DETROIT REVOLUTIONARY MOVEMENT RECORDS

BOX 7 OF 16

FOLDER 28

VIETNAM WAR

IS THE WAR IN VIETNAM ILLEGAL??

Today, February 6, 1967, at 10 A.M., David Mitchell will begin serving a five year prison sentence for breaking the Selective Service Act. At this very time, when the Supreme Court is to decide whether to review his case, he has been ordered by the government to surrender himself. Such a step is only taken when there is a threat to public safety, which he was never considered in the past two years when he was out on bail. Despite the fact that Mitchell's petition to the Supreme Court was filed on January 28th, his stay has been denied, and he is being rushed to jail.

What accounts for such a strange, seemingly unnecessary, certainly unprecedented persecution? Apparently, the government is so positive that the Supreme Court will not review, it has jailed Mitchell in advance as a fait accompli. This assumption serves as a pre-judgement and as further pressure on the Supreme Court to follow the lead of the lower courts in refusing to hear the issues Mitchell has raised.

Using his own future as the stake, Mitchell deliberately refused induction in order to challenge the legality of the war in Vietnam. To quote the Federal Court of Appeals, he "made no claim to be a conscientious objector, but sought to produce evidence to show the war in Vietnam was being conducted in violation of various treaties to which the U.S. was a signatory and that the Selective Service system was being operated as an adjunct of this military effort." However, on Dec. 6, 1966, this court ruled, in upholding the lower courts that "we need not consider whether the substantive issues raised by appellant can ever be appropriate for judicial determination." Though it admits that the legality of the war has not been decided, it insists that since the draft is legal, its use, no matter what the purpose, cannot be questioned. According to our legal system, however, when a law is used for illegal purposes, its use within that context must be challenged. Otherwise the draft law is transformed into a sacred taboo which serves as an automatic silencer on legitimate resistance to a war which may, someday, well be adjudged illegal.

Several years ago, Mitchell drew the parallel between our conduct in Vietnam, and that of the Nazis. He insisted that he was boundby individual responsibility to international law and morality (as established in the International Military Tribunal Charter and the resulting Nuremburg trials) not to obey a law which would require his complicity in war crimes. If the Supreme Court refuses to review the evasions of the lower courts, it will have barred for us all any legal hearing of a national stance, which far from being "irrelevant" and "frivolous" as the courts charge, is a matter of life and death. It would only prove that the much advertised democracy which we ostensibly defend in Vietnam does not exist here.

The government's cowardly haste in jailing Mitchell now before the Supreme Court has ruled, exposes its fear that he represents increasing numbers of his countrymen. Despite its hope that the case is closed, and that it is easing the path for the Court to evade its duty, our efforts may tip the scales. Even those who do not wholly agree with Mitchell should defend his right to a public airing of his views. THE NEXT TWO WEEKS ARE CRUCIAL. Write or wire the Court urging it to review. Funds are desperately needed to bring this message to others and to pursue the appeal. Make checks payable to End The Draft, c/o Salvatore, 280 Ninth Avenue, New York 10001.

(Not printed at Government expense)

United States *of* America

Congressional Record

PROCEEDINGS AND DEBATES OF THE 90th CONGRESS, FIRST SESSION

National Lawyers Guild Resolution on the Tonkin Bay Resolution

EXTENSION OF REMARKS

OF

HON. JOHN CONYERS, JR.

OF MICHIGAN

IN THE HOUSE OF REPRESENTATIVES

Friday, December 15, 1967

Mr. CONYERS. Mr. Speaker, recently the National Lawyers Guild issued a resolution which very carefully and thoroughly examined the legal questions regarding the Tonkin Bay resolution passed by Congress in August 1964.

I commend this carefully prepared resolution to my colleagues for their consideration and include it at this point in the RECORD:

THE TONKIN BAY RESOLUTION DID NOT EXTEND TO THE PRESIDENT THE AUTHORITY HE CLAIMS TO CARRY ON A FULL SCALE WAR IN VIETNAM

I. *The Tonkin Bay Resolution Implicitly and by Virtue of its Explicit Terms Requires Its Interpretation as Continuing in Effect the United States' Obligations Under the United Nations Charter, the SEATO Treaty and International Law Generally, All of Which Are Being Violated by the Current Conduct of the Vietnam War by the United States.*

The Tonkin Bay Resolution, a joint resolution of the House and Senate, was passed August 10, 1964. (78 Stats. 384) Naval P.T. boats off North Vietnam fired upon two United States destroyers in the Tonkin Bay off the shores of North Vietnam on August 2 and 4, 1964. On August 4 President Johnson addressed a message to both House and Senate asking them "to join in affirming the national determination that all such attacks will be met, and that the United States will continue in its basic policy of assisting the free nations of the area to defend their freedom." (110 Cong. Rec. 18132 and 18237.)[1]

The Tonkin Bay Resolution recited the occurrence of the attacks upon the United States destroyers, asserted that these attacks "have . . . created a serious threat to international peace," and declared that "these attacks are part of a deliberate and systematic campaign of aggression." The Resolution then resolved:

"That the Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.

"SEC. 2. The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in South East Asia. *Consonant with* the Constitution of the United States and the *Charter of the United Nations and* in accordance with its obligations under the *Southeast Asian Collective Defense Treaty*, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom." (Emphasis added.)

Any construction of the Tonkin Bay Resolution must place it in its temporal setting. At the time of the resolution the United States forces in South Vietnam were present only in an advisory capacity. There had occurred no United States participation in combat. Aside from the retaliatory raids which immediately followed the Tonkin Bay incident, the commencement of United States participation in combat and the opening of United States air assaults upon North Vietnam did not occur until February 1965, six months after the Tonkin Bay Resolution.

