

# International Law and the Response of the United States to "Internal War"

*By Edwin Brown Firmage\**

With the spectre of nuclear weapons acting as a restraint upon the nations in terms of the levels and types of violence they will employ to achieve national goals, warfare since 1945 has undergone radical change.<sup>1</sup> There has been no massive, overt aggression by one major power against another, although there have been half a dozen provocations which might well have led to international war in pre-nuclear times. NATO's central front, the major focus of attention in the late 1940's and early 1950's, is no longer considered a likely spot for open conflict between the communist and non-communist world. After the Soviet Union had taken full advantage of the position of its armies at the end of World War II by establishing Communist governments in the countries of Eastern Europe, some of the early prototypes for violence in our time emerged. The non-Communist Czechoslovakian government was toppled by a combination of intimidation from the Red Army and subversion by Czech Communists. A similar attempt by the Soviet Union to intimidate and subvert the government of Turkey failed largely because of the success of the Truman Doctrine and growing Western solidarity. A Soviet-sponsored civil war in Greece failed because of the same factors plus a coincidental break between Tito and Stalin which closed Yugoslavia as a conduit for supplies to Greek Communists. Western support also prevented the Government of Iran from being intimidated into collapse.

At the same time, a civil war was taking place in China which would have profound effect upon the form violence would take in the post-war world, due in part to the belief of its architect that under certain conditions his pattern could be successfully followed in many parts of the world as "wars of national liberation." An incredible end to at least one chapter of violence was written as Mao triumphed in his 20-year battle with Chiang Kai-shek over the mantle of Sun Yat-sen after suffering shattering early defeats. At first the Kuomintang, with their strategy of encirclement and annihilation, had severely defeated the Communists. But Mao broke through Chiang's blockade in Southern China and led 30,000 survivors 6,000 miles — the famous "Long March" to Northwest China and the caves at Yen-an. There Mao developed a theory of warfare based upon the dogma outlined by Lenin at the Second Comintern Congress in 1920 and, more importantly, upon Mao's own experiences in the war with the Nationalists. Although forced to realize the vast military superiority of the Kuomintang, Mao came to discern the political weakness of the Nationalists, who held the major cities but who had little effective control or support in the countryside where the majority

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<sup>1</sup> See H. ARENDT, *ON REVOLUTION* (1963), one of the pioneering studies on this transformation.

of the people lived. Although his position was militarily weak, Mao had growing political support because of his rural work among the peasants,<sup>2</sup> and from this situation emerged his classic pattern of guerrilla warfare: surrounding the cities from the countryside for a protracted war of attrition. His application of the formula "the enemy advances, we retreat; the enemy halts, we harass; the enemy tires, we attack; the enemy retreats, we pursue" eventually demonstrated the weakness of the Kuomintang military giant which had no political roots in the countryside. This lesson demonstrating the primacy of political strength in relation to ultimate military strength was not lost on Mao or upon those who would later emulate him. After some years of guerrilla warfare in this classic pattern, Mao's forces were strong enough to confront the Kuomintang in the more traditional patterns of encirclement and annihilation which the Nationalists had used with such initial success upon the Communists. But with Mao's support in the countryside, Chiang could not have in turn followed Mao's earlier strategy even if the Kuomintang had been sufficiently perceptive and responsive to attempt it.

The explosion of nationalism must also be recognized as adding to the controlling concepts which were shaping the nature of violence in the post-war world. As the forces of nationalism destroyed the remaining fabric of 19th century colonialism in a shockingly short 20 years, some colonial powers resisted the nationalist forces while others peacefully acquiesced to the inevitable. The most anquishing dilemmas were posed to framers of Western foreign policies on those occasions when the forces of nationalism and communism were merged to some indeterminate degree in opposition to "legitimate" Western-oriented governments.

A more traditional form of violence, having similarities to the factors of nuclear weapons, Maoist doctrine and example, and nationalism, still existed. Civil war, without communist or anti-colonialist overtones, also occurred as people with rising expectations and undiminished birth rates found that the progress they heard about on transistor radios and saw in the persons of foreign travelers could not be achieved in the form they wanted it or with the speed they demanded.

Can international law fashion a set of rules which could govern these several forms of violence? The traditional distinction between civil and international war and the different rules which follow the distinction are strained by the attempt to force such disparate types of violence into traditional molds. Tension is especially created by the interplay between two equally desirable goals. On the one hand, the interests of the United States and the future of international law and order would best be served if the United States avoided any "Metternich doctrine of legitimacy"<sup>3</sup> under which we opposed any revolutionary change in the fashion of a resurrected Council of Europe with 20th century America in the place of 19th century Austria. In so doing, it is essential that the United States distinguish a civil war between contend-

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<sup>2</sup> See 4 MAO TSE-TUNG, *SELECTED WORKS* 190-95 (1963).

<sup>3</sup> See Friedmann, *Law and Politics in the Vietnamese War: A Comment*, 61 AM. J. INT'L L. 776, 782 (1967).

ing nationalist forces from an attempt by a Communist state to depose the non-Communist government of another state by some form of exported violence.<sup>4</sup>

On the other hand, it is equally essential to the interests of the United States, and I believe to the growth of meaningful international order, that we find appropriate means to oppose other forms of aggression. Democratic institutions which have had success in meeting blatant aggression must not now become immobilized, enervated, and separated from each other when faced with more subtle but no less dangerous types of aggression.

The primary problem, before deciding upon a course of action in response to violence, is to perceive accurately the nature of the violence and the identity of the participants. In analyzing these problems in regard to Viet-Nam, the Department of State and its critics have reached disparate results.

#### I. THE POSITION OF THE DEPARTMENT OF STATE

The Department of State has noted that the Geneva Accords of 1954 established a "demarcation line" between North Viet-Nam and South Viet-Nam and prohibited the use of either zone to "further an aggressive policy" against the other.<sup>5</sup> The Democratic Republic of Viet-Nam (D.R.V.N.) violated the Accords by engaging in an "armed attack" against the Republic of Viet-Nam (R.V.N.). The Department of State interpreted several courses of conduct of the D.R.V.N. as constituting, individually or collectively, "armed attack" within the meaning of Article 51 of the United Nations Charter. This conduct included the development of a "covert political-military organization" in South Viet-Nam composed of Viet-Minh cadres which had been left in the South after 1954, in violation of the Accords. Kidnaping, assassination of hamlet chiefs and officials of the R.V.N., and other acts of terrorism were instigated by the D.R.V.N. and constituted its major aggressive action against the South for approximately five years following the Geneva Conference.

From 1959 to 1961, the Department of State asserts, the D.R.V.N. infiltrated thousands of southerners who had gone to the North in 1954 back into the South to join the Viet Cong in guerrilla activity against the R.V.N. The Department of State estimates that by 1964 over 40,000 guerrillas had been infiltrated from the North into South Viet-Nam. The findings of the International Control Commission are cited as partial authority for this proposition.<sup>6</sup>

Beginning in 1964, the D.R.V.N. began infiltrating increasing numbers of native northerners into the South, because of an apparent exhaustion of its ranks of southerners. At this time also, according to the State Department, regular units of the PAVN (People's Army of Viet-Nam) began crossing into South Viet-Nam to aid the Viet Cong. The Department admits that it

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<sup>4</sup> See Farer, *Intervention in Civil Wars: A Modest Proposal*, 67 COLUM. L. REV. 266 (1967).

<sup>5</sup> Office of the Legal Adviser, U.S. Dep't of State, *The Legality of United States Participation in the Defense of Vietnam*, 54 DEP'T STATE BULL. 474 (1966), reprinted in 75 YALE L.J. 1085 (1966).

<sup>6</sup> *Id.* at 474-76.

is difficult to identify any one event or any fixed time when this mixture of clandestine and blatant aggression constituted an "armed attack," but it insists that the "infiltration of thousands of armed men clearly constitutes" such an attack, and that the infiltration had definitely reached such a status prior to February 1965.<sup>7</sup>

In response to this aggression, the Department of State has argued that the R.V.N. possesses the inherent right of individual and collective self-defense recognized by international law and reaffirmed in Article 51 of the United Nations Charter; that such right exists whether or not South Viet-Nam is considered to be a sovereign state or a temporarily divided zone; that such right, described by Article 51 as being "inherent," is not limited to members of the United Nations; and that collective self-defense is open to states acting unilaterally or within regional organizations. On these grounds, the State Department memorandum concludes that United States participation in the defense of South Viet-Nam at the latter's request was an act of collective self-defense permissible under customary international law and the United Nations Charter.

The memorandum maintains that United States actions prior to 1961 in supplying the R.V.N. with military equipment and advisors were within the provisions of the Geneva Accords which permitted replacement of existing personnel and equipment. With the withdrawal of French training and advisory personnel, the United States gradually enlarged its advisory and training forces in South Viet-Nam. Then, in response to "intensified" aggression, "increased infiltration," and terrorism in the South directed by the D.R.V.N., the United States found it necessary to "increase substantially" its military personnel and equipment. Such action was justified, according to the Department of State, by the international law principle that a material breach of an agreement (the Geneva Accords) by one party entitles the other "to withhold compliance with an equivalent, corresponding, or related provision."<sup>8</sup> The "systematic violation" of the Accords by the D.R.V.N. justified the R.V.N. in suspending its compliance with those portions of the Accords controlling the entry of foreign military personnel and equipment.

The refusal of the R.V.N. to implement the election provisions of the Accords is defended by the Department of State on the grounds that South Viet-Nam specifically objected to the election provisions at the time the Accords were signed by the participating states. Further, even if the R.V.N. were considered to be bound by the Accords generally, no breach occurred in the failure to implement the election provisions since the condition precedent to "free elections" had not been met — namely, the existence of conditions in North Viet-Nam such that fair, uncoerced elections could be held.<sup>9</sup>

## II. THE CRITICS

Various critics have taken opposition to every major point of the State Department memorandum. Both the origin of the hostilities in South Viet-Nam and the identity of the participants are disputed by these scholars.

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<sup>7</sup> *Id.* at 475.

<sup>8</sup> *Id.* at 483.

<sup>9</sup> *Id.* at 483-84.

