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Book Reviews

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Book Reviews

The Vietnam War and International Law Volume 4: The Concluding Phase

Edited by Richard A. Falk; Princeton University Press, Princeton, New Jersey; 1976; xiv and 1051 pp., (Index), \$35.

Reviewed by ALWYN V. FREEMAN

This group of papers closes the series sponsored by the American Society of International Law on the controversial legal issues which surfaced during the war in Vietnam. The papers chosen for inclusion (most of which have been published previously) were selected by the Civil War Panel of the Society. Along with the contributions in the three earlier volumes they constitute what appears to be a comprehensive and balanced assembly of the writings of scholars, government officials and lawyers on the complex legal aspects of the conflict. Not the least of the collection's merits is, of course, that it renders accessible with a minimum of effort virtually all of the useful material bearing upon the initiation, conduct and conclusion of one of America's sorriest episodes. The war spilled a considerable amount of blood. It also was responsible for spilling more ink in a shorter period than any other major war in American history.

Volume 4, which focuses on the final stage of the American war effort in Indo-China, is divided into five major topics, with papers on (1) The Role of International Law and Organization; (2) Laws of War, including repatriation of prisoners of war presenting a stimulating exchange between Richard Falk and Howard Levie (one of the world's great authorities on prisoners of war); (3) War Crimes and Individual Responsibility (with a devastating rebuttal by Waldemar Solf of Telford Taylor's curiously uninformed attempt to equate Vietnam and Nuremberg); (4) the settlement of the war and (5) its domestic aftermath in the United States in the constitutional sphere of war-making. A

handy appendix reproduces documents containing agreements on the settlement of the war, principal judicial decisions and the legislative action in the United States on war-related issues (such as *Holtzman v. Schlesinger*, *Mottola v. Nixon*, *Orlando v. Laird* and the War Powers Resolution). Finally, a special supplement treats the resumption of hostilities by Hanoi and the defeat of the South, with the diplomatic notes and executive statements pertaining thereto, along with several papers commenting upon the finale.

Like its predecessors, the papers in Volume 4 represent a massive intellectual effort. As scholarly studies they are of an uneven quality, which might be anticipated in a work of this magnitude. Some few are transparently partisan pleadings, reflecting a slant which is not cured by a pseudo-objective scholarship. Here one can detect slightly more than a propaganda effort, cloaked in the raiment of juridical dialectic. Happily, there is more than the indispensable share of sound scientific analysis relating to the countless legal issues provoked by the war, to enable newcomers to this jousting pit to reach their own conclusions as to whether the United States effort in Vietnam was immoral, illegal and contrary to everything in this nation's history (adjectives earlier used by the French communists when France was fighting the Viet Minh); or whether it was grounded on the solid legal principles, consistent with the rationale of the Southeast Asia Treaty and inspired by this country's desire to support and defend the independence of a small State under siege by a kin neighbor but-tressed by the two leading communist powers.

Unfortunately, the volume was produced prior to the revealing memoirs of Van Dong which confirmed what many pro-Western observers had fruitlessly insisted: that the Viet Cong were not really a spontaneous, indigenous revolutionary group struggling to overthrow the Diem regime; but that, in truth they were the creation and the stooge of North Vietnam, and promptly disappeared from the stage when Saigon was defeated; that the terrorist tactics designed to destroy the fabric of village leadership in the South originated in Hanoi; that the Cong had been organized as a technique to dissimulate the nature of the conflict so as to make it look like something different from the bald aggression which the North had planned for years against the South. All of which leaves those who trumpeted that the United States was interfering in a bona fide civil war with some highly rancid egg on their faces, and possibly, just possibly, with a slight twinge of conscience at the degree to which their actions may have prolonged the conflict, multiplied its victims by the thousands and effectively contributed to the success of the enemy's war effort. Yet, is there any doubt that the misguided apologists for Hanoi would have sung a wholly different tune during that war had the enemy borne the swastika of the NSDAP instead of the hammer and sickle of the Soviet CCCP? In that hypothesis one can rest assured that the entire balance of the literature addressing problems discussed

in this series on Vietnam would have tilted in a different direction.

One of the most original contributions in the volume is Robert W. Tucker's scholarly postlude on Vietnam, *The Final Reckoning* (at p. 1011), which is no less disturbing, or perhaps the most disturbing, because the author sees the dénouement of that tragedy as a vindication of the position of all those who opposed United States intervention from the beginning:

[A]merican involvement in Vietnam represented, more than anything else, the triumph of an expansionist and imperial interest which by the 1960s had submergled the narrower and more conventional security interest the policy of containment initially expressed. Without question, the involvement in Vietnam was also a legacy of the classic cold war, of the momentum generated by the cold war . . . Vietnam was perceived as a threat to this larger interest, and it was the preservation of this larger interest—an imperial interest—that must ultimately explain Vietnam. In the purpose of maintaining a particular vision of world order, in the equation of this order with American security . . . and in the reluctance to withdraw from a conflict that could not be “won” without resort to *odious* measures, Vietnam affords a classic case of an imperial war. [Italics supplied.]

Other observers may have some difficulty accepting so neat and bland a characterization, given the realities of Soviet expansionist policies either in today's world, or in the world of Vietnam. A primary objective of that policy is the relentless exclusion of the United States and the West from strategic areas of this planet, a policy in which the USSR has been doing quite well, thank you. Now, it is not terribly naive or simplistic to regard Indo-China as representing such an area, nor the Persian Gulf, nor the Mediterranean, nor Angola, nor the critically strategic sea-lane control routes around South Africa. Of course, the United States has a choice: we can recline indolently on our diplomatic fundament and hope that the USSR trips on its face as it did in Egypt, with all the risks that entails; or we can adopt a policy to meet this gathering menace to our survival. If we have such a policy it is too dimly implemented to have any substance. High-sounding moralisms are not a policy; despite our pre-World War II antipathy toward the Soviet Union, we overlooked its tyranny, its suppression of human rights and its then muted dedication to our own destruction when we joined with it against what we perceived to be a worse tyranny. The highest respect for our own future independence may well justify a comparable alignment with certain other friendly nations whose domestic policies may be abhorrent to the American people. For us to contribute to the destruction of these nations may well be tantamount to cutting our own throats.