This is important because in the interpretation of the Resolution stated in the Senate by its chief spokesman, Senator William Fulbright,[2] the entire thrust of the Resolution was said to be directed at attacks upon United States military forces, of the type involved in the destroyer incidents which called forth the Resolution. It was stated there was intended no endorsement of any military moves changing the United States position in South Vietnam from an advisory to a combat character. The President, in requesting a Congressional resolution of policy, stated in his communication to Congress that it was the purpose of the United States to "continue its basic policy." The United States, he stated in his message, "seeks no wider war." (110 Cong. Rec. 18132) In the Senate debate on the Resolution, Senator Nelson reminded the Senate that "the mission of the United States in South Vietnam for the past 10 years . . . has been to supply a military cadre for training personnel, and advisory military personnel as well as equipment and materiel [but without combat participation]." (*Id.*, p. 18406.) He states he was "concerned about the Congress appearing [in the Resolution] to tell the executive branch and the public that we would endorse a complete change in our mission." (p. 18407.) Senator Fulbright replied, "I do not interpret the joint resolution in that way at all. It strikes me, as I understand it, that the joint resolution is quite consistent with our existing mission and our understanding of what we have been doing in South Vietnam for the last 10 years." (*Id.*) Senator Nelson then further inquired whether Senator Fulbright meant that "the language of the resolution is aimed at the problem of further aggression against our ships and our naval facilities [and not at participation by United States troops in combat acts or mission]?" Senator Fulbright replied, "I think that is the logical way to interpret the language." (*Id.* at p. 18407.)

Subsequently, to underline the clarification thus expressed, Senator Nelson requested consent of the sponsor of the Resolution to an amendment to state: "Our continuing policy is to limit our role to the provision of aid, training assistance, and military advice, and it is the sense of the Congress that, except when provoked to a greater response, we should continue to attempt to avoid a direct military involvement in the Southeast Asian conflict." Senator Fulbright

[1] The President's address to the nation appeared in the *New York* Times, August 4, 1964, and is reproduced in 110 Cong. Rec. at p. 18459.

[2] Senator Fulbright was chairman of the Senate Foreign Relations Committee, which, together with the Committee on Armed Services conducted the hearings on the Resolution, and it was Senator Fulbright who favorably reported the Resolution to the Senate with a recommendation for its passage. 110 Cong. Rec. 18133.

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stated that the proposed amendment "states fairly accurately" what he understood to be the sense of the Resolution and of the President's speech, and stated that the amendment "[as] a statement of policy . . . is unobjectionable" as an "enlargement" or clarification of the Resolution, but he could not consent to the amendment because it would delay the passage of the Resolution and immediate passage was urgently required to support the President before the world. Senator Fulbright stated that this was not only his own position but that to his knowledge "most members of the Committee" (meaning the Senate Foreign Relations Committee, which, with the Senate Committee on Armed Services, conducted the Senate Hearings on the Resolution) "with one or two exceptions, interpret [the Resolution] the same way." (p. 18459.)

Still further emphasizing the point here developed, Senator Fulbright in a subsequent observation in 1966,[3] recalled that he had stated in the debates on the Tonkin Bay resolution that he believed confining its authorization of the use of force to prevention of "further aggression against our ships and our Naval facilities" was "a logical way to interpret the language," and stating further, "The point is that I, along with most of the members of the committee, did not at that time visualize or contemplate that this [war in Vietnam] was going to take the turn that it now appears about to take" and that he, as a person who had played an important part in the passage of the Tonkin Bay Resolution, believed that it "should not be interpreted as an authorization or approval of an unlimited expansion of the war."

Thus in view of its time-setting and its language, and the comtemporaneous comments of Senator Fulbright as its primary Senate spokesman, it is altogether reasonable to read the Tonkin Bay Resolution as authorizing only United States self-defense against attacks upon United States military units, and as authorizing *no* United States change in South Vietnam from a training and advisory role to a role of combat.

The only portion of the Resolution which could be contended to constitute an authorization for the use of United States forces in combat acts is Section 2 of the Resolution. But that Section *expressly* conditions the "use of armed force" under it to acts "[c]onsonant with . . . the Charter of the United Nations." Thus assuming the Resolution intended to authorize not only retaliatory "use of armed force" but direct combat participation in the Vietnam War, the authority therefor was conditioned by the requirement that such conduct be "consonant" with the obligations of the United States under the United Nations Charter.

[3] The statement here appears in the observations of Senator Fulbright in the hearings before the Senate Committee on Foreign Relations, January 28, 1966, reported in "The Truth About Vietnam" (1966) pp. 56–57.

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The military intervention and participation by the United States in the Vietnam War violates the Charter of the United Nations.[4] The inherent right of collective self-defense provided for in Article 51 of the Charter is an exception to the basic provisions of the Charter prohibiting the use of armed force except under the aegis of the Security Council. (Articles 2 and 39.) This exception is limited to responses to "an armed attack . . . against a Member of the United Nations." (Article 51.)

At the time that the United States brought its troops into combat action in Vietnam in February 1965, there had by no definition of the term been any "armed attack" upon the territory temporarily established as South Vietnam. All that had been claimed by the State Department is that a number of North Vietnamese had infiltrated into South Vietnam and joined the fighting between the South Vietnamese. This does not constitute an armed attack and is precisely the kind of situation where any use of armed force to achieve peace is conferred by the Charter exclusively upon the Security Council.

Actually under the 1954 Geneva Pact South Vietnam was never intended to be more than a temporary administrative zone of Vietnam to exist only until the holding of nation-wide elections scheduled for 1956. The violation of this treaty by the refusal of the South Vietnamese administration with the support of the United States to permit the election to be held did not legally convert the temporary zone of South Vietnam into an independent nation. What ensued was a civil war originating in the territory of South Vietnam and spreading to include North Vietnam, the other half of the single nation. The involvement of North Vietnam was preceded and precipitated by the illegal intervention in the civil war by the United States.

Apart from both of the factors noted above a foreign nation may legally assist another nation in resistance to an armed attack only after receiving a request for such assistance from the independent government of the nation under attack. South Vietnam has never had such an independent government. The creation for the first time of a government in South Vietnam in 1954 was the product of United States intervention and its continued existence has at all times since then depended upon the continuance of that United States intervention. The request for assistance relied upon by the United States is tantamount to a request by itself.

Reliance upon the SEATO Treaty as justifying the United States intervention is misplaced. Such intervention violated that Treaty for many reasons, the most fundamental of which is that the SEATO Treaty is by its terms subordinate to the United Nations Charter.[5]

[4] We summarize this proposition only briefly for it is covered fully in "Vietnam and International Law: An Analysis of the Legality of the United States Military Involvement" (1967), published by the Lawyers Committee on American Policy Towards Vietnam, O'Hare Books, hereafter referred to as the Lawyers Committee Report.