Professor Tom Farer<sup>10</sup> has presented a somewhat jaded analysis of modern United States foreign policy, which he views as being counterrevolutionary regardless of the participants:

[W]e now see each revolution as a potential or actual battle in an immense, world-wide struggle against Communism. Thus, the significance of every revolutionary civil war is grotesquely magnified, with the ultimate consequence that because we have decided that left-wing revolution is a threat to us, we guarantee that it will be a threat to the peace.<sup>11</sup>

Professor Farer's central question relates to the identification of norms which will restrict the participation of third parties in civil wars. He identifies four criteria by which to judge such norms: first, the chance that the norm would be accepted by the nations involved; second, the likelihood that it would reduce great power confrontation if accepted; third, the necessity that the norm be sufficiently unambiguous that serious violations are readily identifiable; and fourth, the capacity of the norms to facilitate geographic containment of violence.

Professor Farer maintains that the classical view (to which Washington "clings with rational rigidity") — that in a civil war's early stages outside powers can only aid the established government — has lost its force since the emergence of a host of relatively powerless governments has erased any real distinction between the ability of legitimate and insurgent forces to maintain domestic peace. No new norm to limit third power intervention in civil wars will develop, according to Farer, as long as the United States "insists on its right to intervene in any revolution with whatever scale of force is required to suppress it . . ."<sup>12</sup> He rejects the most obvious norm, complete nonintervention in civil wars, on the plausible ground that it would be unenforceable and unacceptable because of resulting ambiguity in the interpretation of training programs, economic aid, military assistance prior to the outbreak of internal violence, and the definition of civil war in general.

In place of the traditional rule regarding third party participation in civil wars, Professor Farer proposes a norm which would prohibit tactical support by a third power to either side engaged in civil war. No third party could send forces — be they advisors, volunteers, transports, or whatever — into any zone of combat. Within the definition of "zone of combat" would be air defense installations, which could not be manned by foreign personnel.

Under the proposed norm, a country would be legally free to extend any type or quantity of aid other than forms of assistance which could involve its personnel in actual combat. There would be no justification for a state allied with the incumbent government to attack a state aiding the insurgents within the allowed limits; such aid would not

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<sup>10</sup> Farer, *supra* note 4.

<sup>11</sup> *Id.* at 267.

<sup>12</sup> *Id.* at 273. Professor Friedmann has joined in the attack on the Administration position, criticizing the "Metternich doctrine of legitimacy" which permits assistance to the recognized government but not insurgents. Friedmann, *supra* note 3.

constitute an act of aggression against the country in which the civil war was being fought.<sup>13</sup>

The United States would have violated this norm in Viet-Nam at least by 1961 with its shuttling of R.V.N. forces to combat zones in helicopters.

Professor Quincy Wright has concluded that the D.R.V.N. committed no acts against the R.V.N. prior to the United States bombing north of the cease-fire line which would constitute "armed attack" upon the South.<sup>14</sup> Therefore, no justification for the United States bombings in the North could be made under color of "collective self-defense." Self-defense is permitted under international law and the United Nations Charter, according to Professor Wright, only if an "instant and overwhelming necessity permitting no moment for deliberation" exists.<sup>15</sup> He concluded that there was no evidence to support the assertion that organized contingents of the PAVN had crossed the cease-fire line prior to the bombings in February, 1965. Professor Wright termed "controversial" the question whether the infiltration by the D.R.V.N. of large numbers of irregular forces into the South prior to February, 1965, would constitute "armed attack" or merely "defense measures against the military activities of South Viet-Nam and the United States."<sup>16</sup> The activities of the D.R.V.N. prior to 1958, presumably including acts of planned assassination of village leaders and other acts of terrorism, "did not constitute aggression or armed attack in international relations but civil strife within the domestic jurisdiction of Viet-Nam, similar to the action of the North against the South in the American Civil War,"<sup>17</sup> since prior to that time Ho Chi Minh had been frustrated in achieving the elections provided for in the Geneva Accords. Professor Wright concluded that "the United States response by bombings in North Viet-Nam, which began in February, 1965, violated international law, the United Nations Charter, and the Geneva Agreement, if the latter were in effect."<sup>18</sup>

Richard Falk has proposed that "internal wars" in which third powers have intervened be treated as civil wars. Response would be limited to counter-intervention, and third countries would not be permitted to directly attack the homeland of the intervening power unless the intervention were on the massive scale of a Korean-type invasion.<sup>19</sup> "[A]n intervening nation whose own territory is not the scene of conflict may not attack the territory of a state intervening on the other side."<sup>20</sup> The alternative is to consider the

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<sup>13</sup> Farer, *supra* note 4 at 276. "The possibility of combat is the crucial distinction. Any entry, whether by land, sea, or air, into war zones *i.e.* — any area in which organized units of both rebel and government forces are located . . . must be prohibited." *Id.* at 278.

<sup>14</sup> Wright, *Legal Aspects of the Viet-Nam Situation*, 60 AM. J. INT'L L. 750, 764 (1966).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 766.

<sup>17</sup> *Id.* at 767.

<sup>18</sup> *Id.*

<sup>19</sup> Falk, *International Law and the United States Role in the Viet Nam War*, 75 YALE L.J. 1122, 1123 (1966).

<sup>20</sup> *Id.*

act of foreign intervention of such importance that an internal war would thereby be turned into an international war, the intervention being considered as an "armed attack," thus permitting an act of collective self-defense directly against the aggressor nation by a third nation. The consequences of this geographic escalation in the nuclear age, however, are so dangerous, and the interest of international law in restricting the scope and intensity of the war consequently so great, that a severe if not impossible burden should be placed upon nations seeking to convert an internal war into an international war "by characterizing external participation as 'aggression' rather than as 'intervention.'" <sup>21</sup> Former Secretary of State John Foster Dulles is noted as suggesting that indirect aggression not be treated as an armed attack by one country upon another. <sup>22</sup> Professor Falk proposes, to build a stable international order, that internal wars be treated as civil wars, regardless of inter-

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 1123-24. Professor Falk quotes a statement made by Secretary Dulles in 1957 in response to a question put him by Senator Fulbright during the Senate hearings on President Eisenhower's proposals regarding the Middle East. *Hearings on S.J. 14 and H.R.J. 117 Before the Senate Comms. on Foreign Relations & Armed Services*, 85th Cong., 1st Sess., pt. 1 at 28 (1957). Senator Fulbright was concerned about the wording of a proposed resolution which would authorize the President to "employ the Armed Forces of the United States as he deems necessary to secure and protect the territorial integrity and political independence of any such nation . . ." requesting such aid against *overt armed aggression* from any Communist nation. *Id.* at 27. Senator Fulbright feared that the statement pledging action only against overt armed aggression implied that we would not use force in any other circumstance even though our national interests might be threatened. The Senator proposed a hypothetical situation in which the Government of Mexico would be subverted by the U.S.S.R. without our taking action. Secretary Dulles assured the Senator that action would be taken, but that response to subversion could take other forms than military invasion of the subverting nation. It was at that point that the statement quoted by Professor Falk was uttered by Secretary Dulles. *Id.* at 28.

It is obvious from the context of this testimony that Secretary Dulles was talking of response to types of intervention far less violent than that committed by the D.R.V.N. upon the R.V.N. during late 1950's to the present. The response which the late Secretary would have made to clandestine subversion, propaganda, economic coercion and even acts of assassination would in all probability have been quite different from a response aimed at the infiltration of thousands of irregular and regular troops across a cease-fire line.

A year after the hearings quoted above, the crisis in Lebanon occurred. The level of foreign involvement was far less than what has occurred in Viet-Nam, and the United States response was therefore able to be contained within Lebanon. In commenting upon this situation, however, Secretary Dulles left little doubt as to his opinion regarding the necessity of opposing indirect aggression with sufficient force to deprive the aggressor of his intended goal:

Indirect aggression is nothing new. . . . Through use of inflammatory radio broadcasts; through infiltration of weapons, personnel and bribe money; through incitement to murder and assassination, and through threats of personal violence, it becomes possible for one nation to destroy the genuine independence of another.

It was in order to help to halt such practices that the United States responded to the urgent plea of the freely elected government of Lebanon and sent United States forces to Lebanon to assist that democratic country to retain its independence.

. . . .

The United States is convinced that if indirect aggression, in the form of fomenting civil strife or subverting foreign governments, is now tolerated as an instrument of international policy, events will indeed follow the tragic pattern which led to World War II . . . .

Text of Address by Secretary Dulles before the Veterans of Foreign Wars, N.Y. Times, Aug. 19, 1958, at 12, col. 2.

vention by third parties, permitting "a neutralizing response as a maximum counteraction."<sup>23</sup>

In his most recent writing,<sup>24</sup> Professor Falk has proposed that the "organized international community" (presumably the United Nations) give prior assent before a victim state be allowed to characterize indirect aggression in such a manner that "self-defense" would be justified as interpreted under Article 51 of the United Nations Charter. This would greatly reduce the unilateral discretion of the victim state,<sup>25</sup> the would-be ally of the victim state,<sup>26</sup> and the executive branch of that potential intervening third power.<sup>27</sup> World order would presumably be promoted by this restriction.<sup>28</sup>

In order to understand a criticism of these critics, it is essential first to understand the nature of the hostilities in Viet-Nam and to establish a chronology of events regarding certain critical stages in the escalation of third power intervention in 1961 and again in 1964-1965.

### III. SUBVERSION, INDIRECT AGGRESSION, AND WARS OF NATIONAL LIBERATION

Although Ho and Giap and others have made significant changes in Mao's doctrines on protracted war,<sup>29</sup> the war in South Viet-Nam has to date been a classic example of a so-called "war of national liberation," following Mao's model and preachments. After many years of French colonial domination, with French influence centered almost completely in the major cities, Viet-Nam clearly fit within Mao's doctrine of surrounding the cities from strong countryside bases supported by the peasants. Mao's rationale for this policy is equally applicable to Viet-Nam and French military policy there:

Since powerful imperialism and its allies, the reactionary forces in China, have occupied China's key cities for a long time . . . [the revolutionary forces must] build the backward villages into advanced, consolidated base areas, into great military, political, economic and cultural revolutionary bastions, so that they can fight the fierce enemy who utilizes the cities to attack the rural districts, and, through a protracted struggle, gradually win an overall victory for the revolution.<sup>30</sup>

The long war fought by Ho against the French, along with the American bombing of the North, has aided Ho in turning nationalism into his tool as did Mao before him.<sup>31</sup>

<sup>23</sup> Falk, *supra* note 19, at 1125.

<sup>24</sup> Falk, *International Law and the United States Role in Viet Nam: A Response to Professor Moore*, 76 YALE L.J. 1095 (1967).

<sup>25</sup> *Id.* at 1142.

<sup>26</sup> *Id.* at 1149.

<sup>27</sup> *Id.* at 1150.

