been among the major contributors to a violent world. An "Athenian stranger" observed hundreds of years ago that "the state in which the law is above the rulers, and the rulers are the inferiors of the law, has salvation, and every blessing which the gods

can confer." [89] If we were to achieve that happy condition, we would at once eliminate much violence now caused by our own illegal acts, and perhaps we would then be in the position to deserve and receive the emulation of others.

---

[89] PLATO, LAWS BK. III (J.M. Dent Trans. 1934).

American Attitudes Toward International Law as Reflected in "The Pentagon Papers"

PERRY L. PICKERT

THE LEGALITY of American intervention in Vietnam has been a key issue for both supporters and opponents of governmental policy. The government itself has used the SEATO Pact, the Geneva Accords, and claims of North Vietnamese aggression as justification for bombing North Vietnam and for introducing American combat troops into South Vietnam. Yet with all the debate over the legality of the war, little has been settled. The reason for the confusion is that there are few undisputed facts and the pertinent legal documents are flawed or ambiguous. None of the parties to the dispute can boast clean hands. All have participated in unspeakable violence while claiming rights under the law and moral sanction for their actions. The uncertainty of the law and the facts of the Vietnam case make both the assertion of a legal argument and its refutation easy matters. Each side has violated the law, so all justifications are attackable. Since it is doubtful that the relative merits and claims of the parties will be settled authoritatively by any independent tribunal, the legality of American intervention will remain a matter of opinion. Some opinions are better than others, but no simple answer will be forthcoming.

While it is impossible to give a simple and authoritative answer to the question of legality, the publication of "The Pentagon Papers"[1] does afford a more complicated view of the attitudes of American decision-makers toward international law. The purpose of this paper is to use the documents of "The Pentagon Papers" to reflect American assumptions about international law and the use of law, legal arguments, and legal techniques in the conduct of foreign policy.[2] In order

[1] The three texts used in this study are, in order of publication: Sheehan, N., Smith, H., Kenworthy, E. W., and Butterfield F., *The Pentagon Papers* (New York: Bantam Books, Inc., 1971), hereafter cited NYT plus page number; Senator Gravel Edition, *The Pentagon Papers: The Defense Department History of the United States Decision-making on Vietnam* (Boston: The Beacon Press, 1971), hereafter cited G. plus volume number and page number, e.g., G. II, p. 50; U.S. Department of Defense, *United States-Vietnam Relations 1945-1967* (Washington: U.S. Government Printing Office, 1971), hereafter cited GPO plus book number, volume number, and page number, e.g., GPO 1, III, p. A-15).

[2] At this point a few comments are necessary with regard to the use of "The Pentagon Papers." Although the Defense Department had many Presidential and State Department documents in its files, the Defense Department historians did not have access to the com-

to reveal in concrete contexts American use of international law, two case studies will be considered. The first concerns American attitudes toward the Geneva Accords. "The Pentagon Papers" illustrate the American policy dilemma which led to participation in the conference at Geneva. They further reveal the intricacies of the negotiations themselves and the subsequent role of the Accords in the conduct of American policy. The second case study concerns the use of the traditional concept of reprisal to initiate and pursue the bombing of North Vietnam.

The Path to Geneva

It would be difficult to invent a set of legal relationships as complicated and confusing as the Geneva Accords. The combination of French logic and panic, two factions of Vietnamese, Russian deviousness, Chinese fear of Russian deviousness, British reserve, and American ingenuity produced what one might expect—a mess. It is not within the scope of this paper to analyze in detail the content of the Geneva Accords. Such a task would be a project in itself.[3] This paper is con-

---

plete documentation. They were also unable to do extensive interviewing of the principals. Thus Leslie H. Gelb, Chairman of the Office of the Secretary of Defense Task Force, which prepared the study concluded:

> The result was not so much a documentary history, as a history based solely on documents—checked and rechecked with ant-like diligence. Pieces of paper, formidable and suggestive by themselves, could have meant much or nothing. Perhaps this document was never sent anywhere, and perhaps that one, though commented upon, was irrelevant. (G. I, p. xv)

Therefore the documents cannot be considered as telling the complete inside story of decision-making. Each cable or memorandum must be weighed on its own and in terms of the context in which it was drafted. Beyond the problem of each particular document itself, we must also be aware that the documents presented in "The Pentagon Papers" have been selected for us by the Defense Department historians. This selection process rests on criteria which are not stated explicitly. The relative importance of a document and its selection for incorporation into the study depended upon the story the historians were trying to tell. It is conceivable that an equal number of conflicting documents remain classified. Although the quality of the Defense Department study is high and the narrative is generally consistent with the known facts, the conclusions of this paper rest on the three versions of "The Pentagon Papers" and nothing more.

[3] A complete and able treatment of the Geneva negotiations is available in Robert F. Randle, *Geneva 1954: The Settlement of the Indochinese War* (Princeton, New Jersey: Princeton University Press, 1969). Professor Randle analyzes the Geneva negotiations from both legal and political points of view. He concludes:

> The Geneva Agreements (the cease-fire agreements, the Final Declaration, and the unilateral declarations) were vaguely worded at crucial points. Indeed, they were incomplete and legally defective in various essentials. Thus in most instances it is meaningless to

cerned rather with the American role in the negotiation of the Accords and the subsequent role of the Accords in American relations with Vietnam.

The Geneva Accords themselves[4] consist of: (1) the Agreement between the Commander-in-Chief of the French Union Forces in Indo-China and the Commander-in-Chief of the People's Army of Vietnam on the Cessation of Hostilities in Vietnam; (2) the Agreement on the Cessation of Hostilities in Cambodia; (3) the Agreement on the Cessation of Hostilities in Laos; (4) the Final Declaration of the Geneva Conference on the problem of restoring peace in Indo-China; and (5) declarations by the Government of the French Republic, the Government of the United States of America, the Royal Government of Cambodia, and the Royal Government of Laos.[5]

As they concern Vietnam, these documents in the main represent French capitulation to the Viet Minh and the division of Vietnam into two temporary military zones, one for the communists in the north and one for the French Union Forces in the south. The agreement between the Commanders-in-Chief of the French Union and the People's Armies set up a Joint Commission (an equal number of representatives of the commanders of the two parties) and an International Commission for Supervision and Control in Vietnam (Canada, India, and Poland) to "be responsible for supervising the proper execution by the parties of the provisions of the Agreement."[6] The agreement between the Commanders-in-Chief also provided eventual elections to reunify the country, but stated that "the conduct of civil administration in each regrouping zone shall be in the hands of the party whose forces are to be regrouped there in virtue of the present Agreement."[7] In Article 14 (d), provisions were made to require that "any civilians residing in a district controlled by one party who may wish to go and live in the

---

speak glibly of this or that state violating the "Geneva Accords." (p. x).
Yet the publication of "The Pentagon Papers" removes the need to resort to inference in discerning American intent. The documents also allow scrutiny of the government's secret attitudes towards the Accords once they were made.

[4] For the remainder of this paper the term "Geneva Accords" will be used to denote the general political and legal settlement made in Geneva in 1954. Where it is possible to discern the particular agreement or declaration being referred to by the term "Geneva Accords," the more exact designation will be used.

[5] See Randle, op. cit., pp. 569ff., and Richard A. Falk, *The Vietnam War and International Law* (Princeton, New Jersey: Princeton University Press, 1968), pp. 543ff.

[6] Falk, op. cit., p. 554. [7] Ibid., p. 546.

zone assigned to the other party shall be permitted and helped to do so by the authorities in that district."[8] The practical result of the work of the Conference was the disengagement of France and the partition of Vietnam into the Republic of Vietnam in the south and the Democratic Republic of Vietnam in the north.

The history of American involvement in Vietnam can be traced to the helter-skelter environment of the settlement of the extant problems following the defeat of Japan and the beginning of the Cold War. Americans found that the policies of anti-colonialism and anti-communism were somewhat contradictory. Even before the communist threat emerged, America was caught on the horns of a dilemma: self-determination versus allied solidarity. Both the British and the French did not appreciate American anti-colonialism. Just as in the settlement after the First World War, Americans proposed the concept of a trusteeship. President Roosevelt expressed the feelings of many with regard to the settlement of the colonial problem:

> . . . I had, for over a year, expressed the opinion that Indo-China should not go back to France but that it should be administered by an international trusteeship. . . .
>
> Each case must, of course, stand on its own feet, but the case of Indo-China is perfectly clear. France has milked it for one hundred years. The people of Indo-China are entitled to something better than that.[9]

Yet there was another side to the coin. American policy was primarily concerned with the rebuilding of Europe through the Marshall Plan. Since cooperation in war and peace with the British and the French was the cornerstone of American foreign policy, the concept of trusteeship was not pressed too hard. During the course of World War II the President was unwilling to disturb the vital alliance. While Roosevelt was informed that it would be difficult to deny French participation in the liberation of Indo-China, his response in January 1945 was, "I still do not want to get mixed up in any Indo-China decision. It is a matter for postwar."[10]

But the decision not to decide left the matter to the military. Since the United States was concentrating its efforts on the Japanese home

[8] Ibid., p. 547.

[9] G. I, p. 10. Roosevelt's reply to a memorandum from Cordell Hull, 24 January 1944.

[10] G. I, p. 11. Roosevelt to Stettinius, 1 January 1945.

islands, the command of Southeast Asia was divided between Chiang Kai-Shek to the north and British Admiral Lord Mountbatten to the south of latitude 16° North. Although the British did land a small detachment in Saigon, their policy deferred to the French from the outset.[11] Thus by default Vietnam was returned to French control and the Indochina War began. Even at the very beginning of the struggle, logical inconsistencies in American policy emerged. The need for alliances was not consistent with the policy of self-determination for all peoples. In spite of the fact that Britain and France were allies, there were fundamental differences on the issue of colonialism. The characteristic American response to this contradiction was legalism: the concept of trusteeship. The term contained an essential ambiguity. Just as in the days of the League of Nations, a trusteeship could be used both as "disguised annexation" and also as proof that American policy had secured significant movement in the direction of self-government. The American policy dilemma was resolved by achieving ambiguous acceptance of American principles in law while stopping short of taking positive action to control events. The United States would use pressure to gain legal acceptance of an ambiguously worded principle,[12] knowing full well that her ally was contemplating violating that very principle. Then, she would look the other way while her ally performed an ugly deed. American policy would be not to aid or condone the act. Afterward, America would chastise her ally for violating the principle she had forced her to accept.

This pattern can clearly be seen in the reestablishment of French control over Indo-China. Although she questioned the French claim of the support of the people and clearly stated that it was not American policy to "assist the French to reestablish their control over Indo-China,"[13] and although she continually chastised the French for not giving independence to the Vietnamese, the United States looked the other way as the Marshall Plan and military aid to France was channeled to Vietnam to execute policies which were publicly opposed. There are two ways to view this American tactic, both of which contain an element of truth. The first is to argue that the pressure used to gain acceptance of principles is not wasted because it gives the government

[11] G. I, p. 16.