Construction of the Tonkin Bay Resolution as not intending a nullification or repudiation of the United Nations Charter is required not only by the specific language of the Resolution but by a firm line of Supreme Court precedents holding that subsequent acts of Congress must be construed as to be consistent with the obligations of pre-existing treaties wherever such construction "is possible." (*United States v. Payne* (1924) 264 U.S. 446, 449; *Cook v. United States* (1933) 288 U.S. 102, 120; *Pigeon River Improvement Co. v. Cox* (1934) 291 U.S. 138, 160; *Whitney v. Robertson* (1888) 124 U.S. 190, 194.) A purpose in Congress to repudiate or nullify a prior treaty by a subsequent statute will not be inferred unless the treaty and the subsequent statute are "absolutely incompatible" (*Johnson v. Browne* (1907) 205 U.S. 309, 321); this because it must be presumed that the United States at all time intends to abide by all of its treaty obligations "with good faith and fairness." (*United States v. Payne, supra*, 264 U.S. 446, 448.)

A case illustrating the rule is Chew Heong v. United States (1884) 112 U.S. 536. The Chinese-United States Treaty guaranteed to then United States resident Chinese laborers a right of free departure and re-entry. A subsequent statute (the Act of May 6, 1882, as amended July 5, 1884) in terms prohibited the entry of any Chinese laborers into the United States after the date of its enactment. The issue was whether the subsequent statute nullified the terms of the prior treaty. The Supreme Court held that the statute should be interpreted as subordinate to the obligations of the prior treaty. Said the Court at page 530 et seq.:

"The court should be slow to assume that Congress intended to violate the stipulations of a Treaty, so recently made with the government of another country. 'There would no longer be any security,' says Vattel, 'no longer any commerce between mankind, if they did not think themselves obliged to keep faith with each other and to perform their promises.' Bk. 2, ch. 12. . . . 'Treaties of every kind,' says Kent, 'are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and are to be kept in the most scrupulous good faith.' 1 Kent Com., 174 . . . [The] court cannot be unmindful of the fact that the honor of the Government and the people of the United States is involved in every inquiry whether rights secured [by treaty] shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a coordinate department of the Government were it to doubt, for a moment, that these contentions were present

[5] There are many other violations of the Geneva Pact of 1954 and of basic principles of International Law which are marshalled and detailed at length in the Lawyers Committee Report, *supra*.

in the minds of its members when the legislation in question was enacted." [6]

The Court observed that the question of the construction of a statute in connection with a prior treaty is upon analysis, akin to the problems of "repeals by implication" of one statute by another, with the added factor that where treaties are concerned there is also involved a pledge of the national "good faith." Said the court on this score, at page 549:

"[E]ven in the case of statutes, whose repeal or modification involves no question of good faith with the Government or people of other countries, the rule is well settled that repeals by implication are not favored and are never admitted where the former can stand with the new Act. *Ex Parte Yerger,* 8 Wall. 105 (U.S. 339) . . . . 'If, by any reasonable construction, the two statutes can stand together, they must so stand.'" The Tonkin Bay Resolution *by its terms* declares that all and any use of force authorized by it must be limited to such as is "consonant with . . . the Charter of the United Nations." In the *Chew Heong* case the statute there involved contained a similar recital that the statute was enacted "to execute [the relevant] Treaty stipulations relating to Chinese [persons]" (112 U.S. at p. 544, fn. 1); and thus, the Court stated, "the purpose avowed in the Act was to faithfully execute the Treaty", and because of this "any interpretation of [the statute's] provisions would be rejected which imputes to Congress an intention to disregard the plighted faith of the Government and, consequently, the court ought to, if possible, adopt that construction which recognized and saved rights secured by the Treaty." (*Id.,* at p. 549.)

This clear analysis applies as well to the avowal in the Tonkin Bay Resolution that any force authorized by it must be limited to force "consonant with the Charter of the United Nations." This declaration expresses, in the Supreme Court's words in *Chew Heong,* an "avowed purpose . . . to faithfully execute [and abide by] the Treaty" and announces the "plighted faith of the Government" to such end.

The Tonkin Bay Resolution provides in its final paragraph that, "This resolution shall expire . . ." when the President shall determine and so proclaim, "except that it may be terminated earlier by concurrent resolution by the Congress." (78 Stats. p. 384.) It is argued on behalf of the administration [7] that this means the Resolution continues and is in effect renewed each day that it exists without repeal by Congress; that, there having been to date no such repeal, Congress must be considered as having each day renewed, re-enacted and reiterated its support and approval of everything done by the United States in Vietnam to that date.

This would invert law. Any statute or resolution continues until it is repealed, yet what continues is the *original* enactment, not an "imputed" or frictional "re-enactment" each day that repeal of the original does not take place. The continuation in effect of the Resolution may no more be construed to bespeak a nullification or repudiation of the Charter obligations than may be the original enactment of the Resolution.

One final circumstance remains confirming that the intention of Congress in passing the Tonkin Bay Resolution and the other, subsequent, lesser measures here concerned was *not* to repudiate any part of the United Nations Charter. This lies in the *actual practical construction* of the Resolution by the continued membership and participation of the United States in the United Nations as an organization. The Charter could not be renounced by the United States while continuing in force its full legal membership and participation in the United Nations in light of the express requirement of Article 2, Clause 2, of the Charter that "all members" must "fulfill in good faith" all of "the obligations assumed by them in accordance with the . . . Charter."

The circumstances existing at the time of the adoption of the Tonkin Bay Resolution, the intent of the Resolution is expressed by the most authoritative spokesman at the time of its passage and the specific language of the Resolution separately and collectively, establish that the Resolution has not authorized the administration to engage the armed forces of the United States in the ground war in South Vietnam or the bombing of North Vietnam.

II. *Congress Was Without Authority to Nullify or Repudiate the United States' Obligations Under the World Peace Provisions of the United States Charter and of International Law, Even Had It So Intended.*

The Supremacy Clause of the Constitution establishes treaties, equally with Acts of Congress, as "the supreme law of the land." (Art. VI, U.S. Constit.) The Supreme Court has long made it clear that the United States (at least in the absence of a controlling Federal statute) is "bound by the law of nations, which is a part of the law of the land." [8]

Absent an overriding subsequent Federal statute, the obligations under treaties and general international law are binding under United States law wherever relevant.