<sup>28</sup> *Id.* at 1140.

<sup>29</sup> See B. FALL, *THE TWO VIET-NAMS* 112-13 (2d rev. ed. 1967).

<sup>30</sup> 3 MAO TSE-TUNG, *SELECTED WORKS* 85 (1954). Those who propose an enclave theory based upon static defense positions around the coast of South Viet-Nam might pause to consider the Maoist doctrine of encircling the cities and fortified areas from the countryside, as developed by Mao and used with such success against the Kuomintang, and the record of Ho and Giap against the French policy of holding the cities and highways and fortified areas, leaving the countryside to the Viet Minh.

<sup>31</sup> See C. JOHNSON, *PEASANT NATIONALISM AND COMMUNIST POWER* (1962); H. SALISBURY, *BEHIND THE LINES — HANOI* (1967).

Mao's influence on Ho, Giap, Truong Chinh, and others later to play important roles in Viet-Nam is unquestioned.<sup>32</sup> Truong Chinh, then secretary general of the Indochinese Communist Party, wrote *The Resistance Will Win* in 1947. This was the first Vietnamese adaptation of Mao's *On Protracted War*, with its famous three stages of defensive strategy, equilibrium, and counteroffensive, which Mao developed against Chiang.<sup>33</sup> General Vo Nguyen Giap has followed Mao and Chinh in practice and principle.<sup>34</sup>

That both Mao and Ho would like to export this form of conflict to border countries can hardly be doubted. Past and present conflict in Laos, Cambodia and Thailand, supplemented by blatant statements of intent,<sup>35</sup> clearly

<sup>32</sup> FALL, *supra* note 29, at 98, 99, 112-14. See also SALISBURY, *supra* note 31, at 180, 181; F. TRAGER, WHY VIETNAM? 206 (1966); Hilsman, *American Response to the Guerrilla*, CHICAGO TODAY, Spring, 1967, at 34.

<sup>33</sup> B. FALL, *supra* note 29, at 112-13.

<sup>34</sup> V. GIAP, PEOPLE'S WAR PEOPLE'S ARMY (1962); Modelski, *The Viet Minh Complex*, in COMMUNISM AND REVOLUTION 185, 207-09 (C. Black & T. Thornton eds. 1964); Hilsman, *supra* note 32.

<sup>35</sup> See, for example, statement by Vice Premier and Defense Minister Lin Piao. Lin Piao, *Long Live the Victory of People's War!*, PEKING REV., Sept. 3, 1965, at 9-30.

On November 1, 1964, the "Thailand Independence Movement" was formally announced with backing from Peking and Hanoi. The purpose of this organization was to overthrow the Thai government and to sever all ties with the United States.

On January 1, 1965, the "Thailand Patriotic Front" was formed — again with the backing of Communist China and the D.R.V.N. — with the same objectives as the "Thailand Independence Movement." In March and April, 1965, Peking announced the arrival of representatives of both groups.

By late 1965 and early 1966, guerilla bands supplied and aided by Peking and Hanoi were increasingly active in the Phu Phan Mountains of Northeast Thailand. After several clashes with Thai security forces, documents were found linking the guerilla bands with the "Thailand Patriotic Front" and the "Thailand Independence Movement."

In May of 1965, the Foreign Minister of Thailand, Thanat Khoman, was on *Meet the Press*. The following exchange took place:

Question: Mr. Minister, the Chinese Foreign Minister tells us that Thailand is next on his list as a target for a Communist-supported war of national liberation. How do you evaluate this threat, and how vulnerable is Thailand to the kind of war that is being fought today in South Viet Nam?

Thanat: It amounts to a declaration of war. When a country says against another country that "we will start a war," be it a guerrilla war or an open war, it doesn't make much difference. It has been a declaration of war on the part of Communist China on Thailand. Now, of course, it is guerrilla war, and we are taking necessary measures and steps to meet the situation.

We didn't take it lightly. We heeded the warning, the danger signal, and I assure you that both the government of Thailand and the people of Thailand are doing everything to preserve our freedom and our independence.

Question: What specific evidence is there of Communist China's intentions to infiltrate and to dominate Thailand?

Thanat: We start from a statement attributed to the Minister of Communist China, Che'n Yi, who said that the guerrilla warfare will begin in Thailand before the year is out. They have been trying to bring about the first phase of the subversive war. I'm referring to the process of sending agents, of recruiting sympathizers, of training cadres in Thailand, and of trying to build armed caches.

President Johnson has also emphasized the role of China:

Over this war, and all Asia, is another reality: the deepening shadow of Communist China. The rulers in Hanoi are urged on by Peking. This is a regime which has destroyed freedom in Tibet, attacked India, and been condemned by the United Nations for aggression in Korea. It is a nation which is helping the forces of violence in almost every continent. The contest in Vietnam is part of a wider pattern of aggressive purpose.

Address by President Lyndon B. Johnson, Johns Hopkins University, Baltimore, April 7, 1965, reprinted in VIET NAM: HISTORY, DOCUMENTS, AND OPINIONS ON A MAJOR WORLD CRISIS 324-25 (M. Gettleman ed. 1965).

support this view. Since the basic steps in domestic and world revolution are identical in Maoist theory,<sup>36</sup> what Mao did in China, according to Mao and his disciples, can be duplicated elsewhere under certain conditions.

For over 20 years, Mao has considered war between the United States and the Soviet Union to be unlikely. He believed that the major areas of conflict would be in colonial or former colonial areas outside the immediate spheres of interest of either super-power, and hence, in areas where the will of the United States to fight a protracted war would be very limited.<sup>37</sup> Ho found that the same thing was true regarding the French in Indo-China. Political support in France for the continuation of such a war gradually eroded, and the French Government found it politically impossible to send draftees to supplement the professional soldiers. Finally, Mendes-France was chosen Premier upon his promise to end hostilities in Indo-China within 30 days. It was within this context of bargaining power, eroded further by the defeat at Dien Bien Phu, that the French began the negotiations at Geneva in 1954.

There are, however, doctrinal and empirical indications that, when faced with firm opposition, those who would otherwise instigate wars of national liberation might refrain, or might terminate such a war on the basis of something considerably less than complete success. After discussing the concept of defensive war, Mao says:

Secondly, the principle of victory. We do not fight unless we are sure of victory; we must on no account fight without preparation and without certainty of the outcome. . . . Thirdly, the principle of truce. After we have repulsed the attack of the die-hards and before they launch a new one, we should stop at the proper moment and bring that particular fight to a close. We must on no account fight on daily and hourly without stopping, nor become dizzy with success. Herein lies the temporary nature of every struggle.<sup>38</sup>

The Chinese Communists enjoyed geographical continuity with a friendly government, the Soviet Union — a factor which greatly aided their defeat of Chiang. The D.R.V.N. enjoys the same advantage with Communist China. But if tumult in China continues and increases, this advantage may look less reliable to the D.R.V.N. Ho displayed a propensity to settle for half a loaf by accepting the Geneva Accords in 1954, when his battlefield position entitled him to much more. It is hard to believe that this was motivated by any real hope that unsupervised elections would be held after the imposition of a Communist dictatorship and the elimination of all anti-Communist elements in the North.<sup>39</sup>

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It is clear that Ho Chi Minh had intended to take over Cambodia and Laos as well as South Viet-Nam following the Geneva Accords of 1954. By February 1962, North Viet-Nam had 10,000 troops and advisors in Laos. See Address by Assistant Secretary of State William P. Bundy, *American Policy in South Viet-Nam and South-east Asia*, 52 DEP'T STATE BULL. 168-75 (1965). See also Bartelle, *Counterinsurgency and Civil War*, 40 N.D. L. REV. 254 (1964).

<sup>36</sup> See JANOS, *The Communist Theory of the State and Revolution*, in COMMUNISM AND REVOLUTION 32-42 (G. Black & T. Thornton, eds. 1964).

<sup>37</sup> See MAO TSE-TUNG, *SELECTED WORKS* 97-101 (1963). See also B. FALL, *THE TWO VIET-NAMS* 117 (2d rev. ed. 1967).

<sup>38</sup> 3 MAO TSE-TUNG, *SELECTED WORKS* 199 (1963).

<sup>39</sup> See note 102 *infra* and accompanying text.

At this point the question may be asked whether a policy which limits response to indirect aggression and subversion to counter-intervention is a sufficient deterrent to those who would export their wars of national liberation. The challenge we face is finding a means of frustrating wars which are stimulated by third powers, while avoiding a counterrevolutionary policy which opposes any violent change even if it be of a completely internal nature. At the same time, the level of violence in any type of war must be kept below that level which could lead to a direct confrontation between the United States and the Soviet Union.

#### IV. CHRONOLOGY OF ESCALATION BY THIRD PARTIES IN VIET-NAM

Before evaluating the policies and pronouncements of the Administration and its critics, it is necessary to examine the record of escalation of third party activity in North and South Viet-Nam. Only from such a perspective can the policies of the Administration be meaningfully criticized.

The first major escalation of United States participation in hostilities in South Viet-Nam occurred in late 1961, when President Kennedy approved an increase in the number of military advisors in South Viet-Nam from 800 at the end of 1960 to 2,000 at the end of 1961 and 10,000 by late 1962. In addition, American pilots carried South Vietnamese units to combat zones in helicopters and air transports and provided essentially every service short of the introduction of American combat units into action.

Prior to this escalation—since the 1954 Geneva Convention—the D.R.V.N. had been making provisions for the destruction of the regime in the South. Although the Geneva Accords called for the regroupment of Communist forces north of the 17th parallel, thousands of former Viet Minh troops remained in the South. In addition, large arms caches were deposited in the South for future use. Bernard Fall reported that the pattern of assassination of village officials from 1954 to 1957 indicated “a *prima facie* case for the existence of close coordination between the Communist guerrillas in South Viet-Nam and the North Vietnamese intelligence apparatus.”<sup>40</sup>

Roger Hilsman, a prominent critic of Administration policy in Viet-Nam, records the North Vietnamese actions which directly led to the decision by President Kennedy to drastically alter our participation in the defense of South Viet-Nam in 1961:

After Mao's “East Wind prevails over West Wind” speech in November 1957, following the Soviet sputnik success, the North Vietnamese reactivated the Communist cadres who had remained in South Vietnam after the 1954 Geneva agreements, and began to use the old Ho Chi Minh trails through Laos to send down new cadres, selected from among the 90,000 southerners who had gone north in 1954. By mid-1961, the Viet Cong were estimated to have about 12,000 regular guerilla troops, and they more or less controlled as much as a third of the

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<sup>40</sup> *Id.* at 23.

countryside. Over 1,400 civilians, mainly village officials, had been assassinated in the previous twelve months, and over 2,000 kidnapped.<sup>41</sup>

It was only after the level of infiltration from the North and the number of D.R.V.N.-directed assassinations and other acts of terrorism had reached such a stage as to seriously threaten the R.V.N. government, that President Kennedy acted upon recommendations made by General Taylor and Walt Rostow, following their mission to South Viet-Nam, by increasing the number of American advisors and providing support units to the R.V.N.