[12] In this case Article 73 of the U.N. Charter, the Declaration Regarding Non-Self-Governing Territories.

[13] G. I, p. 17.

some leverage in trying to make progress toward the principles. In most cases the ally would act regardless of what Americans said or did. By getting the ally to accept the principles, the United States can at least keep the pressure on and push for policies consistent with her principles. On the other hand, the tactic may be seen as a cynical mechanism of rationalization both in terms of domestic politics and individual psychology. The rhetoric of principle can be used to obscure a policy of expediency. Success in achieving acceptance of ambiguous principles produces the impression of an aggressive moral thrust to American policy while expediency dictates the actual execution of policy. Thus we can see a vigorous international effort to establish the principles of independence and self-government for the colonial world while quietly returning command of these areas to the military control of the old colonial power.

In the period from 1945 to 1950, American policy rested on the tension between solidarity with France and constant pressure on the French to grant true independence to Vietnam. Americans felt the difficulties in the area were simply the result of the French failure to follow American advice and grant independence to Vietnam. Although there was considerable revolutionary activity in Vietnam by the Viet Minh, Southeast Asia was not considered a critical area. But in Eastern Europe the Cold War had begun in earnest, and by 1950 the events in Vietnam became irrevocably linked to the global struggle against communism. American neutrality in the Franco-Viet Minh War, 1946-1949, was to undergo an abrupt change. The ugly turn of events in Europe, Greece, Turkey, and China plus Soviet and Communist Chinese recognition of Ho Chi Minh's government prompted Secretary of State Acheson to make the following public statement on February 1, 1950:

> The recognition by the Kremlin of Ho Chi Minh's communist movement in Indochina comes as a surprise. The Soviet acknowledgment of this movement should remove any illusions as to the "nationalist" nature of Ho Chi Minh's aims and reveals Ho in his true colors as the mortal enemy of native independence in Indochina.[14]

Overnight, American policy toward Vietnam was shifted from a reserved policy toward Ho and pressure on France to a willingness to accept any French rationalization with a promise to get on with the war against the

[14] G. 1, p. 41.

communists.[15] France's "Bao Dai experiment" to give Vietnam the appearance of independence and nationalist leadership was accepted. Following the Elysée Agreement,[16] the United States began its shift of position. On May 10, 1949, the American Consul in Saigon was notified:

> At the proper time and under the proper circumstances, the Department will be prepared to do its part by extending recognition to the Bao Dai government and by expressing the possibility of complying with any request by such a government for U.S. arms and economic assistance.[17]

On February 4, 1950, President Truman approved U. S. recognition of the Bao Dai Government.[18] By May, the Department of State was working on plans to implement a program of $60 million in aid for Southeast Asia under the Mutual Defense Assistance Program for the general area of China.[19] By the end of the year the United States had signed the Pentalateral Protocol of 1950 with France, Bao Dai, Laos, and Cambodia, which provided for American advisors.[20] Although total United States assistance to the French reached only $10 million in the first year, 1950, by fiscal year 1954 the total was $1,063 million accounting for 78 percent of the French war costs.[21] On February 27, 1950, the National Security Council issued a report entitled "The Position of the United States with Respect to Indo-China." The conclusions of the report set out the basic policy of the United States which has never changed:

> It is important to United States security interests that all practicable measures be taken to prevent further communist expansion in Southeast Asia. Indo-China is a key area of Southeast Asia and is under immediate threat. . . .
>
> The neighboring countries of Thailand and Burma could be expected to fall under Communist domination if Indo-China were controlled by a Communist-dominated government. The balance of Southeast Asia would then be in grave hazard.

[15] G. I, p. 34.

[16] Formally an exchange of notes between Bao Dai and Auriol, signed on 8 March 1949. The French agreed to turn over the internal administration of Vietnam to the Vietnamese within the French Union. France retained control of the armed forces. (GPO 1, I, p. A-40, also GPO 1, II, p. A-7)

[17] G. I, p. 33. [18] G. I, p. 41. [19] G. I, p. 42.

[20] G. II, p. 288, and 3 United States Treaties and other International Agreements 2756.

[21] G. I, p. 77.

> Accordingly, the Departments of State and Defence should prepare as a matter of priority a program of all practicable measures designed to protect United States security interests in Indo-China.[22]

The terminology and assumptions of this National Security Council report are significant in three respects. In the first place, Vietnam is linked to the security interests of the United States. Secondly, this link is made on the basis of the "domino theory." The third important element of the National Security Council report was the assertion that "all practicable measures be taken to prevent further communist expansion in Southeast Asia." This means that the "domino theory" was taken for granted and that from February 27, 1950, onward, the problems with respect to Southeast Asia were merely a matter of means.

From the bureaucratic as well as logical points of view, the elevation of Vietnam to the highest level of security assumption had profound effects. It gave sanction to the development of a program with a specific objective: preventing a communist takeover of Vietnam. Furthermore, it recognized Vietnam as policy of the highest priority which could compete on an equal basis for American resources. Therefore, American "commitments and strategic priorities" were to be reassessed in terms of this new assumption.[23] Values considered below the level of national security interests would have to be sacrificed. For example, the first casualty to this elevation of the importance of Vietnam was the reluctance to help the colonial French. On the basis of the National Security Council Report, the Joint Chiefs of Staff, though "recogniz(ing) the political implications involved in military aid to Indo-China," recommended in view of the "unstable" political situation to drop "insistence upon independence for Vietnam and a phased French withdrawal" and to introduce "a small military assistance group to work with both the Vietnamese and French to stop the communists."[24] From this point onward, policies toward Vietnam are selected on the basis of "practicality" or expediency. In the hierarchy of policy arguments, national security is supreme. Propositions or policies of a lower level are used or cast aside depending on their usefulness in serving the highest principle. Once

[22] G. 1, p. 362.

[23] G. 1, p. 363. Memo from Deputy Under-Secretary of State Dean Rusk to Major General James H. Burns of the Office of the Secretary of Defense, 7 March 1950.

[24] G. 1, p. 365. Memorandum for the Secretary of Defense by Omar N. Bradley, Chairman for the Joint Chiefs of Staff.

the basic policy was established, it was merely a matter of selecting the available means to achieve the objective.

The events from 1950 to 1954 both reinforced and weakened Vietnam's claim as a pillar of American security. The loss of China to communism and actual engagement of American troops in Korea seemed to substantiate the assumptions of the "domino theory." On the other hand, Vietnam had to compete with the hot war in Korea for American military resources. An Army position paper concluded that since "The equivalent of 12 U.S. divisions would be required to win a victory in Indo-China, if the French withdraw and the Chinese Communists intervene" and "a victory . . . cannot be assured by U.S. intervention with air and naval forces alone . . . U.S. intervention with combat forces in Indo-China is not militarily desirable."[25]

But even in the desperate hours of Dien Bien Phu, the French declined American proposals for united action. The French were unwilling to grant American demands for Vietnamese independence as the price of American intervention. The French were also afraid the United States would assume the control of the operations. French General Paul Ely explained to Admiral Arthur Radford of the Joint Chiefs of Staff that "Americans acted as if the United States sought to control and operate everything of importance . . . the United States appears to have an invading nature as they undertake everything in such great numbers of people . . . (and that) U.S. administrative procedures are enormously wasteful, irritating, and paper heavy."[26] But beyond the military hesitance to deploy troops to another front in Asia and French reluctance to let Americans run the show, there was further the domestic political situation within the United States. The stalemated Korean War had dampened public support for land wars in Asia, and the Eisenhower Administration had just parried the attempt to curb Presidential authority in the form of the Bricker Amendment.

This situation prompted President Eisenhower, after a meeting of Admiral Radford, Secretary Dulles, and Congressional leaders on April 3, 1954, to reject unilateral intervention and to indicate that any United States military involvement in Indo-China would depend on

[25] G. 1, p. 471. Army Position on National Security Action No. 1074-A, 5 April 1954. Also see Secretary of the Army Stevens' memo of 9 May 1954, GPO 9, p. 475.

[26] G. 1, p. 457. Memorandum for the President's Special Committee on Indochina, 29 March 1954.

(1) formation of alliance for united action; (2) a declaration of French willingness to accelerate independence for Vietnam; (3) Congressional approval of United States involvement.[27] The experience of the Truman Administration of getting involved in the Korean War without a formal Congressional resolution was obviously on the President's mind. Therefore on the eve of the Geneva Conference of 1954, American decision-makers found themselves in a rather helpless position. The French Government was in a precarious political position at home, and the United States was trying to muster French support for the proposed European Defense Community. Both Vietnam and the Defense Community were highly volatile political issues in France, so little real pressure could be exerted there. The American public and Congress had tired of Asian wars and the British were not interested in further adventure in Asia. It is important to recall that American policy had not changed, but the means of achieving a non-communist government in Vietnam were scarce. The military situation was so bad that even Secretary Dulles questioned the feasibility of intervention. The French wanted American commitments to bolster their bargaining position, but Washington was in no mood to write a *carte blanche* for the French. The U.S. was willing to intervene for victory but not to facilitate a French capitulation. Dulles wrote to Geneva:

> They want, and in effect have, an option on our intervention, but they do not want to exercise it and the date of expiry of our option is fast running out.[28]

The real American desire was for the French to fight on to victory. Even through the first half of June, the Administration tried to keep the united-action option open, dependent on a series of French concessions, such as formal requests for aid from France and the Associated States (Vietnam, Laos, Cambodia), a French guarantee of independence for Vietnam with an unqualified option to withdraw from the French Union at any time, and a new military command structure. President Eisenhower was prepared to seek Congressional approval for such an effort.[29] The French were given the unpalatable choice of internationalizing the war or surrendering to the Viet Minh. The decision-makers in Washington were willing to take drastic action but felt limited by the

[27] G. I, p. 94.
[28] G. I, p. 523. Dulles to Smith, 14 June 1954.
[29] G. I, p. 101.

domestic political requirements of some sort of united action and independence for Vietnam. Both of these prerequisites were steps France adamantly refused to take. Washington would take "all practicable measures," but the combination of domestic expectations and French recalcitrance cut the available means.

