

Book Reviews & Notes

Vietnam And International Law. By the Lawyers Committee On American Policy Towards Vietnam, The Consultative Council, O'Hare Books: Flanders, New Jersey, 1967. Price, soft-bound, \$2.00; hard-bound, \$3.75.

The review copy arrived in our editorial offices with a letter of transmittal suggesting two reviews, one taking a "pro" stand, and the other, a "con" stand about the book. The letter also enclosed a list of persons said to be "qualified" to review the book. This review is by the editor-in-chief of *The International Lawyer*, whose name, of course, was not included among the persons deemed by the publishers to be "qualified" to review the book. There follows at pp. 176-179 a "pro" review by Robert Layton, former Secretary of the International and Comparative Law Section.

Review by Clifford J. Hynning

This reviewer's curbstone reaction to an "Analysis Of The Legality Of The U.S. Military Involvement" by an organization called the "Lawyers Committee On American Policy Towards Vietnam" was that the "analysis" was written by a committee of "lawyers." The public would think the same, presumably. However, the authorship is a collectivity described as the "Consultative Council" to the Lawyers Committee. According to the biographical details of the Consultative Council, as given on pp. 16-18, six out of eleven members of the Council do not list membership in any bar in the United States, and are presumably not actively engaged in the practice of law anywhere in the United States. Of the minority of five members of the Consultative Council who do list bar membership, no one listed membership in the American Bar Association,¹ the largest organization of lawyers in the world. (As most readers of *The International Lawyer* know, the American Bar is formally on record through its House of Delegates that it is the view of the organized bar in the United States

¹ Prof. Richard Falk has recently joined the International and Comparative Law Section of the ABA and is consequently now an exception to the above statement.

that our government's position in Vietnam is entirely in accord with international law.)

These disclosures about the "Consultative Council" puzzled the reviewer who thought he should verify the authors' credentials as practicing "lawyers." On April 19, 1967, he wrote the Lawyers Committee at its address at 38 Park Row, New York, New York, inquiring whether the above information was correct. Having received no reply by May 4, the reviewer wrote a second letter to which again there was no reply.

Before turning from the *ad hominem* to the substance of the book and its arguments, the reviewer readily concedes that it does not make too much difference whether an argument against the Vietnam war legality is made by a group of lawyers or a group of professors of international relations. If they are essentially professors and researchers of international relations, however, should they style themselves "lawyers"—unless their public-relations sense told them that lawyers would seem to know more about legality than professors?

The opening chapter states (p. 19) that "The Unprecedented Character of The United States Involvement in Vietnam Requires The Most Rigorous Legal Analysis." The reviewer would not challenge this conclusion; he does challenge the scholarly manner of the analysis displayed in the work. Chapter II on "Basic Facts About Vietnam" (p. 21) is remarkable for what it omits. For example: (1) It states nothing about the Potsdam Conference in 1945 where the Allies had agreed that upon the surrender of the Japanese forces in what was formerly known as French Indo-China the liberated area would be placed under separate British and Chinese commands south and north of the 16th parallel, respectively. The Chinese allowed the guerilla forces under Ho Chi Minh to become entrenched in the northern area, while the British encouraged the return of French colonial government in the south. Thus a line of partition between north and south in Vietnam was drawn at the very beginning of the postwar period by unanimous decision of the Great Allies. But these facts of allied policy are not convenient to the civil-war argument (*infra.*, p. 175), which predicates essentially a single state of Vietnam, and were thus ignored by the "Lawyers Committee." (2) The book refers (p. 21) to a 1946 convention between a French commissioner and Ho Chi Minh, but ignores the Elysee and Pou agreements of 1949 and 1950 of the French Government which established the independence of Vietnam within the French Union. The difficulty for

the "Lawyers Committee" may have been that these agreements were not with Ho Chi Minh but with His Majesty Bao Dai. (3) This chapter wholly ignores the 1952, 1954, and 1958 debates and votes in the Security Council of the U.N. on the admission of Vietnam. Again the difficulty for the "Lawyers Committee" may have been that these resolutions referred to the Saigon Government and not to Hanoi. (4) The summary description of the Geneva Accords (p. 22) does not even refer to the cease-fire line, the one provision on which all States were agreed, including the U.S. and Saigon, as well as Hanoi. But then that cease-fire line is inconvenient to the subsequent argument of the book. The solution by the "Lawyers Committee" in Chapter II is to omit basic facts which are inconvenient to its argument. Is that "rigorous legal analysis," or even scholarly?