Even with the high level of infiltration of men and supplies from the North during the 1959-1961 period, President Kennedy rejected the Taylor-Rostow recommendation that 10,000 American combat troops be committed to the defense of South Viet-Nam immediately. Instead, American support was extended only by increasing the number of advisors, the commitment of helicopters and other air transport groups, and the use of American pilots in air combat missions as instructors for South Vietnamese trainees<sup>42</sup> with instructions not to fire unless fired upon.<sup>43</sup>

In 1962 the International Control Commission reported that the D.R.V.N. had allowed its territory "to be used for inciting, encouraging, and supporting hostile activities in the zone in the South . . ." in violation of Articles 19, 24, and 27 of the Geneva Agreement. It also charged that the R.V.N. and the United States had violated Articles 16, 17, and 19.<sup>44</sup> The Chairman of the Commission, Gopalaswami Parthasarathy of India, stated, however, that in his opinion the United States and the R.V.N. had been forced to take action violative of the Agreements as a reaction to subversion by North Viet-Nam.<sup>45</sup>

From 1962 to 1964 the level of infiltration of men and supplies from the North increased. The Department of State has estimated that almost 13,000 men entered the R.V.N. from North Viet-Nam in 1962, and that by 1964 over 40,000 men had entered the South.<sup>46</sup>

During 1963 and 1964 a significant change in D.R.V.N. policy regarding the insurgency in the South occurred. First, D.R.V.N. control over the National Liberation Front became complete down to the village level. Douglas Pike reports that "in early 1963 well-known old-line Communist Cadres of the Viet Minh days, who had gone North, appeared for the first time at the provincial level and in August and September at the village level."<sup>47</sup> In August and September of 1963 "at least two generals from Hanoi

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<sup>41</sup> Hilsman, *supra* note 32, at 36. For the Administration's account of the chronology and nature of escalation of D.R.V.N. and United States participation in hostilities in South Viet-Nam, see U.S. DEP'T OF STATE, PUB. NO. 7839, AGGRESSION FROM THE NORTH 404-25 (1965).

<sup>42</sup> Hilsman, *supra* note 32, at 37.

<sup>43</sup> N.Y. Times, March 16, 1962, at 1, col. 5.

<sup>44</sup> VIET NAM: HISTORY, DOCUMENTS, AND OPINIONS ON A MAJOR WORLD CRISIS 185-88 (M. Gittleman ed. 1965).

<sup>45</sup> N.Y. Times, May 26, 1962, at 1, col. 2.

<sup>46</sup> U.S. DEP'T OF STATE, CONCISE HISTORY OF ESCALATION IN VIET-NAM 2 (unpublished document).

<sup>47</sup> D. PIKE, VIET CONG: THE ORGANIZATION AND TECHNIQUES OF THE N.L.F. OF SOUTH VIETNAM 117 (1966).

arrived in the highland of the South to act as advisors, or possibly commanders, in the N.L.F.'s armed struggle movement."<sup>48</sup> Then, in late 1963 and 1964, thousands of North Vietnamese regular army (PAVN) soldiers were ordered to the South.<sup>49</sup> In 1964 at least a third of the 6,500 (the Department of State says 12,400) infiltrators were North Vietnamese, which indicated a change in the previous policy of infiltrating those forces which had been withdrawn to the North from the South following the Geneva Agreements in 1954. By 1965, almost all forces infiltrated into the South were native North Vietnamese.<sup>50</sup> The 325th Division of the PAVN was identified in action in South Viet-Nam by December, 1964.<sup>51</sup>

With this complete Northern control over the insurgency in the South, including leadership down to village levels and a dependence upon native Northerners for manpower, it is submitted that a state of "armed attack" by the D.R.V.N. upon the R.V.N. existed. Though many single events could be identified as constituting such an attack, including the infiltration of thousands of PAVN regular troops into the South along with native North Vietnamese irregular forces, this writer agrees with Professor Alford that "[u]nder conditions of modern military action, an 'armed attack' may be regarded as a process and not solely a single hostile offensive event."<sup>52</sup>

With the increased pressure from the North, it became obvious that the government in the South was in danger of collapse. It would appear that the Administration realized the necessity of increased American participation to avoid this collapse: by December, 1964, American military personnel totalled 23,000 men, although no regular combat units had yet been introduced.

After the Viet Cong attack upon American forces near Pleiku, the United States began "measured bombing attacks" upon military targets in the North. At the same time, Marine combat units were introduced for the first time to guard American installations previously defended by South Vietnamese forces.

While the real reason for American escalation at this point was not the isolated incident at Pleiku<sup>53</sup> — of which the Administration made too much in order to justify its action — the basic reasons for the escalation were impelling. As General Taylor testified before the Senate Foreign Relations Committee, "it became clear [by February, 1965] that we could no longer

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<sup>48</sup> *Id.* at 102.

<sup>49</sup> *Id.* at 164.

<sup>50</sup> *Id.* at 324.

<sup>51</sup> U.S. DEP'T OF STATE, *supra* note 46.

<sup>52</sup> Alford, *The Legality of American Military Involvement in Viet Nam: A Broader Perspective*, 75 YALE L.J. 1109, 1113 (1966).

<sup>53</sup> See Charles Mahr's article in the N.Y. Times, Feb. 8, 1965, at 14, col. 6, where he reports that in terms of the size of the attacking Viet Cong force and the weapons they employed, the attack on Pleiku was of a different nature than attacks in the past. No evidence of Hanoi direction on this specific attack was found. That an American attack on North Viet-Nam had previously been planned is evidenced by the presence of all three attack carriers of the 7th Fleet in the South China Sea near the Vietnamese coast, while the usual procedure is for each carrier to form the nucleus of a separate attack force operating in different parts of East Asia.

tolerate this clandestine support from the immune sanctuary in North Vietnam which served as the external base for the Viet Cong insurgency."<sup>54</sup>

#### V. A CRITIQUE

The challenge to international law is to identify or create rules which would at once diminish the likelihood of violent conflict between nations and at the same time avoid proscriptions which would establish a Metternichian-type insurance for the eternal continuance of the status quo. From the United States' point of view the rules should discourage third party instigation of "wars of national liberation" or any other type of civil disorder fomented and supported by third powers dedicated to violent evangelism on behalf of communism.

Professor Farer proposed a norm which would prohibit tactical support by a third power to either side in a civil war.<sup>55</sup> Although a country could extend aid in the form of supplies and, presumably, arms of any type, no advisors, volunteers, or transports would be allowed in the tactical "zone of combat."

The difficulty in formulating one set of norms to govern many disparate situations is illustrated by Professor Farer's attempt. With the overwhelming presence of the war in Viet-Nam quite obviously serving as the nexus for Professor Farer's norm, other fact situations apparently were not considered. One initial weakness is that it is as necessary to define civil war under Professor Farer's norm as under the traditional one, even though Professor Farer rejected the simple rule of complete nonintervention in civil disputes in part to avoid having to attempt this definition.

In addition, the events concerning Cuba, the United States, and the Soviet Union from the Bay of Pigs to the missile crisis present especial difficulty for this norm. There was an internal conflict with significant third power intervention — the Soviet Union actively supported the Castro government and the United States extended erratic support to various insurgent groups. The transportation of Cuban exiles by the United States to the Bay of Pigs would represent a violation of Professor Farer's norm. Yet the potentially far more dangerous placement of offensive missiles in Cuba by the Soviet Union would not represent a violation since no tactical "zone of combat" existed there, and,

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<sup>54</sup> THE VIETNAM HEARINGS 172 (Random House ed. 1966). For other statements defending and explaining the United States bombing of North Viet-Nam, see Statement of Secretary Rusk before the American Foreign Service Association, reprinted in U.S. DEP'T OF STATE, PUB. NO. 7919 at 11 (Far Eastern Series 136, 1965); Statement of Secretary Rusk before the Senate Foreign Relations Committee, reprinted in THE VIETNAM HEARINGS, *supra* at 11. Secretary Rusk's first public comment on the 1965 escalation was before the American Society of International Law, April 23, 1965. He stated that the United States was providing assistance in the exercise of the right of collective self-defense under the U.N. Charter at the request of the Republic of Viet-Nam, and that "[o]ur assistance has been increased because the aggression from the North has been augmented. Our assistance now encompasses the bombing of North Vietnam. The bombing is designed to interdict, as far as possible, and to inhibit, as far as may be necessary, continued aggression against the Republic of Vietnam." He said that the insurgency "receives vital external support — in organization and direction, in training, in men, in weapons and other supplies," which violates general international law expressed in the U.N. Charter and the 1954 Geneva Accords. VIET NAM, *supra* note 44, at 333.

<sup>55</sup> See notes 12-13 *supra* and accompanying text.

according to the proposed norm, any type of supplies could be extended by third powers. That under Farer's norm, the Soviets could supply the Castro government with missiles but no Soviet troops would be permitted to man them, would further destabilize the situation and make international war more probable. The suggested rule would in this case violate almost all of the criteria suggested by Farer as prerequisite tests for the norm. The likelihood of great power confrontation would be encouraged by the allowance of a supply of weapons which could be used against the territory of the United States; if the weapons were used, geographic containment would be virtually impossible; and the degree of ambiguity in the suggested norm which permits such a disparate treatment of two types of intervention in Cuba by the Soviet Union and the United States is obvious. Farer's focus upon a "war zone" as the critical area in which outside intervention would not be permitted is unrealistic in an age of intercontinental missiles.