It must be pointed out at this stage, however, that both of the limitations posed by American domestic political considerations were connected to problems of legality. President Eisenhower was highly sensitive to the Constitutional requirement for Congressional approval for war. He knew meaningful American intervention meant war and possibly even a war with China. Further, the necessary Congressional approval was seen to rest on independence for Vietnam and some sort of united action. The united action should include the military participation of Britain and a regional group of interested Asian states and bringing the matter to the United Nations.[30] All of these measures implied an attempt to clothe American action with both domestic and international legality. Washington's struggle to attain French acquiescence to American domestic political demands produced a resolve to formalize a regional defense pact. Secretary Dulles was convinced of the need for a pact including Western and Asian allies by his experience in trying to persuade a bipartisan group of Congressional leaders to work for a resolution authorizing the President to use U.S. air-naval power to aid the French at Dien Bien Phu. The State Department Summary of Secretary Dulles's meeting concluded:

> It was the sense of the meeting that the U.S. should not intervene alone, but should attempt to secure the cooperation of other free nations concerned in Southeast Asia, and that if such cooperation could be assured, it was probable that the U.S. Congress would authorize U.S. participation in such "United Action."[31]

Of course it is impossible to distinguish exactly the role law plays in such a political argument. Perhaps the Congress wanted no part of any kind of intervention and simply phrased its displeasure in terms of legal requirements. But the formal legal requirements of a Congressional resolution, independence for Vietnam, and collective sanctions for intervention indicated a search for legitimacy in which legal forms play a part. Both President Eisenhower and Secretary Dulles felt

[30] G. I, p. 124.

[31] G. I, p. 101. Meeting of 3 April 1954.

the need of satisfying formal legal requirements prior to intervention. Just one week after his unsuccessful confrontation with Congressional leaders, Secretary Dulles journeyed to London and Paris trying to elicit support for united action.[32] By May, the National Security Council had established a planning board to work on possible groupings for regional organization.[33] Thus American decision-makers felt restricted in the execution of policy by the lack of at least the appearance of a formal legal obligation to intervene. In both the American position at the Geneva Conference and in the formation of the SEATO Pact, Americans sought to remove this handicap.

The Geneva Negotiations

Since intervention was ruled out by French intransigence and the internal French political situation seemed to demand French withdrawal, Americans simply had to face the undesirable prospect of a French deal with the communists at Geneva. For both the Russians and the Chinese, American participation was required. They felt ridding Vietnam of the French would be meaningless if the agreement did not at least decrease the likelihood of American unilateral or multilateral intervention.[34] Mendes-France expressed the view that without a "clear-cut U.S. guarantee that would protect Associated States in the event that the Communists did not honor the spirit of any agreement . . . a settlement would not be worth the paper it was written on."[35] Beyond that, the French wanted to use a threat of U. S. intervention to strengthen their position in negotiations. Although on the surface the British mouthed the hard line of Washington, it was well known that they were never convinced that Indochina's security was inextricably linked to the security of all Asia.[36] Therefore in terms of Vietnam, Washington had two conflicting policies: on the one hand was the desire to help the French get the best possible terms, including some specific American proposals; and on the other hand was the avoidance of becoming legally bound by unsatisfactory provisions of an agreement. Yet Washington also feared that if the U.S. was forced by an unacceptable settlement to disassociate itself, what Dulles characterized as "irreparable injury to Franco-American relations" might occur.[37]

[32] G. I, p. 101. [33] G. I, p. 143. [34] G. I, p. 167.

[35] G. I, p. 553. Dillon to State recording a conversation with Mendes-France on 11 July 1954.

[36] G. I, p. 142.

[37] G. I, p. 548. Dulles to Dillon, 8 July 1954.

Dulles's tactic was to first make it perfectly clear to the French that the U.S. was "not prepared at the present time to give any commitments that it will intervene in the war if the Geneva Conference fails."[38] Then he instructed Undersecretary Smith to adopt a stance of "an interested nation which, however, is neither a belligerent nor a principal in the negotiations."[39] Beyond this, the government agreed with the British to a list of seven principles of "an acceptable agreement."[40] Dulles' plan was to inform both the French and the communists that the U.S. would withdraw from the Conference if its seven principles were not met.[41] Since Secretary Dulles had categorically stated that "The United States will not, however, become cosignatory with the Communists in any Declaration,"[42] there was no question of the United States becoming a party to either the military agreement or the declaration of the Conference. The United States would make a unilateral declaration of its position. Dulles hoped to use the tension between "respect" and "disassociation" to prod the French to make a satisfactory settlement while at the same time keeping freedom of action by avoiding any commitments or obligations under the Geneva Accords. By "respect" Dulles meant that the U.S. "would not seek directly or indirectly to upset settlement by force."[43] But even "respect" was dependent on the inclusion of the seven American principles. Finally, to insure the maxi-

[38] G. I, p. 153.

[39] G. I, p. 507. Dulles to Smith, 12 May 1954.

[40] The seven US-UK requirements for an acceptable agreement were:

(1) Preservation of the integrity and independence of Laos and Cambodia, and assurances of Viet Minh withdrawal from those countries.

(2) Preservation of at least the southern half of Vietnam, and if possible an enclave in the Delta, with the line of demarcation no further south than one running generally west from Dong Hoi.

(3) No restrictions on Laos, Cambodia or retained Vietnam "materially impairing their capacity to maintain stable non-Communist regimes; and especially restrictions impairing their right to maintain adequate forces for internal security, to import arms and to employ foreign advisers."

(4) No "political provisions which would risk loss of the retained area to Communist control."

(5) No provision that would "exclude the possibility of the ultimate reunification of Vietnam by peaceful means."

(6) Provision for "the peaceful and humane transfer, under international supervision, of those people desiring to be moved from one zone to another of Vietnam."

(7) Provision for "effective machinery for international supervision of the agreement." G. I, p. 143.

[41] G. I, p. 543. Dulles to Dillon, 3 July 1954.

[42] G. I, p. 152.

[43] G. I, p. 146. Dulles to Smith, 24 June 1954.

mum flexibility in the final hours of a settlement, Secretary Dulles empowered General Smith to act on his own if time were short.

> If in your judgement continued participation in the Indochina phase of the Conference appears likely to involve the United States in a result inconsistent with its policy, as stated above, you should immediately so inform your Government, recommending either a withdrawal or the limitation of the U.S. role to that of an observer. If the situation develops such that, in your opinion, either of such actions is essential under the circumstances and time is lacking for consultation with Washington, you may act in your discretion.[44]

Secretary Dulles's fear was that the United States might seem to have become involved in "a multilateral engagement with Communists which would be inconsistent with our basic approach and which subsequently might enable Communist China to charge us with alleged violations of agreement to which it might claim both governments became parties."[45] The United States shared the Vietnamese view that the Geneva settlement would amount to nothing more than a pause in the fighting so that the United States did not want to be legally bound in any way. Among the seven principles the US-UK agreement required of a settlement was the insistence that there be "no political provisions which would risk loss of the retained area to communist control."[46] The election provisions of the military agreement and the Final Declaration of the conference were what Dulles had in mind. This was the only serious departure from the US-UK terms. Dulles expressed his objection,

> since it is undoubtedly true that elections might eventually mean unification of Vietnam under Ho Chi Minh this makes it all the more important they should be only held as long after ceasefire agreement as possible and in conditions free from intimidation to give democratic elements best chance. We believe important that no date should be set now and especially that no conditions should be accepted by French which would have direct or indirect effect of preventing effective international supervision of agreement ensuring political as well as military guarantees.[47]

[44] G. I, p. 507. Dulles to Smith, 12 May 1954.
[45] G. I, p. 569. Dulles to Smith, 19 July 1954.
[46] G. I, p 144. See *supra* note 40, requirement 4.
[47] G. I, p. 546. Dulles to Dillon, 7 July 1954.

Thus the basic position of the United States in relation to the Geneva Conference can be seen. If left to its own devices, the United States would have simply not returned to the second phase of the talks, thereby leaving itself completely free.[48] But the French response was so strong that such a position might have seriously endangered Franco-American relations. The formula of a unilateral declaration taking note of the military agreements for Cambodia, Laos, and Vietnam and the Final Declaration of the conference were made to give at least the appearance of an American guarantee. The declaration asserted that the United States would "refrain from the threat or the use of force to disturb them" and also "would view any renewal of the aggression in violation of the aforesaid agreements with grave concern and as seriously threatening international peace and security."[49] Thus the American intent was to provide an optional guarantee, that is, a guarantee which carried no obligation or duty on the part of the United States but merely the option to act if the aggression was resumed. It was simply a threat. Also, the pledge not to use force to disturb the Accords was linked to Article 2 (4) of the Charter of the United Nations, so that it could be argued that no new obligations were undertaken. But more important is what was left unsaid. The United States gave no promise to uphold the Geneva Accords and also left open use of any means other than force to disturb the Accords. The third important element of the unilateral declaration was a clear statement opposing the provisions for elections on the basis of the Accords and substituting truly "free" elections supervised by the United Nations. Washington was clearly anticipating having to balk at the election provisions as established in the Accords. By proposing U.N. supervision, Washington was proposing a condition which communist countries had consistently rejected and yet a provision which seemed reasonable to American domestic opinion. The fourth element of the declaration gives some solace to the "representative of the State of Viet-Nam" in that the "United States reiterates its traditional position that peoples are entitled to determine their own future and that it will not join in an arrangement which would hinder this."[50] Since South Vietnam had announced it would not be a party to agreement and did not consider itself bound by the Accords, this meant self-determination for South Vietnam despite any provisions of the Geneva Accords.

[48] G. 1, p. 548. Dulles to Dillon, Aldrich, and Johnson, 8 July 1954.
[49] Falk, *op. cit.*, p. 559. [50] *Ibid.*

Therefore Washington established early the position that South Vietnam had the right of self-determination and thereby threw into question the "provisional" nature of the military demarcation lines. It must be noted, however, that the implications of the unilateral declaration seem obvious at first reading. Yet when these provisions are read in the full knowledge that Secretary Dulles had carefully developed a position which avoided any "multilateral engagement with Communists . . . which might enable Communist China to charge us with alleged violations of agreement to which it might claim both governments became parties,"[51] it can be seen that the unilateral declaration served its purpose well. To drive home the point that the United States would not become a party in any obligations or arrangements with communists, the American declaration took note of only the first twelve paragraphs of Final Declaration. The thirteenth paragraph was an agreement of the members of the conference to consult with one another on requests that might be referred to them by the International Supervisory Commission to study measures which might be necessary to ensure respect for the Accords. Secretary Dulles would have none of that. Dulles had used the tension between "disassociation" and "respect" to milk the best possible terms from the French and the communists. He had preserved the Franco-American alliance while avoiding any new international commitments. He encouraged the South Vietnamese to exercise their right of self-determination while making no concrete commitments. Most ironic was America's stance as protector of the Geneva Accords. By virtue of taking note of the Accords with major reservations as to elections and self-determination for South Vietnam, the United States selected the part of the Geneva Accords which suited its purposes and protected those elements, while casting aside the other provisions. When asserting rights or powers, the United States would recall its participation in deliberations at Geneva but when obligations, liabilities, or duties were mentioned, the United States would refer to the unilateral declaration.

The Role of the Geneva Accords in American Policy

Since the question as to which party violated the Geneva Accords can only be debated without authoritative resolution, an interesting question which can be dealt with on firmer ground since the publication of "The Pentagon Papers" is: what were American attitudes toward

[51] G. I, p. 569. Dulles to Smith, 19 July 1954.

the Geneva Accords, and in what sense did Americans feel bound by their provisions?

