



Fall 9-1-1967

Law and Conflict: Some Current Dilemmas

Hardy C. Dillard

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Jurisprudence Commons](#)

Recommended Citation

Hardy C. Dillard, *Law and Conflict: Some Current Dilemmas*, 24 Wash. & Lee L. Rev. 177 (1967).
Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol24/iss2/2>

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

Washington and Lee Law Review

Member of the National and Southern Law Review Conferences

Volume XXIV

Fall 1967

Number 2

LAW AND CONFLICT: SOME CURRENT DILEMMAS*

HARDY C. DILLARD†

Before launching into my subject, I would like to make an observation which I believe can be linked with the man in whose honor these lectures are named.

Recently I had the privilege of serving the government by acting as a member of the five-man committee charged with advising the Secretary of the Air Force concerning conditions at the Air Force Academy and the reasons for the widely publicized cheating episode of 1965. The Honor Code was presumably operative, why the breakdown?

Reflecting on my observations, I have come to see how stultifying a sense of tradition can be when uninformed by certain attributes and how significant it can be when these attributes are a felt part of the environment. This led me to reflect on the role of individuals in molding traditions and fashioning them to the higher ideals of a profession or a society.

Which brings me to John Randolph Tucker, grandson of St. George Tucker of William and Mary and son of Henry St. George Tucker who is credited with beginning the Honor System at the University of Virginia.

The Air Force Academy had no heroes. It did not even have a cemetery. It could not boast a Grant, a Lee, an Eisenhower, a MacArthur, a Nimitz or a Halsey. It could not even claim Arnold or Spaatz.

*This is the John Randolph Tucker Lecture delivered at the School of Law, Washington and Lee University, on April 22, 1967. The word "dilemma" in the title is not used in its strict logical sense but only to suggest a perplexing problem.

†Dean and James Monroe Professor of Law, University of Virginia School of Law. B.S. 1924, United States Military Academy; LL.B. 1927, University of Virginia. President, American Society of International Law 1962-63.

It is not the abstraction but the living image that fires the imagination as every poet knows. In default of personified ideals you are reduced to merely quantitative symbols of excellence. And they are not enough. They are not enough because they speak only of the ends achieved and not the way of achieving them.

Think for a moment how much poorer our judiciary would be without its Marshalls, Holmeses, Cardozos, Brandeises and Learned Hands. Think how much poorer the whole bar would be without its John W. Davises, its Newton D. Bakers, its Ross Malones and its Lewis Powells to mention only some of your graduates.

When John Randolph Tucker took the side of the Chicago anarchists in the 1880's¹ and replied to his critics, "I do not defend anarchy. I defend the Constitution,"² he was speaking the kind of language and manifesting the kind of conduct which ennoble a profession by vivifying its ideals. Ideas which appeal to our reason are, of course, important; it is when ideas are wedded to ideals and identified with a vivid person that they become the stuff of a great tradition.

It is for me a distinct privilege to be on a lecture series which began with John W. Davis, in whose office I once worked, at a University which nourished my father, and in honor of one of those who helped to create your fine tradition.

So much by way of preface.

I turn now to my subject. It is a large one, and I fear it may appear to you to be overly abstract.³

I

Law as Value Oriented

Conflict involves both facts and attitudes about facts. Facts may be conveniently divided into "first-order" facts which are the raw

¹*Spies v. Illinois*, 123 U.S. 131 (1887). The case involved a petition for a writ of error to the Supreme Court of Illinois. The writ was not allowed on the ground that the decision of the Federal question was clearly right. Mr. Tucker represented all three petitioners. The summary of his argument reproduced at 143-55 of 123 U.S. and especially his discussion of the scope of the fourteenth amendment and the argument of Benjamin F. Butler at 157-67, counsel for two of the petitioners, who were aliens, are particularly illuminating and interesting in light of contemporary problems.

²Quoted in Davis, *John Randolph Tucker, The Man and His Work*, in the JOHN RANDOLPH TUCKER LECTURES 1949-1952, 15 (1952).

³While I have modified the text to some extent for publication, I have not attempted to avoid the kind of informal diction that is appropriate in a lecture. Bearing in mind that the audience was not exclusively composed of law students and lawyers, I have included some matter that may seem elementary.

data pressing upon our five senses and "second-order" or "cultural" facts, which are the propositions believed in by men. It is hardly novel to suggest that first-order facts, filtered through the gateway of our senses, are to some extent (in a manner not clearly understood) conditioned by what goes on in our minds including the kinds of values to which we subscribe.⁴ It is a first-order fact that I am speaking in Lee Chapel at noon today; it is a second-order fact that what I may say will doubtless appeal to some, disenchant others and weary many.

Arguments over events and first-order facts lend themselves to an answer keyed to truth. That is true which "corresponds" to reality as, for instance, that I have five fingers or that yesterday the Dodgers beat the Giants or that Robert Huntley will succeed Charles Light as Dean of the Washington and Lee Law School. We can say these things are true because we have a ready method of measuring the accuracy of the assertion by reference to a conventional standard.

When we shift our focus from events and facts to attitudes and motives which are subjective, to causes which are complex, and to consequences which are not always foreseeable, a simple analysis keyed to the "correspondence theory" of truth is inadequate. This is because there is no simple yardstick by which they may be measured.

Is euthanasia or birth control good or bad? Should we permit *Lady Chatterly's Lover* to be published or not? Is Martin Luther King saint or sinner? Is the open housing section of the Civil Rights Bill to be applauded or condemned? Is our involvement in South Viet Nam morally right or wrong?

Questions of this kind are not "truth" oriented but "value" oriented. The answer is not that they are true or false but that they are good or bad. And the criteria for judging what is good or bad differ markedly from the yardsticks which measure what is true or false.

I mention this because at the very outset of any understanding of law and conflict it is important to recognize that law is value oriented. In this respect it differs from both medicine and engineering. Except in extreme cases the doctor does not bother to ask whether health is good or bad; he simply assumes it is good. And the engineer

⁴Northrop, *Contemporary Jurisprudence and International Law*, 61 YALE L.J. 623 (1952) reprinted as *The Method and Neurophysiological Basis of Physical Anthropology* in NORTHROP, *THE COMPLEXITY OF LEGAL AND ETHICAL EXPERIENCE* 102 (1959). The thrust of Professor Northrop's analysis is to show that the relationship between perceived facts and overt behavior is not adequately accounted for by mere conditioned reflexes. See also, SIR JOHN ECCLES, *THE BRAIN AND THE PERSON* (Australia—THE BOYER LECTURES) esp. at 8, § 43-45 (1965). Cf. Boulding, *THE IMAGE* 47-63 (1961).

does not question whether traffic is good or bad; he simply assumes that if you want a bridge to span a river it should be a bridge that will sustain traffic.

This difference between a value oriented and non-value oriented discipline is critically important. Medicine is concerned with the application of principles of anatomy to the human body and its ailments; engineering is concerned with the application of the principles of physics and mechanics to physical nature. Each finds a concrete focus in the human body and the land, the sea and the air. It would be naive to assume that these foci are altogether tractable, but they are surely more tractable than the objects dealt with by law.

Law's focus is, in a sense, intangible. Concerned as it is with the relationships between human beings, its function is to so order these relationships as to maximize values that are worthwhile. Because its focus is intangible and value ridden, its complexities are many.

Conspicuous among the values which law seeks to promote is "Order" both in the domestic and international arenas. The antithesis of order is "caprice"—"arbitrary" action. A society which is not animated and sustained by a sense of order is not a society at all, but a rabble. But in a democracy, "Order" is not an exclusive value. You can compel order by fiat as Hitler and Mussolini did. What we seek in a democracy is not merely order but good order, that is, order directed to a purpose. What purpose?

Many answers have been given throughout history, each located in a theory of the good life which ethical scholars and leaders have supported with reason and proclaimed with fervor. Conspicuous among recent descriptions of democracy's purpose is simply "the realization of human dignity in a commonwealth of mutual deference."⁵ Its supreme value is the promotion of the dignity and worth of the individual. Hence a democracy is a commonwealth of mutual deference where there is full opportunity to mature talent into socially creative skill free from artificially imposed and non-rational discrimination. This is the exact opposite of the ugly values symbolized by the Swastika of Nazi Germany. It is asserted to be the opposite of the values promoted by the symbol of the hammer and the sickle.⁶

⁵Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 *YALE L.J.* 203, 217 (1934) reprinted in McDougal and Associates, *STUDIES IN WORLD PUBLIC ORDER* 42, 59 (1960).