Professor Falk proposed that internal wars be treated as civil wars, regardless of intervention by third parties, permitting a "neutralizing response as a maximum counteraction," with no action being taken beyond the initial territory within which the internal war was being waged.<sup>56</sup> For Falk, the maximum response in South Viet-Nam, if indeed any response would be justified, would be a neutralizing counter-intervention rather than a response to "armed attack."<sup>57</sup>

In an age when internationalized "civil" wars have become the predominant form of conflict, and when several nations have openly advocated the instigation of and support for such types of conflict, query whether the proposal of Professor Falk would possess significant deterrent capacity. Is there any real deterrent effect when the worst a potential aggressor would face, when contemplating indirect aggression, is the frustration of such efforts? Must our entire military strategy in the age of international civil wars and wars of national liberation be reactive? If all the international gambler has to lose would be the chips he chooses to place on the table, foreign adventurers would be free to intervene with relative impunity. They would know that the maximum response from third party nations friendly to the legitimate government would be an attempt to negate the intervention of the aggressor nation with counter-intervention.

Nations which choose to intervene in civil wars within other nations on the scale that North Viet-Nam has intervened in South Viet-Nam should recognize that force commensurate with their aggression might be employed against their homeland. Surely Richard Falk's proposal does not contain any sanction sufficient to meet Henry Kissinger's definition of deterrence: "Deterrence is the attempt to keep an opponent from adopting a certain course of action by posing risks which will seem to him out of proportion to any gains to be achieved."<sup>58</sup>

Further, it must be assumed as a prerequisite to Professor Falk's proposal that the "contending factions" within a country are in fact indigenous to the

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<sup>56</sup> Falk, *supra* note 19, at 1123-25.

<sup>57</sup> *Id.* at 1125.

<sup>58</sup> H. KISSINGER, *NUCLEAR WEAPONS AND FOREIGN POLICY* 96 (1957).

country. From that point it may be argued, as Professor Falk does, that international law may permit (or at least does not proscribe) the intervention by an outside state on behalf of an indigenous insurgent group when such an insurgency reaches some degree of stability.<sup>59</sup> But it could hardly be argued that foreign support for a "contending faction" can be permissible under international law when that "contending faction" is *first created* and then directed, supplied, and maintained by another country. To permit one nation to first create an insurgent force within another country and then claim the right under international law to direct and support such a force since it has indisputable existence would turn the definition of civil war on its head. No more flagrant example of the bootstrap doctrine could be posed.

The most current information available to this writer would indicate that the National Liberation Front was created in the North and, though initially staffed to some extent by southerners who had gone North after 1954, has since 1963 been directed by northerners who in turn are controlled directly by Hanoi. Though the D.R.V.N. was able to exploit a revolutionary situation in the South, and though there are unquestionably many native nationalistic southerners in the N.L.F., it cannot legitimately be called an indigenous southern organization.<sup>60</sup>

Of course, if Viet-Nam is considered as one entity, this North-South distinction is meaningless. But to so do one must ignore the historical separate-ness of these regions,<sup>61</sup> the acts of recognition by over 60 states of the Republic of Viet-Nam, its membership in scores of international organizations, including specialized agencies of the United Nations, and most important of all, the de facto separate existence of North and South under separate governments for the last 13 years.<sup>62</sup>

Falk's thesis is sound at some lesser levels of intervention. "Subversive activities," or indirect aggression of the scope to which Secretary Dulles was

<sup>59</sup> Falk, *supra* note 19, at 1134-39.

<sup>60</sup> See D. PIKE, *supra* note 47; U.S. DEP'T OF STATE, DEALING WITH THE N.L.F. AS A PATH TO PEACE IN VIET-NAM 1 (unpublished document); Carver, *The Faceless Viet Cong*, 44 FOREIGN AFFAIRS 364 (1966); Chaffard, *Who Controls the Viet Cong?*, CHICAGO TODAY, vol. 4, Spring 1967, at 40; Fall, *Viet Cong—The Unseen Enemy in Viet-Nam*, in THE VIET-NAM READER (Raskin & Fall eds. 1965); cf. J. LACOUTURE, VIETNAM: BETWEEN TWO TRUCES 55 (1966); H. SALISBURY, BEHIND THE LINE—HANOI 159-74 (1967).

<sup>61</sup> Fall states:

Viet-Nam, as a unified independent state, had again disappeared — if it can be said to have had time to bloom in the few chaotic months of the Tran Trong Kim regime under Japanese protection, and of the Ho Chi Minh regime under Chinese aegis. As in the sixteenth century, so again Viet-Nam was divided into two distinct states, but from 1946 until 1954, this was to be a new, strange, urban-rural division rather than a north-south division, with the Viet Minh holding much of the countryside, including the hill tribe areas; while the French and, later, the non-Communist Vietnamese administration were to hold the lowlands and, especially, the cities. In 1954, the "normal" north-south division of Viet-Nam was to appear again, only a few miles to the south of the ancient Wall of Dong-Hoi.

And, once more, the two Viet-Nams began to build their own separate institutions.

B. FALL, *supra* note 29, at 77-78.

<sup>62</sup> See Moore & Underwood, *The Lawfulness of United States Assistance to the Republic of Viet Nam*, 5 DUQUESNE L. REV. 235, 239-70 (1967).

referring in his testimony quoted by Professor Falk,<sup>63</sup> could be met by the response of the legitimate government within that nation or perhaps by reciprocal subversive activities against the subverting nation. But third nation responses should be limited to countering such subversion within the territory of the state of the legitimate government. However, at some point in escalated intervention, surely by the time that cadres of troops and war supplies have been transported across borders or into a zone of a temporarily divided state, the aggressor nation must be faced with the possibility of a response directed at its homeland commensurate in strength with the original aggression.

Professor Falk has maintained that the classification of the actions of North Viet-Nam against South Viet-Nam as "armed attack" threatens to obliterate the distinction between international and civil war.<sup>64</sup> Is it really "civil war" when the entire leadership structure of the guerrilla forces, along with a significant portion of the manpower and essentially all of the arms and munitions are supplied by a third power? Granted that "the war in South Viet-Nam should be viewed as primarily between factions contending for control of the southern zone, whether or not the zone is considered a nation,"<sup>65</sup> when one of these factions is first created and then directed, partially manned, and supported by another state, it is submitted that this factor abolishes the distinction between international and civil war, and not a subsequent decision to classify a war as one or the other.

Professor Falk's most recent proposal<sup>66</sup> — that the discretion of the victim state, the potential intervening third state, and the executive branch of that third state be severely limited by prior "organized international community" assent to the characterization of covert aggression as "armed attack" — is based upon one gigantic assumption. That is that there exists an institution of the international community with sufficient integrity and responsibility to be the repository of such power. Though I would wish that the contrary were true, I do not believe that the United Nations possesses such qualifications at this time.

Even if it is agreed that international law should place no prohibitions upon the right of a third state to retaliate within the territory of another third power that is intervening in an internal war, when such intervention reaches the level of North Viet-Nam's intervention, however, it does not follow that such a response should be initiated. Factors of strategy and tactics, including the desire to limit the geographic escalation of violence emphasized by Professor Falk, should be carefully considered. But international law should place no absolute prohibition on retaliation by third powers because a potentially more unstabilizing effect would result from the elimination of a credible deterrent to foreign-sponsored wars of national liberation of the scope of the D.R.V.N. activities against the R.V.N.

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<sup>63</sup> Falk, *supra* note 19 at 1123-24.

<sup>64</sup> *Id.* at 1133.

<sup>65</sup> *Id.*

<sup>66</sup> Falk, *supra* note 24, at 1142-50.

Two factors which are related to this problem have to do with the initial decision to resort to counter-intervention in an internal war. (It is at this point that a natural fire-break occurs. It may be easier and less costly in terms of lives, economics, credibility and prestige not to intervene in the first instance than to abide by certain rules limiting the scope of intervention once it has been initiated.) The first factor has been mentioned previously. That is the decision to categorize an internal war as primarily involving contending nationalistic elements vying for control of the government — in which case intervention is presumably not to our interest — or to categorize a war as primarily involving elements of foreign initiation and direction, leadership, manpower and supplies — in which case counterintervention is *possibly* within our interest.

One of the chief sources of frustration and dilemma for those attempting to analyze the struggle in Viet-Nam is that the factors of foreign Communist influence and genuine nationalism are so hopelessly intertwined. In Viet-Nam, communism and nationalism are present in almost equal amounts even within the major personality in the struggle, Ho Chi Minh. Ho has fought those who were imposing foreign control upon his country, from the French to the Japanese to the French once again. As a type of embodiment of the spirit of his people, he has also resisted a satellite status for North Viet-Nam in relation to Communist China. Those who would characterize him as a puppet of Peking do a great disservice to others who must bear the results of such characterization in the form of political and military strategy. Yet Ho is unquestionably a dedicated Communist who hopes to impose this ideology upon most if not all of Indo-China. This record does not support the suppositions of some that Ho would be an Asian Tito if left alone. Consequently, which element — that of dogmatic Communism with designs upon neighboring states, or legitimate expression of nationalism against those who would impose another form of foreign ideology — should the policy maker choose to characterize the nature of the violence in Viet-Nam? Either could be accepted — with substantial evidence to support it — as the chief characteristic of this violence. The choice has largely determined the nature of the American response.

Proponents of the American policy in Viet-Nam are fond of offering as precedents our reaction to guerrilla war in Greece, intimidation in Turkey, and subversion in Iran. Opponents are offended by this comparison and deny its applicability with equally broad statements. But while in this writer's opinion some similarities are present, the factors of internationally fostered communism and nationalism were not so hopelessly intertwined as they are in Viet-Nam. That crucial difference, it is submitted, goes a long way toward explaining why this nation is so dangerously divided over Viet-Nam and yet was able to meet the crises of 1947–1950 with considerably more unanimity. Today, either side may make its characterization with almost equal empirical validity.

The second factor which the United States must weigh before making the initial decision regarding counter-intervention is a purely pragmatic one.

What are the chances of success? This may be determined by factors which, according to Mao and Lin Piao, are the prime considerations of the Communist state that makes the initial intervention in support of a war of national liberation. Mao has said that "we do not fight unless we are sure of victory; we must on no account fight without preparation and without certainty of the outcome."<sup>67</sup> Lin Piao stated that "[r]evolution or people's war in any country is the business of the masses in that country and should be carried out primarily by their own efforts; there is no other way."<sup>68</sup> Translated into our own jargon, and viewed from the standpoint of counter-intervention, this would mean that there must be a sufficient national and non-Communist base to politically support a non-Communist government in dealing with truly internal dissent, and also offer a national base upon which a counter-intervening nation could build, in order to help frustrate intervention by an outside power.