The simplest answer to a question about American attitudes toward the Geneva Accords would be to say that the United States cynically set out to subvert the agreement from the drafting stage onward. Unfortunately the reality is not that simple. While the Americans' carefully drafted unilateral declaration was intended to absolve the United States of any legal obligations, from 1954 onward American policy assumed the binding force of the Geneva Accords. Americans were sensitive to the kinds of activities and agreements which would retain the appearance of legality. The distinction between what was to be done in a covert versus an overt manner was made on the basis of the legal requirements of the Geneva Accords. At the critical stage of the elections to unify Vietnam, the United States was careful not to disturb the provisions of the Accords herself but rather left this to the Government of Vietnam. In the end, in 1961, when the United States found it necessary to disregard fundamental provisions of the military agreement, the Final Declaration of the conference and its own unilateral declaration, the decision-makers had both a rationalization for their own psyche and a cover for the action for public consumption. What is more, throughout the period, the Americans called the other side to task for so-called violations of the Geneva Accords.

A broader view of American attitudes toward the Geneva Accords shows ambivalence. On the one hand, the United States accepted the loss of North Vietnam and took no positive steps to recapture the North. On the other hand, the United States regarded the provisional demarcation lines as establishing a permanent international frontier. The United States would regard any attempt to disturb the provisional lines as aggression. In other words, the United States needed the Geneva Accords for the obligations they placed on the communists. In spite of the fact that America had carefully prepared a legal case for not being bound by the Accords, at least the appearance of compliance was necessary in order to give standing to complaints of communist abuses. Thus, from the American point of view, the situation was ideal. The United States could make a plausible case that it was not bound at all by the Geneva Accords. This argument would be reserved for the last ditch defense to preserve America's moral position of not breaking the law. At the second defensive line the United States would use its declaration as the ground for complaints of communist violations. On this level, the

United States would pick and choose the provisions of the Accords which bound the communists. Any U.S. or South Vietnamese violations would be excused on the grounds of self-determination for South Vietnam and the refusal of the South Vietnamese to become party to the Accords. The first line of defense was simply to treat South Vietnam as another state with which the United States had programs for aid and support. This view treated economic and military aid as a normal state of affairs having no bearing on the subversion of international agreements. The American attitude toward the Geneva Accords was therefore to accept the benefits of the agreement while rejecting its liabilities. But the more specific character of American ambivalence can be seen in the perceived implications of the Accords for American action in Vietnam.

Oddly enough the first real evidence that the United States felt bound by the provisions of the Geneva Accords was provided by Americans who planned to conduct the covert war against the communists. Early in 1954, while the French were still holding out at Dien Bien Phu, the Saigon Military Mission headed by Colonel Edward G. Lansdale, USAF, was created and authorized to go to Vietnam to "undertake paramilitary operations against the enemy and to wage political-psychological warfare."[52] At Geneva, agreement was reached that the "personnel ceiling of U.S. military personnel with MAAG (Military Assistance Advisory Group) would be frozen at the number present in Vietnam [on Aug. 1]."[53] Colonel Lansdale was faced with having only two officers in the whole of Vietnam. Consequently "a call for help went out. Ten officers in Korea, Japan, and Okinawa were selected and were rushed to Vietnam."[54] Working during the hectic period of the flux of refugees between zones, the Lansdale-group report pointed with pride to its accomplishments:

> Haiphong was taken over by the Vietminh on 16 May. Our Binh and northern Hao teams were in place, completely equipped. It had been hard work to beat the Geneva deadline, to locate, select, exfiltrate, train, infiltrate, equip the men of these two teams and have them in place, ready for actions required against the enemy. It would be a hard task to do openly, but this had to be kept secret from the Vietminh, the International Commission with its suspicious French and Poles and Indians, and even friendly Vietnamese.[55]

[52] G. I, p. 574. Landale Team's Report on Covert Saigon Mission in 1954 and 1955.
[53] G. I, p. 576. [54] *Ibid.* [55] G. I, p. 583.

Although the American covert operations in North and South Vietnam were contrary to the spirit of the Geneva Accords, and the letter of both international and domestic law, the American attitude toward these activities was interesting. Americans went to ridiculous extremes to comply with the letter of the Geneva Accords. Formal compliance was important. While the military, in this case General O'Daniel, was willing to look the other way while Colonel Lansdale got away with a little hanky-panky, there is no question but that the military felt bound to uphold the letter of the law. To bend the law here and there was acceptable, but they were careful not to act so as to allow their being charged with a clear violation. A cynical lawbreaker would never be troubled about the timing of the arrival of covert operators. It is only a mind which sees itself as upholder of the law which is driven to such contradictions.

Throughout the 1954 to 1961 period, the Joint Chiefs of Staff were very specific in their attitude in regard to the introduction of American military personnel. Although they were willing to fudge a number here and there, the distinction between action under the Accords and a formal breach of the Accords was kept clear. The military was unwilling to get involved in piecemeal action which would surely lead to failure. The Geneva Accord guideline of mere replacement was used by the Joint Chiefs to make their point, so that both on the level of covert operations and planning for overt military action, the American activities presumed the binding force of the Geneva Accords.[56]

On the diplomatic level, Americans responded to the Geneva Accords with the formation of the SEATO Pact. General Smith's statement, "We must get that Pact!"[57] was part of an American diplomatic initiative which led to Manila in September 1954. In spite of the fact that both the United States and South Vietnam had not signed the Geneva Accords, the membership of Britain and France necessitated the use of a protocol to make the provisions of SEATO applicable to South Vietnam. Since the Accords had forbidden military alliances, Britain and France were bound not to form alliances with Vietnam. While on the one hand Secretary Dulles initiated the pact to put the communists on notice that aggression would be opposed, the United States, on the other hand, was not willing to undertake any firm commitments. The Joint Chiefs of Staff were opposed to any unilateral commitment which would restrict American freedom of action.[58] The result was Article IV

[56] G. II, p. 408. [57] G. I, p. 212. [58] *Ibid.*

of the treaty which was anything but a pledge to automatically respond with force to communist aggression. The article provides that the parties recognize armed attack in the treaty area would endanger their own peace and safety and that each party agrees "that it will in that event act to meet the common danger in accordance with its constitutional processes."[59] In the preliminary discussions with the French concerning an overall security umbrella for Indochina, the French used the word "Locarno," which the United States found to be an unfortunate choice of terms.[60] Obviously just as in the case of the Geneva Accords themselves, the United States wanted power to provide an optional guarantee. The SEATO Treaty was designed not to commit the United States to action but rather to give the appearance of a promise which would deter the communists and provide a sanction for executive action in the domestic American political context.

To a large extent, the SEATO Treaty was the result of President Eisenhower's and Secretary Dulles's confrontation with Congress which resulted in rejection of intervention in Vietnam at the time of Dien Bien Phu. The paper work was being prepared for a future crisis in Asia. The next time the Administration would have a solemn treaty commitment to honor. Secretary Dulles argued that Article IV constituted "a clear and definite agreement on the part of the signatories, including the United States, to come to the aid of any member of the Pact who under the terms of this treaty is subjected to aggression."[61] The difficulty with this argument is that neither the United States nor any of the other parties made such a commitment. The terms of the treaty give the option of unilateral intervention with the mere appearance of a multi-national commitment. Therefore, the SEATO Pact was constructed to meet the Congressional requirement of multilateral sanction for American intervention. Within the domestic arena the package was sold as total American commitment to defend Asia against communist aggression. Yet on the international level it would be hard to imagine using the language of the SEATO Treaty to induce an unwilling state to act to meet some alleged aggression. French and British reluctance to become involved in Vietnam demonstrates the weakness of the SEATO arrangement. The continual use of the treaty in political arguments within the United States testifies to its durability and power in fulfilling its major purpose. Thus the collective defense arrangement attempts to give the added weight of a pseudo-

[59] Falk, *op. cit.*, p. 562. [60] G. I, p. 143. [61] G. I, p. 212.

international legal obligation to policy decisions of the American executive. The SEATO Treaty itself was a response to the Administration's frustration in connection with the Geneva settlement. Since such treaties are drafted to have maximum domestic political effect and no international legal effect whatsoever, in order to keep American options open, American treaty commitments rest on the credulity of the audience rather than any legal obligations. On this level Americans use international legal forms without any real substantive content to make debating points in policy decisions in the domestic forum.

While the United States worked to beat the deadline of the military agreement for Vietnam and the diplomats prepared SEATO, a more specific stand was required as the deadline for elections approached. With respect to the Geneva Accords themselves, and the International Control Commission, Secretary Dulles held the view; "while we should certainly take no positive step to speed up present process of decay of Geneva Accords, neither should we make the slightest effort to infuse life into them."[62] But rigor mortis had set into the Geneva Accords even before they had supposedly come to life July 21, 1954. The French had prepared a legal trick to cloud the status of South Vietnam under the Accords. On June 4, 1954, nearly six weeks before signature of the Accords, the Laniel Government had recognized "Vietnam as a fully independent state in possession of all qualifications and powers known in international law,"[63] and Mendes-France promised to uphold the agreement. Thus, although the Geneva Accords bound France and her successors, it can hardly be argued that South Vietnam was a successor to France with respect to the Geneva Accords since Vietnam was granted its independence before the Accords were signed.

The point came clearly into focus as the last date for consultations to prepare for elections drew near (July 20, 1955). In a draft policy paper prepared in May, the United States suggested that Vietnam accept the elections with the provision of a secret ballot and strict supervision by the United Nations. This policy was consistent with the groundwork laid by the unilateral declaration of the United States and was safe, the Americans argued, since the communists in Germany and Korea had refused these conditions.[64] Vietnam could appear to uphold the Accords while insuring that no election would be held. The studied ambiguity of such a position shifted the onus of rejecting the Accords

[62] G. I, p. 241.

[63] G. I, p. 210. 4 June 1954.

