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Lawyers Committee On American Policy Towards Vietnam

38 Park Row, New York, N.Y. 10038
Area Code 212 CO 7 2899

March 23, 1966

To the Members of the Senate and
House of Representatives:

We recently sent you our 26-page documented Memorandum of Law which regrettably concludes that the Administration's actions in Vietnam contravene the essential provisions of the United Nations Charter, violate the Geneva Accords, are not sanctioned by SEATO, and violate our own Constitution and its system of checks and balances by the prosecution of a war in Vietnam without a Congressional declaration of war.

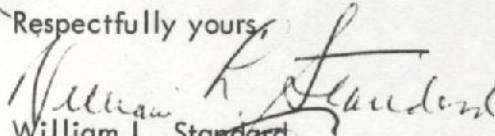
The House of Delegates of the American Bar Association subsequently passed a resolution without debate affirming the legality of American actions in Vietnam, relying on a miniscule analysis consisting of a distorted excerpting of a few phrases, out of context, from Articles 51 and 52 of the United Nations Charter.

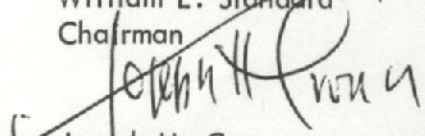
We believe you will be interested in our comments on the ABA's action as set out in the enclosed letter.

You will also note therein our rebuttal of the argument advanced by Secretary of State Rusk that the Southeast Asia Treaty imposes an obligation upon our Government to intervene in Vietnam.

Professor Jerome A. Cohen, of the Harvard Law School, has pointed out (New York Times, March 13) that the ABA resolution was adopted in immediate compliance with a request by Senator Russell Long, that "not a single delegate asked a question or suggested the serious deliberation that this complex and important issue deserved"; and ended with a plea that "this nation's principal body of lawyers avoid the appearance and the reality of serving as the obedient tool of Government".

Respectfully yours,


William L. Standard
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March 15, 1966

Edward W. Kuhn, Esq.
President, American Bar Association
1155 East 60th Street
Chicago 37, Illinois

Sir:

The Lawyers Committee On American Policy Towards Vietnam believes that the recent action of the House of Delegates of the American Bar Association in passing by unanimous voice "and without debate" a resolution affirming the legality of the actions of the United States in Vietnam does a disservice to the Bar for it treats the gravest issue of the day in a manner not befitting a bar association. The resolution relies on a minuscule analysis consisting of a distorted excerpting of a few phrases, out of context, from Articles 51 and 52 of the United Nations Charter, and totally fails to meet the points advanced in the 26-page documented Memorandum of Law prepared by the Lawyers Committee On American Policy Towards Vietnam and endorsed by distinguished authorities in the fields of international law and constitutional law.

The Lawyers Committee's Memorandum of Law first appeared in the Congressional Record on September 23, 1965, having been inserted therein by Senators Wayne Morse and Ernest Gruening. Thereafter the Congressional reprint of our Memorandum was mailed to more than 173,000 lawyers throughout the country and to each of the 3,750 law professors listed in the Directory of Law Teachers. Our Memorandum was recently presented to the President on January 25, 1966, a submission reported in The New York Times of February 5. Our Memorandum was thereafter reintroduced into the Congressional Record by Senator Gruening along with our letter to the President (February 9, pp. 2252 et seq.). And on February 18 our Memorandum was inserted in the record of the hearings conducted by the Senate Foreign Relations Committee inquiring into the Administration's policy vis-a-vis Vietnam.

Our Memorandum amply documents the regrettable but inescapable conclusion that the actions of the United States in Vietnam contravene the essential provisions of the United Nations Charter, violate the Geneva Accords, are not sanctioned by SEATO, and, besides, violate our own Constitution and the system of checks and balances which is its essence by the prosecution of the war in Vietnam without a Congressional declaration of war.

