

VIET-NAM AND INTERNATIONAL LAW: TWO PRELIMINARY ISSUES

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In the past year significant writing has been published on the legality of United States activities in Viet-Nam.¹ Advocates for the legality of the United States policies in Viet-Nam under international and constitutional law² have been met by those who have concluded that such activities violate law.³ From this mix of contrary conclusions of fact and law, and indeed disagreement over identification and statement of the issues, two issues emerge upon which debate should be joined if the arguments of proponents and opponents⁴ are to meet.

First, the nature of the debate regarding later issues, such as whether an "armed attack" within the meaning of Article 51 of the United Nations Charter occurred, the relevance of the identity of the National Liberation Front (N.L.F.), proper utilization of the United Nations by the United States, and the legality of the United States military activities within North and South Viet-Nam, depend to some extent upon whether the Republic of Viet-Nam (R.V.N.) is a recognized state under international law.

Second, even if it is concluded that under traditional criteria of international law the R.V.N. is a sovereign state, the identity of the combatants in South Viet-Nam must be established to determine the nature of the conflict there. Who are the leaders and members of the N.L.F.? What factors led to its creation? How and where did the N.L.F. originate?

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¹ Alford, *The Legality of American Military Involvement in Viet Nam: A Broader Perspective*, 75 YALE L.J. 1109 (1966); Falk *International Law and the United States Role in the Viet Nam War*, 75 YALE L.J. 122 (1966); Farer, *Intervention in Civil Wars: A Modest Proposal*, 67 COLUM. L. REV. 266 (1967); Friedmann, *Law and Politics in the Vietnamese War: A Comment*, 61 AM. J. INT'L. L. 776 (1967); Moore & Underwood, *The Lawfulness of United States Assistance to the Republic of Viet Nam*, 5 DUQUESNE L. REV. 235 (1967); Wright, *Legal Aspects of the Viet Nam Situation*, 60 AM. J. INT'L. L. 750 (1966). See also the memorandum setting forth the official Department of State Position, reprinted in 60 AM. J. INT'L. L. 565 (1966).

² See Moore & Underwood, *supra* note 1, and Alford, *supra* note 1.

³ See Falk, Farer and Wright, *supra* note 1.

⁴ Reference is here made not to opponents and proponents of the United States policy in Viet-Nam, but rather to those who oppose or support such policy as being violative or consistent with international law. However, this writer believes that most of the writing on the legality of the United States position in Viet-Nam has been shaped not a little by prior judgments regarding the moral and strategic desirability of American policy there.

The International Legal Status of the Republic of South Viet-Nam

The State Department memorandum defending the legality of the United States actions in South Viet-Nam takes the position that whether the Republic of South Viet-Nam is considered to be an independent sovereign state or merely one zone of a temporarily divided state, it possesses the same right of individual and collective self-defense against aggression from the Democratic Republic of Viet-Nam (D.R.V.N.) which would be equally indefensible regardless of the international legal status of the R.V.N.⁵ Following from this, the memorandum concludes that the United States may assist the R.V.N. in its collective defense whether or not it is an independent sovereign state.⁶ However this may be, a major part of the writings defending and attacking the legality of the United States activities in North and South Viet-Nam center upon attempts to characterize hostilities as civil or internal war on the one hand, or international war on the other. Implicit within this dialogue is a rejection of the State Department position that such characterization is immaterial. It is recognized that the question of the internal or international nature of the hostilities in North and South Viet-Nam is larger than the question of the international legal status of the R.V.N. However, it is difficult to avoid the conclusion that the manner of resolution of the latter question has a significant impact upon the former.

Quincy Wright has concluded that "Viet-Nam is one state and...the hostilities of Ho Chi Minh's government against the Saigon Government would be civil strife within its domestic jurisdiction unless forbidden by the cease-fire agreement."⁷ His major support for this conclusion comes from history prior to 1954 and the provisions of the Geneva Accords in defining the nature and purposes of the cease-fire line.

Wright notes that from 1946 to 1954, both France and the D.R.V.N. viewed Viet-Nam as one state. The question dividing them was whether Viet-Nam would be an "independent state" within the Communist orbit or a "free state" within the French community.⁸ This position is strengthened by the language of the Geneva Accords⁹

⁵ *Office of the Legal Adviser, U.S. Dep't of State, The Legality of United States Participation in the Defense of Vietnam* 11-13 (March 4, 1966) [hereinafter cited as *Memorandum*].

⁶ *Id.* at 14.

⁷ Wright, *supra* note 1, at 756.

⁸ *Ibid.* See also Moore & Underwood, *supra* note 1, at 241-49. Moore agrees with Wright's conclusions that France, the R.V.N. and the D.R.V.N. regarded Viet-Nam as one state with two competing governments prior to the Geneva Accords.