The remainder of the book is devoted to approximately nine arguments against the legality of the Vietnam war. These arguments are summarized in the following statements and chapter headings: The Military Intervention by the United States in Vietnam Violates the Charter of the United Nations; The Military Intervention by the United States in Vietnam Violates the Geneva Accords of 1954; The United States Started Its War Actions Against North Vietnam as a "Reprisal"; this reprisal was unlawful; even if the United States were lawfully participating in the collective self-defense of South Vietnam, certain of its methods of warfare would nevertheless be unlawful; foreign military intervention in a civil war is illegal under international law; the SEATO Treaty of 1954 does not "commit" the United States to take military action in Vietnam; the United States has not fulfilled its obligations toward the United Nations; the Security Council has not tacitly approved the military course of the United States in Vietnam; the United States failed to seek a peaceful solution, as prescribed by the Charter of the United Nations; Presidents Eisenhower and Kennedy did not "commit" the United States to war action in Vietnam; to the extent that the war actions by the United States violate international treaties, they also violate the United States Constitution.

In the space available in this review, it is not possible to examine in detail the validity of the various arguments of the alleged illegality of the U.S. position on the war in Vietnam. This is a matter that has already been discussed at some length in the pages of the *American Bar Journal* last year, and no purpose would be served by restating those arguments, pro and con. However, the reviewer has at hand

further examples of the kind of "rigorous analysis" the book displays in developing the argument. In Chapter III the book argues (p. 26) that the "existence of an 'armed attack' is not established." If anything was agreed at the Geneva Accords of 1954, it was the establishment of a cease-fire line by agreement between the commander-in-chief of the French Union Forces in Indo-China and the commander-in-chief of the Peoples Army of Vietnam. Both the United States and the State of Vietnam (represented by the Saigon Government) undertook "not to use force to resist procedures carrying the cease-fire into effect." There can be no doubt that a breach of an internationally demarcated cease-fire line constitutes a violation of international law. In a report dated June 2, 1962, the International Commission for Supervision and Control found that in 1961 armed and unarmed personnel, arms, ammunitions, and other supplies have been sent from the zone in the North to the zone in the South "with the object of supporting, organizing, and carrying out hostile activities, including armed attacks, directed against the armed forces and administration of the zone in the South" (Report, p. 7). The ICC has also held that "the PAVN [People's Army of Vietnam] has allowed the zone in the North to be used for inciting, encouraging, and supporting hostile activities in the zone in the South, aimed at the overthrow of the administration in the South." Both of these findings by the ICC are stated to be "in violation" of the Geneva Accords. They are inferentially admitted in the book, but are brushed aside as losing their significance in the "context of this gradually increasing military build-up of the United States" (p. 28). The same ICC report also found violations of the Geneva Accords in the receipt by South Vietnam of "increased military aid from the United States of America in the absence of any established credit in its favor" and in "a factual military alliance" between South Vietnam and the United States (p. 10). Yet the uncontrovertible fact remains that the military forces of Hanoi have consistently crossed the internationally established cease-fire line, and thereby engaged in what can only be described as an "armed attack" on South Vietnam. Leonard C. Meeker, Legal Adviser to the Department of State, gave in an address to the University of Pittsburgh Law School on December 13, 1966, the following summary:

The North Vietnamese regime began to infiltrate these ethnic southerners into South Viet-Nam as early as 1957. Up to the concluding months of 1964, approximately 40,000 infiltra-

tors moved south, to join the guerrillas already there who had been supported with arms and supplies by Hanoi since 1956. Once in South Viet-Nam, the infiltrators were assigned to existing combat units, or used to form new units, frequently in their original home provinces. All of this activity—the training, the equipping, the transporting, the assigning—was directed from Hanoi. It did not just happen within South Viet-Nam.

As the infiltration from the North continued, Hanoi began to exhaust its supply of ethnic southerners who could be sent into the South for guerrilla warfare. Beginning in late 1964, the infiltrating units consisted essentially of North Vietnamese soldiers organized in regular army units. Upward of 80,000 of these troops have infiltrated from the North during the last two years. The northerners have frequently entered in large units, rather than in small groups, and have retained their military organization. After allowing for casualties from all causes, it is estimated that there are today about 45,000 North Vietnamese army regulars in South Viet-Nam.¹

In arguing that the military intervention “violates the Geneva Accords of 1954,” the book makes the most popular argument of the Vietnam war debate, alleging that the refusal of the Saigon authorities to permit elections to be held in 1956 justified military action across the cease-fire line by the authorities in Hanoi. The authors seem unaware of the relevancy of Article II of the U.N. Charter, which prohibits the use of force to correct a political violation of an international agreement.²

The argument that the war in Vietnam “is a civil war” (black-letter heading of Chapter VII of the book) sounds rather Aesopian. Presumably, one would have expected to find in that chapter a categorical statement (other than the black title) that this conflict is indeed “a civil war” and the categories of fact leading to that legal characterization. A careful reading of that chapter, however, again illustrates the kind of “rigorous analysis” that the book displays in this regard. It alleges that the “position of the United States is based entirely on the contention that the warfare in South Vietnam

¹ LVI Dept State *Bulletin* No. 1437 (January 9, 1967), 56-57.