It is true that under the doctrine of *The Head Money Cases* (1884) 112 U.S. 580, as to "two-nation" treaties, recording merely private accords, a subsequent inconsistent Federal statute can and will nullify the obligations of a prior treaty (*The Head Money Cases, supra,* 112 U.S. 580, 597–599; *Whitney* v. *Robinson* (1888) 124 U.S. 190 193–195; *Reid* v. *Covert* (1957) 354 U.S. 1, 18; *Botiller* v. *Dominguez* (1889) 130 U.S. 238, 247; *Chae Chan Ping* v. *United States* (1889) 130 U.S. 581, 600–603; *Clark* v. *Allen* (1947) 331 U.S. 503, 509); *Moser* v. *United States* (1951) 341 U.S. 41, 45) or the requirements and duties of a prior-governing principle of international law. (*The Charming Betsy* (1804) 6 U.S. 34 (2 Cranch. 64), 118; *The Paquete Habana, supra,* 175 U.S. 677, 700; *The Nereide, supra,* 13 U.S. 242, 236.)

This principle has never been held applicable to treaties purporting to "legislate" or record *world* obligations affecting the rights and duties of all nations within the international community to the end of maintaining world peace, law and order. The central premise of the Head Money Cases doctrine grounds the Congressional power to override or nullify international obligations upon the stated proposition that "there [is nothing] in its essential character" which upon reason should give a private treaty "superior sanctity" over a subsequent, inconsistent or overriding Federal statute under the Supremacy Clause.[9]

This core premise is completely inapplicable to the entirely new and different type of world-encompassing undertakings such as the new United Nations Charter. The fundamentals of world law indispensable as a means of securing in the atomic age, global peace, order and law cannot be equated with two-nation treaties covering private accords.

To the new world-wide public-law treaties the premise of the *Head Money Cases* doctrine applies *in reverse.* As to the international obligations fundamental to world order, there *is* in the very test words of the *Head Money Cases* "something" in the "essential character" of the obligation "which gives it superior sanctity," and which by *reason,* "makes it irrepealable [and] unchangeable" by any act of unilateral, national law.

Prior to World War II it was considered debatable whether true and valid International Law could make any war a crime. The world community of nations has so emphasized the primacy of national sovereignty

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[6] The *Chew Heong* case is a leading case in this area of treaty-statute interrelationship and construction. Its reasoning and rule, as excerpted above, is quoted, endorsed and followed, in the later decision in *United States* v. *Gue Lim* (1900) 176 U.S. 459, 465, and its reasoning and the rule is cited and followed also in *Cook* v. *United States, supra,* 288 U.S. 102, 120; *United States* v. *Payne, supra,* 264 U.S. 446, 449, and *Pigeon River Improvement Co.* v. *Cox, supra,* 291 U.S. 138, 160.

[7] See, for example, the Department of State paper, "The Legality of United States Participation in the Defense of Vietnam," March 1966, 75 Y.L.J. 1085, 1102–1106, and the much larger paper, "The Lawfulness of United States Assistance to the Republic of Vietnam," May, 1966, by Professors John N. Moore, James L. Underwood and Myres S. McDougal, 112 Cong. Rec. 14943–14989 (daily edit., July 14, 1966).

[8] The Nereide (1815) 14 U.S. (9 Cranch.) 338, 423. As the Supreme Court has stated, "International law is the [a] part of our law" (the *Paquete Habana* (1900) 175 U.S. 677, 701) which [f]rom the very beginning of its history this Court has recognized and applied." (*Ex parte Quirin* (1942) 317 U.S. 1, 27.)

[9] *The Head Money Cases, supra,* 112 U.S. 580, 599. "[T]here is nothing in [a private treaty, as such] which makes it irreparable or unchangeable" as a matter of the domestic law of the United States. (*Id.*)

as to consider permissible any war undertaken by a "sovereign nation"; the international community considered itself incapable of judging, let alone condemning as "illegal" or "criminal" any such war.

However, a *great* change in the content of International Law took place in the aftermath of World War II, and particularly in the conduct of the Nuremburg Trials and the organization of the United Nations, and in that change the *dominant leadership* was that of the United States. At the firm and resolute lead of the United States the world community of nations formulated and established at least three major new fundamental principles of International Law:

1. International law *could* and *did* make "aggressive war" or "war in violation of a treaty" (including now most importantly the United Nations Charter) *criminally illegal;*

2. This law *could* and *did* apply as *world-public-law* to states and also to individuals; the affected individuals, not as an act of political retribution but under international law, could be *tried and punished* for *criminal war guilt* based upon a finding that the state had engaged in illegal war; and

3. No act, policy or command of any single nation could alter, nullify or renounce the foregoing world public-law, nor privilege any individual for the commission of any violation thereof; the said law, in short, was *supreme* over, and nullified, all contrary domestic law of any individual nation.

It was at *this country's determined and clear lead* that the world community, after World War II, in the authorization and ratification of the Nuremberg charter, trial and judgment, and in the United Nations Charter, and in and through other related public acts and documents, for the first time, *established clearly and unmistakably* the legal supremacy of *world public-law* (including *specifically* the duties against engaging in illegal war) over the internal law or policies of any single nation. It was also at this country's lead that world law condemning illegal war was *universally recognized* as an international crime not admitting of *any defense* based on contrary national politics, laws or judgment or on claims of "acts of state" or of superior military or civilian orders.

It is possible that without the leadership of the United States in the aftermath of World War II, the foregoing world public-law would not have been established. It is *certain* that with and through such United States leadership just such world law *was established,* and was fully recognized not as mere retribution or political policy, but as *law.*

In the punishment of the Nazi war leaders after victory the United States *could* well have proceeded merely to a victory's infliction of whatever punishment might be deemed fit. This would have been a *political act,* an act of *retribution* only. And, at the time, many distinguished and articulate leaders of thought in the United States, including many students of international law, advocated just such course.