Again, in South Viet-Nam this issue is so close that men of equally good will and similar liberal instincts have reached contrary conclusions. On the one hand, many factors indicate that there are a significant and probably dominant number of people in the South who prefer living under a non-Communist regime. These factors include the voluntary migration of almost one million people, mostly Roman Catholics, from North Viet-Nam to South Viet-Nam after the Geneva Agreements; the capacity of the South Vietnamese to bear appalling casualties for a protracted time and still continue as a political entity; and the absence of significant "Yankee go home" sentiment on the part of any major segment of the country, including Buddhist elements which are opposed to the government at Saigon.

On the other hand, no political figure or group has emerged who could serve as the nucleus of a government with which the people in the countryside could identify. No real political support in the countryside exists in favor of a man or a government, even though considerable opposition does exist toward the Communist North. This situation is dangerously close to that experienced by Chiang in pre-1949 China, when he had impressive military forces, some political support in the cities, but few political roots in the countryside. And as in China, the vast majority of the people of South Viet-Nam do not live in the cities. Diem was a legitimate nationalist and no one questioned the depth of his anti-Communism. Attempts to picture him as a French or an American puppet are completely erroneous. But his flaws eventually more than matched his impressive qualities. And no one since has had the stature or the background of fighting the nationalist fight against colonial powers. The southern equivalent of Ho is painfully absent. Without a man around whom the country can unite and with whom the people can identify, the chances of the formation of a stable government with true political power are slim. And without such a government the chances of successful American counter-intervention are equally slight. We would be faced with the choice of perpetual presence or the rapid evaporation of a politically rootless non-Communist government in the South.

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<sup>67</sup> See 3 MAO TSE-TUNG, *supra* note 38.

<sup>68</sup> Lin Piao, *supra* note 35, at 19.

Again, the existence of such impelling factors on both sides of the question of the existence of a truly nationalistic yet non-communist society in the South make for excruciating political decisions for policy makers and critics alike.

This writer is in general agreement with Professors Moore and Underwood in categorizing the activities of the D.R.V.N. in South Viet-Nam as "armed attack."<sup>69</sup> To this extent, the General Assembly condemnation of Yugoslavia, Bulgaria, and Albania for aiding the Greek rebels is a relevant and appropriate citation of authority for the proposition that aiding rebellion in another country constitutes aggression under international law;<sup>70</sup> the high level of terrorism in the South which has been initiated, controlled, and directed by the D.R.V.N. constitutes aggression as well;<sup>71</sup> and Professor Kelsen's inclusion of supporting revolutionary movements in another country within the definition of "armed attack" under Article 51 of the United Nations Charter would seem to state correctly the better interpretation of this portion of the Charter.

Since the Charter of the United Nations does not define the term "armed attack" used in article 51, the members of the United Nations in exercising their right of "individual or collective self-defense" may interpret "armed" attack to mean not only an action in which a state uses its armed force but also a revolutionary movement which takes place in one state but which is *initiated or supported by another state*. In this case the members could come to the assistance of the legitimate government against which the revolutionary movement is directed.<sup>72</sup>

Under this definition, the actions of the D.R.V.N. prior to their use of regular PAVN troops would have constituted aggression and an "armed attack." After the use of regular forces, and absent justification recognized under international law, there would be no question but that an "armed attack" had occurred.

Even if the actions of the United States in assisting the R.V.N. against the D.R.V.N. are technically lawful under customary international law and the United Nations Charter, there remains a larger and perhaps more important question regarding the use (or non-use) of the United Nations by the United States from 1954 to 1966. Granted that, as Lauterpacht and McNair maintain,<sup>73</sup> Article 51 only enlarges and restates an inherent right of self-defense; granted further that collective self-defense does not require prior Security Council approval;<sup>74</sup> and granted that the United States technically met its reporting obligations to the Security Council,<sup>75</sup> it was not until January 31,

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<sup>69</sup> Moore & Underwood, *supra* note 62.

<sup>70</sup> *Id.* at 288-89.

<sup>71</sup> *Id.* at 290-91.

<sup>72</sup> KELSEN, *COLLECTIVE SECURITY UNDER INTERNATIONAL LAW* 88 (1954) (emphasis in original).

<sup>73</sup> Moore & Underwood, *supra* note 62, at 299-300.

<sup>74</sup> *Id.* at 301-04.

<sup>75</sup> See Statement by United States Ambassador to the U.N., Adlai Stevenson, in the U.N. Security Council, Aug. 5, 1964, reprinted in 51 DEP'T STATE BULL. 272-74 (State Dep't Pub. No. 7710, 1964); Letter from Ambassador Stevenson to President of the U.N. Security Council, Feb. 7, 1965, reprinted in 52 DEP'T STATE BULL. 240-41 (State Dep't Pub. No. 7817, 1965).

1966, that the United States through Ambassador Goldberg made a serious proposal in the form of a draft resolution to bring the question of the hostilities in Viet-Nam officially before the United Nations.<sup>76</sup> This writer does not doubt that sincere efforts are now being made to initiate negotiations, within and without the United Nations, through formal and informal means.<sup>77</sup> But it is difficult to avoid the conclusion that the United States has made serious use of the United Nations only when it became apparent that a favorable military solution to hostilities in South Viet-Nam would be either impossible or too costly, in terms of a prolonged and escalated presence in the face of an attrition of popular political support in the United States for such a war. In retrospect, one might wonder why the Soviet draft resolution proposing United Nations membership for both the D.R.V.N. and the R.V.N.<sup>78</sup> would not have provided the basis for a negotiated settlement in Viet-Nam many years ago.

It may be that the United States, not without precedent in other times and countries, has over-learned its lesson of the late 1940's that complete reliance upon the United Nations for purposes of collective security is not only foolish but potentially disastrous. Might it not be that at least within a certain limited area where the interests of the United States and the Soviet Union are not hopelessly opposite, the original suppositions of the founders of the United Nations regarding primary reliance upon the Security Council might be capable of fulfillment? With both the Soviet Union and the United States possessing nuclear weapons, with an increasing identity of interest between these countries to avoid the possibility of nuclear confrontation similar to that involving Cuba, and with a similar desire to check to some degree the aggressive tendencies of Communist China, it would seem that conditions for the fulfillment of big power unity are more nearly attainable now than they were in 1945.<sup>79</sup>

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<sup>76</sup> Letter from United States Ambassador to the U.N., Arthur J. Goldberg, to the President of the Security Council, Jan. 31, 1966, reprinted in SENATE COMM. ON FOREIGN RELATIONS, 89th CONG., 2d SESS., BACKGROUND INFORMATION RELATING TO SOUTHEAST ASIA AND VIETNAM 271-73 (Comm. Print, 2d rev. ed. 1966) [hereinafter cited as BACKGROUND INFORMATION]; Letter from Ambassador Goldberg to Roger Seydoux, President of the U.N. Security Council, Jan. 31, 1966, reprinted in BACKGROUND INFORMATION, at 273; Statement by President Johnson, Jan. 31, 1966, reprinted in BACKGROUND INFORMATION, at 273-75.

<sup>77</sup> See Goldberg, *An Ambassador on the War*, NEWSWEEK, July 10, 1967, at 56.

<sup>78</sup> In early 1957, the Soviet Union introduced a draft resolution proposing the admission of the D.R.V.N., the R.V.N., the Democratic People's Republic of Korea, and the Republic of Korea. 11 U.N. GAOR, ANNEXES, AGENDA ITEM No. 25, at 5-7, U.N. Doc. A/SPC/L.9, A/3519 (1957). Debate on this resolution produced several speeches by the Soviet delegate recognizing the de facto existence of two separate states and two separate governments in Viet-Nam. United States-supported draft resolutions at this time called for the admission of Korea and Viet-Nam with the recognition of the Southern governments, respectively, in both countries as representing both the northern and southern portions.

Though the Soviet draft resolution was never accepted, it does show, some months after the Geneva Agreements deadline on national elections in Viet-Nam had passed, that the Soviet Union was willing to live with the reality of two states in Viet-Nam, and that they probably never really expected such elections to take place.

<sup>79</sup> See Firmage, *A United Nations Peace Force*, 11 WAYNE L. REV. 717, 727-37 (1965).

Though an accord would have to be reached with Peking and Hanoi, as well as with Moscow, the present tumult in China may make Hanoi increasingly dependent upon Moscow for supplies and increasingly less intimidated by Peking regarding any desired overtures toward serious negotiation. Consequently, opportunities missed in the past for a United Nations supervised truce might be capable of attainment in the future. The statement made by Moore and Underwood that the United Nations might have been utilized by other nations under Article 35 or the Secretary-General under Article 99 to bring the issue of Viet-Nam before the international body, even absent a United States draft resolution, misses the point.<sup>80</sup> It is obvious that international institutional gadgetry cannot accomplish what the major powers do not want accomplished. That fact applies in regard to the United States and its attitude toward a settlement in Viet-Nam as well as to the Soviet Union. If Hanoi is finally made dependent upon Moscow for its continued support of hostilities directed against the R.V.N., and if Moscow and Washington both desire a settlement in Viet-Nam, the United Nations offers an ideal forum for such a settlement and various possibilities for its implementation. It offers no more than this.

#### VI. THE ELECTION PROVISIONS OF THE GENEVA ACCORDS

The Geneva Conference resulted in four separate documents and seven limiting declarations. These included three cease-fire agreements, one each for Cambodia, Laos and Viet-Nam,<sup>81</sup> and a Final Declaration of the Conference. The seven declarations were by Cambodia (2), Laos (2), France (2), and the United States (1). The cease-fire agreements were bilaterals between the Viet Minh and the Commander of the French Union Forces. The Final Declaration was not signed but was approved at the Final Plenary Session of the Conference, with the United States refusing to subscribe and issuing a unilateral declaration, and the State of Viet-Nam making an important reservation to its approval.

The Final Declaration of the Geneva Conference<sup>82</sup> provided for elections in Viet-Nam during "July 1956, under the supervision of an international commission composed of representatives of the member states of the International Supervisory Commission . . ." These were to be "free general elections by secret ballot."<sup>83</sup> The failure of the R.V.N. to hold such elections has been cited by critics of the Administration position as a major reason for the resumption of hostilities by the D.R.V.N. and a justification recognized by international law for such action. Falk has attacked the memorandum of the Department of State for its defense of the refusal of the R.V.N. to enter into negotiations leading to elections. The memorandum's justification of Saigon's

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<sup>80</sup> Moore & Underwood, *supra* note 62, at 323-24.

<sup>81</sup> 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 Viet-Nam on the Cessation of Hostilities in Viet-Nam, Cmnd. No. 9239 (1954), reprinted in 60 AM. J. INT'L L. 629 (1966).

