

COMMENT: VIETNAM AND PUBLIC INTERNATIONAL LAW

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With each international crisis inevitably come the self-styled "realists" proclaiming that there is no such thing as public international law. The Vietnam war is no exception, although here, due to the unusual complexity of the facts and the controversy over the applicable rules of international law, many of the published replies to the "realist's" positions have themselves been insubstantial and unconvincing. Let us look first, briefly, at the arguments of one of the realists, and then, with equal brevity, at some of the counterclaims. The remainder of this comment will be addressed to the larger issues involved and some suggested avenues for coping with the implementation of the ideal of world peace through world law.

Mr. Joseph K. Andonian's impatience with those who would apply international norms to the Vietnam situation probably represents the views of a majority of successful domestic American lawyers. He claims in an article entitled Law and Vietnam that lawyers "make a mockery of law" when they "indulge in the pretense that the question of our involvement in Vietnam is a conventional legal matter."¹ Andonian asserts that since there is no binding, enforceable, customary international law governing the Vietnam conflict, lawyers should not pretend otherwise. Such pretense confuses the public and denigrates the idea of the rule of law. Rather, Mr. Andonian argues, lawyers should expend their efforts to help bring about a sense of "community" in international relations by promoting increases in travel, trade, communications, and a sense of commitment to the world community. With the advent of this commitment, we may expect to see the gradual creation of an international legislature, an organized judicial system employing compulsory jurisdiction, and an international police force to back up the legislature and judiciary. Only then, he concludes, can lawyers meaningfully discuss questions of international law.

Mr. Andonian's article was in reaction to some prior publications assessing the legality under international law of the American position in Vietnam. One of these earlier publications was a brief by the self-appointed "Lawyer's Committee on

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¹54 A.B.A.J. 457, 458 (1968).

American Policy Towards Vietnam" inserted in the Congressional Record by Senator Wayne Morse.² The second was a State Department memorandum asserting the legality of the American involvement.³ Both of these documents are highly unsatisfactory, even as polemical papers. The State Department memorandum asserts many facts without convincing proof, facts that subsequently have been challenged in Congress and elsewhere. The Lawyer's Committee paper is even less effective, not so much for its factual assertions as for its shotgun series of legal arguments, obviously assembled in great haste by those having little training in international law. One may sympathize with Mr. Andonian's "realism" when confronted by papers such as these which have had wide readership and have been discussed extensively.

A considerable improvement in the quality of legal analysis is afforded by a recent collection of articles published by the American Society of International Law under the editorship of Professor Richard A. Falk.⁴ Apparently, Mr. Andonian had not seen this book while writing his article. Even so, the effect of the book is bewildering. Some of the 23 articles and 11 appendices help define certain issues of the war more clearly, but on the whole the collection is a confused mass of phrases such as "self-defense," "non-intervention," "armed attack," and "indirect aggression." Plowing through the 633 pages of this book is like hacking through a jungle in Vietnam without leaving behind a clear trail for others to follow.

Yet can we conclude from these efforts that there is no applicable international law on Vietnam, that there is no consensus as to legal rules of conduct in that admittedly complex and difficult arena? Is it not overly facile to say, as does Mr. Andonian, that lawyers should divert their efforts to promoting a sense of community in international relations so that eventually a world government can emerge and the rule of law will be triumphant? While efforts made along these lines are unobjectionable, they are truly utopian. We shall most likely be completely annihilated by thermonuclear war, (The major powers at present have over sixty tons of nuclear explosives for every man, woman, and child alive today) than first achieve world government. The current urban crises in the United States will soon spread to racially inflammatory southern Africa, to vast areas of poverty in Latin America, and to overcrowded conditions in Asia; new "Vietnams" in different

²American Policy Vis-a-Vis Vietnam, Memorandum of Law, 112 Cong. Rec. 2552 (daily ed. Feb. 9, 1966).
354 DEP'T STATE BULL. 474-89 (1966).

⁴The Vietnam War and International Law (1968).

contexts may arise with increasing frequency in the 1970's and 1980's. These problems will not be avoided by a premature world government to which no nation, least of all the United States, wants to entrust its sovereign rights. But a greater attention to international law, as it has thus far developed, might help avoid major-power military involvement in these forthcoming crises.