[64] G. I, p. 239.

to the communists without any risk of entanglement for the United States. However, there was a risk for the South Vietnamese. By proposing such conditions, the South Vietnamese would tacitly accept the binding force of the Accords and also stand the risk that the North Vietnamese would accept the conditions and demand the elections. The Vietnamese, however, were not interested in the American tactic which minimized American risks while maximizing the risks for the Vietnamese. Consequently, Diem settled the matter with an unequivocal statement:

> We did not sign the Geneva Agreements. We are not bound in any way by these Agreements, signed against the will of the Vietnamese people. . . . We shall not miss an opportunity which would permit the unification of our homeland in freedom, but it is out of the question for us to consider any proposal from the Viet Minh if proof is not given that they put the superior interests of the national community above those of communism.[65]

Diem refused even to meet the Viet Minh to discuss the election. The American role in the decision was not to press Diem. No positive action was necessary since he would not even talk to the communists. American policy from 1954 onward assumed that elections would be held. This assumption was based on the American estimate that France would remain in Vietnam.[66] The French were bound by the Geneva Accords. In fact there was considerable French pressure on Diem to hold the elections. There was pressure from French public opinion to hold the elections to avoid giving Hanoi a pretext for renewing the fighting while the French Expeditionary Corps remained in South Vietnam.[67] By the time the deadline for consultations rolled around, the French were gone. Diem was asserting his independence from the French and would no longer respond to French pressure. After all, he had the Americans. The situation prompted the French Foreign Minister to comment:

> We are not entirely masters of the situation. . . . The position in principle is clear: France is the guarantor of the Geneva Accords. . . . But we do not have the means alone of making them respected.[68]

Since the United States feared an election would result in a victory for Ho Chi Minh, the United States merely stopped talking about free

[65] G. I, p. 287. [66] *Ibid.* [67] G. I, p. 239. [68] G. I, p. 286.

elections and supported Diem in his refusal to enter into pre-election consultations. A State Department historical study noted the shift from nominal acceptance of elections with a variety of conditions, to the position that "The whole subject of consultations and elections in Viet-Nam should be left up to the Vietnamese themselves and not dictated by external arrangements."[69] The fact that the United States was willing to disregard provisions of the military agreement was made clear when in unusually frank and unequivocal language Secretary Dulles publically stated:

> Neither the United States Government nor the Government of Viet-Nam is, of course, a party to the Geneva armistice agreement. We did not sign them, and the Government of Viet-Nam did not sign them and, indeed, protested against them. On the other hand, the United States believes, broadly speaking, in the unification of countries which have a historic unity, where the people are akin. We also believe that, if there are conditions of really free elections, there is no risk that the Communists would win."[70]

Even rejecting elections, Dulles does not reject elections. It is obvious that the concept of free election meant elections which the Free World would win. In the election crisis the Secretary was rather bold in stating that the United States and South Vietnam were not parties to the Geneva Accords. But it was not long before America and South Vietnam were to notice infiltration from the north which constituted aggression. Of course aggression across the DMZ was a violation of the Geneva Accords. With the exception of the Dulles outburst on the occasions of subverting the election provision of the Geneva Accords, the United States kept a low profile in South Vietnam. The French were gone and to borrow General Ely's phrase, the invading, enormously wasteful and paper heavy Americans had arrived. Diem had established a semblance of order unfortunately followed by the gradual degeneracy of his family and government. An insurgency movement gathered momentum while, at least by 1959, a significant increase of infiltration was observed coming from the north.[71] But until 1961 the United States could claim with at least a measure of truth that it had not disturbed the Geneva Accords by force. The Military Assistance Advisory Group had kept its personnel approximately within the replacement guideline. American aid, mostly police or military equipment, was given as economic assistance and was

[69] G. I, p. 245. [70] *Ibid.* [71] G. I, p. 266.

not of a magnitude which would encourage Diem to move outside of South Vietnam. Direct violation of the Final Declaration of the Geneva Conference and the military agreement was avoided by the use of a protocol to give the Vietnamese the protection of SEATO without becoming a party to the treaty, and the United States signed no bilateral treaty with Diem. Although the United States was engaged in a variety of covert operations, they were well within the rules of the game and constituted no real threat to North Vietnam. Even the subversion of the elections could be blamed on Diem; the United States simply looked the other way. There were no foreign bases on Vietnamese soil. However, this state of affairs was disturbed in 1961 when the United States again discovered that Vietnam was about to fall to communism if heroic action was not taken. Thus for the first time since Geneva, the United States was forced to return to the 1950 National Security Council dictim and use "all practicable measures . . . to prevent further communist expansion in Southeast Asia."[72]

On April 29, 1961, President Kennedy approved an additional 100 men for assignment to the Military Assistance Advisory Group.[73] Although the numbers do not appear significant, the decision itself represented the first formal American breach of the military agreement and its own unilateral declaration. This act had both symbolic and practical importance. The decision was made in full consciousness by the decision-makers that the United States would no longer be bound by the provisions of the Geneva Accords. In preparation for the decision, Colonel E. F. Black's position paper had argued that the increase in personnel and the new types of weapons would require that the President decide the United States would no longer be bound by the Geneva Accords.[74] At the time, the crises in both Vietnam and Laos were acute and the President had ordered a 5,000 man force to be prepared to land near Hue (Tourane) and also in Udorn, Thailand. A cable from the Joint Chiefs, also on April 29, 1961, alerted the commander of American forces in the Pacific:

> 1. Request you prepare plans to move brigade size forces of approximately 5,000 each into Udorn or vicinity and into Tourane or vicinity. Forces should include all arms and appropriate air elements. Plans should be based solely on US forces at this time.

[72] G. I, p. 362.
[73] G. II, p. 38.
[74] G. II, p. 40.

2. Decision to make these deployments not firm. It is expected that the decision as to Thailand will be made at meeting tentatively scheduled here on Monday. Decision regarding Vietnam will be even later due to consideration of Geneva Accords.

3. It is hoped that these movements can be given SEATO cover but such possibility must be explored before becoming a firm element of your planning. State is taking action to explore this aspect.[75]

Although it was unnecessary to deploy these troops because the crisis in Laos subsided, the level of contemplated action was obviously greater than the hundred men actually deployed. From the spring to the fall of 1961, the military and civilian leadership were actively engaged in the choice of means to preserve a non-communist South Vietnam. The National Security Council policy of 1950 was to be put to a new test. The situation in Vietnam was perceived as so desperate that all the means contemplated for solution would require obvious violations of the Geneva Accords. The question was not whether to violate the Accords but rather how to violate them. The debate turned to numbers: 10,000, 25,000, or 40,000 American advisors. As in the cable above, the principals were perfectly aware that action would have legal consequences. In a paper entitled "Concept of Intervention in Vietnam," by U. Alexis Johnson, the various measures were weighed in terms of pros and cons. The working paper discussed the plan: "It breaks the Geneva Accords and puts responsibility on the U.S. for rationalizing the action before the U.N. and the world."[76] How, then, did the United States fulfill its responsibility?

The process of rationalization was a carefully orchestrated public relations offensive. In a joint memorandum to the President, Secretaries Rusk and McNamara recommended the deployment of "a significant number of United States forces" (8,000 possibly growing to 40,000) to Vietnam linked with a specific diplomatic initiative.[77] The plan included using SEATO "cover," an exchange of letters between President Kennedy and Diem, the issuing of the "Jordan Report" (which catalogued North Vietnamese infiltration), and the introduction of United States forces under the cover of a "humanitarian" flood relief effort in the Mekong Delta. On the need for multilateral action, the memo noted, "from the political point of view, both domestic and inter-

[75] G. II, p. 41.

[76] G. II, p. 76.

[77] G. II, p. 110, 11 November 1961.

national, it would seem important to involve forces from other nations. . . . It should be difficult to explain to our own people why no effort had been made to invoke SEATO. . . ."[78] The memo also noted that deployment should "not be contingent upon unanimous SEATO agreement."[79] The next stage was for Ambassador Nolting to approach Diem and get his cooperation in implementing the plan. Then:

> Very shortly before the arrival in South Viet-Nam of the first increments of United States military personnel and equipment proposed under 3., above, that would exceed the Geneva Accord ceilings, publish the "Jordan report" as a United States "white paper," transmitting it as simultaneously as possible to the Governments of all countries with which we have diplomatic relations, including the Communist states.
>
> Simultaneous with the publication of the "Jordan report" release an exchange of letters between Diem and the President.
>
> (a) Diem's letter would include reference to the Democratic Republic of [North] Vietnam violations of Geneva Accords as set forth in the October 24 Government of [South] Vietnam letter to the International Control Commission and other documents; pertinent references to Government of [South] Vietnam statements with respect to its intent to observe the Geneva Accords; reference to its need for flood relief and rehabilitation; reference to previous United States aid and the compliance hitherto by both countries with the Geneva Accords; reference to the United States Government statement at the time the Geneva Accords were signed; the necessity now of exceeding some provisions of the Accords in view of the DRV violations thereof; the lack of aggressive intent with respect to the Democratic Republic of [North] Vietnam; Government of [South] Vietnam intent to return to strict compliance with the Geneva Accords as soon as the Democratic Republic of [North] Vietnam violations ceased; and request for additional United States assistance in framework foregoing policy. The letter should also set forth in appropriate general terms steps Diem has taken and is taking to reform Governmental structure.
>
> (b) The President's reply would be responsive to Diem's request for additional assistance and acknowledge and agree to Diem's statements

[78] G. II, p. 113. [79] *Ibid.*

on the intent promptly to return to strict compliance with the Geneva Accords as soon as DRV violations have ceased.[80]

One important change in this strategy was revealed in a cable to Ambassador Nolting guiding him in the execution of the Rusk/McNamara plan. The Ambassador was instructed that Diem's letter to Kennedy "need not confirm to the world and Communists that Geneva Accords are being violated by our increased aid. Need not accuse ourselves publicly, make Communists' job easier."[81]

Although American official communications such as President Kennedy's letter to Diem retained an ambiguous stance towards the Accords, i.e., not being a party ourselves but holding the communists to their violations, on the secret level Americans felt they were about to breach an international obligation.[82] The private and public rationalization for this course was the violations of the Accords by the North Vietnamese. But an argument of non-compliance by the other side presumes the legally binding force of the arrangement. It also presumes compliance on the part of the complaining party. If the United States was not bound by the Accords and neither were the South Vietnamese, why all the fuss? The simple reason is that American action was taken to thwart communist aggression. South Vietnam was attacked, from within and without, and the United States was aiding in Vietnam's defense. Unfortunately, if there were no DMZ under the Accords and no obligation on the part of the Viet Minh, there could be no aggression. The whole of Vietnam would have been in a state of civil war from 1954 to the present. The core of the American justification for intervention rested on the concept of aggression in violation of the law. There is no aggression between two sides of an ongoing civil war. There is just fighting. The continuing civil war theory would require the complete victory of one faction over another, and this would imply, from the American point of view, the conquest of the North by the South with American aid. The United States, because of the lesson of Korea, was unwilling to risk the intervention of Russia and China which this course would involve. Thus Americans spoke with certain fondness of a return to the Geneva Accords. By this they meant not the formal documents of the Geneva Conference but rather the partition of Vietnam with a pro-Western south. Thus when Americans speak of the "Geneva Accords," they mean the part of the arrangement which coincides with

[80] G. II, p. 115. [81] G. II, p. 119. [82] G. II, p. 805.

American policy. Whenever the United States takes some action which appears to violate a provision of the Accords, the action is taken under cover. If discovered, it is argued that the action was taken in the spirit of the "Geneva Accords." But if the question persists, of course, the United States did not sign the Geneva Accords anyway, so what is all the fuss about?

