Ralph
You may want this
to go with the other
which I had duplicated
for you.
Frank

United States Intervention in Vietnam Is Not Legal

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

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

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

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

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

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

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

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

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

No. 7

national dialogue on Vietnam" (emphasis supplied).

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

I. Unilateral Intervention Violates U.N. Charter

The writer of the "legality position" article discusses the first exception of Article 51 of the Charter of the United Nations, which reads: "Nothing in the present Charter shall impair the *inherent* right of individual or collective self-defense *if* an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security" (emphasis supplied).

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

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

This limitation was not inadvertent. It was the result of careful draftsmanship by Senator Arthur H. Vandenberg, who "was the principal negotiator in the formulation of this text" of Article 51.[2] In a statement of June 13, 1945, before the United Nations Commission that drafted Article 51, Senator Vandenberg said: ". . . [W]e have here recognized the inherent right of self-defense, whether individual or collective, which permits any sovereign state among us [*i.e.*, members of the United Nations] or any qualified regional group of states to ward off attack . . .".[3]

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

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

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

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

During the Suez crisis President Eisenhower said: "The United Nations is *alone* charged with the responsibility of securing the peace in the Middle East and throughout the world" (emphasis supplied).[7]

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

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

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

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

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

---

1. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 193-195 (1958); KELSEN, THE LAW OF THE UNITED NATIONS 793 (1950).
2. The quoted words are from a memorandum, "Participation in the North Atlantic Treaty of States Not Members of the United Nations", dated April 13, 1949, prepared by the Office of the Legal Adviser, Department of State, and reproduced in 5 WHITEMAN, DIGEST OF INTERNATIONAL LAW 1068.
3. Memorandum, *op. cit.* supra note 2, in 5 WHITEMAN, DIGEST OF INTERNATIONAL LAW 1068, 1072.
4. 12 Dep't. State Bull. 949-950 (1945).
5. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 244 (1954).
6. U. N. SECURITY COUNCIL OFF. REC., 790th meeting 5.
7. 4 UNITED NATIONS ACTION IN THE SUEZ CRISIS: INTERNATIONAL LAW IN THE MIDDLE EAST CRISIS—(Tulane Studies in Political Science, Vol. IV (1956).
8. New York Times, November 6, 1956.
9. KELSEN, *op. cit. supra* note 1, at 797.

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

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

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

No Armed Attack Within Meaning of the Charter

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

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

"Self-defense" is not justified by every aggression or hostile act, but only in the case of an "armed attack", when the necessity for action is "instant, overwhelming, and leaving no moment for deliberation". This definition was classically stated by Secretary of State Daniel Webster in *The Caroline*[11] and affirmed in the Nuremberg judgment. It was codified in the charter by unanimous vote of the General Assembly at its first session.[12]

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

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

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

William L. Standard did his undergraduate work at Columbia College, class of 1922, and he received his law degree from the New York University School of Law in 1924. He is chairman of a group known as the Lawyers Committee on American Policy Towards Vietnam.

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

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

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

11. 7 MOORE, DIGEST OF INTERNATIONAL LAW 919 (1906).

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

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

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

United Nations for collective redress against aggression.

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

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

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

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

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

Intervention Not Justified by "Collective Self-Defense"

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

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

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

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

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

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

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

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

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

16. New York Times, April 3, 1966.

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

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

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

II. U.S. Military Presence Violates Geneva Accords

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

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

In its own pledge to observe the Geneva Accords, the United States recognized that the military participation in Vietnam was temporary and that, in any case, it was not political or geographic. Insofar as the United States referred to that country, it designated it as "Vietnam", not "South Vietnam" or "North Vietnam". The elections thus were to determine not whether North and South Vietnam should be united, but what the government of the single state of Vietnam should be. As the time for the arrangements for the elections approached, however, the Diem regime, which was then in control of South Vietnam, announced on July 16, 1955, that not only would it defy the provisions calling for national elections, but would not engage even in negotiations for modalities.