⁶WELDON, *STATES AND MORALS—A STUDY IN POLITICAL CONFLICTS* esp. at 165-75 (1947). While calling attention to the difficulties in terminology, Professor Weldon nevertheless discusses the different moral implications flowing from

If this is a valid democratic postulate, what is the function of law? The quick and easy answer is that its function is to promote these values. It is not an end in itself; it is not something to worship. Its function is to serve in such fashion as to justify its purposes.

Many people today fear that it is malfunctioning both domestically and internationally. They say its minimum function is to provide order yet look at what is happening. There were riots in Watts and surely more to come; there was open defiance by Wallace and Barnett; there is the preachment of civil disobedience by Martin Luther King. Has not respect for law diminished causing a loosening of the whole fiber of our society?

And if we turn from the domestic to the international arena, are we not beset by doubts and misgivings? Was "law" an operative factor in controlling State behavior in any of the crises of recent times?

In addressing myself to these large questions, I should, at the outset, impose a disclaimer. My purpose is not to analyze in depth the many disputes, at home and abroad, which now plague us. I propose only to lift out certain features which seem to me to be significant.

II

Civil Disobedience

Our domestic doubts and misgivings centering on "civil disobedience" are, of course, not new. Any competent historian would plead for a sense of perspective. He would remind us of the Stamp Act revolt, of Shay's Rebellion, of the Whiskey Rebellion, of the abortive revolution in New England at the time of the War of 1812; of the violent suffragette movement accompanied by many symbolic burnings of the Constitution and of numerous other instances in our brief history, including the unlamented days of Prohibition, when disobedience was deplored yet frequently vindicated by the march of subsequent events.

One way to analyze the question of civil disobedience dispassionately is to specify four basic attitudes we may have toward government and law.⁷ Let me tick them off rapidly.

an "organic" (collectivist) type state and a "mechanical" one in light of "organic," "consent" and "force" theories. His restrained conclusion calls for the need to avoid dogmatic crusading attitudes, keyed to political and moral theories.

⁷I recall reading an analysis of this kind keyed to the problem of governments-in-exile in World War II written, I believe, by Arthur Goodhart. The reference eludes me.

- (1) We may recognize the authority of government and obey the law. This is what most of us do, most of the time.
- (2) We may recognize the authority of government but disobey the law. This is what most of us do some of the time. (As for instance when we double park.)
- (3) We may refuse to recognize the authority of government yet obey the law. In this instance we obey sheerly from fear, as most Frenchmen and Belgians obeyed the Germans during the occupation. This is incipient rebellion.
- (4) We may refuse to recognize the authority of government and disobey the law. This is open rebellion. This is the shot fired on Fort Sumter.

Despite the weird fulminations of some extremists and the utter lawlessness of the Watts' type rioting, it is yet clear that our civil disturbances have not reached the point of challenging the legitimate authority of government. Activist protests against social and economic conditions entailing the destruction of property are illegal by virtue of the destruction rather than the protest and thus fall short of insurrection or rebellion. This suggests that while lawlessness is to be deplored legislation directed against it which entails a repression of protests is likely to be misdirected. The patch must be commensurate with the hole.

Which brings us to our second point. Is it ever morally justifiable to break a law and to urge that it be broken?

This question is as old as Socrates, indeed, older, as the Antigone of Sophocles reveals. While I do not have time to develop it fully I will yet venture the opinion that the answer depends on two related factors. The first is directed to the purpose of disobeying and the second to its asserted need. If its purpose is to vindicate democratic values as opposed to those of the totalitarians, then it cannot be condemned out of hand. But this is only a necessary and not a sufficient condition. There must also be a need. This means that there must be no viable alternative to defiance—as through the ballot box or through the orderly processes of law—to achieve the purpose. The evaluation of the need is empirically oriented. If Negro voting rights are indeed frustrated and there is, in fact, as opposed to theory, no legal redress, then defiance may well be justified when it would not be justified otherwise.⁸ To this last statement one qualification needs

⁸A sophisticated analysis would, of course, require a discussion of many other facets of the problem. The literature is extensive. For some recent discussions see,

to be added. The exercise of power whether in enforcing or defying law should always conform to the overriding principle of proportionality which, ever since Aristotle, has been considered a cardinal precept of justice.

Related but quite separate is the fundamental point that "protests" involving no defiance of law are a permissible form of persuasion in any society sincerely committed to democratic tenets. Although "freedom of speech" and "freedom of assembly" are neither ends in themselves nor absolutes, they are yet fundamental to the working of the democratic process, if for no other reason than that the alternative (*i.e.*, suppression) entails a denial of one of the basic values to which the society is committed. This assertion invites a corollary not always adequately appreciated. If the democratic process is rested on the assumption that freedom of expression contributes to the "rational" ordering of a good society, then protests impeding the "rational" exposition of a point of view (*i.e.*, speech) constitute a denial of one of the basic grounds for the exercise of freedom itself. Overzealous protestors either in defense or in opposition to our involvement in South Viet Nam would do well to bear this in mind. Surely "persuasion by protest" is purchased at too high a price when it obstructs or even impedes the right to speak and be heard. Such protests qualify for the wry comment that their advocates are all in favor of freedom of speech—they are only against its exercise.

III

The International Arena—Preliminary

So much for our domestic dilemmas. Permit me to turn to the international arena.

There can be little doubt that a conflict of values underlies the tensions between our Western heritage and those of our Communist adversaries. Its roots are deep. We have a dual inheritance—from Greece an instinct for freedom and from Rome an appreciation of order. We have attempted to weld the two in a democratic society, committed through flexibly designed institutions, to the principle of "ordered liberty." Our historic experience embraces the gradual

Burke Marshall, *The Protest Movement and the Law* 51 VA. L. REV. 785 (1965); Powell, *A Lawyer Looks at Civil Disobedience* 23 WASH. & LEE L. REV. 205 (1966); Frankel, *The Morality of Civil Disobedience* in THE LOVE OF ANXIETY AND OTHER ESSAYS 172 (1966); LAW AND PHILOSOPHY 3-105 (Hook, ed. 1964); Walzer, *The Obligation to Disobey*, 77 ETHICS 163 (1967); Prosch, *Toward an Ethics of Civil Disobedience*, 77 ETHICS 176 (1967). The indiscriminate lumping together of "revolutions," "protest movements," "ordinary criminality," and "civil disobedience" should, of course, be avoided.

erosion of feudalism, the rise of the Modern State System, the tempering of the industrial revolution and the hoped-for elimination of religious wars in inter-state relations.

The same experience has not been duplicated in Russia, Asia or Africa where transitions have been abrupt and the break with tradition more violent. It follows that we share no international memories which might shape our concepts, condition our attitudes and channel our rhetoric to common purposes.⁹

Thus the incidences of conflict are not over facts alone or even "interests" as that word is usually meant. To a much greater extent than in the domestic area, they are over attitudes about facts and the values attributed to the assertion of interests.

Does this mean that "law" has only limited utility in the international arena or that when invoked it is merely an empty facade masking the cruder play of power politics?

There are those who seem to think so and to say so. Or rather, to be more accurate, there are those who concede a limited utility to law in the world of foreign trade and commerce but believe it a useless and possibly even an undesirable instrument where deeper values are at stake. This, of course, is the attitude of the "real politik" school and even of such perceptive scholars as George Kennan and Hans Morgenthau.¹⁰ It is implicit also in the general attitude of Dean Acheson.¹¹

Proponents of international law are usually quick to denounce this view claiming it is shortsighted and inaccurate. Yet it reflects an attitude widely shared not only among the public but in some government circles. It is a demonstrable fact, for instance, that in the Senate hearings on our involvement in South Viet Nam allusions to "law"

⁹Cf. Brogan, *Conflicts Arising Out of Differing Governmental and Political Institutions*, in *THE CHANGING ENVIRONMENT OF INTERNATIONAL RELATIONS* 37-64 (Brookings Lectures, 1956).