² Paragraphs 3 and 4 of that article read as follows:

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
4. All 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.”

is not a civil war, but consists of resistance against external aggression ('armed attack from the North') (p. 63); the fighters against the Saigon government are referred to as insurgents and the Hanoi authorities as their "Northern fellow-countrymen"; the book asserts that "to contend that the conflict in Vietnam is not a civil war contradicts the factual circumstances of the South Vietnamese tragedy ever since 1954"; the book refers to repressive measures taken by the Saigon authorities as justifying rebellion by "many domestic groups" and "anti-government demonstrations"; and the book argues that a stress on the "urgent need for basic social reform" is an acknowledgement that "the war is essentially a revolt against economic, domestic conditions." This is the total "evidence" cited to sustain the civil war chapter heading.

But does any of this make conflict between two *de facto* states across an international cease-fire line a civil war? Whatever the origins of the conflict in Vietnam may have been in the late 1940's or the early 1950's, plainly after the Geneva Accords set up an internationally demarcated cease-fire subject to inspection by an International Control Commission, any substantial crossing of that line by military forces of the North for deployment against the military forces of the South, whether in aid of local rebellion or not, was taking on the form of an international conflict, in the traditional sense of international law, between governmental authorities and military forces, each having a measure of recognition by the international community of states. To characterize such a conflict as a "civil war" is hardly a contribution to legal scholarship or the realistic use of language. It also derogates from the force of international law which requires respect of its principles by divided states, however temporary or permanent that division may be, whether in Vietnam, Korea, or Germany. But the authors say only (pp. 84-85) that "the United States has abandoned the standards and procedures of international law to such an extent as to imply that 'international law is irrelevant in the Vietnam case.'" The reader can judge for himself.

Review by Robert Layton

Vietnam and International Law is a detailed and improved version in book form of the original memorandum "American Policy Vis-à-Vis Vietnam" which touched off an enormous debate throughout the United States as to whether our military activities in South Vietnam violated international law. The book is a fully footnoted, docu-

mented answer to the March 4, 1966 State Department Memorandum entitled "The Legality of United States Participation in the Defense of Vietnam," and represents the legal analysis of the Consultative Council of the Lawyers Committee On American Policy Towards Vietnam, the group of American lawyers who in 1965 issued the first challenge to the validity under international and constitutional law of United States action in Vietnam.

It is to the great credit of this group of private citizens and legal scholars that they devoted themselves selflessly to a project unpopular among the majority of their brethren and highly unwelcomed by makers of American foreign policy. Their original memorandum produced an almost unending dialogue in legal, academic, and political circles as to whether the United States, a founder of the United Nations, was itself violating established tenets of international law by its increasing military activities in Southeast Asia. In reaction, bar associations hastily enacted resolutions in support of the administration, learned professors of international law joined together in preparing responses to the arguments of the memorandum, Senators inserted memoranda of reply and counter-reply into the Congressional record,¹ legal journals were deluged with articles on the subject, and the Department of State was stirred to preparation of its second² and more elaborate brief in support of the administration case.

The purpose of this book and the work of the Lawyers Committee, as expressed in the foreword written by Professor Richard A. Falk, is "to avoid future Vietnams" by calling the attention of administration policy makers to the restraints imposed on their decision-making by international law, rather than to its use as *post hoc* justification for controversial conduct when such conduct is challenged. In this respect its purpose has been largely realized. The Administration has not been able to ignore the challenge and has justified its actions in the legal terms of citations to treaty, article, and precedent. The desirability of the result is, however, questionable.

The Department of State came forward with an adversary document which proved too much, committed us to specious arguments such as reliance on the SEATO treaty, and rested heavily on sharply controverted issues of fact. This kind of justification could prove embarrassing in future situations where someone else's ox is being

¹ *E.g.*, 112 Cong. Rec. 5274, 3694, 11174, 1975.