Despite these voices, the United States determined resolutely upon a contrary policy—to exact from the nations and the peoples of the world express recognition, establishment and ratification of the above described basic fundamentals of new world public-law making *criminally punishable under law* any *individuals or nations* breaking the peace of the world by engaging in illegal war, and placing this law beyond the power of any act, policy, law, order or declaration of any individual nation, or officer thereof, to nullify, repudiate or alter.[10]

The United States cannot legally or honorably repudiate these doctrines of world law for which it is so significantly responsible. The world law which this nation helped proclaim is as binding upon it as it was upon those found guilty of war crimes at the conclusion of World War II. At the time of the war crimes trials, Mr. Justice Jackson, speaking for the United States, assured the world "that while this law is first applied against German aggressors, this law includes, and, if it is to serve a useful purpose, it must condemn aggression by any other nation, including those which sit here now in judgment."[11]

The participation of the United States in the war in Vietnam violates the peacekeeping provisions of the United Nations Charter. It is therefore illegal under international law. The Tonkin Bay Resolution by its terms disclaims approval of such illegality on the part of the administration. In so doing it merely confirms this nation's pledge that it will be bound by the principles of Nuremberg establishing in the area of peace and war principles of international law binding upon all nations and all mankind. The survival of civilization rests upon the honoring of this pledge by all nations, including the United States.

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[10] Upon all of the issues concerned here see: *United States et al.* v. *Goering et al.* (The Nurenberg Judgment) (Sept. 30, 1946) 6 Fed. Rules Dec. 73, 86, 106–111; Resolution 95(I) adopted unanimously by the United Nations General Assembly, December 11, 1946, approving and endorsing "the principles of international law recognized by the Charter of the Nurenberg Tribunal and the judgment of Tribunal" (Resolution 95(I), GOAR, 12, Resolution A/64/Add. 1, p. 188) Final Report to President Harry S. Truman of Mr. Justice Jackson, United States prosecutor at the Nurenberg proceedings, 15 Dept. St. Bull. 771–776, and the reply thereto of President Truman 15 Dept. St. Bull. 776; Glueck, "The Nurenberg Trial and Aggressive War," 59 Harvard L. Rev. 396–456; Schneeberger, "The Responsibility of the Individual under International Law," 35 Geo. L. J. 481–489; Woetzel, "The Nurenberg Trials in International Law" (1962) pp. 68–69, 96–97, 100–107, 156–157, 170–171; Fenwick, "International Law" (4th Edit., 1965) pp. 149–150.

[11] 1 Nazi Conspiracy and Aggression (1946) at p. 172.

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U.S. GOVERNMENT PRINTING OFFICE: 1968

THE NEW YORK TIMES, SUNDAY, JANUARY 15, 1967.

Leading American authorities on international law reply to the President...

U. S. intervention in Vietnam is *illegal*

The President, in his State of the Union Message, advanced as basic grounds for our involvement in Vietnam, our "commitment" under the SEATO Treaty, "aggression" by North Vietnam, and the Korean "precedent". These same grounds have been advanced by the Legal Adviser of the State Department in a detailed Memorandum, "The Legality of the U. S. Participation in the Defense of Vietnam", issued in March 1966—and more recently in an address to the University of Pittsburgh Law School on December 13. Ten days ago our Committee submitted to the Secretary of State a comprehensive 45,000-word Analysis prepared by its Consultative Council* demonstrating that the Administration's legal justification of U. S. involvement in Vietnam is based on misleading presentations of fact and unwarranted interpretations of law. Observance of the law would have spared the American people as well as the Vietnamese a cruel war. So that the American people may gauge the legality or illegality of our involvement in Vietnam, our Council's Analysis is summarized on this page in Points I to V—as briefly as is possible for a responsible understanding of the issues. Point III deals with the SEATO "commitment". Point I (1) deals with "aggression" by North Vietnam. Point I (5) deals with the Korean precedent. Other points deal with our commitments under the United Nations Charter, the 1954 Geneva Accords, and our own Constitution. At stake are not "legalisms".

At stake are the norms of behavior essential for world order. Therefore our government must. we plead, conduct its foreign relations in conformity with international law. WE HAVE REQUESTED THE SENATE FOREIGN RELATIONS COMMITTE TO HOLD HEARINGS ON THE LEGALITY OF U. S. INVOLVEMENT IN VIETNAM. WE URGE YOUR SUPPORT,

CONSONANT WITH INTERNATIONAL LAW, and in support of Secretary General U Thant's peace plan, we urge the United States Government to take immediately the following specific steps:

- **1. *Unconditional* termination of bombings in North Vietnam.**
- **2. Cooperate in replacing U.S. military forces with personnel of the International Control Commission which is legally responsible for supervising the execution of the 1954 Geneva Accords.**
- **3. De-escalation of military operations in South Vietnam starting with the cessation of offensive operations.**
- **4. Recognition of the National Liberation Front as possessing belligerent status, and hence negotiating status, equal to that of the Saigon regime.**
- **5. Commitment to negotiate on the basis of the 1954 Geneva accords, including the withdrawal of all foreign military forces and the elimination of all foreign bases in South and North Vietnam within a specified period of time.**

¶United States intervention in Vietnam constitutes a series of violations of the United Nations Charter and of other fundamental rules of international law governing the use of force in international relations.

¶The United States has a duty—embodied in our Constitution—to abide by general international law and by the treaty obligations it has freely and sovereignly accepted.

¶In the nuclear age, the survival of the United States and the world requires that we become again a nation "of laws and not of men," as truly in international affairs as in domestic life.

THEREFORE, WE, THE UNDERSIGNED, call upon the United States Government to cease its present conduct and to heed the counsels of restraint prudently built into international law as protection against the ever-worsening scourge of war; we call upon the United States Congress without delay to exercise its prerogatives toward these ends; and we call upon fellow Americans and men and women everywhere to support this effort to promote the cause of peace.

Point I

The Unilateral Military Intervention of the United States in Vietnam Violates the Charter of the United Nations. The Charter's Exceptional Authorization of individual and collective Self-Defense "if an Armed Attack Occurs Against a Member of the United Nations" does Not Apply In the Case of Vietnam.