¹⁰KENNAN, *AMERICAN DIPLOMACY 1900-1950*, at 95, 96 (1951); MORGENTHAU, *IN DEFENSE OF THE NATIONAL INTEREST* 101 (1951) and MORGENTHAU, *POLITICS AMONG NATIONS* 64 (1948). It should be stated that Kennan's views were somewhat modified in his *REALITIES OF AMERICAN FOREIGN POLICY* (1954). Much of the dispute centers on the ambiguities lurking in such elusive terms as "power" and "interest" to say nothing of varying views as to the meaning of "law." The matter is discussed generally in Dillard, *Some Aspects of Law and Diplomacy*, Hague Academy of Int. Law *RECUEIL DES COURS* 449-534 (1957). Viewed as a protest against a sterile manipulation of norms divorced from the realities of the international political and social structure the writings of Kennan, Morgenthau and Acheson deserve a degree of credit not sufficiently appreciated by some critics.

¹¹Acheson, *The Lawyer's Path to Peace*, 42 *VIRGINIA QUARTERLY REVIEW* 337 (1966), and see *infra* note 17.

while not altogether absent were quite minimal and even misdirected.¹² The debate has now become a heated one among legal scholars, and the Legal Adviser has, of course, fortified the position of the government by two elaborate memoranda which are themselves the focus of much of the dispute.¹³ Nevertheless, it is probably true to assert that "law" viewed either as a body of restraints or as a body of permissive doctrine appeared to be only tangentially significant.

In defense of the real politik view is the fact that while it narrows the scope of law it yet safeguards it against purely polemical uses. It thus blunts at the outset the accusation frequently made that legal arguments advanced in support of national policies are rationalizations cloaking the play of power politics. "Law" is not abused if it is irrelevant.

Nevertheless, this view is believed to be too restrictive, partly because it ignores the "order creating" or "constitutive" function of law and partly for other reasons to be suggested presently.

IV

A "Typology" of Conflict

A crude "typology" of conflict, borrowed from an analysis by Anatole Rapoport, might help to locate the role of law. Using this approach, we can detect three major types of conflict.

¹²Since the United States was already committed, it is perhaps understandable that the legal issue, viewed as a possible inhibition on the original commitment, was not a major subject of inquiry. Nevertheless, it is surprising to note that the Index to the Senate Hearings contains only one specific reference to International Law. Scattered references are, of course, made to the Geneva Accords, the Charter of the U.N. and the SEATO Treaty. Dean Rusk relied heavily on the latter treaty as an "obligation that has from the outset guided our actions in South Viet Nam." *Hearings on S.2793 Before the Senate Committee on Foreign Relations*, 89th Cong., 2nd Sess., pt. 1, at 567 (1966). The SEATO Treaty is significant, but it is not believed to be the basic legal justification for rendering military assistance to South Viet Nam.

¹³The second memorandum entitled *The Legality of U.S. Participation in the Defense of Viet Nam* (Mar. 4, 1966) is reprinted in 54 DEPT. OF STATE BULLETIN 474 (Mar. 28, 1966). The memorandum is vigorously criticized in a point by point analysis in FALK AND FRIED, *VIET NAM AND INTERNATIONAL LAW, AN ANALYSIS OF THE LEGALITY OF THE U.S. MILITARY INVOLVEMENT* (1967). This book by the Consultative Council of the Lawyers Committee on American Policy Towards Vietnam is the most thorough single treatment from the opponent's point of view. The most thorough and elaborately documented treatment in defense of the legality of U.S. involvement is McDougal, Moore and Underwood, *The Lawfulness of United States Assistance to the Republic of Viet Nam*, 112 CONG. REC. 13232-33 (daily ed., June 22, 1966) and 112 CONG. REC. 14943 (daily ed., July 16, 1966) reprinted in 5 DUQUESNE UNIV. LAW REV. 235-352 (1967). See also, exchange between Professors Alford and Falk in *Legality of United States Participation in the Defense of Viet Nam: A Symposium*, 75 YALE L.J. 1109, 1122 (1966). The symposium also includes a reprint of the Memorandum of the Legal Adviser, Department of State, at 1085.

First, there is the "fight" type, although the term might be considered extreme. The "actors" are not operating within an accepted system of ordered relations; indeed, they are struggling either to sustain or overthrow the system. At best, the environment is characterized by a feeling of instability and, at worst, by one of hostility. Labor relations in the nineteenth century might represent a mild form of this type of conflict. Wars, revolutions and insurrections furnish more dramatic examples. The object of the fight is to weaken the enemy, even to harm him. Apparently, there are many, like the late Mr. John Foster Dulles, who consider our relations with the Soviet Union and the People's Republic of China as falling in this category.

Second is the "game" or "contest" type. In striking contrast to the fight type, the object is not to defend or overthrow a system but to operate within it. Indeed, without the system the "game" could not go on. The environment is relatively stable, and the object of the contest is not to weaken or harm an opponent although it might involve outmaneuvering him. Trade and commercial dealings fall in this category. Paraphrasing a remark of Boulding's the first type would have the actors saying, "If you do something nasty to me, I will do something nasty to you," whereas in the second type they would be inclined to say, in keeping with a spirit of reciprocity, "If you do something nice to me, I will do something nice to you."

Third there is the "debate" type. Here the object is not to overturn the system or to operate within it but to establish it by altering attitudes and beliefs. As Rapoport puts it:

"The object of a debate is to change the opponent's image, not to prove his statements wrong. The opposing views in a genuine debate stem not from different notions of what the facts are, nor even from different inferences drawn from the facts. The opposing views stem largely from different criteria for *selecting what to see, what to be aware of.*"¹⁴

¹⁴RAPOPORT, FIGHTS, GAMES AND DEBATES 300 (1960). A cursory analysis of the role of law in this type of "conflict" has been eliminated from the printed version of the lecture. The matter is touched on in Dillard, *Conflict and Change: The Role of Law*, 1963 PROC., AM. SOC. INT'L L. 50, 61-67. Law in the developing nations is needed perhaps less as a device for settling specific disputes than as an ordering device to help bring about better conditions of political stability. It may be suggested that American conceptions of law are dominated too much by the "fuss fallacy"; by the image of third-party judgment and by the notion that "law" is merely the aggregate of specific "laws." An appreciation of the utility of legal "standards" as opposed to narrow "rules" is an antidote to these notions. I have attempted to deal with this aspect of the problem in Dillard, *supra* note 10 at 477-98.

Our relations with the developing nations fall under this type. There are, of course, many variants of each type and even other types, as, for instance, the kind of systems represented by a military alliance, a business partnership or a happy marriage where attitudes are based less on calculated reciprocity than on mutual cooperation toward desired ends.

Reverting to the three major types, it is too readily assumed that law plays no role in the first type which brute power is supposed to dominate; or even in the third type which is thought to be the exclusive prerogative of diplomacy. If this view is sound, the role of law in the international arena is reduced merely to regulating relations within a system. This is an important function, and there is little doubt that without law the system would not work. But is law so limited?

I think not. And it is my submission that the art of statesmanship and diplomacy can both be aided if the role of law is better understood. For clearly in our relations with our Communist adversaries it would be well if the first type of conflict were reduced to the second and if in our relations with the developing nations which, to repeat, is where the third type is located, the debate took a turn favorable to the values and institutional systems of the West.

The failure adequately to recognize the role of law in the first and third types is traceable, I believe, to intellectual confusion about the meaning of law itself.

V

Controlling vs. Affecting State Behavior

Let us take the recognition of the Communist government of China as an example.

Three views are visible. One is that the question is purely one of national discretion to be exercised as arbitrarily as the nation chooses. Under this view, law is said to be totally irrelevant. The second view is that law is relevant, and we have breached it. The third view is that law is relevant, and we have not breached it.¹⁵

¹⁵The argument that there is a "duty" to recognize the government of another state when it satisfies certain objective criteria is rested on the assumption that the failure to do so is a form of intervention, since it is an attempt to influence the form of government, economy, culture, or ideological presuppositions of another state. This is said to be contrary to the basic assumption of the International Legal Order which, ever since the Peace of Westphalia, has been rested on a concept of state sovereignty. According to this view, the role of international law is concerned exclusively with the external relations of states which by definition excludes internal matters, including in particular contending ideological or re-

The same stuttering dialogue is heard with respect to the Cuban missile crisis of 1962, the use of force in the Dominican Republic in 1965 and our current involvement in South Viet Nam.