The difficulty is that the United States wanted that portion of the Geneva Accords which brought a cease-fire, a demilitarized zone, and a non-communist government for South Vietnam. This was the portion of the agreement which the United States agreed to respect and perhaps guarantee. That no one else agreed to Washington's declaration is taken to be irrelevant. The years of nominal compliance and even the use of the "humanitarian" flood cover for the first significant increment of American forces was necessary to cast the United States in the role of guarantor of the Geneva Accords. The orchestrated duet of Kennedy and Diem was designed to cast American actions in the light of lawful responses to communist violations of the Accords. The reason for all this is that the United States set as its goal a return to that part of the Geneva Agreement which coincided with its policy: the limited goal of a non-communist government in the South. This goal would be achieved if the communists fulfilled their obligations under the Geneva Accords. The goal could only be achieved if the election provisions were disregarded. While the Viet Minh considered the election provision as an essential element of the Accords, the Americans were not greatly concerned. "Free" elections could be held at any time if only the North Vietnamese would hold up their side of the agreement. Since the Viet Minh had clearly undertaken to refrain from infiltration in the Geneva Accords, and this was the activity which Washington wanted to stop, it chose to articulate its demands in terms of communist obligations under the Accords. Washington wanted it both ways. It wanted to hold the Viet Minh to their side of the bargain without accepting any obligations itself.

The problem with the American legal policy was that it wanted too much. American decision-makers needed legal obligations and legal rights to defend their policies in the domestic political arena. However, they were unwilling to enter into any arrangements which would create clear duties. This would restrict freedom of action. Therefore, in the case of the Geneva Accords, the United States entered into no legal relationships. On the other hand, the government wanted to hold the

Viet Minh to account for any violations of it. The government mimicked observance of the Geneva Accords even to the extent of sending 8,000 men to Vietnam under the guise of humanitarian relief. The only possible explanation of this charade was to keep the appearance of legality for the benefit of American and world public opinion. The concept of SEATO "cover" is used in the same way. The communists have hardly been fooled. The British and French have shown little enthusiasm. Since the American people are the target of American international law, they are also its victims.

Reprisal

In spite of the rather panicked atmosphere of Vietnam in 1961, things settled down again and many American advisors were even withdrawn. But by late 1963, gloom had returned. Diem fell and large portions of South Vietnam came under Viet Cong control. This time the crisis was viewed as so acute that American troops were required to fill a combat role and American bombing of North Vietnam was needed to preserve a non-communist government in the South. Again, the American people had to be prepared for intervention, but this time the numbers game was in the hundreds of thousands of men. Rather than using communist violations of the DMZ as a reason for non-compliance of the United States to the provisions of the Geneva Accords with respect to advisors, violations of the Accords were used to justify the bombing of North Vietnam.

In this context the concept of reprisal was used to prepare the American people for an undeclared war. Well before the Gulf of Tonkin incident, American decision-makers had decided that United States troops and bombing of the North were required to salvage the situation in South Vietnam. In January, 1964, a Joint Chiefs of Staff memorandum indicated that to insure victory, the "United States must make ready to conduct increasingly bolder actions in Southeast Asia." Among the measures recommended were bombing "key North Vietnamese targets, support for large-scale U.S. commando raids against critical targets in North Vietnam . . . committing additional U.S. forces, as necessary, in support of the combat action within South Vietnam," and "committing U.S. forces as necessary in direct action against North Vietnam."[83] In addition to the perceived need for large scale United States participation, a program of covert operations was

[83] G. III, p. 498.

initiated in February. First seriously discussed at the Honolulu conference of November 20, 1963, OPLAN 34A was reviewed by an interdepartmental group headed by Major General Krulak, USMC, and was approved by President Johnson on January 16, 1964.[84] The program was to include such activities as U-2 overflights, South Vietnamese bombing in Laos and North Vietnam, intelligence gathering and psychological operations in North Vietnam, commando raids along the coast, and hit-and-run raids into Laos.[85] The program was divided into four-month sections with each segment composed of the same types of activities but ever increasing in magnitude and tempo. The covert operations were "designed to result in substantial destruction, economic loss, and harassment."[86] The purpose of the pressure against North Vietnam was to punish the North for infiltrating the South.

The logic of reprisal was present in Vietnam well before the decision to bomb the North. Americans and South Vietnamese felt at a considerable disadvantage because they were forced into a defensive position and could not attack the source of the problem. Ambassador Taylor phrased the dilemma as early as November 1961 in the context of the decision to embark on a massive influx of American advisors:

> Can we admit the establishment of the common law that the party attacked and his friends are denied the right to strike the source of aggression, after the fact of external aggression is clearly established? . . . it is clear to me that the time may come in our relations to Southeast Asia when we must declare our intention to attack the source of guerrilla aggression in North Vietnam and impose on the Hanoi Government a price for participating in the current war which is commensurate with the damage being inflicted on its neighbor to the south.[87]

In terms of the policy debate of 1964, the principle of reciprocity was phrased as the Rostow thesis, namely, "covert aggression justifies and must be fought by attacks on the source of aggression."[88] As abstract propositions, the Taylor and Rostow formulations have considerable merit. It would be difficult to argue that a state or group of states would not have the right to defend themselves from covert attacks. The problem, however, is complicated by the prohibition of the use of force in international relations. War and the traditional techniques for the use

[84] G. III, p. 151. [85] G. III, p. 150. [86] *Ibid.*
[87] G. II, p. 97. [88] G. III, p. 200.

of force to settle disputes have for the most part been made unlawful while no workable system has been substituted. The facts of the Vietnam War also reinforce the conclusion that some sort of action against the north was justified. From 1954 onward, there was certainly some relationship between the Viet Cong and Hanoi and after 1959, there was considerable movement of North Vietnamese regular troops into South Vietnam. By 1965 North Vietnamese units were operating at regimental strength below the DMZ. If such a situation occurred across most of the borders of the world, there would be little question as to the right of retaliation. But the Vietnam case is not so clear. First, there is the problem of the civil war in the whole of Vietnam. If it is a civil war, such action would not constitute aggression. The second problem is the timing and the extent of the infiltration. It is difficult to determine when and where the aggression started, or which side was at fault. Thirdly, there is the problem of the relative amounts of intervention. The rules of the game are not clear. While some covert activity is expected and tolerated, the level of activity deemed to have international significance is not settled. Finally, there is the question of the Geneva Accords. Did the failure of the South to hold the elections give the North the right to achieve results by force? All of these questions cloud the application of abstractions to the Vietnam case.

The complexity of the legal and moral issues were resolved into the simplicity of a desperate tactical situation and a need for strong measures. In this context, the concept of reprisal was used to justify American intervention. The concept of reprisal was used ambiguously before the Gulf of Tonkin incident. On the one hand, it was behind the logic of the covert operations. The whole OPLAN 34A was considered a signal to cease and desist. On June 18, and August 15, 1964, Canadian International Control Commissioner Seaborn met with Premier Phan Van Dong of North Vietnam to convey the meaning of the covert operations and the greater threat they implied.[89] But Hanoi was unmoved and the intensity of the covert operations increased according to plan. On the other hand, the concepts of reprisal and reciprocity were used in preparing the American people for large scale American intervention. In this context, William P. Bundy prepared, on May 23, 1964, a secret 30-day scenario of coordinated political and military action which would: (1) warn the North; (2) gain a Joint

[89] *G.* III, p. 292.

Resolution of the American Congress; (3) publish the "Jordan Report" documenting North Vietnamese atrocities and infiltration; (4) order the North to cease and desist; (5) conclude that the North had rejected all reasonable offers; and finally, (6) begin bombing the North. At first this would be done with South Vietnamese aircraft, but there would be a gradual transfer to American bombing to include the destruction of the North's ability to support the war in the South.[90] The planned Congressional Resolution accused the communists of violating the Geneva Accords and resolved:

> That the United States regards the preservation of the independence and integrity of the nations of South Vietnam and Laos as vital to its national interest and to world peace;
>
> To this end, if the President determines the necessity thereof, the United States is prepared, upon the request of the Government of South Viet Nam or the Government of Laos, to use all measures, including the commitment of armed forces to assist that government in the defense of its independence and territorial integrity against aggression or subversion supported, controlled or directed from any Communist country.[91]

The military planners had a dual problem. While the bombing of the north might be justified as a reprisal, the introduction of large numbers of American troops would have to be justified on the basis of reciprocity. However, this distinction was not made because the bombing itself would begin the escalation scenario. The problem was to have a credible justification for the first bloodletting. As early as March 16, 1964, Secretary McNamara recommended to the President that the military "prepare immediately to be in a position" on thirty days notice to initiate the program of Graduated Overt Military Pressure against North Vietnam.[92] In the context of this memo "Retaliatory Actions" meant bombing strikes and commando raids on a tit-for-tat basis, aerial mining, and reconnaissance flights using South Vietnamese with American assistance and support. "Graduated Overt Pressure" meant using both United States and South Vietnamese resources to attack military and possibly industrial targets. This memo was approved by the President and the order to begin planning was sent by the Joint Chiefs of Staff to the Commander-in-Chief, Pacific, on March 18, 1964. McNamara's

[90] G. III, p. 167. [91] NYT, p. 286. [92] G. III, p. 509.

recommendation was made with the full knowledge that "there would be the problem of marshalling the case to justify such action, the problem of communist escalation, and the problem of dealing with the pressure by premature or 'stacked' negotiations." Although the problems were seen as "extremely delicate,"[93] planning was begun.[94]

At this juncture, however, it must be recalled that the summer and fall of 1964 was also the time for Presidential politics in the United States, so there was considerable restraint on the aggressiveness of American action. Since President Johnson was running as a "dove" against "hawkish" Barry Goldwater, aggressive overt military action was out of the question. Yet both the planning for overt operations and the continuation of covert activity marked this period. From early spring on, there was little question in any of the decision-makers' minds that drastic action had to be taken. It was only a matter of how and when such coercion should begin. The concept of reprisal was still used on two distinct levels. On the first level, covert operations and the secret diplomatic moves were underway. On the second level, bombing was being considered as a reprisal for the ongoing activity of the North Vietnamese in South Vietnam. This use of the concept was only in the planning stage, and it joined military activity with diplomatic activity in an orchestrated program to gain support of American public opinion. But the fall of 1964 was not the time for William P. Bundy's 30-day scenario. On the 31st day, President Johnson might have been out of office.