The Charter of the United Nations is a treaty that specifically obligates the United States (1) to refrain from the unilateral use or threat of force in international relations (Article 2 (4)) and (2) to settle international disputes by peaceful means.

The Charter creates a very narrow exception to the broad prohibition of unilateral force. This exception (Article 51) affirms the "inherent right of individual or collective self-defense if an *armed attack* occurs against *a Member of the United Nations*. . . ."

The Department Brief seizes upon the word "inherent" to argue that prior to the adoption of the United Nations Charter, states possessed a broad right of self-defense; that this right is not diminished by Article 51. Hence, it argues, the exercise of this right of "collective self-defense" by the United States on behalf of South Vietnam is not inconsistent with the Charter.

This contention is fallacious for several reasons:

1. There Has Been No "Armed Attack" Upon South Vietnam Within the Meaning of Article 51 of the Charter.

The question crucial for world order is—What kind of grievance permits a state to act in "self-defense"?

The right of self-defense under the Charter exists only if an "armed attack" has occurred. The language of Article 51 is unequivocal. The concrete term "armed attack" was deliberately introduced into the Charter to eliminate the discretion of states to determine for themselves the scope of permissible self-defense—that is, to wage war without *prior* U.N. authorization. A claim for self-defense is permissible only "when the necessity for action is instant, overwhelming, and leaving no choice of means, and no moment for deliberation." This definition of self-defense was stated in classic form by Secretary of State Daniel Webster in the *Caroline Case*, (VII Moore's Digest of International Law, 919) and was affirmed in the Nuremberg judgment and by unanimous vote of the U.N. General Assembly at its First Session. Res. 95 (1).

The State Department Memorandum acknowledges that a *specific* form of aggression, namely, an "*armed attack*" is an essential condition precedent to the use of force in self-defense, and that a mere allegation of indirect aggression does not entitle a state to wage war by unilateral discretion. However, the Memorandum blurs the essential distinction between the broad and vague *general* concept of aggression and the narrow one of armed attack. Evidently endeavoring to justify the U.S.'s open combat actions against North Vietnam and in South Vietnam which started on February 7, 1965, the State Department merely alleges the occurrence of an armed attack by North Vietnam "before February 1965", without providing a convincing demonstration of why its allegations about the gradual infiltration of North Vietnamese guerrillas over a period of ten years in support of the Vietcong insurgency should be regarded as an armed attack.

The Department Brief quotes selectively from the reports of the International Control Commission to support its claims of subversion and infiltration over the "years." It fails, however, to acknowledge passages in the reports of the ICC that criticize the forbidden, and progressively increasing, military build-up of South Vietnam by the United States that commenced almost immediately after the Geneva Accords of 1954. It is in the context of this gradually increasing American military build-up of South Vietnam and American military presence in South Vietnam that one must assess the contention that the infiltration of 40,000 North Vietnamese between 1954 and 1965 should be viewed as an armed attack.

The Department Brief itself provides the reasoning with which to reject its charge of "armed attack" by North Vietnam. The long-smoldering conditions of unrest, subversion and infiltration in South Vietnam that it describes is an example of the very opposite of an emergency demanding immediate response "leaving no choice of means, and no moment for deliberation" and justifying a claim of self-defense. The State Department's argument, if accepted, would broaden Article 51 far beyond either its intended or desirable meaning. Whereas the Charter limits the use of force by unilateral decision to specific emergencies where there is no time to seek authorization from the Security Council, the State Department's doctrine would grant all states—and even "entities" which are not sovereign states—a dangerous and virtually unlimited discretion to decide when force shall be used. This is in clear contrast to the letter and spirit of the Charter.

The Department Brief does not even sustain its charge of indirect aggression. It indicates that prior to 1964 the "infiltrators" were South Vietnamese that had previously moved North after July 1954. Moreover, the lumping together of "40,000 armed and unarmed guerillas" is not meaningful. How can an unarmed Vietnamese who moves from one zone of his own country to another be classified as a "guerilla" and "infiltrator", contributing to "armed attack"? Above all, the implication that by 1964 the Southern insurgents had been reinforced by 40,000 guerillas from the North is altogether misleading; for this figure, even if correct, fails to deduct all those who during a whole decade died, became incapacitated, were taken prisoners, deserted, or simply withdrew from or never participated in the insurgency.

The Mansfield Report shows that before 1965 Infiltration from the North "was confined primarily to political cadres and military leadership." On the other hand it notes that by 1962, "United States military advisers and service forces in South Vietnam totaled approximately 10,000 men." The Report makes plain that significant armed personnel were introduced from the North only *after* the United States had intervened when "total collapse of the Saigon government's authority appeared imminent in the early months of 1965." It states (at p. 1):

"United States 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." The Report (p. 3) underscores that significant forces from the North followed and did not precede the direct involvement of the United States.

To summarize this crucial point—self-defense is legally permissible only in response to a particularly grave, immediate emergency—decribed in international law and the Charter as "armed attack." The kind of force allegedly employed by North Vietnam in South Vietnam cannot appropriately be regarded as an "armed attack" within the meaning of Article 51. Therefore a claim to act in self-defense is unavailable to South Vietnam; and, *a fortiori*, unavailable to the United States as an ally acting in collective self-defense.

2. The United States Failed to Fulfill its Charter Obligation to Seek a Peaceful Solution in Vietnam

The State Department also ignores the obligation under the Charter to seek *first of all* a peaceful solution by any method of the disputant's own choice, within or outside the machinery of the United Nations. This legal requirement is elaborated in Article 33 (1): **"The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall *first of all*, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."**

The United States has had many years within which to seek a peaceful solution of the Vietnam situation. Indeed, a report prepared for the American Friends Service Committee —"Peace in Vietnam"—discussing "The Negotiation Puzzle", points out that "a careful reading of the *New York Times* shows that the United States has rejected no fewer than seven efforts to negotiate an end to the war" (p. 51), citing efforts by U Thant, President de Gaulle, Hanoi and others, made long before the United States embarked upon an active combat role in February, 1965.

Ever since the mid-1950's the reports of the International Control Commission contain many complaints about South Vietnam's deliberate and systematic sabotage of the machinery created by the Geneva Accords to prevent dangerous developments. The United States has done little to dispel the belief that it has favored a "military solution" to the conflict in Vietnam.