<sup>82</sup> Final Declaration of the Geneva Conference on the Problem of Restoring Peace in Indo-China, Cmnd. No. 9239 (1954), reprinted in 60 AM. J. INT'L L. 643 (1966).

<sup>83</sup> *Id.* at 644.

refusal on the basis that "free elections" were impossible in North Viet-Nam at that time are rejected by Falk on the ground that the "meaning of 'free elections' in Communist countries was well known to all"<sup>84</sup> and still such provisions were included in the settlement. The assumption made here, of course, is that such elections were actually expected by the parties and participants to be held.

Falk criticized the memorandum for its conclusion that under international law, North Viet-Nam was not justified in attempting to accomplish its political goals by force when the elections were not held. He stated that international law is ambiguous regarding the breakdown of a settlement of an internal war,<sup>85</sup> and that if the R.V.N. repudiated the Accords, the "principle of mutuality of obligation" would free North Viet-Nam from any proscriptions in the Accords.<sup>86</sup>

While the Final Declarations called for "free general elections by secret ballot,"<sup>87</sup> Quincy Wright agrees with Falk that the knowledge possessed by the participants at Geneva of conditions in Viet-Nam precludes belief that they considered conditions necessary for the holding of free and fair elections as a prerequisite to such elections.<sup>88</sup> Furthermore, the elections were such an integral part of the Cease-Fire Agreement, says Wright, that the failure to hold them justified the D.R.V.N. in resuming hostilities. Ho Chi Minh was entitled to regard the holding of elections in July 1956 as being obligatory upon France "and its successor in South Vietnam, Diem":<sup>89</sup>

[The] provisions concerning elections in the final resolutions of the Geneva Conference were considered essential elements in the Cease-Fire Agreement. This agreement, therefore, became suspendable when the elections were frustrated by one of the parties and the other party, Ho Chi Minh, was free to consider his obligation to respect the cease-fire line suspended and to continue his long effort to unify Viet-Nam by force.<sup>90</sup>

Wright based this conclusion upon the assumption that Ho would not have signed the Cease-Fire Agreement in the first place unless he was sure that he could achieve his objective — the unification of Viet-Nam under his government — by means of the election.

Although Wright recognized that the R.V.N. was not a party to the Geneva Agreements, "France was, and the Diem government established in the Southern Zone as successor to France was bound by them."<sup>91</sup>

One major and two subsidiary questions result from this conflict between the memorandum and two of its critics. First and most important, was the

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<sup>84</sup> Falk, *International Law and the United States Role in the Viet Nam War*, 75 *YALE L.J.* 1122, 1153 (1966).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Final Declaration of the Geneva Conference, *supra* note 82, at 644.

<sup>88</sup> Wright, *Legal Aspects of the Viet-Nam Situation*, 60 *AM. J. INT'L L.* 750, 759 (1966).

<sup>89</sup> *Id.* at 759-60.

<sup>90</sup> *Id.* at 760.

<sup>91</sup> *Id.* at 762.

provision regarding elections really a significant factor in Ho's decision to sign the Accords? Was the provision such an integral part of the Cease-Fire Agreement in the intention of the parties, that failure to hold elections suspended the agreement? Second, was the R.V.N. a "successor to France" and thereby bound to honor the election provision of the Cease-Fire Agreement? This question is of lesser importance than the first, since if the provision for elections is not an integral part of the Cease-Fire Agreement, its breach would not provide grounds for suspension of the agreement in any event. Third, if the Republic of Viet-Nam is not a successor to France and is not bound by that or other conditions to the election provision of the Final Declaration, is North Viet-Nam thereby released from the cease-fire provisions under the principle of "mutuality of obligation?"

Bernard Fall has concluded that factors other than the belief that elections would be held motivated Ho Chi Minh to sign at Geneva.

It is still not entirely clear why the DRVN accepted the compromise of a "temporary" division of Viet-Nam inasmuch as the prospects for the holding of a reunification election within two years, as provided by the Geneva agreements, seemed fairly slim from the outset. Soviet pressure on North Viet-Nam for the sake of improving Russian relations with France — more specifically, for the purpose of inducing Paris to block the creation of a European Defense Community including West Germany — may well have been the main factor behind Hanoi's agreement.<sup>92</sup>

The pragmatism Mao built into his doctrine of protracted war — that such wars should be temporarily concluded and consolidated rather than do serious injury to the country — has previously been mentioned.<sup>93</sup> Fall has concluded that this same pragmatism is shared by Ho:

Another probable factor was the pragmatism of the North Vietnamese Communist leadership. Ho Chi Minh has characteristically settled for a safe half-loaf rather than fight to the finish merely to prove a point. Moreover, the consolidation of Communist power in North Viet-Nam after four years of Japanese depredation, one year of Chinese pilfering, and eight years of scorched-earth war with the French was a formidable enough problem to tackle.<sup>94</sup>

Intense Soviet pressure and North Viet pragmatism seem far more persuasive explanations for Ho's actions at Geneva than to think that one of the shrewdest revolutionaries of our century really believed that the government in the South would agree to hold elections the outcome of which would be fixed as much by Ho's complete destruction of opposition in the North as his unquestioned popularity throughout the country.

Although Wright believes that D.R.V.N. subversion of the government in the South began only after the failure to hold elections,<sup>95</sup> terrorism and planned subversion actually occurred from the time of the Geneva Agree-

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<sup>92</sup> Fall, *North Viet-nam: A Profile*, in *PROBLEMS OF COMMUNISM*, vol. 14, July-Aug. 1965, at 18.

<sup>93</sup> See note 38 *supra* and accompanying text.

<sup>94</sup> Fall, *supra* note 92, at 18.

<sup>95</sup> See Wright, *supra* note 88, at 757-78.

ment, mounting in intensity as it became apparent that no elections would be held, and, more importantly, that the South would not collapse as a result of its own problems.<sup>96</sup>

Again, any reticence to begin immediate, massive infiltration of the South can be explained more credibly by the necessity of consolidation in the North than real hope for elections. Ho and Giap were finding it easier to "blow up a water main than to run a water-purification plant, and to sabotage the locomotive roundhouse of Hanoi than to run trains on time."<sup>97</sup> Ho was plagued with the problems of conducting constructive government rather than destructive guerrilla war; he was also following Mao's advice of consolidation and his own pragmatic bent of not going to war again if the desired result could be accomplished by other means. But it is submitted that the failure of Diem's government to fall apart under internal strain, rather than the failure of that government to hold elections, was the major factor in the timing of Ho's increased use of terror, assassination, and infiltration in the South. When it became increasingly clear that Diem had established a government which, with United States help, could last indefinitely, Ho had to use means familiar to him.<sup>98</sup>

That Ho needed a time of recovery seems to be unquestionable. The D.R.V.N. were unable to properly run the cement plants, textile factories, coal mines, and power plants.<sup>99</sup> The government was chaotic.<sup>100</sup> It must be remembered that while the 1946-1954 war with the French was a brilliant success for Ho and Giap, it was not the sort of victory that one could stand too frequently or endure forever. Their greatest victory, Dien Bien Phu, had cost them three men for every one lost by the French, and the overall Viet Minh casualties in the Indo-China war were three for each one of the 172,000 casualties suffered by the French Union Forces.<sup>101</sup>

Fall's description of events in North Viet-Nam immediately following the Geneva Agreement help explain Ho's temporary preoccupation with the North and Diem's reluctance to hold elections:

Following the Geneva accords, the DRVN settled down to the task of transforming itself into a full-fledged "people's democracy." A "Population Classification Decree" issued in March 1953 had divided the population into distinct social categories, and the regime now proceeded to eliminate all landlords by methods of force and terror reminiscent of the Chinese Communists — and with similar results. Exact figures remain unavailable, but the number of peasants killed during the North Vietnamese "land reform" drives from 1954 to 1956 is variously estimated at between 50 and 100 thousand.

This brutal policy led to the outbreak, in November 1956, of a veritable peasant rebellion in Nghe-An Province — the same region which had been the seat of the pro-Communist peasant uprising of 1930.<sup>102</sup>

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<sup>96</sup> See F. TRAGER, *WHY VIETNAM?* 115-16 (1966).

<sup>97</sup> See Fall, *supra* note 92, at 138.

<sup>98</sup> See F. TRAGER, *supra* note 96, at 122-39.

<sup>99</sup> FALL, *supra* note 92, at 139.

<sup>100</sup> *Id.* at 139-41.

<sup>101</sup> *Id.* at 129.

<sup>102</sup> Fall, *supra* note 92, at 18.

Whether or not Diem would have acquiesced to "free" elections, there is no doubt that such elections could not have been accomplished in 1954, 1956, or any time thereafter. After the new D.R.V.N. constitution of 1960, elections were held in the North. They followed the familiar Communist pattern, with 99.8% of the voters casting ballots for 458 candidates who were competing for 404 seats. In Hanoi, two tiny minority parties were permitted to put up a few candidates as long as they continued to collaborate with the Communists.<sup>103</sup> Fall reported that the legislative elections held in 1964 "brought little apparent change . . ."<sup>104</sup>

The participants in the Geneva Conference did not appear to be surprised at the failure to hold elections. The Soviet Union introduced a draft resolution calling for the admission of both the D.R.V.N. and the R.V.N. as members of the United Nations after the July 1956 deadline for elections.<sup>105</sup> The British had favored permanent partition in the first place.<sup>106</sup>

The assertion by Wright that the R.V.N. is a "successor" to France in its relationship to the Geneva Accords would seem to run afoul of the very definition of the term. Both France and the State of Viet-Nam<sup>107</sup> were represented at Geneva, France as a participant, the State of Viet-Nam as an associated state. As Professors Moore and Underwood have pointed out, the State of Viet-Nam had achieved independence and recognition from France prior to the Geneva Conferences;<sup>108</sup> Foreign Minister Bidault expressly so recognized at the Geneva Conference.<sup>109</sup> The State of Viet-Nam formally objected to the Final Declaration of the Conference and Dr. Tran Van Do, its representative at the Conference, refused to approve the Declaration as it stood and offered an amendment which expressed the intention of the State of Viet-Nam to abide only by the Cease-Fire Agreement.<sup>110</sup> Prior to this, on May 12, 1954, he had rejected the proposals for partition of the country and had called for national elections after international supervision of the terms of the cease-fire. He reserved for his government "complete freedom of action to guarantee the sacred right of the Vietnamese people to territorial unity, national independence and freedom."<sup>111</sup>

Mr. Bedell Smith, representing the United States, refused to approve the Final Declaration but instead offered a declaration which stated that the United States would "refrain from the threat or the use of force" to disturb the Cease-Fire Agreements and would "view any renewal of the aggression

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<sup>103</sup> *Id.* at 21.