On July 17 and 31, 1964, the U.S.S. *Maddox* was engaged in the so-called DE SOTO patrols off North Vietnam.[95] Her orders were to conduct various intelligence tasks such as "sampling electronic environmental radars and navagation aides" and to find the "location and identification of all radar transmitters."[96] The *Maddox* was to cruise no closer than eight nautical miles off North Vietnam. These missions were to include the triggering of North Vietnamese radar to determine their capabilities. As part of OPLAN 34A, the South Vietnamese, on July 30, made commando raids on Hon Me and Hon Nieu Islands which are North Vietnamese territory. At the time of these raids, the *Maddox* was heading into the waters off North Vietnam. Exactly what happened in the Gulf of Tonkin on August 2 and 4 will probably never be known with certainty, but it seems the North Vietnamese responded

[93] G. III, p. 503. [94] G. III, p. 504. [95] G. III, p. 182.
[96] G. III, p. 183.

to the American and South Vietnamese covert operations with an overt response.[97] On August 5, the United States conducted air strikes against the torpedo boat bases in North Vietnam, and on August 6, the United States Congress passed the Gulf of Tonkin Resolution which authorized the President "to take all necessary steps, including the use of armed force."[98] Thus, the North Vietnamese had taken steps which joined the two concepts of reprisal into one program of action. The planning of early summer fell into place; the reprisal was conducted, and the Joint Resolution was achieved. The information in the Pentagon Papers does not indicate that the Gulf of Tonkin incident was a staged event. Before August, the two concepts of reprisal were parallel and distinct. The covert operations were distinct from the 30-day scenario and reprisal planning. For the Washington decision-makers, the spectacular success of the Gulf of Tonkin incident was stimulating. Although no program of action or graduated pressure was initiated immediately, since August was too close to November, the planners in State and Defense saw considerable future for the Tonkin precedent.

On August 11, 1964, William P. Bundy circulated a memo entitled "Next Courses of Action in Southeast Asia," which was to begin the process of a policy of reprisal. Bundy argued for overtly stepping up the OPLAN 34A operation, cross-border operations, renewed DESOTO patrols, and tit-for-tat reprisal actions for North Vietnamese and Viet Cong activities. The program was designed "to maintain the initiative and morale of the GVN [Government of (South) Vietnam] and Khanh, but that would not involve major risks of escalation. Such actions could be such as to foreshadow stronger measures to come, though they would not in themselves go so far to change Hanoi's basic actions."[99]

Considerable subtlety was added to the concept of reprisal by Assistant Secretary of Defense John T. McNaughton in his development of William P. Bundy's plan in a memo of September 3, 1964, entitled "Plan of Action for South Vietnam." He saw no reason for shifting American and South Vietnamese action from the covert to the overt level. The Gulf of Tonkin incident was all the more effective because most of the world did not know that the patrols of the *Maddox* were part of a program of covert activities.

[97] It must be noted that portions of the treatment of the Gulf of Tonkin incident are deleted from the published versions of "The Pentagon Papers."

[98] Falk, *op. cit.*, p. 579.

[99] NYT, p. 296.

Actions. The actions, in addition to present continuing "extra-territorial" actions (U.S. U-2 recce[100] of DRV, U.S. jet recce of Laos, T-28 activity in Laos), would be by way of an orchestration of three classes of actions, all designed to meet these five desiderata—(1) from the U.S., GVN and hopefully allied points of view, they should be legitimate things to do under the circumstances, (2) they should cause apprehension, ideally increasing apprehension, in the DRV, (3) they should be likely at some point to provoke a military DRV response, (4) the provoked response should be likely to provide good grounds for us to escalate if we wished, and (5) the timing and crescendo should be under our control, with the scenario capable of being turned off at any time. . . .[101]

The various "targets" of American action are clearly outlined in the McNaughton memo along with the delicate nature of the election problem within the U.S.

Special considerations during next two months. The relevant "audiences" of U.S. actions are the Communists (who must feel strong pressures), the South Vietnamese (whose morale must be buoyed), our allies (who must trust us as "underwriters"), and the U.S. public (which must support our risk-taking with U.S. lives and prestige). During the next two months, because of the lack of "rebuttal time" before election to justify particular actions which may be distorted to the U.S. public, we must act with special care—signalling to the DRV that initiatives are being taken, to the GVN that we are behaving energetically despite the restraints of our political season, and to the U.S. public that we are behaving with good purpose and restraint.[102]

In a meeting of Taylor, Rusk, McNamara, and General Wheeler on September 7, 1964, the Joint Chiefs of Staff advocated the idea of deliberately provoking North Vietnam into actions which could be made the excuse for reprisals.[103] While the group advocated renewing the covert operations, they recognized the sensitivity of the problem. The consensus as reported by William P. Bundy was:

[100] "Recce" means armed reconnaissance flights with authority to return and suppress fire.

[101] NYT, p. 356.

[102] NYT, p. 357.

[103] G. III, p. 110.

> The main further question is the extent to which we should add elements to the above actions that would tend deliberately to provoke a DRV (North Vietnamese) reaction, and consequently retaliation by us. Example of actions to be considered would be running US naval patrols increasingly close to the North Vietnamese coast and/or associating them with 34A operations (South Vietnamese commando raids). We believe such deliberately provocative elements should not be added in the immediate future while the GVN (South Vietnamese Government) is still struggling to its feet. By early October, however, we may recommend such actions depending on GVN progress and Communist reaction in the meantime, especially to US naval patrols.[104]

On September 10, 1964, the President issued a National Security Action Memorandum approving the resumption of DESOTO patrols and OPLAN 34A commando raids. He indicated that "We should be prepared to respond as appropriate against the DRV in the event of any attack on US units or any special DRV/VC action against SVN (South Vietnam)."[105] Although the President rejected 34A covert air strikes "for the present," he indicated strengthening the Government of South Vietnam was the most important item at the moment and "such action should precede larger decisions. If such larger decisions are required at any time by a change in the situation, they will be taken."[106] It was also recognized that the North Vietnamese would publicize the nature of the South Vietnamese commando raids and that these operations might have to be made overt and justified by the South Vietnamese on the basis of infiltration from the North. The President also indicated that the destroyer patrols should be "well beyond the 12-mile limit and be clearly dissociated from 34A maritime operation."[107] Therefore, by keeping the nature of the destroyer patrols secret and postponing the American role in air strikes against the North, the President retained the "covert" nature of American participation in the pressure against the North. While the leadership, planning, and material for these activities was strictly American, the United States would retain a covert stance. Vietnamese cover would allow the United States to

[104] G. III, p. 562. Courses of Action for South Vietnam, 8 September 1964.

[105] G. III, p. 565. National Security Action Memorandum.

[106] G. III, p. 566. The difficulty was not with the tactic of provocation, but merely a matter of the timing.

[107] G. III, p. 565. National Security Action Memorandum No. 314, 10 September 1964.

adopt a policy of reprisal for allegedly illegal and unprovoked attacks when the communists responded. Although the rationale for postponing the provocative actions was the weakness of the South Vietnamese Government, the real reason was the political situation in the United States. This is clearly shown by the American response to the Viet Cong attack on the Ben Hoa American air base, killing five Americans and wounding seventy-six on November 1, 1964.[108] The Joint Chiefs of Staff responded by recommending B-52 strikes against the Phuc Yen airfield near Hanoi and against other airfields and petroleum storage areas throughout North Vietnam.[109] That President Johnson did not approve such a request on the eve of election is hardly surprising since he had campaigned as a "dove." However, there was certainly a feeling of a missed opportunity. Another indication that the American public was the primary audience of American reprisal plans was the Viet Cong bombing of the United States officer's billet in Saigon on December 24, 1964, killing several Americans. Although this would have been a perfect incident for a reprisal, the time was obviously not ideal as far as American politics was concerned.[110] President Johnson did not want to give the American people a war for Christmas.

After President Johnson's election, however, plans firmed up. William P. Bundy again prepared a scenario of military and public relations activity. Although he concluded that the problem was a "real jigsaw puzzle in which you have to weigh at every point the viewpoints of: (a) The American Congress and public, (b) Saigon, (c) Hanoi and Peiping, (d) key interested nations," he recommended the following series of actions and statements:[111]

CHECKLIST FOR SCENARIO ACTIONS

I. *U.S. Public Actions*
   A. White House statement following Tuesday meeting.
   B. Background briefing on infiltration in both Saigon and Washington
   C. Congressional Consultation
   D. Major speech
   E. Jordan Report (documenting N. Vietnamese infiltration)

108 G. III, p. 288.
109 G. III, p. 289.
110 G. III, p. 14.
111 The order of these priorities is quite revealing.

II. *GVN*
- A. Consultation with GVN (S. Vietnamese Government)
- B. GVN statement

III. *Key Allies*
- A. Consultation with RLG (Royal Laotian Government)
- B. Consultation with Thai
- C. Consultation with UK, Australia, New Zealand, and Philippines
- D. SEATO Council statement (?)

IV. *Communist Nations*
- A. Signals and messages to Hanoi and Peiping
- B. What to say to Soviets (and Poles?)

V. *Other Nations*
- A. Canada, India, and France
- B. UN is required

VI. *Existing Categories of Military Actions*
- A. US Laos reconnaissance
- B. RLAF attacks in Laos (Royal Laotian Air Force)
- C. GEN MAROPS (Coastal commando raids)
- D. US high-level reconnaissance of DRV (N. Vietnam)

VII. *Reprisal Actions*
- A. Renewed DESOTO patrol
- B. Another Bien Hoa or other spectacular

VIII. *Added Military or Other Actions*
- A. Stopping flow of dependents
- B. YT strikes in Laos: infiltration areas, Route 7 (U.S.A.F. in Laos)
- C. US low-level reconnaissance over DRV
- D. Strikes across the border into DRV: GVN and US roles[112]

At 2:00 A.M. on February 7, 1965, the Viet Cong carried out a well-coordinated attack against the American air base at Pleiku killing nine Americans. Fourteen hours later forty U.S. Navy jets from the USS *Coral Sea* and USS *Hancock* hit North Vietnamese barracks at Dong Hoi. On the same day, McGeorge Bundy presented a memo en-

[112] G. III, p. 676, 28 November 1964.

titled, "A Policy of Sustained Reprisal" to the President. The memo stated: "We believe that the best available way of increasing our chances of success in Vietnam is the development and execution of a policy of *sustained reprisal* against North Vietnam—a policy in which air and naval action against the North is justified and related to the whole Viet Cong campaign of violence and terror in the South."[113] In the following weeks, the air war against the North shifted from the tit-for-tat reprisals conducted by joint American and South Vietnamese operations under the concept of FLAMING DART, approved by the President in late January 1965, to American operations titled ROLLING THUNDER, which commenced in March.[114] The logic of an ever-escalating crescendo which reflected the Bundy scenarios was carried into operation plans. By March 29, when Viet Cong terrorists bombed the United States Embassy in Saigon, the President made no special spectacular reprisal attack on the North.[115] The concept of reprisal was dropped and the air action was just another aspect of the war. Within a day the President decided to commit United States troops to a ground combat role in South Vietnam.[116] After the attack on the Embassy, the justification for the air war against the North was shifted to the "interdiction" of men and supplies into the South. By the beginning of May, plans were made for the first bombing pause. Given the code name MAYFLOWER, the pause was, in the President's words, "to clear a path either toward restoration of peace or toward increased military action, depending on the reaction of the Communists."[117] Since the communists refused to capitulate after five days, the air war began again in earnest.