3. The Doctrine of "Collective Self-Defense" Cannot Justify the United States Military Intervention in the Civil War in South Vietnam

If the conflict in South Vietnam is a civil war the intervention of the United States is a violation of the undertaking, fundamental in international law, that one state has no right to intervene in the internal affairs of other countries.

It seems most correct to regard the present conflict in South Vietnam as essentially a civil war among, what James Reston has described 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." (*New York Times*, April 3, 1966.)

The Charter of the United Nations is silent on the subject of civil war. It has been generally assumed, however, that a civil war is a matter essentially within the domestic jurisdiction of a state (Article 2(7)), and that therefore even the United Nations is obliged to refrain from intervening unless the civil war is identified by a competent organ of the U.N. as a threat to international peace. Certainly if the United Nations must stay aloof from civil wars, then it is even clearer that individual states are likewise obliged to refrain from interfering in civil wars. The weight of opinion among international lawyers lays stress upon a duty of non-intervention in ongoing civil wars.

Even if North Vietnam and South Vietnam are accorded the status of separate entities in international law, approximating the status of independent countries, rather than being "temporary zones" of a single country as decreed by the Geneva Accords, 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 for an outside state to respond to an intervention by another state in a civil war with a military attack on the territory of the intervening state. Neither Germany under Hitler nor Italy under Mussolini claimed that their intervention in behalf of Franco during the Spanish Civil War would have vindicated their use of military force upon the territory of the Soviet Union, a state intervening in behalf of the Loyalists. Correspondingly, the Soviet Union, intervening in behalf of Spain's legitimate government, did not claim any right to use military force against Germany or Italy. It is sobering to realize that if the United States was lawfully entitled to bomb North Vietnam in response to North Vietnam's intervention in the Southern civil war, then North Vietnam or any of its allies would have been lawfully entitled to bomb the United States in response to the United States' much more massive intervention in that civil war.

4. The "Request" of the "Government" of South Vietnam Does Not Provide a Legal Basis for "Collective Self-Defense."

The evidence shows that in many respects the present Saigon regime, just as its predecessors since 1954, is a client government of the United States. These governments seem to have been incapable of independent action, as regards either inviting American assistance or requesting modification or termination of American assistance. Furthermore, these regimes have been unable to act on behalf of their people or even to rule effectively the territory under their control.

The present government has no constitutional basis, and is incapable even of achieving stability on its own side in the face of the emergency represented by the ongoing civil war, a factor that normally postpones protest movement until the civil war is settled. The recurring protests of Buddhists, Catholics, business leaders, students, intellectuals, and other civilian groups in South Vietnam are dramatic evidence of the tenuous existence and the repressive quality of Premier Ky's regime.

If the United States were to withdraw from South Vietnam the Ky government would collapse. In what sense, then, is such a regime sufficiently constituted as a government to authorize military intervention of the United States on its own behalf? It is hardly comforting to rely upon the Soviet suppression of the Nagy uprising of 1956 in Hungary as a useful precedent to support what the United States is doing in Vietnam on a far larger and sustained scale.

5. The Korean Precedent Does Not Justify the Unilateral Intervention of the United States in Vietnam

The State Department's reliance upon the Korean precedent to sustain "the right to organize collective defense," is inadequate to establish a legal basis for the unilateral U. S. military intervention in Vietnam. General Ridgway, among others, has pointed to some of the important differences between Korea and Vietnam (*Look Magazine*, April 5, 1966, p. 82):

"In South Korea, we had a workable government . . . We acted in concert with many nations and had been *deputized by the United Nations* to repel the aggressor in its name."

In Korea, a massive invasion (armed attack) from the North had occurred, as attested to by United Nations observers; nevertheless, the United States did not claim a right of "collective self-defense" on behalf of the South but brought the case before the United Nations Security Council, and thereafter acted in the name of the United Nations.

Point II

The Military Presence of the United States in Vietnam Violates the Geneva Accords of 1954

The State Department claims that the U. S. military intervention in Vietnam is compatible with the Geneva Accords of 1954 and, in fact, is based on U. S. assurances made at the time of their signing.

The Geneva Conference dealt with the situation created by the defeat of the French in their 8-year war against the Viet Minh for control over the whole of Vietnam. After the battle at Dien Bien Phu in June 1954, the Viet Minh occupied the major part of the country north of the thirteenth parallel. However, Ho Chi Minh agreed to withdraw his forces to the north of the seventeenth parallel in exchange for two central commitments: (1) the unconditional promise that all foreign military forces in Vietnam would be removed, and (2) that within two years elections would be held under international supervision to unify the country, so that the temporary division of Vietnam into a northern and southern zone would end by July 1956.

The United States pledged on July 21, 1954 not "to disturb" the Geneva Accords. Article 6 of the Final Declaration of the Geneva Conference explicity stated that "the military demarcation line is provisional and shall not in any way be interpreted as constituting a political or territorial boundary."

It is generally acknowledged that Hanoi initially carried out the central provisions of the Accords and eschewed violence south of the seventeenth parallel bcause it expected to win the elections and did not wish to alienate those whose electoral support it sought. (See, e.g., Fourth Interim Report of the International Control Commission, Vietnam No. 3, Command Paper 9654 (1954)). Nevertheless, on July 16, 1955, the Diem regime, with United States backing, announced that it would not participate in the prescribed nation-wide elections and would not even negotiate with Hanoi, as also prescribed in the Accords, about their modalities. The fact that the Accords granted Diem a full year (July 1955-July 1956) to demand any safeguards for fair elections refutes the State Department's assertion that Diem's obstruction of the central provision of the Geneva Settlement—reunification—was justified because the elections would not have been fair in the North.

As late as September 18, 1961, the International Control Commission (ICC) insisted upon compliance with the obligation to hold elections for reunification. In a Special Report of June 2, 1962, the ICC declared that the United States "increased military aid" to South Vietnam and that the United States' "factual military alliance" wih South Vietnam violated the Geneva Agreement.