One, though by no means the only, source of intellectual difficulty lies in the failure to distinguish between law as a body of restraints designed to constrain the bad man and law as a guide to action designed to assist the puzzled man. It is the confusion bred of failing to distinguish between a legal duty and a legal liberty or privilege.

Another source of difficulty lies in a concept which considers "law" as a mere body of autonomous rules abstracted from the institutional apparatus which not only gives it authority but meaning. I shall have more to say about this later.

Reverting to the recognition of the Communist Government of China, it is, I think, clear that although the decision to recognize or not is discretionary its exercise cannot be altogether arbitrary if, for no other reason, than that it is attended by serious legal consequences involving, among many others, title to property, the capacity to sue and the application of the Act of State Doctrine. These consequences are felt restraints on the government and affect its exercise of discretion.

Another way of putting the matter is to say that what the law fails to prohibit it permits. This is clearly seen in the domestic realm. Each of us may be free to enter a contract or not as we choose, or to vote or to strike or to play an electric guitar. This does not mean that the exercise of our freedom is unaffected by law or made in a legal vacuum.

VI

Recent International Disputes—Preliminary

Turning to Cuba, the Dominican Republic and South Viet Nam, the issue is likewise centered on whether the requirements of international law including in particular the express provisions of the Charter of the United Nations are absolute proscriptions on the choice of the military instrument or whether the language of the norms and

ligious movements. *Cuius regio eius religio*. One of the best brief statements of this position, echoes of which are heard in the Cuban, Dominican and South Vietnamese conflicts, will be found in Wright, *The Status of Communist China*, 11 JOURN. OF INT. AFF. 171 (1957). For a brief analysis of the varying criteria for recognition, see Dillard, *The United States and China: The Problem of Recognition* 44 YALE REV. 180-196 (1955). For a comprehensive bibliography including the problem of representation in the U.N., see Assn. of the Bar of the City of New York, *The International Position of Communist China*, HAMMARSKJOLD FORUM No. V, 73-113 (1965).

the expectations aroused permit an element of choice including the unilateral use of force. A subsidiary but by no means irrelevant factor is who is to say what the norms mean.

Time does not permit a detailed analysis of these disputes, each of which has unique features. Nevertheless, and at the risk of oversimplifying, I shall try to show why I believe the Charter and the requirements of international law have not been breached by our use of force, at least in the Cuban and South Vietnamese conflicts.

The critical norms are contained in Articles 2(4) and 51 of the Charter. The former states quite explicitly that members:

“... shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

Characterized as the “corner stone” of the Charter system, it is said to register the resolute will of the framers to “abolish the scourge of war.” It is asserted to be a clear, definite proscription.¹⁶

Article 51 appears, however, to qualify the prohibition. It stipulates that:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations until the Security Council has taken the measures necessary to maintain international peace and security. . . .”

In all three crises, a principal argument has centered on the term “armed attack.” It is said that this alone can trigger the invocation of the “right” of self-defense.

Here again we have the hard-boiled view that law is irrelevant and a split view among those who say it is relevant. A representative of the first view is Dean Acheson who, speaking to the Cuban crisis declared:

“In my estimation, however, the quarantine is not a legal issue or an issue of international law as these terms should be understood. Much of what is called international law is a body of

¹⁶BRIERLY, *THE LAW OF NATIONS* 414 (6th ed. 1963). Henkin, *Force, Intervention and Neutrality in Contemporary International Law*, 1963 PROCEEDING, AM. SOC. INT'L LAW 147, 148, 167; Henkin, *International Law and the Behavior of Nations*, Hague Academy of Int'l Law, RECUEIL DES COURS 175, 204 (1965). The relative weight to be given Arts. 2(4) and 51 of the Charter has been vigorously disputed. For a view opposing that of Professor Henkin, see McDougal *Remarks*, 1963 PROCEEDINGS, AM. SOC. INT'L LAW, 163-65. The problem is discussed extensively in MCDUGAL and FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* (1961); BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* (1958); STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* (1954) and in many other works.

ethical distillation, and one must take care not to confuse this distillation with law."

and again:

"I must conclude that the propriety of the Cuban quarantine is not a legal issue. The power, position and prestige of the United States had been challenged by another state; and law simply does not deal with such questions of ultimate power—power that comes close to the sources of sovereignty."¹⁷

I do not think it necessary to take this extreme position. As I indicated earlier, there is no need to assume that because law does not *control* state behavior it is therefore irrelevant. There is abundant evidence that our legal posture *affected* even if it did not control the decision-making process.¹⁸

VII

Cuba

The official U.S. position in the Cuban crisis was that our actions were legally justified under the resolutions of the OAS acting under the Rio Treaty. This resolution recommended members to take measures, including the use of armed force, to deny to Cuba the receipt of military materiel from the Sino-Soviet powers.

In light of this action, it was not thought necessary for the U.S. to rely on Article 51 of the U.N. Charter. Nevertheless, the issue has been hotly debated. Could Article 51 have been legitimately invoked?

I resist the temptation of spelling out all the technical arguments. Fundamentally, those who say "No" rely on a literalist reading of the Charter and a concept of the purposes of Article 2(4), which is almost absolute in its intended prohibition. And they narrowly limit the scope of Article 51. Self-defense, so they assert, does not embrace anticipatory self-defense nor should it. Furthermore, read the words "armed attack" as you will, they cannot be stretched to mean "arming for attack."¹⁹

I believe this restrictive interpretation, though ably and persuasive-

¹⁷Acheson, *The Cuban Quarantine—Remarks*. 1963 PROCEEDINGS, AM. SOC. INT'L LAW 13, 14.

¹⁸*Cf.* Chayes, *Law and the Quarantine of Cuba*, 41 FOR. AFF. 550 (1963). It is recognized that ambiguity lurks in the use of the term "legal issue." No doubt Mr. Acheson would concede that law is "relevant." However, it is important to note that "law" is involved even when the decision itself is not legally compelled.

¹⁹See references n.16 *supra*. See also, Windass, *The Cuban Crisis and World Order* 3 INT'L REL'S 1-15 (1966). For a comprehensive bibliography see, Ass'n of the Bar of the City of New York, *The Inter-American Security System and the Cuban Crisis*, HAMMARSKJOLD FORUM NO. III, 73-87 (1964).

ly defended, is not compelled by the Charter and reflects a concept of law that is too narrowly focused on an *ex parte* reading of the norms themselves instead of considering the norms in conjunction with what Pound calls the "legal order," that is, the norms plus the institutional apparatus available for their interpretation and enforcement. The point is oriented jurisprudentially and is concerned in part at least with the delicate problem of determining when norms should be given a precise as opposed to a more flexible meaning.

VIII

The Dominican Republic

The nature of the Dominican dispute centers on whether our dispatch of 400 Marines in 1965, later augmented to 20,000, constituted an illegal act of "intervention" in a purely civil strife. Those who, like A. A. Berle, read the "first-order" facts one way are convinced that our acts were not only politically and strategically justified but also legally permitted. Others, of whom Wolfgang Friedmann is one, disagree both with respect to the facts and the meaning of the applicable norms.²⁰

A partial inventory of the items in the conflicting interpretations of fact and law would reveal the following: On the side of justification is a reading of the facts which links the Dominican revolt with antecedent actions of both the USSR and Cuba at the time of the missile crisis in 1962; the announced policies of both governments to encourage if not prosecute "wars of liberation," including a policy by the USSR to support such wars in Latin America, including specifically the Dominican Republic; the guerrilla uprising in Venezuela in 1963; the dispatch of cadres of Dominicans for guerrilla training in both Cuba and Czechoslovakia, the existence of a plan to take over the government by these cadres and the dispatch of an appeal for help to the U.S. Government by a military junta which was the established government and which had been in substantial control of the country for two or three years.