The American reprisal policy can be seen to fill two distinct roles, one international and the second domestic. On the international level, the reprisal was used in a rather traditional manner. The covert coercion linked with the warnings of Blair Seaborn of the ICC, represented the classic use of reprisal. The Americans asserted that the Northern support of the Viet Cong was illegal and began a graduated series of coercive acts to prompt the North to cease and desist. It may be argued whether or not the American view was correct, but granting American assumptions, the coercion was proportional and it must be admitted that South Vietnam had grounds for complaint. On the level of do-

113 G. III, p. 687.
114 G. III, p. 272.
115 G. III, p. 348.
116 G. III, p. 348. 1 April 1965.
117 G. III, p. 366. 10 May 1965, FLASH message from President Johnson to Ambassador Taylor.

mestic politics, there is also some justification for the policy. The Americans felt that the traditional rules of international law did not take into account the gradual escalation of infiltration which was conducted against South Vietnam. There was no clear moment of armed attack. Consequently, the just response to aggression could not be argued in traditional language. American action was required to save Vietnam, and the only question was how to get the American people behind what the government felt to be action in the national interest as well as morally justifiable. To do this the government felt that it was necessary to "prepare" the American people. Thus, the covert American activities were designed to provoke overt attacks on Americans which could be responded to under the concept of reprisal.

The whole American charade was based upon the need for moral and legal justification of American action to the American public. The decision-makers used the highly moralist and legalist rhetoric of American policy debate to create a consensus in favor of the action deemed necessary. The Gulf of Tonkin and the Pleiku incidents were characterized as breaches of the law for which just punishment was due. The difficulty was that the American case was in reality quite weak. The United States could not claim clean hands. American forces in Vietnam were hardly disinterested spectators. The charge of aggression rested on the validity of the Geneva Accords, which the United States had not signed, and the election provisions, which had not been upheld. As for the violations of international law, the activity of the American destroyers in the Gulf of Tonkin was hardly pacific. From the beginning of 1954 at least, Americans had participated in the violence and illegality of the Vietnam War. Of course Americans were not alone in this ugly mess. The North and South Vietnamese, the French, the Russians, and the Chinese all shared in the guilt.

What is perhaps most tragic even beyond the lying, the hypocrisy, and the bloodshed of the reprisal policy was its failure. The pieces of William P. Bundy's jig-saw puzzle did not fit together in a coherent manner. It is impossible to use a single policy for conveying messages to our allies and enemies, and for simultaneously justifying a particular course of conduct to the American people. During the summer of 1964, the problem was complicated further by Presidential politics. How could Hanoi interpret covert reprisals in conjunction with Johnson's "dove-like" coos? The American policy was caught somewhere between using reprisal as a technique in international relations and using it as

an argument in domestic politics. The use of the instrument in one or the other context is possible, but to use it in both simultaneously is impossible. To use reprisal as pretext implies that the decision for war has already been made. To use reprisal as a means short of war requires decisive enough action to secure the desired concession. Unfortunately the United States conducted both policies simultaneously. The graduated intensity of covert activity indicated that Washington wanted to hide from its own people the fact that it wanted to enter the war. The covert nature of the operation indicated that the reprisal argument was to be used as a pretext. Yet many of the American decision-makers felt once Hanoi was convinced of American purpose, the issue would be solved and Hanoi would realize the folly of persistence. The covert and uncommitting nature of American action was counterproductive. Hanoi concluded that the American Government was hesitant because it did not have the support of the people. This was not the real reason for the hesitancy. The President, following the American tradition of keeping options open, had not made a decision. Both the Vietnamese and the American situations were fluid. American commitment to a government about to collapse would be stupid. So he waited for the decision while preparing the groundwork for various options. The dual use of reprisal and particularly the covert operations carried a momentum of their own. In spite of the fact that the President was able to keep the Gulf of Tonkin incident as a discrete incident, it merely whetted the appetite of those who wanted wider action. By the time the "larger decisions" were made, the situation in Vietnam was so desperate that even the policy of "sustained reprisal" offered no hope for success. Thus the American decision-makers tricked not only the American people but themselves as well. By using covert means, they subverted the traditional utility of reprisal; and by tricking the American people, they cheapened their word. Like the little boy who called "wolf," one day they would pay.

From the point of view of law, the American use of reprisal was also tragic. In classic international law, a reprisal was used to coerce small states to follow the will of powerful states. A cruiser would fire a few rounds at the presidential palace or the marines would land and a week later the affair would be settled. A few lives would regrettably be lost, but real violence was avoided. However, the sensibilities of great democracies and the pride of nationalism, coupled with the identity of morality and international law, have turned the reprisal into an instru-

ment of escalating violence. It was American restraint and legal sensibility which dictated the policy of covert reprisal. It was the American notion that the uses of power must have a lily-white morality that drove Americans to trick the American people. These sensibilities and Vietnamese pride unleashed terrible forces of violence. In terms of law, the technique of reprisal was distorted into a grotesque; rather than minimize the violence, it helped to maximize it. Thus, in addition to cheapening its word, the government cheapened the law.

Conclusion

American assumptions about the international legal order reflect a certain ambivalence. With respect to enemies, allies, and domestic public opinion, the United States steadfastly proclaims the legal and moral basis of American foreign policy. The law and moral principles are held in sacred regard. But the ritual of reverence which demands a lily-white appearance is seen by the practitioners of foreign policy as a severe limitation to practical and reasonable action. This is particularly true in crisis situations in which the United States faces ruthless adversaries. The moral and legal rhetoric of American policy asserts the validity and effectiveness of the law of cooperation, coexistence, and restraint, while the practitioners really believe that the law is only workable in situations of coexistence and cooperation.[118] This situation has resulted in a rhetorical use of international law and the practice of what is called the "rules of the game." While in principle legal norms exist in the law of restraint, such as the Charter of the United Nations, these rules are ambiguously worded and provide for no certain remedial procedures or measures. While the use of force is technically unlawful, there is no established and compulsory means for the settlement of disputes. The provisions of the law of restraint are vague or ambiguous, and the states have been careful to retain the right of auto-interpretation.[119]

[118] See Leo Gross, "International Law and Peace," *The Japanese Annual of International Law* 11 (1967), pp. 1-14. In brief the law of coexistence consists of the rules which are necessary for international relations to exist at all. These rules are rarely violated. Diplomatic immunity is an example. The law of cooperation consists of law designed to help states work toward common objectives. The river commissions provide a good example. Finally the law of restraint refers to the twentieth-century attempt to use law to control the use of force between states. The Kellogg-Briand Pact, by attempting to outlaw war as an instrument of national policy, moved into the law of restraint.

[119] This is the undisputed right of a state, in the absence of an agreement to the contrary, to interpret international agreements for itself at its own risk. See Leo Gross, "States

Thus while the law establishes the principles and provides the language of crisis discourse, auto-interpretation and the authority of national leadership render the law of restraint a pliant servant of policy. In fact the law itself is drafted in such a way as to admit of these uses. The use of the Geneva Accords in the two decades of the Vietnam crisis provides an excellent example of the tragic weakness of the law of restraint. The State Department concluded in 1961 that "the Geneva Accords have been totally inadequate in protecting South Vietnam against Communist infiltration and insurgency."[120] The problem was, as everyone at the Conference knew, there was no real agreement. The document had only the appearance of legal relationships. Yet for twenty years the various parties utilizing auto-interpretation and the spreading of half-truths claimed rights and protested violations of the Geneva Accords. The function of the Accords was not to define the legal relationships of the North and South Vietnamese. They knew perfectly well that they were at war. The function of the Accords was to give the French a little something to toss to public opinion in return for saving a lot of Viet Minh lives. The American participation in this process produced a document which the United States would continually use to justify its intervention. All this was possible only because no truly legal settlement or authoritative interpretation of the Accords was ever considered. The development of the SEATO Treaty is another example. The function of the Treaty is not to define international legal relationships. It was carefully drafted to include no obligations. Yet the Treaty was interpreted by the American government for the American people as a sacred commitment. Its use was to gain support for governmental policy.

The extension of law as rhetoric has also distorted the principles and techniques of customary international law. The limited use of force in reprisal is highly questionable under the law of the Charter. Yet states still feel the need to use coercion. The American use of the technique of covert reprisal reflects the need for a traditional technique and sensitivity to its current disrepute. Since the use of force and war itself now have connotations of illegality, the great powers and their clients have

---

as Organs of International Law and the Problem of Autointerpretation," in Lipsky, G., *Law and Politics in the World Community* (Berkeley: University of California Press, 1954), pp. 59-88.

120 G. II, p. 45.

had to resort to a charade called "the rules of the game."[121] The problem is that no one knows for sure the content of these rules or how they are to be interpreted. The use of reprisal in Vietnam is a good example. The one thing that is clear from the whole mess is that both North Vietnam and Moscow have failed to get the message. The escalation scenarios were so subtle and sophisticated that no one understood them. The escalation ladder seems to maximize rather than minimize the violence. Traditional international law offered a similar pattern of increasing force as "the rules of the game," but the signals were clear, the language was universal. "The rules of the game" is a shoddy plastic substitute which disintegrates under pressure. The constant misreading of intentions and objectives which characterize the Vietnam escalation should be ample proof of the weakness of these rules if they exist. The game goes on and everybody loses. The extension of rhetorical international law to the traditional techniques of the use of force short of war has resulted in the distortion of the technique into an unclear and garbled message. The so-called "rules of the game" offers not more but less clarity.

In both the drafting of the law of restraint and the use of customary law, the rhetoric of legalism beyond the point to which states are willing to go in terms of real law has been unsuccessful in practice. Rhetoric is no substitute for law, and law which is nothing more than rhetoric provides no protection. The serious problem is not the failure of the law as law to achieve results and aid in the solution of the Vietnam dilemma. It is rather the ostensive success of the rhetorical law of restraint as practiced on the American people that is the real danger. The Geneva Accords, the SEATO Treaty, the covert operations, the policy of sustained reprisal, and the invocation of sacred commitments have worked. In spite of widespread opposition, the government has in fact been able to keep alive the policy that it is a matter of American national interest to preserve a non-communist government in South Vietnam. The purpose of this paper is not to analyze this assumption or even the policy itself. It cannot be denied that the vast majority of elected officials and their advisors either shared this view or did not feel the need to reject it. Even granting this assumption, the American use

[121] See Richard A. Falk, "International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order," *Temple Law Quarterly* 32 (Spring 1959), pp. 295-320; and Edward T. McWhinney, "Soviet and Western International Law and the Cold War in the Era of Bipolarity," *Canadian Yearbook of International Law* 1 (1963), pp. 63-81.