Among the distinguished professors who have endorsed our Memorandum are:

Wallace McClure and	Duke University - World Rule
William W. Van Alstyne	of Law Center
Quincy Wright	University of Virginia
Richard A. Falk	Princeton University
Roy M. Mersky	University of Texas
Norman Malcolm	Cornell University
Robert C. Stevenson	Idaho State University
Alexander W. Rudzinski	Columbia University
Wolfgang Friedmann	Columbia University
William G. Rice	University of Wisconsin
Robert M. MacIver, Chancellor	New School for Social Research
Thomas I. Emerson	Yale University
David Haber	Rutgers University
D. F. Fleming	Vanderbilt University (Emeritus)
Darrell Randell	American University (Wash., D.C.)

In the face of this record, it is shocking that the only analysis and authorities marshaled in the Special Joint Report of the Standing Committee on Peace and Law Through United Nations and the Section of International and Comparative Law to support the claim of legality of American actions in Vietnam is contained in the two solitary sentences reproduced below:

"Articles 51 and 52 of the Charter expressly provide that nothing contained therein 'shall impair the inherent right of individual or collective self-defense', nor preclude 'the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action'. The South-East Asia Treaty Organization is such an arrangement or agency."

Strangely, the reference to Article 51 vis-a-vis the right of collective self-defense omits to state that this Article applies only "if an armed attack occurs against a Member of the United Nations". It is indisputable that South Vietnam is not a member of the United Nations. Indeed, the 1954 Geneva Accords - which our Government pledged not to "disturb" - recognizes all of the Vietnam as a single state, of which South Vietnam is but a temporary zone.

On July 21, 1954 Under-Secretary of State Walter Bedell Smith in a declaration made at the Geneva Conference and confirmed on the same day by President Eisenhower, pledged that our Government would not "disturb" the Geneva Accords and would "not

join in an arrangement which would hinder" the rights of peoples "to determine their own future". However, the United States departed from these pledges when on July 15, 1955 the Diem regime announced, with American backing, that it refused to engage in the consultations between the representative authorities of the two zones scheduled to begin on July 20, 1955 under the terms of the Final Declaration of Geneva (Article 7) and would defy the mandate calling for national elections scheduled for July 1956, thus violating the central condition which had made the Geneva Accords acceptable to the Vietminh. And the United States also chose to ignore the ban on the introduction of troops, military personnel, arms and munitions into Vietnam and the prohibition against the establishment of new military bases in Vietnam territory - provisions set out in the Geneva Accords. It is an historical fact that the refusal to hold the elections prescribed by the Geneva Accords coupled with the reign of terror and suppression instituted by the Diem regime precipitated the civil war.

International law firmly forbids outside intervention in civil strife, as President Lincoln repeatedly pointed out to France and to Britain during our own civil war.

This analysis demonstrates that Article 51 on its face cannot serve as a legal justification for the present actions of the United States in Vietnam.

The Special Joint Report of the Standing Committee on Peace and Law Through United Nations and the Section of International and Comparative Law is even wider of the mark in invoking Article 52.

Although Section 1 of Article 52 states that the "existence of regional arrangements or agencies" is not precluded under the Charter, the report totally ignores Section 3 of Article 52 which declares that regional arrangements are authorized only to achieve "peaceful settlements of local disputes". The dispute in Vietnam is hardly local so far as the United States is concerned, and its actions in waging war thousands of miles from its shores is hardly a "peaceful settlement".

The report also disregards Section 4 of Article 52 which expressly preserves the paramountcy of the United Nations Charter over any regional arrangements. Thus, in the same issue of The New York Times (February 22) which reported the action of the House of Delegates, Professor Commager points out that in 1956, President Eisenhower noted that under the Charter "the United Nations is alone charged with the responsibility of securing peace... throughout the world." A summary reading of all the provisions of Article 52 makes it patently clear that the actions of the United States in Vietnam cannot be remotely justified under the plain provisions of Article 52.