The other side denies that the military junta was in fact the established government and considers the antecedent facts recited above to be irrelevant especially when contrasted with the acts of repression allegedly perpetrated by prior dictatorships. More specifically is the

²⁰See discussion by Professors Thomas, Berle, Friedmann and Sandifer in Assn. of Bar of the City of New York, *The Dominican Republic Crisis*, HAMMARSKJOLD FORUM No: IX 1-141 (1967). As with other publications in this useful series, a comprehensive bibliography is appended to the working paper and the discussions.

denial that the revolt was either Communist inspired or dominated. According to this view, U.S. intervention, allegedly designed to prevent a Communist take-over, merely succeeded in throttling a legitimate social revolt.

Shifting to the legal side the critical issues do not focus on the original landing of Marines to protect the lives and property of U.S. citizens but on the later buildup and its justification as an act of "self-defense." The issue, already made familiar in the Cuban crisis, was again disputed. The argument that the invocation of self-defense was not justified proceeded on the "plain meaning" of the Charter provisions coupled with the assertion that a direct invasion from a third state was needed to constitute an "armed attack."

It is frequently asserted that international law does not and should not concern itself with civil strife, by which is meant revolts and insurrections inspired and manipulated exclusively within the state. This assertion does not, however, exhaust the inquiry when an appeal for help is registered by the recognized government, a point to be discussed later. In any event the legitimacy of the response is abetted if it can be shown (by no means a simple matter) that the incipient revolt was fomented from outside and that in responding to the request the responding government acted on a good faith interpretation of the facts.

Those who support the position of the United States invoke the legislative history of the Rio Treaty and also the provisions of Article 5 of the NATO Treaty. According to this view, "indirect wars" are sufficient to constitute an armed attack and thus to justify acts of intervention under the privilege of individual and collective self-defense. In contrast, Hungary is said to furnish an example of illegal intervention by the USSR because there was no evidence that the revolt was fomented or aided by any outside source.

The countervailing argument, as already noted, is keyed to an entirely different appreciation of the facts and a narrow concept of self-defense.

There were other legal issues involved including the relative roles of the U.N. and the O.A.S. and the meaning of "enforcement action" under Art. 53 of the U.N. Charter. These need not detain us.

IX

South Viet Nam

The grave concern manifested by the American people over our involvement in South Viet Nam centers principally on its moral, stra-

tegitic and political aspects. To many thoughtful people the moral posture exhibited by a large and powerful nation bombing a small one appears at once cruel and obscene. And the mood of deep concern is heightened by public confusion over the strategic concepts animating the involvement and the political purposes to which it is directed. In this, as in other areas of dispute, the first-order facts, which include sobering statistical data, are colored by the second-order facts which, to repeat, are a product of the propositions believed in by proponents and critics of our policies.

Embraced in these propositions are certain notions about history and conflict which may be briefly noted.

According to the critics, our "globalistic" policies are stimulated by an exaggerated fear of a monolithic Communism; reveal a misguided reading of history especially the history of Southeast Asia; ignore the transcendent importance of the images believed in by men and assume an arrogance of power bordering on hubris. Basic to this view is the notion that the United States is resurrecting to its own and the world's detriment the ancient concept, with all its attendant evils, of religious wars which cut across national boundaries. It was precisely the function and purpose of the Peace of Westphalia to eliminate this kind of ideological dispute. Furthermore, international order and harmony are better promoted by allowing a free play to social revolutions—even if abetted from outside—since revolutionary movements tend to become less so once power and responsibility are achieved and once the apocalyptic fervor generated by the revolution has spent itself.

The contrary view takes more seriously the Communist threat and would allow more scope for the exercise of responsible power in arresting its spread. Basic to this view is a reading of international political history which sees that a balance of power system which maintained relative peace and security in the Nineteenth Century has now eroded. The United Nations Organization does not supply a collective security system, and there is thus a power vacuum which will be filled by aggressively minded Communist manipulators unless some form of countervailing power is provided. The requirements of a world public order based on a decent regard for human dignity make it politically and strategically imperative that this power be provided. In addition, our purposes are not geared to national aggrandizement, and our credibility is at stake in ways that transcend the issues in Viet Nam.

Putting these large matters aside and turning to "law," what is the nature of the dispute?

It is immediately apparent that some of the arguments advanced

in the Cuban and Dominican cases are paralleled in South Viet Nam. The facts, many of which are disputed, center on the nature and extent of the assistance furnished to the Viet Cong by North Viet Nam; the extent to which the National Liberation Front represents the legitimate aspirations of the people and the significance to be attached to the many antecedent facts which gave rise to the Geneva Accords of 1954, the failure to hold elections in 1956 and the implications flowing from that failure. I shall relegate to an appendix references to these conflicting views.

One feature in the South Vietnamese situation which is absent from the others, although it also bears on the issue of recognition, has to do with the international status of South Viet Nam. Those who argue that there was an act of aggression from the North claim that it is sufficient to constitute such aggression that troops and materiel moved across the cease-fire line provided under the Geneva Accords. Their argument is, however, further fortified by the allegation that South Viet Nam is, in fact, an independent state, hence the nature of the conflict is mislabelled when characterized as civil strife. The argument supporting the assertion that South Viet Nam is an independent state finds a parallel in the status of Taiwan, which, in turn, bears on the representation of the Peoples Republic of China in the United Nations. Fundamentally, the argument is that history has overtaken whatever may have been intended at the time of the separation of one component from the other, and that customary criteria are available to demonstrate the existence of an independent South Viet Nam as evidenced by the recognition policies of other governments, participation in international bodies and the establishment of governmental controls over a designated territory.

Opponents of our involvement are not impressed with this argument, claiming that the separation of Viet Nam, which was intended to be provisional, should not strip the conflict of its essentially local character as a fight for control over a single state. Sophisticated arguments, along with many that are questionable, are advanced in support of this view.²¹

My own view inclines me to side rather with those who assert our actions are legally privileged than with those who contend they are legally prohibited. This seems to me so even if we take a "literalist" as opposed to a "liberalist" interpretation of the Geneva Accords, the

²¹See *supra* note 13. See also Appendix: BIBLIOGRAPHICAL NOTE ON SOUTH VIET NAM, compiled with the assistance of Professor John Moore and Mr. Jeffrey Howard (research assistant).

SEATO Treaty and the United Nations Charter. Furthermore, it seems to be so whether we characterize the tragic conflict as civil strife or not. The chief weakness in the opposing argument is rested in what might be called, somewhat sententiously, the "fallacy of the misplaced category."

The argument that our military involvement is "illegal" is rested on the assumption that it is contaminated by its purpose, which is said to be to arrest the spread of Communism. This is alleged to be not only contrary to customary international law but also a clear violation of Article 2(4). Under this view, the invocation of Art. 51 or the SEATO Treaty (which is subordinate to the Charter) is alleged to be specious and the ungracious sequel is sometimes suggested that those who disagree are debasing "law" by allowing national bias to influence an "objective" analysis of law's clear meaning and intended reach.

Wherein lies the fallacy? It lies, I submit, in placing in the same category alleged breaches by South Vietnamese with the use of force by the North Vietnamese. Let me explain.

Let us assume *arguendo* that the National Liberation Front represents the aspirations of many people in South Viet Nam; that the Viet Cong is not merely a tool of Hanoi but the legitimate arm of the N.L.F. and that the genesis of the conflict antedates the Geneva Accords by many years. It still would not follow that our involvement was legally proscribed. Why?

The answer lies in the underlying purposes of both Article 2(4) of the U.N. Charter and the most critically important articles of the Geneva Accords which proscribed the use of force by either side.²² Even the "literalists" concede that Article 2(4) applies to Viet Nam even though not a member of the U.N. And everyone concedes that the North has invoked the Geneva Accords in its dispute with the

²²Article 1 established a "provisional military demarcation line"; article 11 provided for a "simultaneous cease-fire," and article 24 provided *inter alia* that "the armed forces of each party shall respect the demilitarized zone and the territory under the control of the other party." In fairness, it should be said that article 19 (much relied upon by critics of our involvement) provided that "no military base under the control of a foreign state may be established in the regrouping zone of either party; the two parties shall ensure that the zones assigned to them do not adhere to any military alliance and are not used for the resumption of hostilities or to further an aggressive policy." The provisions of the Geneva Accords are printed in the appendix to Falk and Fried, *VIETNAM AND INTERNATIONAL LAW: AN ANALYSIS OF THE LEGALITY OF THE U.S. MILITARY INVOLVEMENT* (1967) cited *supra* note 13 and in *Background Information Relating to South East Asia and Vietnam*, Committee on For. Rels., U.S. Senate 89th Cong. 1st Sess., 28-42 (Jan. 14, 1965).

