# COMMENTS ON THE LEGALITY OF US INVOLVEMENT IN VIETNAM

by Mark Jewett

In the interests of avoiding as much as possible a polemic on this issue, and yet at the same time to take a position on the war, I wish to refrain from disucssing the moral and strategic failings of the U.S. government in South-East Asia at this time. Instead, I feel that it may be worthwhile to examine the legality of the U.S. position, inasmuch as the U.S. claims its intervention to be justifiable in international law. I propose to show that it is not.

The first question I would pose is this: why does the United States attempt to justify its presence in Viet Nam by reference to its "love for, and obligations to", the South Vietnamese people, rather than the obvious reason (which incidentally has been recently reaffirmed by Clark Clifford, the new Defense Secretary), the Truman Doctrine of containing Communism and preventing the fall of dominoes? Aside from considering whether this doctrine, formulated in 1947, is still relevant in view of present geo-political realities, I submit that the answer is clear – international law does not recognize ideological differences, and intervention by a state in the internal affairs of another state, even on invitation of the government which it recognizes, whether in behalf of a Communist faction to assist its "war of liberation" or in behalf of an anti-Communist faction to "contain Communism", violates international law and the United Nations Charter. For further documentation on this point, see the American Journal of International Law, vol. 48, p. 616 (1954), and The Role of International Law in the Elimination of War, by Quincy Wright, on p. 61. Over a century ago, in his Essays on Politics and Culture, John Stuart Mill wrote (at p. 405):

> We have heard something lately about being willing to go to war for an idea. To go to war for an idea, if the war is aggressive, not defensive, is as criminal as to go to war for territory or revenue.

One trouble with fighting for an idea is that there is no way to measure how much sacrifice its defense is worth. An absolutism sets in. The image of the enemy that justifies his destruction is held secure against prudence, reason and morality. To digress for just a moment, allow me to comment on this dogmatic opposition to Communism. Viet Nam seems to me to be the prime example of a policy centered upon the assumption that it is always adverse to U.S. interests to allow a society to be identified as "Communist". To call a movement "Communist" that can also draw upon the revolutionary nationalism of a society, as both Hanoi and the Viet Cong can, is to overlook one real base of political potency. Viet Nam, unlike other Asian states, is a country where Communist leadership under Ho Chi Minh has for several decades commanded almost all of the forces of anti-colonialism and nationalism. To resist these forces is to become allied with reactionary elements in the society. Unaided, these reactionary elements would have no prospect of prevailing over a popularly-based nationalist movement, whether or not it is Communist-led. To defeat such a nationalist movement, if at all, presupposes an enormous foreign effort on behalf of the reactionary faction, an effort which the events of the past weeks have shown to be extremely taxing on even the greatest of powers. The result for South Viet Nam is, at best, a dependence that entails a new subservience to an alien Western power, an absence of selfish motives notwithstanding. Now, having violated my earlier expressed intention not to engage in polemics, let us examine some of the legal issues involved, which to my mind revolve around the answers to three questions.

(1) Are the hostilities between North and South Viet Nam international hostilities or civil strife? That is, are we dealing with two states or one? The Cease-Fire Agreement of 1954, chaired by Anthony Eden, clearly recognized Viet Nam as one state and provided that it should be united by one government in 1956 (the U.S. and Bao Dai, Ngo Dinh Diem's predecessor, dissenting).

(2) Was the requirement for an election in 1956 dependent on the development of conditions assuring that the election would be free and fair? The members of the Geneva Conference provided categorically for the holding of elections in 1956, in July, and they were well aware of the difficulties involved that might impair the freedom and fairness of the elections. That was the reason for the delay of two years, "in order to ensure that sufficient progress in the restoration of peace has been made, and that all the necessary conditions obtain for free expression of the national will." Ho Chi Minh was entitled to regard the holding of elections in July, 1956, as obligatory on the parties to the Cease-Fire Agreement, including France and its successor in Viet Nam, Diem.

(3) Was the requirement concerning elections in the resolutions of the Geneva Conference such an integral part of the Cease-Fire Agreement between France and the Democratic Republic of Viet Nam (Ho Chi Minh) as to permit suspension of the cease-fire when the elections were frustrated? The principle espoused by the U.S. in its Legal Brief on the Legality of U.S. Participation in the Defense of Vietnam, March 4, 1966, is that "a material breach of an agreement by one party entitles the other to at least withold compliance with an equivalent, corresponding or related provision until the defaulting party is prepared to honor its obligations." Could not this principle equally be invoked to permit North Viet Nam to regard the obligation to respect the cease-fire line as suspended after the provision for terminating the temporary line in 1956 was frustrated by the refusal of South Viet Nam to co-operate in carrying out the elections? Not only was the provision for elections a major factor in inducing Ho Chi Minh to accept the temporary cease-fire (he had a commanding military advantage after Dien Bien Phu), but it is expressly mentioned in the Cease-Fire Agreement in Article 14(a).

I would add one final commentary to this necessarily brief argument. The U.S. has made what is to me an utterly unconvincing appeal to principles of world order; it purports to be resisting aggression in South Viet Nam. Although such a contention is without any firm factual base, its allegation in circumstances of ambiguity allows the U.S. government to maintain its war effort without admitting its true motivation, thereby confusing its supporters and angering its opponents. As psychologist R. K. White states in his article Misperception of Agression (21 O. Int'l. Affairs 123, 125):

> There has been no aggression on either side – at least not in the sense of a cold-blooded, Hitler-like act of conquest. The analogies of Hitler's march into Prague, Stalin's takeover of Eastern Europe, and the North Korean attack on South Korea are false analogies.