We should not sell the rule of law short. Despite our frustration at the quality of the debates on the legality of American involvement in Vietnam, we should remember that with better effort and with the utilization of more scientific techniques in the determination of present international law, a consensus might have been found with respect to Vietnam and can be found in future situations like Vietnam. What kinds of efforts and techniques are possible? Let us briefly consider some of them.

A Universal Language

The mass media have recently given considerable attention to the work in linguistics of Professor Noam Chomsky and his colleagues at Massachusetts Institute of Technology. Professor Chomsky has argued in a series of books and articles that there are certain underlying regularities in grammatical structure and syntax among what would otherwise appear as highly dissimilar languages -- primitive languages, Oriental languages, Romance languages, and others.⁵ His studies open up the fascinating possibility that human communication may be to some extent innate, that languages are not just learned at random but reflect inborn regularities of the mind. By elaborate mathematical computations, it is becoming possible to discern a universal language or syntactical structure that may eventually facilitate human understanding and communication.

If we move from languages in general to a particular kind of language -- the language of law -- it is possible to find even more striking regularities. For hundreds of years, nations in their international diplomatic discourse have resorted to essentially the same language -- that of international law -- in their state papers. International law itself, as Professor H.L.A. Hart has argued, involves the free transfer of techniques of domestic lawyers to the international arena.⁶ Chance alone cannot account for the fact of the

⁵See, e.g., Chomsky, Formal Properties of Grammars,

²LUCE et al., HANDBOOK OF MATHEMATICAL PSYCHOLOGY 323 (1963), and bibliography therein.

⁶HART, THE CONCEPT OF LAW 209-30 (1961); see D'Amato, "The Neo-Positivist Concept of International Law," 59 AM. J. INT. L. 321 (1965).

utility of international legal discourse for so long a period of time; rather, there must be an underlying universal language of legal discourse which, with appropriate modifications and translations, serves a highly useful diplomatic purpose.

International law is basically a language. It is a way of communicating policies, positions (both geographical-boundary positions and claims to increased jurisdiction), and intentions from one country to another. Lawyers of all countries and backgrounds seem to understand international law after only a brief training in its special techniques. These lawyers are in highly placed political positions, and, when they are called upon by statesmen to give their advice, they exert considerable influence in national policies. It is international law, ultimately, that determines what a nation's boundaries are, what rights it has in the seas and in the airspace, what rights it has over visiting foreigners within its territory, and what its rights and duties are toward foreign countries and territories. This complex system of international legal rights and duties effectively limits and directs the behavior of most nations most of the time, as Professor Henkin has accurately observed.⁷ When disputes arise, statesmen consult the language of international law to determine their nation's legal positions, though eventual settlement of the dispute may be based on considerations other than international law.

Few readers perhaps will disagree with what has been said so far, but the implications of what has not been said are probably more controversial. International law has not been discussed in terms of legislatures, courts and sanctions. This kind of creative and enforcement machinery is of course an important component of domestic systems of law, but in international law a central legislature does not exist and international courts lack the power to enforce their decisions. Is international law therefore something "less" than "law"? Professor Fisher has pointed out that domestic constitutional law cannot be "enforced" against the government in the traditional sense, and even a decision in the Court of Claims cannot be enforced against a Congress or a President unwilling to meet its obligations.⁸ It is very hard to "enforce" a legal decision against an abstract entity such as a state or a government, yet these entities

⁷Henkin, International Law and the Behavior of Nations, 114 RECUEIL DES COURS 171, 179 (1965).

⁸Fisher, Bringing Law to Bear on Governments, 74 HARV. L. REV. 1130 (1961).

have an important stake in the rule of law, if only for their own self-preservation. But even apart from Professor Fisher's arguments, it is somewhat irrelevant to ask whether international law is "law" in the true sense (as Mr. Andonian asks in his article). The fact is that, whatever it may be called, international legal communication is a highly useful device for diplomatic accomodation short of violence among nations.

In the development of this legal language, lawyers have an extremely important role to play. Indeed, they have a duty to continue to apply legal language to international problems as well as to local problems. At the very least, some order may be introduced into the otherwise chaotic state of propaganda and emotional claims that can harden nations' positions and make war more likely.