South. The central purpose of both instruments was and remains the containment of the unilateral use of force.

Now the one big fact which emerges from the mass of other facts is that at no time did the government of Saigon mount an attack against the North or initiate any kind of aggression whether direct or indirect against the government of Hanoi. No one has contended that its use of force was other than in its own defense. Exactly the reverse is true of the use of subversion and force by the North. Despite some disagreement over the extent and timing of the infiltration, it is yet not denied that it occurred in substantial amounts prior to any substantial buildup of United States forces.²³

Which brings us to the main point. Surely it is disingenuous to assert that the failure to consult about elections in 1954-55 or even the failure to hold them in 1956 or that some other alleged breach of some other provision of the Geneva Accords can serve as an excuse for the use of force in defiance of the flat prohibitions against its use. The acts are qualitatively in entirely different categories. Neither in the domestic jurisprudence of any state nor in international law has the strange contention been advanced that a breach of a provision of a contract or a treaty, even if deemed "material," furnishes a legitimate (*i.e.*, legal) excuse for the use of aggressive force.²⁴

²³Opponents have drawn conflicting inferences from the celebrated Mansfield Report entitled *THE VIETNAM CONFLICT: THE SUBSTANCE AND THE SHADOW*. Report to the Committee on For. Rels. U.S. Senate 89th Cong. 2d Sess. (Jan. 6, 1966). The report states that as of 1962 U.S. military advisers and service forces totalled approximately 10,000 which by May of 1965 had increased to about 34,000. The report states that at this time "the American force was still basically an advisory organization" (p. 2). By December 1965 American forces had increased to 170,000 troops augmented by 21,000 troops from the Republic of Korea, 1200 men from Australia and 150 from New Zealand.

In December 1965 Viet Cong strength in South Viet Nam was 230,000, approximately double that of 1962. Of this number 73,000 were main force soldiers including regular PAVN (Peoples Army of North Viet Nam). Infiltration of political cadres and soldiers from North Viet Nam through Laos is said to have been going on for many years with estimates placed at 1500 per month.

The best estimates seem to be that prior to 1961, the United States Military Assistance Advisory Group numbered approximately 800-900. In the period from 1959-1961, North Viet Nam infiltrated an estimated 10,000 men into the South. See, McDougal, Moore and Underwood, *The Lawfulness of United States Assistance to the Republic of Viet Nam*, 5 *DUQUESNE UNIV. L. REV.* 235, 272 (1967) cited *supra* n. 13; Dept. of State, Office of the Legal Adviser, *The Legality of United States Participation in the Defense of Viet Nam*, 75 *YALE L.J.* 1085, 1098 (1966). U. S. Dept. of State, *VIET-NAM INFORMATION NOTES* 3 (Number 3, February 1967).

²⁴Perhaps the strongest justification for the use of force would be the contention (as viewed from Hanoi) that the United States intended to prevent any future unification of Viet Nam by the establishment and long-range support of a permanent state hostile to North Viet Nam. While the declared purposes of the

The attempt to classify the struggle as "civil strife," while plausible, is also weak. This is so because the "civil strife" characterization assumes that there is a power struggle for the *whole* of Viet Nam and that it is legitimate for Hanoi to aid the N.L.F. since the N.L.F. is merely a contending faction in an internal thrust for power without reference to any division between North and South. This assumption would make Hanoi the only legitimate government and Saigon a rebellious government seeking to disrupt the unit of the area. Viewed legally, it is significant, however, that the Saigon government has been recognized as a legitimate government by sixty states, has participated in numerous international bodies and has been urged for membership in the U. N. as the representative of a new state. Even the U.S.S.R. has conceded, at least conditionally, the international status of the Saigon government.²⁵ In striking contrast to this kind of official benediction is the fact that while Hanoi has also been recognized by some governments, at no time has the N.L.F. been accorded any kind of diplomatic recognition.²⁶ This latter point is significant if we consider the civil strife to be located in South Viet Nam for the exclusive control of South Viet Nam.

Rightly or wrongly, international law, fortified by state practice, does not prohibit aid to a recognized government caught in a civil

United States deny this, Hanoi might consider the denial mere window dressing. Under this geopolitical approach the U.S. is the prime enemy, and the alleged breach by Saigon of article 19 would be subordinate and relatively immaterial. However the use of force by North Viet Nam antedated any substantial use of U.S. troops. From the point of view of "containing the use of force" Hanoi's acts, therefore, do not appear to be justified even if inspired by larger geopolitical considerations.

²⁵In 1952 the General Assembly by a resolution recognized the Bao Dai government as representing a peace-loving state within the meaning of article 4 of the Charter. This resolution passed by a vote of 40 to 5 with 12 abstentions despite arguments by the Soviet Union that Ho Chi Minh's Democratic Republic of Viet Nam was the only government representing the state. 7 U.N. GAOR, Annexes, Agenda Item No. 19 at 10 (1952); 7 U.N. SCOR, 603rd meeting 9 (1952). Admission was blocked by the Soviet veto.

In 1957 when the issue was again raised the Soviet delegation did not oppose the admission on the ground that it was not a state but instead argued that *both* the Republic of Viet Nam and the Democratic Republic of Viet Nam should be admitted along with the divided States of Korea. See McDougal, Moore and Underwood *supra* note 23 at 9, 25 (1966).

²⁶According to U.S. State Department records, North Viet Nam has full diplomatic relations with 24 countries of which 12 belong to what is sometimes referred to as the Communist bloc. *Legal Status of South Viet Nam*, Office of Public Services, Bureau of Public Affairs, U.S. Dept. of State (4/316 865BT). The N.L.F. was not formally created until December 1960. Its few representatives abroad do not claim diplomatic status. Fall, *Viet-Cong—The Unseen Enemy in Viet-Nam*, in Raskin and Fall, *THE VIET NAM READER* 252, 257, 260 (1965).

strife. It does prohibit aid to non-recognized factions whether labelled guerrilla forces or not.²⁷

The civil strife argument for the North is rendered even more vulnerable if account is taken of the principle of "self-determination" also incorporated in the U.N. Charter [Art. 1(2)].

However vague the principle may be, it surely encompasses some notion of freedom to choose a representative government. If this purpose justifies civil strife, then it is difficult to see how the actions of Hanoi and the Viet Cong contribute to its fulfillment. Nor is it an answer to say that the Saigon government may itself be non-representative, or even repressive, unless the purpose of overthrowing it is to institute a regime vindicating the principle of self-determination.

A corollary of the "civil strife" argument also needs to be noted. If it is assumed (contrary to the weight of international law authority as previously shown) that third states may not assist either side *militarily*, then states committed to the principle of an open society are put at a distinct disadvantage over those in which state action is cloaked by secrecy. No doubt, all powerful governments have to some extent used clandestine means to influence weaker governments, but even after allowance is made for such behavior there is yet a difference in

²⁷This is sometimes described as the classical view and may deserve to be re-examined. Nevertheless it has a long history and is generally conceded to represent the present weight of international authority. Thus Professor Henkin declares: "It is difficult surely to find today a norm forbidding support, even active military support, for the recognized government of a country... More difficult to justify under traditional law has been military support for rebel causes against established governments." Henkin, *International Law and National Behavior*, *supra* n.16 at 232. In its Peace Through Deeds, G. A. RES. 380 (V), 5 U.N. GAOR Supp. 20, at 13 (1950) the General Assembly condemned "indirect aggression" and in 1965 by a vote of 109 to 0 with one abstention it declared:

"direct intervention, subversion, as well as all forms of indirect intervention are contrary" to United Nations principles and are, "consequently, a violation of the Charter." The Assembly therefore declared that "no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed to the violent overthrow of the regime of another State, or interfere in civil strife in another State...."