Wholly apart from the limitations prescribed by Article 52, it is elementary knowledge that the next succeeding Article - Article 53 - explicitly provides that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council. . .". No such authorization has ever been sought or granted. Hence military action by SEATO as a regional agency - and forsooth military action by an individual member of SEATO (viz., "enforcement action...under regional arrangements...") is prescribed by the plain language of Article 53 of the Charter, regardless of any provision that may be found in the Southeast Asia Treaty.

It is incomprehensible that the Standing Committee on Peace and Law Through United Nations as well as the Section on International and Comparative Law should not have been aware of these fundamental provisions of the United Nations Charter.

The Special Joint Report also makes casual reference to the Southeast Asia Treaty Organization as supporting legally the military measures pursued by the President in Vietnam. We are mindful that the resolution was adopted by the House of Delegates shortly after the citation by Secretary of State Rusk of the Southeast Asia Treaty of 1954 (in his testimony before the Fullbright Committee) as the fundamental source of the President's authority to commit the United States to whatever expenditure of manpower and treasure he deems "necessary" to sustain the war in Vietnam. Arthur Krock, in an illuminating article, "The Sudden Rediscovery of SEATO" (The New York Times, March 6, 1966) points out that the President had utilized "the provocation of the Tonkin Gulf attack on the Seventh Fleet by North Vietnamese gunboats to get a generalized expression of support from Congress. This worked well enough until it was argued, against the public record, as approval by Congress of any expansion of the war the President might make in an unforeseeable future. Then Rusk shifted the major basis for the claim to the SEATO compact.

"But extracts from the 1954 Senate debate on the treaty demonstrate the fragility of this claim. In explaining the commitment to the Senate, Chairman George of the Committee on Foreign Relations made these statements:

'The treaty does not call for automatic action; it calls for consultation with the other signatories. If any course of action shall be agreed. . . or decided upon, then that action must have the approval of Congress, because the constitutional process of each signatory government is provided for. . . . It is clear that the threat to territorial integrity and political independence. . . also encompasses acts of subversion. . . But even in that event the United States would not be bound

to put it down. I cannot emphasize too strongly that we have no obligation. . .to take positive measures of any kind. All we are obligated to do is to consult together about it."

Thus it is clear that the final decision as to the course of action to be taken vis-a-vis Southeast Asia requires the approval of Congress. The credibility of Secretary Rusk's argument or claim that the SEATO Treaty furnished a legal justification for the President's action is also refuted by the fact that the State Department, in a memorandum issued in March 1965, entitled "Legal Basis for United States Actions Against North Vietnam", makes no mention whatsoever of the Southeast Asia Treaty - which can hardly be squared with the belated claim that the treaty imposed an obligation upon the President to intervene in Vietnam. Significantly, too, President Johnson in a press conference statement on July 28, 1965, explaining "why we are in Vietnam", made no mention whatsoever of the Southeast Asia Treaty, advancing as the grounds therefor only the "commitments" of Presidents Eisenhower and Kennedy. Subsequently President Eisenhower categorically stated that his administration had made no commitment to South Vietnam "in terms of military support on programs whatsoever." President Kennedy insisted that the war in Vietnam was "their war" and promised only equipment and military advisors.

Since, as we have shown, Article 53 of the United Nations Charter prohibits military action by a regional agency without the authorization of the Security Council, manifestly SEATO, as a collective agency, would be barred from resorting to military measures. It is chimerical to argue, as Secretary Rusk did, that an individual member of SEATO had an obligation to resort to military measures (under Article IV of the Southeast Asia Treaty), when that power is even lacking in the regional agency. Article IV of the SEATO Treaty is subordinate to the provisions of the United Nations Charter; indeed Article VI of the SEATO Treaty expressly acknowledges the supremacy of the provisions of the United Nations Charter. And even beyond that, Article 103 of the United Nations Charter - the supremacy clause - subordinates all regional and treaty compacts to the United Nations Charter. Article 103 of the United Nations Charter declares "In the event of a conflict between the obligations of the members of the United Nations under the present charter and their obligations under any other international agreement, their obligations under the present charter shall prevail." (Ch. XVI, art. 103.).