² The first memorandum is reprinted in Staff of Sen. Comm. on Foreign Relations, 89th Cong., 2d Sess., Comm. Print., 2d Rev. Ed. 1966.

gored. Clearly, the private sector could have been counted upon to do the job, without tying down the government where it may later wish to have been silent, and to do it better. This has been the case, for plainly the lengthy paper³ prepared by Professors Moore, McDougal, and Underwood is the best legal document offered in support of the position taken by the government and in response to the arguments of the Lawyers Committee. Unfortunately, none of the analyses thus far prepared comes close to being an impartial consideration of the legal issues. Where facts are so vigorously in dispute and the subject so entwined with emotion generated by feelings of patriotism and the frustrations of conducting foreign policy in a world order ungoverned by legal considerations, it is highly questionable whether any impartial legal "opinion" can be written, or indeed, whether it would serve any useful purpose.

Vietnam and International Law is a well-documented but clearly adversary book. Fortunately, it appears to abandon the specious argument put forward in the original Lawyers Committee memorandum of law⁴ that in order to act in collective self-defense under Article 51, states must be members of regional systems and that such use of force is illegal unless previously authorized by the Security Council under Article 53. That analysis is untenable. Under the Charter collective self-defense is a matter separate from regional enforcement action. Limitations on regional enforcement action do not apply to properly invoked measures of collective self-defense simply because states undertaking such measures happen also to be parties to a regional treaty organization. This argument did much to weaken the impact of the original Lawyers Committee memorandum. Additionally, the argument in the present volume that "only Members of the United Nations may invoke the right of collective self-defense (pp. 36-37) is of doubtful validity. To maintain this position is to disregard the international practice of both major power blocs since adoption of the Charter in 1945 (NATO and the Warsaw Treaty of 1955) and the expectations of the vast majority of the world community. It would leave many areas of the globe not technically qualified for UN membership prey to subversion or even sudden and successful armed attack.

³ Unpublished monograph, May 1966, widely circulated to members of the Bar and Congress; see shortened version published at Moore, "The Lawfulness of United States Assistance to the Republic of Viet-Nam," 61 *Am. J. Intl. L.*, 1 (1967).

⁴ See 112 Cong. Rec. 2552 at 2557.

On the other hand, many of the arguments put forward by this book are unanswerable if one assumes the United States even considered them prior to its substantial military escalation. No careful analysis of the SEATO Treaty to date supports the view that the United States has any legal obligation or "commitment" to respond by armed force to alleged Communist armed attacks. Indeed, comparison of Article (IV)(1) of the Treaty with Article 5 of the NATO Treaty indicates that automatic military response was rejected as a principle of SEATO. The absence of the argument from the earlier State Department memorandum and the 1964 Senate Foreign Relations Committee testimony of Secretary Rusk⁵ evidence that the SEATO citation was a belated and ill-considered addendum, which has weakened the Government argument in the eyes of many international lawyers.

The point that the State Department Memorandum (Sec. I, A) quotes from a 1962 International Control Commission Report finding North Vietnamese violations of the Geneva Accords and its failure to acknowledge or even mention the simultaneous listing in the very same ICC report of three serious U.S.-South Vietnamese violations of the Accords is a most serious indictment of the factual case put forward by the Department of State. While the U.S. may have a persuasive factual case, it chose to rely upon a document prepared by an independent commission and its treatment causes any trial lawyer to be suspicious of the remainder of its factual assertions when it so patently omits reference to material and damaging facts contained in the very document it offers into evidence.

Equally persuasive is the book's demand for explanation of disregard by the United States of the principle of proportionality in its freewheeling increase in the use of force in bombing and weaponry, apparently unrelated to the question of whether such force is appropriate to accomplish the collective self-defense asserted.

Without question, this volume is one of significance and impact for the international lawyer. Its viewpoint, as intended, is controversial, challenging, and upsetting. It forces the reader to question and commands the attention of all lawyers who are, by training, critical of absolutes and made suspicious of the beauty of the King's raiment simply because they are told he is wearing clothes.

⁵ Released in 1966, see *N.Y. Times*, Nov. 27, 1966. p. 5.

U.S. Income Taxation of Foreign Corporations and Nonresident Aliens, by Sidney I. Roberts and William C. Warren, Practising Law Institute, 1966; Special Supplement on Foreign Investors' Tax Act, 1967. Price, \$55.00 or \$90.00 with replacement page service through December 31, 1967.

The authors of this monumental loose-leaf guide to the tax problems of foreign corporations and nonresident aliens under the U.S. income tax laws are Sidney I. Roberts, a certified C.P.A. and practicing attorney in New York City who has served as chairman of the ABA Committee on Taxation of Foreign Income, and William C. Warren, dean of the Columbia Law School, former tax consultant to the Treasury Department, and associate chief reporter of the American Law Institute Tax Project. Both authors have written extensively in the field of tax law. Twice-yearly supplements keep the publication current.