For additional treatment of the issue including both support and criticism of the classical view, see MOORE, *The Lawfulness of Military Assistance to the Republic of Viet-Nam*, 61 AM. J. INT'L L. 1, 29 (1967); A. THOMAS and A. THOMAS, JR., NON-INTERVENTION 220, 221 (1956); Falk, *The International Regulation of Internal Violence in the Developing Countries*, 1966 PROCEEDINGS, AM. SOC. INT'L LAW 58, 59; P. HIGGINS, HALL'S INTERNATIONAL LAW 347 (8th ed., 1924); H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 28-29 (2nd ed., 1966); G. SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 70 (4th ed., 1960); Wright, *International Law and Civil Strife*, 1959 PROCEEDINGS, AM. SOC. OF INT'L. LAW 145-151; Q. WRIGHT, THE ROLE OF INTERNATIONAL LAW IN THE ELIMINATION OF WAR 61 (1961); W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 265-267 (1964) and L. OPPENHEIM, INTERNATIONAL LAW 659-660 (7th ed., 1952).

kind between such acts and the kinds of subversion and acts of "liberation" represented by the Viet Cong. The difficult factual point would be to determine when civil strife was indeed indigenous and when fomented and even directed from a third state.

From this tedious dissection and my reading of the record, I come to the conclusion that South Viet Nam is in fact an independent state and that our assistance to the Saigon government was not contrary to customary international law or the United Nations Charter.

X

Law and Language

It was suggested at the beginning that since "law" is value oriented, the problem of arriving at a common understanding of our norms is rendered much more difficult than is revealed in disciplines that are truth oriented. The difficulty is intensified when the incidences which the norms attempt to cover are so episodic and disparate. The difficulty is captured in the wry remark that the algebraic formula $(a + b)^2 = a^2 + 2ab + b^2$ is true only on condition that "a" is not stronger minded than "b." The great virtue of mathematical symbols is that they ruthlessly eliminate, for purposes of their special discourse, all adventitious factors including the concrete and particular. Granted we cannot attain such sterilized precision, how close can we approximate it? And when is it desirable to do so?

The story of the three disputes which we have considered and the literature of international law generally reveal varying answers to the degree of precision which should attend the use of such terms as "armed attack," "aggression," "threat or use of force," "self-defense" and many others. Much of the dispute among scholars turns on the extent to which they believe a high degree of precision is necessary and good or unnecessary and bad.²⁸

²⁸In his scholarly and perceptive Hague Lectures of 1965 cited *supra* note 16 and in his much quoted address before the American Society of International Law, Professor Henkin argues vigorously for a literal reading of "armed attack," together with a heavy emphasis on Article 2(4) and a narrow construction of Art. 51. He does not wish to weaken the virtues of certainty (detering bad behavior) provided by norms that are "clear, unambiguous, subject to proof and not easily open to misinterpretation or fabrication." Henkin (Hague Lectures) *supra* note 16, at 266. He has the Korean image in mind and the dangers, in a Cuban type situation, of invoking Article 51. In speaking of "intervention," however, he concedes that for the present

"...it may serve little purpose to insist that Article 2(4) goes farther than many nations will tolerate. It may be better to leave its authority clear and

"A word," Holmes has reminded us, "is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstance and time in which it is used."²⁹ But if a word is not a crystal, neither is it an accordion. So the issue is not whether it is a crystal but when and under what circumstances it is permissible to treat it as one or as an accordion or, at the greatest extreme, like the "a" in the algebraic equation. At what price precision? This may be called the "crystal problem."

Linked with it is the institutional problem of determining who shall say what the words mean. In the ordinary affairs of life we have numerous devices for determining "meaning" including the use of dictionaries. In the event of a simple contest or fuss, the inert authority of words in a book may suffice as in interpreting the rules of poker or bridge. When the contest is more complex and the words are less precise a "living" authority, *i.e.*, an umpire or referee, is needed as in football or baseball. The institutional apparatus for determining the meaning of "legal" words rests ultimately in the organs of the state endowed by custom or agreement with the needed authority to decide specific issues in accordance with a developed technique for specifying issues. Despite periodic strains, this works well enough where confidence in the organs is by custom and tradition widely shared.

These seemingly obvious remarks point up the difference and the difficulty in fixing the meaning of terms in the international arena.

undisputed to cover at least cases of direct, overt aggression which is generally capable of objective and persuasive proof. The legitimate hope that it may yet become a rule against intervention by disguised force or threat of force threatening the independence of a nation may in fact be enhanced if Western Powers do not strongly insist on involving it in situations where, to many nations, independence is the inevitable victim between competing imperialisms, or, worse, where the West seems to be defending the interests which stand in the way of self-determination and independence. The battle of interventions, for the present, will have to be fought as political battles with little help from law."

Henkin, 1963 PROCEEDINGS, AM. SOC. INT'L LAW 147, 158. I do not believe it wise to give to the term "armed attack" too precise a meaning. It has not gone unnoticed that the equally official French text of Article 51 uses the term "agression armée," a much looser expression and one that eludes a precise definition. The French equivalent for "attack" is "attaque."

The term "attack" has the deceptive sound of a "terminal" word as opposed to a "process" word (to use a characterization employed by Gilbert Ryle). So construed it is like "launching" or "finding," *i.e.*, a one-shot affair, as opposed, to say, "swimming" or "searching." The proclaimed virtues for this kind of construction are, in my opinion, outweighed by the difficulties it invites. This seems to me borne out by the present crisis in the Middle East. In the South Vietnamese war the issue is not properly framed in terms of an "armed attack" but rather an accelerating movement of troops over a period of time amounting to aggression.

²⁹Towne v. Eisner, 245 U.S. 418, 425 (1917).

The authoritative bodies are the International Court of Justice and the organs of the United Nations together with regional organizations. The judgments and advisory opinions of the former and the flow of "resolutions" issuing from the latter carry an authoritative imprint that is by no means negligible.³⁰ The trouble lies in a condition, all too frequently absent, which in a developed municipal system is almost taken for granted. I refer to the recognition of legitimated authority and the joinder of authority, power and control. In the municipal arena a high level of predictability is possible, even in advance of an authoritative pronouncement, because everyone knows that the officially intoned words mean business. We can therefore speak with some assurance about the legal and the non-legal. On the other hand, when we speak of an act being "legal" or "illegal" in the international arena (*e.g.*, the Cuban quarantine), we are in a sense betting that the action so described will carry the subsequent approval or invite the disapproval of an amorphous and even protean world opinion vocalized through the official organs of the international community.³¹

If the words of the Charter are clear and unambiguous (crystals), predictions with a high degree of probability may be entertained. When they are less so, doubts arise. The opinions of scholars and the pronouncements of official partisans are, of course, important. In a sense they are exercises in ultimate persuasion. When scholars disagree, the effort should be made to reach beyond the words in order to ferret out the criteria used by them in ascribing the term "legal" or "illegal" to the disputed actions. This effort is not exhausted by merely pointing to the words of the Charter, since this assumes too readily that the words bear a commonly shared meaning, irrespective of wide divergences in the first-order facts to which they are applied and the second-order facts believed in by those to whom they are applied. As with our Constitution, the meaning of the United Nations Charter must be sought by a process which uses "experience developed by reason and reason tested by experience."³² It is not merely an

³⁰For a thorough and perceptive analysis see, Schachter, *The Relation of Law, Politics and Action in the United Nations*, 109 Hague Academy RECUEIL DES COURS 171-200 (1963). Cf. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 1-10 (1963).

³¹Cf. H. L. A. HART, *THE CONCEPT OF LAW*, esp. at 229 (1961).

³²Pound, *The Case for Law*, 1 VALPARAISO UNIV. L. REV. 201, 202 (1967) (Speech delivered in 1959.) The words of Holmes are again relevant:

"But the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be

aggregate of separate proscriptions, and the lenses through which it is read are distorted if they reflect the kind of image revealed by reading a municipal ordinance.

True in all three types of conflict to which allusion has been made, this is particularly true of the first type, where conditions of instability attended by threats and counter-threats prevail. The need is to discriminate more clearly among types of conflict with a view to determining in the context of present realities the degree of normative precision needed to help in their orderly management.³³

Just as "civil disobedience" in the domestic area is not all of one piece, neither in the international arena are insurrections, revolutions and other forms of civil strife.³⁴ And perhaps there is an increased need to encourage greater reliance on regional organizations to give authoritative meaning to the norms.