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

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

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

III. U.S. Intervention Violates SEATO Treaty

Mr. Deutsch also challenges the conclusion of the Lawyers Committee with respect to sanctions under the SEATO treaty, which was adopted in September, 1954. Article 1 of the treaty provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

> The President had utilized the provocation of the Tonkin Gulf attack on the Seventh Fleet by North Vietnamese gunboats to get a generalized expression of support from Congress. This worked well enough until it was argued, against the public record, as approval by Congress of any expansion of the war the President might make in an unforeseeable future. Then Rusk shifted the major basis for the claim to the SEATO compact.
>
> But extracts from the 1954 Senate debate on the treaty demonstrate the fragility of this claim.[22]

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

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

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

Representative Laird pointed out that in soliciting the advice and consent of the Senate to the treaty, Senator H. Alexander Smith of New Jersey, who was a member of the United States delegation to the Manila Conference at which the treaty was negotiated and who was one of the signers of the treaty for the United States, emphasized that "Nothing in this treaty calls for the use of American ground forces . . .". On the floor of the Senate on February 1, 1955, he said:

> Some of the participants came to Manila with the intention of establishing . . . a compulsory arrangement for our military participation in case of any attack. Such an organization might have required the commitment of American ground forces to the Asian mainland. We carefully avoided any possible implication regarding an arrangement of that kind.
>
> We have no purpose of following any such policy as that of having our forces involved in a ground war. . . .
>
> For ourselves, the arrangement means that we will have avoided the impracticable overcommitment which would have been involved if we attempted to place American ground forces around the perimeter of the area of potential Chinese ingress into southeast Asia. Nothing in this treaty calls for the use of American ground forces in that fashion.[24]

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

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

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

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

23. 112 Cong. Rec. 5558 (1966).

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

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

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

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

IV. U.S. Intervention Violates the Constitution

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

The Supreme Court has held that

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

President Woodrow Wilson underscored the President's lack of power to declare war in his historic statement to a joint session of Congress on April 2, 1917:

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

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

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

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

Senator Fulbright in a recent article stated:

> The joint resolution was a blank check signed by the Congress in an atmosphere of urgency that seemed at the time to preclude debate. . . .
>
> I myself, as chairman of the Foreign Relations Committee, served as floor manager of the Southeast Asia resolution and did all I could to bring about its prompt and overwhelming adoption. I did so because I was confident that President Johnson would use our endorsement with wisdom and restraint. I was also influenced by partisanship: an election campaign was in progress and I had no wish to make any difficulties for the President in his race against a Republican candidate whose election I thought would be a disaster for the country. My role in the adoption of the resolution of Aug. 7, 1964 is a source of neither pleasure nor pride to me today.[29]

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

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

> We will insist upon clear explanations of the policies in which we are asked to cooperate. We will insist that we and the American people be treated as adults—that we have the facts without sugar coating.
>
> The function of Congress is not simply to appropriate money and leave the problem of national security at that.[30]

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

---

25. 52 DEP'T STATE BULL. 606, 838 (1965). Arthur Krock, "By Any Other Name, It's Still War", The New York Times, June 10, 1965.

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

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

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

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

30. Jackson, The Role and Problems of Congress with Reference to Atomic War, Publication No. L 54-135, Industrial College of the Armed Forces (1954).

What Action To Take in This Solemn Hour

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

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

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

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

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

> . . . And it means the wisdom to sense that American repute in Asia is not dignified but diminished by untiring war for the unattainable victory . . . and American honor is not tarnished but brightened when so great a power can say, with quiet assurance: we have judged poorly, fought splendidly, and survive confidently.
>
> I can think of no other way that the leaders of the United States might match the courage of the soldiers they have dispatched.[31]

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

Informal Decisions of the Committee on Professional Ethics

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

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

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

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

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

894. It is not ethically improper for a bar association to accept commercial sponsorship of a bar-produced public service radio series. However, the bar association should maintain control over the type of advertising to assure that it is consistent with the dignity and responsibility of the profession.

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

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

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

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

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

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

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