The Question of Substance

Regularities of communication and discourse do not, of course, amount to a consensus as to any given legal dispute. We cannot expect everyone with legal training to look at the Vietnamese situation and come up with the same conclusion. It is unrealistic in the extreme to expect international law to have built-in answers to large political questions such as the legality of American intervention in Vietnam or even the legality of North Vietnamese intervention in South Vietnam.

At the same time, it is not very sensible to expect to find the answer to any international dispute in the vague phrases of text-writers or in the generalities of the United Nations Charter or other treaties. Debate as to the "real meaning" of these large phrases and concepts is truly illusory.

Rather, three distinct steps are necessary to tackle a large question such as the legality of the American commitment in Vietnam. The first two are the traditional tasks of a well-trained lawyer; the last is a more ambitious and difficult program:

(1) The problem should be broken down into a number of relatively small and manageable categories. We cannot be concerned with the legality of the American commitment in Vietnam in the abstract, as Mr. Andonian implies we are. Rather, there are numerous smaller questions which in turn may provide a conclusion for the larger issue. For example, questions involving issues such as the specific intent of articles in the 1954 Geneva Accords, the use of napalm and gases in warfare (including the question of their use as reprisals), the treatment of prisoners of war, the extension of the war to civilians (and how to define nonparticipants in such a situation), the Tonkin episode, the 1967 elections

in South Vietnam (role of the Buddhists, the government opposition, etc.), and many more.⁹

(2) Once the categories are established and the relevant questions posited, there is the clear necessity of establishing what the facts of the situation are. Much of the "legal" debate on Vietnam is no more than controversy as to the facts in dispute. Some kind of impartial determination of the underlying facts is a clear prerequisite to applying "law" to any situation. A board, a jury, or a panel of lawyers might well attempt to make an impartial inquiry into the many facts of the historical record of Vietnam; short of this, it is unfair to blame "international law" for failing to resolve such a dispute where the facts have not been established.

(3) The basic problem then is reduced to the determination of the applicable rules of international law. First, where are these rules to be found? Not in the writings of scholars, for at best these can only point to better sources. Nevertheless, much of the unsatisfactory debate on Vietnam seems to stop at the textbook level. How about the decisions of international tribunals? The difficulty here is that the decisions are few and far between. Rather, the lawyer-scholar should turn to the actual evidence of the language of international law itself--the diplomatic correspondence of nations and the debates of national representatives in the United Nations, the O.A.S., and other international organizations. In these voluminous sources may be found claims and counter-claims, concessions and resolutions, disagreements on some issues and agreements on many others. This is the raw material of international law, but it lies largely untapped.

New social science techniques of content analysis and the new information-retrieval computers can make this vast body of evidence of international law more available than in the past. Nonparametric statistical tests such as multiple regression analysis and factor analysis can give relatively precise weights to the evidence of legal rules thus uncovered. Standards of relevance and analogy can be set up, tested for statistical significance, and applied to the legal rules. A huge amount of diplomatic discourse and international-organization argumentation has been devoted to questions of indirect aggression, rules of warfare, and other situations directly applicable to the problem in Vietnam, but this information must be systematized and categorized before it can be useful.

The task is an immense one, but not at all impossible. It is certainly an impossible task for one researcher, which

⁹Cf. BEAL & D'AMATO (eds.), THE REALITIES OF VIETNAM (1968).

may be a good reason why writers on international law prefer rehashing the stale generalizations of text-writers rather than the arduous examination of the real sources of international law. But we cannot really afford the individual fragmentation of efforts in which the traditional practitioners delight. For the result all too clearly justifies the pessimistic conclusions of Mr. Andonian and other writers who find the debates on Vietnam so unproductive.

For the United States government to undertake a serious task-force study of the raw material of international law relevant to situations such as Vietnam, an initial expenditure of one million dollars would not be at all unreasonable. Particularly in light of the applicability of the findings of such research to future "Vietnams" which the United States Government, according to all current indications, is quite anxious to avoid, such expenditures might be the only practical way of deriving utility from the rich body of international legal materials. It is doubtful that the government can be moved to make such an expenditure for a research team and for the relevant computer hardware, though the government's own published statistics reveal that it costs this country over one million dollars to kill a single Vietcong soldier.