Two general chapters open the book. The first, entitled "General Principles," deals with the "Allocation of Income, Deductions, Credits, And Other Allowances," "Sham Corporations," and the "Characterization Of Income"; the second details "Tax Patterns Of Foreign Taxpayers"—individuals, corporations, partnerships, trusts, estates, and beneficiaries. The following chapters define "United States," its "Possessions," and the meaning of "Foreign" and "Domestic," and discuss the difficult problems of residence for Federal tax purposes, the basic concept of a person "Engaged In Trade Or Business In The United States," and "Source Of Income," and the "Withholding Of Tax At Source."

The treatment of tax treaties, occupying almost half the pages of the book, will be useful not only to taxpayers and their advisors, but to foreign governments and their advisors who are negotiating tax treaties with the United States.

The book concludes with "Corporations Used To Avoid Income Tax On Shareholders" and the filing of tax returns.

A special supplement contains The Foreign Investors' Tax Act of November 13, 1966, of approximately 100 pages, largely in hectograph manuscript form, together with appendices giving the reports of the Committee On Ways And Means of the House, suggested technical amendments, the report of the Committee Of Finance, the conference report and the final act (Public Law 89-809). Presumably, in time, this supplement will be worked into the basic work.

Although the price of the work is expensive, its subject matter is frequently productive of high fees and the book is plainly expensive to produce and to maintain. Of course, maintenance here is vital because an out-of-date tax reference work is frequently worse than no tax reference work at all. Without question, this is a work that is unique on the shelves of both taxation and international law.

World Peace Through Law. By The World Peace Through Law Center. St. Paul: West Publishing Co. 1967. Pp. xv, 847. Index.

This record of the World Peace Through Law Conference held in Washington, 1965, contains summaries of the principal proceedings of the Conference together with papers prepared for the working sessions. As is to be expected, the quality of the reports and the supporting papers is greatly variable. The topics dealt with include existing and proposed international courts, space law, international law in domestic courts, international communications, transnational trade and investment, arbitral tribunals, human rights, international judicial cooperation, disarmament, industrial and intellectual property, creative research and education in international law, and expanding structure of international law. The very variety of topics make it very difficult to summarize the content of the work. It has something for practically everyone. In this respect it is more in the nature of a reference work to be used in tracking down fugitive materials. Unfortunately for this purpose, the index is rather superficial and unreliable. Consequently, some of the gems of the work may go undiscovered for many readers.

Jurisprudence. By B. A. Wortley. New York: Oceana Publications. 1967. Pp. xxi, 473. Index. \$9.00.

This collection of essays by Professor Wortley of the University of Manchester, also Barrister of Gray's Inn, was written over a period from 1938 to 1966. Apparently only two chapters were specially written for the book on Jurisprudence, namely, Chapter 16 on the "Analysis of Human Rights and Duties," and Chapter 19 on "Justice and Equity." It accordingly suffers from the disjointedness of having been written at various times for a variety of purposes. It has the virtue of collating within the confines of a single book materials that otherwise would be spread through a great variety of sources, including foreign publications, which are not readily available to either students or practitioners.

Possibly of greatest interest to American readers are the chapters on codified legal order (Chapter 10), the unification of law (Chapter 11), and the incompleteness of codes (Chapter 12).

Somewhat provocative is his treatment of distributive justice in relation to the foreign investor (pp. 390-400), even though the concept is derived from Aristotle. The work concludes with a series of topic-sentence conclusions, numbered according to the number of chapters and occupying no more than four pages. On the whole, the work is probably of greater interest to the student than to the practitioner.

Washington Law Review. Vol. 42, No. 2. March, 1967. By the University of Washington School of Law. St. Paul: West Publishing Co. Pp. 333-680.

While technically not a "book," the March issue of the University of Washington Law Review nonetheless is worthy of special mention for its Asian Law Symposium, containing comparisons of the commercial law of Japan and the United States, running to 266 pages. There is an introduction by Dan Fenno Henderson on the scope and legal framework of U.S.-Japanese trade, followed by various articles written jointly by American and Japanese scholars on various aspects of the law of contracts, such as, formation, performance, impossibility and frustration, risk of loss, products liability, and disclaimers of warranty, limitation of liability, and liquidation of damages in sales transactions. The review concludes with a detailed examination of experience in arbitration in commercial matters—which is probably one of the more fascinating of the articles in the symposium—and with a practical guide to the form of citation of Japanese legal materials.

Next time we would like to prevail upon Dan Fenno Henderson, who also serves as the chairman of the Section Committee on Far Eastern Law, to make this kind of material available to *The International Lawyer*, which would be proud to have published the Asian Law Symposium.