If these strictures have any merit, then Professor Tucker's evaluation would evidence that the worst legacy of the Vietnam war on the part of Tucker and other commentators, is that they have drawn all the wrong conclusions from that war; and this failure to draw the proper lessons may well prove fatal to the United States in the years to come. To Tucker's credit, however, part of this

has not escaped his concern:

[I]t is in the excess of Vietnam that we may find a root cause—perhaps *the* root cause—of an outlook today that promises to be as indiscriminate in its anti-interventionism as was the interventionism of only yesterday. If some of the now visible consequences of this sudden change are to be deplored, this consideration cannot alter the judgment rendered on our involvement in Vietnam.

What puzzles this reviewer is the failure of any of the writers in the collection to come to grips with what thus far has seemed to be an untouchable question, but one which should have impelled a congressional inquiry long ago: the extent to which public opinion (including that of legal writers) was molded and manipulated by the communist propaganda apparatus through the media, the universities and the churches, to a degree which gives cause for worry whether this nation could ever wage an effective war against a communist aggressor. For many of the criminal practices by our adversary which would have been—and were—condemned out of hand when indulged in by the Nazi and Fascist belligerents in World War II, were either ignored completely or quickly found accommodating sympathizers in this nation. Hanoi's military power did not defeat the United States, although Clausewitz must have turned in his grave witnessing our inane concentration upon the tentacles of the octopus. The debacle was due as much to Hanoi's brilliant leveraging against us of the diplomatic, political and informational vehicles we freely placed at its disposal, as to our own ineptness and our belated appreciation that much of our immense firepower had been directed towards the wrong targets.

It would have been most helpful, also, in this final volume, if one or more of the contributors had entered upon a comparison of our struggle in Vietnam with the Peloponnesian Wars (as recorded by Thucydides), from the standpoint of campaigns which failed because they lost the support of the people back home; and, even more to the point, the congeries of reasons—some of which have been alluded to in this review—*why* the military in Vietnam lost that support. Perhaps such an inquiry may yet be pursued. He who embarks upon it, along with all members of the profession, must remain forever grateful for the ready assistance which this monumental collection of sources offers on the disaster in Vietnam.

International Law for General Practitioners

Prepared for the State Bar of Texas Institute, State Bar of Texas Headquarters, 1977; 267 pp., \$30.

Reviewed by ALWYN V. FREEMAN

The immediate reaction of anyone who thumbs through the papers collected in the present volume must surely be, "Why hasn't this sort of thing been done before?" What the State Bar of Texas has done is to put together an indispensable *vade mecum* for the practicing lawyer of the most useful suggestions this reviewer has seen on how to go about handling the practical legal problems arising in international business operations. Most general practitioners who are confronted with a trans-national legal situation simply do not know how to begin; although possibly cognizant of the theoretical and academic parameters of an issue, they may have so loose an awareness of the true nature of a given problem that their approach may be ineffective, costly, or, worse, prejudicial to their client. Nor may it be sufficient to avoid pitfalls merely to be able to consult foreign legal talent to act on one's behalf, as this volume clearly attests.

Prompted by the growing international business in Texas, to which an increasing number of lawyers in the state were being exposed in real estate, corporations and general practice, the Texas Bar sponsored a one-day institute in international law in Houston on September 30, 1977, for which these papers were designed. The two sessions of the meeting featured lectures and discussions in the general areas of representation of corporate clients abroad, and of foreign investors in the United States. Overviews of these two fields were given by Ewell Murphy (a past chairman of the Section) and Burnell Goodrich, whose topics dealt, respectively, with (a) certain special factors to be considered in representing clients abroad (such as finding foreign law, choosing

and motivating foreign counsel and typical tax structures for foreign operations); and (b) branch and subsidiary organization in the United States, the regulation of foreign investment and import regulations. Mr. Murphy's paper offers an illuminating warning that "there is no such thing as foreign counsel," emphasizing the importance of not asking the wrong first questions either of a client or of the foreign lawyer whose services are enlisted. Mr. Michael Owen provides an excellent introduction to export sales with suggestions on the role of the lawyer, sources of information in locating export markets and customers, export financing techniques and insurance and the DISC as a tax deferred device which was in jeopardy at the time the paper was delivered.

Jon Bauman's article treats the problem of international distributorship and sales representation contracts for selling products abroad, with a practical checklist of elements which must not be overlooked; while John Lynch's "outline summary" complements this by examining the problem of licensing a client's products abroad. The inevitable and all-important topic of United States income taxation of foreign corporations and non-resident aliens, along with gift and estate taxation and tax treaties, is the subject of Duncan Osborne's paper. Structuring real estate investments in the United States for foreign clients receives a simplified, but adequate examination by Edward Hartline, from the standpoint of the tax consequences of such investments. Finally, the troublesome problem of how to bring foreign investors and foreign personnel of United States companies into the United States under both immigrant and nonimmigrant classifications, is dealt with by Charles Foster, with some practical advice for both alien and employer clients on immigration matters.

Not only the uninitiated but the experienced professional will find much to cherish in this volume, whose insights are not readily acquired in practice except after much trial and error. This reviewer's enthusiastic recommendation to those engaged in the private practice of international law is to run, not walk, to the nearest postal repository with their checks. It could be the most productive \$30 publication they ever acquired.