<sup>104</sup> *Id.*

<sup>105</sup> See note 78 *supra*.

<sup>106</sup> Moore & Underwood, *supra* note 62, at 260.

<sup>107</sup> The State of Viet-Nam was succeeded by the Republic of Viet-Nam in October, 1955, following a referendum vote. Ngo Dinh Diem became President of the R.V.N., succeeding Bao Dai as Chief of State.

<sup>108</sup> Moore & Underwood, *supra* note 62, at 245-47, 337-38.

<sup>109</sup> *Id.* at 337-38. No claim has been made that the State of Viet-Nam is a successor to treaties made by France since 1953. See 2 WHITEMAN, DIGEST OF INTERNATIONAL LAW 976-78 (1963).

<sup>110</sup> Moore & Underwood, *supra* note 62, at 334-36.

<sup>111</sup> DOCUMENTS ON AMERICAN FOREIGN RELATIONS 1954, at 315-16, 318 (Curl ed. 1955).

in violation of the aforesaid Agreements with grave concern and as seriously threatening international peace and security."<sup>112</sup> Then, with direct reference to the provision for elections which had been rejected by the State of Viet-Nam, the United States Declaration stated:

In connection with the statement in the Declaration concerning free elections in Viet Nam, my Government wishes to make clear its position which it has expressed in a Declaration made in Washington on 29th June, 1954, as follows:

In the case of nations now divided against their will, we shall continue to seek to achieve unity through free elections, supervised by the United Nations to ensure that they are conducted fairly.

With respect to the statement made by the Representative of the State of Viet Nam, 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. Nothing in its declaration just made is intended to or does indicate any departure from this traditional position.<sup>113</sup>

This was a direct endorsement of the position previously taken by the State of Viet-Nam — that it would respect the cease-fire, but reserve to itself complete freedom of action regarding the holding of elections. While the Republic of Viet-Nam has recognized the legitimacy of the Cease-Fire Agreement, it has from the beginning refused to consider itself bound to hold elections under the terms of the Final Declaration at Geneva.

The Democratic Republic of Viet-Nam approved the Final Declaration with full knowledge of the position of the State of Viet-Nam. The only portion of the Final Declaration which both the D.R.V.N. and the R.V.N. recognized was the cease-fire provision. The D.R.V.N. apparently did not rely upon the election provisions of the Geneva Agreement in deciding to negotiate a cease-fire, and the R.V.N. are clearly not successors to the French regarding provisions of an agreement which the R.V.N. expressly disavowed. Finally, it hardly follows that the refusal of a nonsignatory to abide by provisions which it had expressly disavowed at Geneva — those relating to elections — justifies a signatory in negating the one portion of the agreement — that relating to a cease-fire — recognized as binding by both.

#### VII. THE NATURE OF THE UNITED STATES COMMITMENT TO THE REPUBLIC OF VIET-NAM

Secretary Rusk has frequently cited the Southeast Asia Treaty as the source of our commitment to the Republic of Viet-Nam. Speaking before the American Foreign Service Association in 1965, he said that when President Johnson authorized combat missions for United States military units, he "recognized the obligations of this nation under the Southeast Asia

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<sup>112</sup> *Further Documents Relating to the Discussion of Indo-China at the Geneva Conference* (Miscellaneous No. 20 [1954] Command Paper 9239). Great Britain Parliamentary Sessional Papers XXXI (1953-1954), at 5-7, quoted in 5 DUQUESNE L. REV. 328 (1967).

<sup>113</sup> *Id.*

Treaty . . .” and “acted under the Joint Resolution of August 1964 . . .”<sup>114</sup> The Secretary expanded on these views at his appearance before the Senate Foreign Relations Committee in 1966. He stated that under the Southeast Asia Treaty and its Protocol, a protocol state has the right to call on members for assistance and that “no doubt we are entitled to offer that assistance.” In reply to Senator Fulbright’s query as to whether we were obligated to do so, Secretary Rusk said that he did not want to get involved in the question of whether we had a legal way to avoid the commitments under the treaty. He stated that the United States is “entitled” to offer the assistance which was requested of us as a signatory by a protocol nation.<sup>115</sup> Later he stated that we had an obligation of policy rooted in the treaty<sup>116</sup> and that Article IV, paragraph 1 was the “fundamental . . . obligation that has from the outset guided our actions in South Vietnam.”<sup>117</sup>

The reticence of Secretary Rusk to assert any legal commitment of the United States to unilaterally act under provisions of the SEATO Treaty<sup>118</sup> is well taken. Both its terms and its history indicate that while the United States may take unilateral action in the situation presented in South Vietnam, it is not legally obligated to do so.

Article IV, paragraph 1, states that:

Each party recognizes that aggression by means of armed attack in the treaty area against any of the parties or against any state or territory which the parties by unanimous agreement may hereafter designate, would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger *in accordance with its constitutional processes*.<sup>119</sup>

The Protocol designates “Cambodia, Laos, and the free territory under the jurisdiction of the State of Vietnam” as coming under Article IV. An understanding incorporated into the Treaty limits the United States commitment to act in response to “Communist aggression” only, with the further proviso that we would consult on other types of aggression. Paragraph 2 of Article IV requires consultation by the parties on measures for common defense, if the independence of any is threatened in any way other than by armed attack.

During the hearings held November 11, 1954,<sup>120</sup> Secretary Dulles made it quite clear that the Administration did not consider it essential under Article IV, paragraph 2, that consultation take place prior to United States action when an “armed attack” occurred.<sup>121</sup>

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<sup>114</sup> Address by Dean Rusk, Washington, D.C., June 23, 1965, in U.S. DEP’T OF STATE, PUB. NO. 7919, VIET-NAM: FOUR STEPS TO PEACE 11 (Far East Series No. 136, 1965).

<sup>115</sup> THE VIETNAM HEARINGS 11-12 (Random House ed. 1966).

<sup>116</sup> *Id.* at 35-36.

<sup>117</sup> *Id.* at 234.

<sup>118</sup> 6 U.S.T. 81, T.I.A.S. No. 3170, reprinted in 60 AM. J. INT’L L. 646 (1966).

<sup>119</sup> *Id.* at 647 (emphasis added).

<sup>120</sup> *Hearings on the Southeast Asia Collective Defense Treaty and the Protocol Thereto Before the Senate Comm. on Foreign Relations*, 83d Cong., 2d Sess., pt. 1 (1954).

<sup>121</sup> See the dialogue between Senator Gillette and Secretary Dulles, *Id.* at 35-36.

The adoption in the SEATO Treaty of the "Monroe Doctrine formula" recognizing that an attack would "endanger its own peace and safety," and leaving each state to decide its own response "in accordance with its constitutional processes" seems to represent a deliberate rejection of the allegedly "automatic" response included in the NATO Treaty formula which provides that an attack on one is an attack on all. Individual discretion is allowed by the former formula.

Finally, Article IV, paragraph 1, provides for notification of the Security Council of any action taken. Secretary Dulles testified<sup>122</sup> that the SEATO Treaty was based upon Article 51 of the United Nations Charter, relating to self-defense, rather than Article 52, relating to regional arrangements, and, therefore, no approval by the Security Council was necessary before action could be taken. Thus, under the Charter, the Council must only be informed of actions taken.

### VIII. CONCLUSION

Both by traditional criteria of international law and by de facto existence as a separate and sovereign state, the Republic of Viet-Nam is a State separate from that of the Democratic Republic of Viet-Nam, which fact has received de jure and de facto recognition from a host of states.

The National Liberation Front has been created, directed and maintained by the Democratic Republic of Viet-Nam, though a situation existed in the South which made that nation ripe for revolution. Southern influence within the N.L.F. has been increasingly muted and, since 1963, has become of relative insignificance in terms of leadership and control. Prior to the most significant American escalation of hostilities in Viet-Nam in February of 1965, the internal nature of that war had been internationalized by the commitment of native North Vietnamese regular and irregular forces in massive numbers. This drastic change in the nature of hostilities was sufficient to constitute an "armed attack" under Article 51 of the United Nations Charter.

The United States has made tardy use of the United Nations by delaying serious attempts to bring peace through that organization until January of 1966. The United Nations was not seriously utilized until it became clear that a favorable military solution might not be possible. This fact, however, does not excuse that organization from all blame since initiation need not come from the United States. However, in fairness it must be said that without receptivity upon the part of the United States and the Soviet Union, there would be no hope of any meaningful United Nations participation.

It may be that whatever chances existed for the use of the United Nations in settling hostilities in North and South Viet-Nam have passed. It would appear that the United States is now pursuing serious attempts to instigate negotiations through that organization as well as through other diplomatic sources, with little receptivity upon the part of the D.R.V.N. However, tumult in China, coupled with the possibility that the United States and the Soviet Union might be within negotiating distance of each other concerning

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<sup>122</sup> *Id.* at 17.

a settlement in Southeast Asia, might make it possible to use the Security Council and the Secretary-General in ways which were anticipated in 1945 but not realizable until the present.

The enigma of events in Communist China may hold the answer to the possibilities of foreseeable negotiations. As the tumult within that country continues or increases, the likelihood that the Democratic Republic of Viet-Nam will desire a negotiated settlement also increases. To this time, however, the critical pressure points of the harvest, nuclear development, and supplies to North Viet-Nam have not been visibly affected by the violence in China.

Basically, our commitment in the Republic of South Viet-Nam is not one in law.<sup>123</sup> Rather, it derives from a combination of altruism and at the same time self-interest in preventing successful wars of national liberation, or Communist-inspired wars of aggression by any other name, from being exported successfully from one nation to another. Though elements of civil war exist in South Viet-Nam, it is not civil war which the United States opposes. It is, rather, the attempt of one country to force its will upon another by violence — assassination, subversion, and in South Viet-Nam, infiltration of regular and irregular troops on such a scale as to constitute "armed attack."

This commitment, however, is not irrelevant to law. For it is in the highest interest of all nations who truly love peace and order that one nation not be allowed to force its will upon another, whether by blatant and massive assault or by more devious and subtle, but no less fatal, means of indirect aggression.

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<sup>123</sup> See an impressive list of communications between Presidents Eisenhower and Kennedy with Prime Minister Churchill and President Diem, and statements of commitment by President Johnson in *WHY VIETNAM?* (Gov't Printing Office, 1965).

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