Finally, one point needs to be reemphasized. We cannot expect to clarify a stuttering dialogue unless we dig beneath the surface manifestations of disputes in search of the underlying criteria which form the basis for our legal as well as our ethical and historical judgments. By airing these criteria and putting them in the public domain, we may not only narrow the area of disagreement but expose the kind of dogmatism that confuses fact with fancy and substitutes "stereotypes for sense and rage for reason."³⁵ This is why the dialogue on Viet Nam should continue unabated even if it makes uncomfortable the wielders of power. For democracy is rested on the premise that the wielders of power are not omniscient, and it is not the decisions alone that count but the way they are reached.

gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." *Gompers v. United States*, 233 U.S. 604, 610 (1914).

³³This is only one of the many problems confronting the contemporary scholar. See, Falk, *New Approaches to the Study of International Law*, 61 AM. JOURN. INT'L LAW 477-95 (1967). Fortunately the American Society of International Law is currently sponsoring a number of studies in depth of significant subjects including both "peace keeping" and problems of "communication." For an interesting recent contribution to the problem of "intervention," see Farer, *Intervention in Civil Wars: A Modest Proposal*, 67 COLUM. L. REV. 266-279 (1967).

³⁴Secretary McNamara is quoted as saying that of the 149 serious insurgencies in the past eight years, Communists have been involved in only 58 including 7 in which a Communist regime itself was the target of the uprising. SCHLESINGER, *THE BITTER HERITAGE* 73 (1967).

³⁵*Id.* at 119.

APPENDIX

BIBLIOGRAPHICAL NOTE ON SOUTH VIET NAM

In the June 4, 1967 issue of the *New York Times* Book Review pp. 2, 26 John Mecklin, author of *MISSION IN TORMENT: AN INTIMATE ACCOUNT OF THE U.S. ROLE IN VIETNAM*, (1965), gives an overview of 25 recently published books dealing with various aspects of the war in Viet Nam. It is estimated that approximately 4,000 books and 5,000 articles have been written on Viet Nam. The bibliography which follows may provide a lead to some of the publications of special interest to the legal profession including a few mentioned by Mecklin.

I. *Historical*

Buttinger, *VIETNAM: A DRAGON EMBATTLED*, Volume I: *From Colonialism to the Vietminh*. Volume II: *Vietnam at War* (1967).

II. *Factual Background and Perspective*

- Crozier, *SOUTHEAST ASIA IN TURMOIL* (1965).
 Fall & Raskin (Eds.), *THE VIETNAM READER* (1965).
 Fall, *THE TWO VIET-NAMS: A POLITICAL AND MILITARY HISTORY* (1965).
 Fall, *VIET-NAM WITNESS* (1966).
 Fulbright, *THE ARROGANCE OF POWER* (1967).
 Gettleman (Ed.), *VIETNAM* (1965).
 Goodwin, *TRIUMPH OR TRAGEDY—REFLECTIONS ON VIETNAM* (1966).
 Honey, *COMMUNISM IN NORTH VIETNAM* (1963).
 Lacouture, *VIETNAM: BETWEEN TWO TRUCES* (1966).
 Pike, *VIETCONG* (1966).
 Salisbury, *BEHIND THE LINES—HANOI* (1967).
 Scheer, *HOW THE UNITED STATES GOT INVOLVED IN VIETNAM* (1965).
 Schlesinger, Jr., *THE BITTER HERITAGE—VIETNAM AND AMERICAN DEMOCRACY 1941-1966* (1967).
 Taylor, *RESPONSIBILITY AND RESPONSE* (1967).
 Thompson, *DEFEATING COMMUNIST INSURGENCY: THE LESSONS OF MALAYA AND VIETNAM* (1966).
 Trager, *WHY VIET NAM?* (1966).
 Warner, *THE LAST CONFUCIAN—VIETNAM, SOUTHEAST ASIA, AND THE WEST* (1964).
VIETNAM HEARINGS: (Intro. by Sen. Fulbright) (1966).
 For sharply contrasting points of view compare: Aptheke, *MISSION TO HANOI* (1966) with: du Bertier, *BACKGROUND TO BETRAYAL—THE TRAGEDY OF VIETNAM* (1965).

III. *Recent Exchange*

- Schlesinger, Jr., *A MIDDLE WAY OUT OF VIETNAM*, *N. Y. Times Magazine* 47 (Sept. 18, 1966).
 Scalapino, *WE CANNOT ACCEPT A COMMUNIST SEIZURE OF VIETNAM*, *N. Y. Times Magazine* 46 (Dec. 11, 1966).

IV. *Background Documentation*

- HEARINGS ON S. 2793 BEFORE THE SENATE COMMITTEE ON FOREIGN RELATIONS, 89th Cong. 2nd Sess., pt. 1 (1966).
Staff of Senate Comm. on Foreign Relations, 89th Cong., 1st Sess., *BACKGROUND INFORMATION RELATING TO SOUTHEAST ASIA AND VIETNAM* (Rev. ed. Comm. Print 1965).
 The Reports of the International Commission for Supervision and Control in

Viet Nam deal with violations on both sides. They are published in Great Britain as Command Papers. The most frequently cited appear to be:

- 1955: Nos. 9461, 9499, 9654
- 1956: No. 9706
- 1957: Nos. 31, 335
- 1958: No. 509
- 1959: No. 726
- 1960: No. 1040
- 1961: No. 1551
- 1962: No. 1755
- 1965: No. 2609

Reports from the SEATO Powers are embraced in the SEATO RECORD.

V. Exchange of Briefs

- Memorandum of Law of Lawyers Committee on American Policy Toward Vietnam*, reprinted in 112 CONG. REC. 2552, (daily ed. Feb. 9, 1966).
- Meeker, Legal Adviser of the Dept. of State, *The Legality of U.S. Participation in The Defense of Viet-Nam* (March 4, 1966), reprinted in 54 DEP'T STATE BULL. 474 (March 28, 1966) and 75 YALE L.J. 1085 (1966).

VI. Articles and Notes in Legal Periodicals

- Alford, *The Legality of American Military Involvement in Viet Nam: A Broader Perspective*, 75 YALE L.J. 1109 (1966).
- Deutsch, *Legality of the United States Position in Vietnam*, 52 A.B.A.J. 436 (1966).
- Falk, *International Law and the United States Role In The Viet Nam War*, 85 YALE L.J. 1122 (1966).
- Finman & Macauley, *Freedom to Dissent: The Vietnam Protests and the Words of Public Officials*, 1966 WIS. L. REV. 632.
- Wright, *Legal Aspects of the Viet-Nam Situation*, 60 AM. J. INT'L LAW 750 (1966).
- McDougal, Moore & Underwood, *The Lawfulness of United States Assistance to the Republic of Viet Nam*, 112 CONG. REC. 14943 (daily ed. July 14, 1966). Reprinted in 5 DUQUESNE UNIV. L. REV. 235-352 (1967).
- Moore, *The Lawfulness of Military Assistance to the Republic of Viet Nam*, 61 AM. J. INT'L L. 1 (1967).
- Partan, *Legal Aspects of the Vietnam Conflict*, 46 BOSTON UNIV. L. REV. 281 (1966).
- Standard, *United States Intervention in Vietnam Is Not Legal*, 52 A.B.A.J. 627 (1966).
- Note, *The Geneva Convention and the Treatment of Prisoners of War in Vietnam*, 80 HARV. L. REV. 851 (1967).
- Note, *Canada's Role in the International Commission for Supervision and Control in Vietnam*, 4 CAN. Y.B. INT'L L. 161 (1966).
- Note, *The Geneva Convention of 1949: Application in the Vietnamese Conflict*, 5 VA. J. INT'L L. 243 (1965).
- Comment, *The United States in Vietnam: A Case Study in the Law of Intervention*, 50 CALIF. L. REV. 515 (1962).

LINGUISTIC NOTE

There appears to be no single authoritative spelling. The United States Government Printing Office Style Manual (rev. ed. 1967) at 247 lists "Vietnam" with a note that the State Department and the Board of Geographic Names prefer "Viet-Nam." The Random House Dictionary of the English Language (1967) lists "Vietnam" first and "Viet Nam" second. The NBC Handbook of Pronunciation (3d ed. 1964) lists "Viet-Nam" first and "Vietnam" second.