The Special Joint Report makes reference to the fact that 31 professors of international law have expressed their opinion that the position of the United States in Vietnam is legal and is not in violation of the Charter of the United Nations. The statement of these professors appears in the Congressional Record (Jan. 27, 1966; p. A410), and the entirety of that statement is reproduced below:

"As teachers of international law we wish to affirm that the presence of U.S. forces in South Vietnam at the request of the Government of that country is lawful under general

principles of international law and the United Nations Charter. The engagement of U.S. forces in hostilities at the request of the Government of South Vietnam is a legitimate use of force in defense of South Vietnam against aggression. We believe that the evidence indicates that the United States and South Vietnam are taking action that attacks neither the territorial integrity nor the political independence of the People's Republic of Vietnam - action that seeks only to terminate aggression originating in North Vietnam."

With due deference, we cannot but observe that this statement is not buttressed by a single citation or authority. This is particularly deplorable since the statement of the 31 professors, issued in November 1965, was intended as a rebuttal to our Committee's Memorandum of Law which had already been sent to all law professors throughout the country and to tens of thousands of lawyers.

The first sentence of the professors' statement is merely an expression of opinion for which no authority is advanced. The proposition set out in the second sentence is untenable in view of the prohibitions against unilateral action prescribed in the United Nations Charter and overlooks the civil strife character of the conflict in Vietnam. The proposition set out in the third sentence merely parallels the claim advanced by the State Department in its memorandum issued in March 1965, attempting to justify legally the actions of the United States in Vietnam. The massive attacks made upon North Vietnam, and the conduct pursued by our Government has led such authoritative individuals as Senator Fulbright and Walter Lippmann to ascribe to the Johnson Administration a demand for the "unconditional surrender" of the adversaries. This can hardly be squared with the allegation advanced by the professors that the "evidence indicates that the United States and South Vietnam are taking action that attacks neither the territorial integrity nor the political independence of the Peoples Republic of Vietnam".

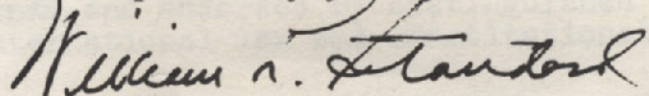
While diverse views upon questions of such vital importance are to be anticipated, and we welcome discussions of these issues - issues of the gravest importance - the bar and the public had a right to expect that the Standing Committee on Peace and Law Through United Nations as well as the Section of International and Comparative Law of the country's largest bar association would have documented their case in a lawyerlike, analytical and objective manner - to illuminate rather than obfuscate issues affecting the lives of Americans and Vietnamese.

We note too that the issue of constitutionality of our Government's action in Vietnam, raised in our Memorandum of Law, was in no way dealt with either in the Special Joint Report or in the resolution. We believe this constitutional point merits serious consideration.

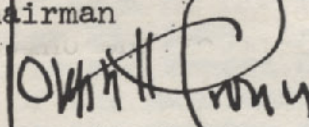
It would seem that at this moment in history the members of the A.B.A. should have before them the full text of our Committee's Memorandum of Law on Vietnam. The report of the two special committees upon which the House of Delegates acted on February 21, it is submitted, is inadequate in light of the enormity of the question embraced by the Resolution.

Towards the end of illuminating the issues, may we suggest that the American Bar Association Journal publish the Memorandum of Law prepared by our Committee together with a definitive report prepared by the appropriate Committees of the American Bar Association. We believe that members of the American Bar Association and lawyers throughout the country share a common objective of obtaining world peace through the rule of law.

Respectfully yours,



William L. Standard
Chairman



Joseph H. Crown
Secretary

- Enclosures:
- (1) Memorandum of Law, prepared by Lawyers Committee on American Policy Towards Vietnam.
 - (2) Reprint of Congressional Record (Sept. 23, 1965) containing said Memorandum of Law.
 - (3) Copy of letter, dated January 25, 1966, submitted to the President of the United States by the Lawyers Committee.