Point III

The United States Is Not Committed by the SEATO Treaty or Otherwise to Intervene in Vietnam

The State Department's claim that the United States military involvement in Vietnam is in fulfillment of its obligation under the Southeast Asia Collective Defense Treaty is untenable. The argument is a late discovery. SEATO was not mentioned in the official U.S. announcements in February 1965, when the bombing of North Vietnam commenced. In March 1965, the State Department, in a Memorandum entitled "Legal Basis for the United States Actions Against North Vietnam," did not refer to SEATO. Neither Secretary of State Rusk, in an address on Vietnam before the American Society of International Law in April 1965, nor President Johnson, in a statement on July 28, 1965 explaining "Why We Are in Vietnam," made any reference to SEATO.

In fact, the SEATO Treaty does not enlarge the legal basis for the use of force contained in the U.N. Charter. The State Department misleadingly asserts that the Treaty's Article 4 (1) creates an "*obligation* . . . to meet the common danger in the event of *armed aggression*". The term "*armed aggression*" is not contained in the Treaty. Repeating the language of the U. N. Charter, Article 4 (1), speaks of "aggression by means of *armed attack*." Since an armed attack has not occurred, SEATO does not authorize defensive action; if an armed attack *had* occurred, SEATO would be redundant, as the use of force would be permissible under Article 51 of the Charter.

In the event of an "armed attack" the United States would have had, at most, the legal *right*, but certainly not an *obligation*, to assist South Vietnam. None of the other SEATO parties regard military intervention in Vietnam as legally required by SEATO. On the contrary, two leading members of SEATO—Pakistan and France — have publicly denounced the United States' role in the Vietnam war.

Article 4 (2) of the SEATO Treaty makes clear 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." And Article 2 of the Treaty makes clear that "subversive activities directed from without" does *not* constitute "an armed attack," but call for consultation by the treaty members. *Consultation* is not unilateral military assistance. Indeed, the Treaty presupposes unanimous *agreement* among the other seven partners before any SEATO power would be authorized to offer military support. In 1964, the unanimity requirement was reinterpreted by the United States to mean that "measures" could be taken in the absence of a dissenting vote among the SEATO partners.

As regards "commitments" of former Presidents, the Department Brief fails to point out that President Eisenhower initially offered limited *economic* aid to the Diem regime if it would be "prepared to give assurances as to the standards of performance it would be able to maintain in the event such aid were supplied," and only on condition that the American "aid will be met by performance on the part of the Government of Vietnam in undertaking needed reforms." (Department of State Bulletin XXXI, November 15, 1954, pp. 735-736). President Eisenhower has stated categorically that his Administration had made no commitment to South Vietnam "in terms of military support or programs whatsoever."

President Kennedy insisted that the war in Vietnam was "their war" and promised only equipment and military advisers. His view of the United States involvement in Vietnam was summed up in the statement he made in September 1963:

"In the final analysis, it's their war. They're the ones who have to win or lose it. We can help them, we can give them equipment, we can send our men out there as advisers, but they have to win it, the people of Vietnam."

It is strange legal logic retrospectively to construe these carefully guarded offers of limited assistance as commitments for military intervention.

Point IV

The Intensity and Destructiveness of United States Warfare in Vietnam Is Contrary to International Law

The intensity, indiscriminateness, and destructiveness of United States war actions in Vietnam violate basic rules of warfare that have been part of international law at least since the formulation of the Hague Conventions in 1907.

These actions are particularly reprehensible so far as North Vietnam is concerned. It has never been denied that the United States military presence vastly exceeds that of the North in South Vietnam. Under the Geneva Accords, the United States is not entitled to introduce military personnel and equipment anywhere in Vietnam (except man-for-man and piece-for-piece replacements as of the status of July 1954) and much less to participate in active fighting in that country. Even if, as the Department Brief contends, reprisal or response to violations of the Geneva Accords by North Vietnam were justified, the United States would be entitled to disregard these Accords only in proportion to their disregard by North Vietnam.

Long before the advent of the United Nations, it was a basic rule of international law that force used in reprisal must be proportional to the illegal provocation. In the leading case of the pre-United Nations era on the subject (the *Naulilaa Incident*, involving the shelling of Portuguese forts by Germany in 1914), a German Portuguese Mixed Tribunal emphasized that reprisals "are limited by consideration of humanity and good faith"; and more generally, that, "One should certainly consider as excessive, and therefore illegal, reprisals out of all proportion with the act which motivated them." Bombing North Vietnam, as of February, 1965, in alleged reprisal for Vietcong attacks on two American airbases in South Vietnam, certainly seems to flaunt this rule of proportionality.

Point V

United States Actions In Vietnam Violate Treaties Which are Part of the Supreme Law of the Land, and Hence Violate the United States Constitution.

Since United States actions in South Vietnam and North Vietnam violate treaties to which the United States has become a party by ratification pursuant to the Constitution, they violate the Supreme Law of the Land. No branch of the Government, alone or together, may, under the Constitution, authorize actions in violation of treaties or delegate power to do so. There is no Constitutional authority to violate the Charter of the United Nations, a treaty of which the United States was a principal architect, which embodies the conscience of mankind, and which is legally binding on all its members.

The reliance of the Department Brief upon alleged past precedents as applicable to the Vietnam situation is wholly unfounded, and the assertion that, since 1789, Presidents have at least 125 times ordered "armed forces to take action or maintain positions without prior Congressional authorization" is misleading. Some of these incidents, except possibly the Korean conflict, involved U.S. war actions comparable in magnitude to those in Vietnam. None involved the dispatch of military forces for combat to a territory from which, by solemn international compact, foreign military personnel, foreign equipment, and foreign bases were to be excluded. Moreover, most of these instances were the product of "gunboat diplomacy" undertaken *before* the United Nations Charter limited the permissible use of force under international law to self-defense against an armed attack.

The Korean precedent is especially inapposite, as President Truman's actions were authorized by a Security Council Resolution and were not unilaterally undertaken as are the actions in Vietnam.

WE PETITION THE CONGRESS TO ADOPT THE COUNCIL'S 5 POINT PROGRAM AND THUS, BY ADHERING TO THE PRECEPTS OF INTERNATIONAL LAW, HELP TO BRING PEACE TO OUR COUNTRY AND TO VIETNAM.

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The signers of this statement agree with its general tenor and conclusions, although not necessarily with every formulation that it contains. Names of institutions are listed for identification only.

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