⁹ *Agreement Between the Commander-in-Chief of the French Union Forces in Indo-China and the Commander-in-Chief of the People's Army of Viet-Nam on the Cessation of Hostilities in Viet-Nam*, Cmd. No. 9239, at 27 (1954). Reproduced in 60 AM. J. INT'L L. 629 (1966). Citations and page numbers will be to the latter volume.

that the line separating North from South Viet-Nam was a "provisional military demarcation line."¹⁰ The Final Declaration of the Geneva Conference interpreted this language with unambiguous clarity: "the Conference recognizes that the essential purpose of the Agreement relating to Viet Nam is to settle military questions with a view to ending hostilities and that the military demarcation line is provisional and should not in any way be interpreted as constituting a political or territorial boundary."¹¹

History prior to 1946, however, is less sanguine regarding the reality of a unitary nation of Viet-Nam. The early history of the region includes few times when any central authority had control over the area. At different times, Chinese, Indian, Thai, and Cambodian influences were dominant in different sections.¹² South and North have had far more significant periods of development apart from each other, and distinctly different influences working upon them, than they have had unifying forces drawing them together. Bernard Fall, in writing of Viet history up to the beginning of the French-Viet war in 1946, records that:

"Viet-Nam as a unified independent state, had again disappeared — if it can be said to have had time to bloom in the few chaotic months of the Tran Trong Kim regime under Japanese protection, and of the Ho Chi Minh regime under Chinese aegis. As in the sixteenth century, so again Viet-Nam was divided into two distinct states, but from 1946 until 1954, this was to be a new, strange, urban-rural division rather than a north-south division, with the Viet-Minh holding much of the countryside, including the hill-tribe areas; while the French and, later, the non-Communist Vietnamese administration were to hold the lowlands and, especially, the cities. In 1954, the "normal" north-south division of Viet-Nam was to appear again, only a few miles to the south of the ancient Wall of Dong-Hoi. And, once more, the two Viet-Nams began to build their own separate institutions."¹³

Whatever the intent of the parties at Geneva, and in spite of the aspirations of contending Vietnamese nationalist forces, communist and anti-communist, events since 1954 have produced two distinct political entities. With no more of a history of national unification than they have behind them, and with such divisive elements within Viet-Nam, this is hardly surprising and may be irreversible. From the early 1920's to the present, powerful nationalist forces within Viet-Nam violently split into communist and non-communist camps, to be superficially united only during those times when an enemy to their common desire for autonomy appeared.

¹⁰ *Id.* at 629.

¹¹ *Final Declaration of the Geneva Conference on the Problem of Restoring Peace in Indo-China*, Cmd. No. 9239, at 9 (1954). Reprinted in 60 AM. J. INT'L L. 643, 644 (1966).

¹² FALL, *THE TWO VIET-NAMS*, 9-19 (2d rev. ed., 1967).

¹³ *Id.* at 77-78.

States with much more history of national unity behind them, such as Germany and Korea, have had to finally recognize that recent history, at least in the short-run, will probably be more conclusive regarding the autonomous status of its communist and non-communist parts than statements of intention of political leaders. Though such recognition may be *de facto*, at least it controls any proclivity to attack its opposite political entity under the guise of "internal" war. In the case of Germany, it is possible and even probable that its past history of unity may outlast the temporary divisions of the cold war. But in that case the division was imposed by the Soviet army. In Viet-Nam, a North-South division occurred in part because of deep division among the people regarding the desirability of living under a communist regime. The 900,000 people who moved from North to South are a reflection of that division.¹⁴ The fact that the governments of the South have been notoriously unstable would indicate that true nationhood is yet to be achieved in the South,¹⁵ but this does not diminish the strength of the popular feeling in the South against living under a communist regime in the North.

Prior to 1954, the French government had recognized the Bao Dai government and the independence of the State of Viet-Nam as an associated state in the French Union.¹⁶ Although membership in the United Nations was denied the State of Viet-Nam due to a Soviet veto in the Security Council, the General Assembly adopted a resolution by an overwhelming margin stating its belief that the State of Viet-Nam fulfilled the Charter requirements of statehood included within Article 4.¹⁷ It should be recognized by those who now suggest that the Republic of Viet-Nam is an insurgent force resisting the *de jure* government at Hanoi, that this United Nations action took place despite Soviet arguments that the legitimate government of Viet-Nam was at Hanoi.

In June of 1954, France signed a treaty with the State of Viet-Nam providing for complete independence as of June 4, 1954.¹⁸ Ngo Dinh Diem became Premier of the State of Viet-Nam under Bao Dai, prior to the Geneva Accords.

Since the international legal effects of the Geneva Accords have been discussed elsewhere,¹⁹ it is sufficient at this point to note that both the D.R.V.N. and the R.V.N. were represented at the Geneva

¹⁴ TRAGER, *WHY VIETNAM?* 97-98 (1966).

¹⁵ Falk, *supra* note 12, at 16.

¹⁶ *Royal Institute of Int'l Affairs, 1947-1948 Documents on International Affairs* 736-37 (1952).

¹⁷ 7 *U.N. GAOR, Annexes, Agenda Item No. 19* at 10, (1952).

¹⁸ 161 *BRITISH AND FOREIGN STATES PAPERS* 649-51 (1954).

¹⁹ Falk, *supra* note 1; Moore & Underwood, *supra* note 1, at 324; Wright, *supra* note 1, at 760.

Conference on Indo-China, the former as a participant and the latter as an associated state. Moore and Underwood note that this was a "factual recognition of the reality of two long separate and competing states in Viet-Nam."²⁰

Since the Geneva Accords, the two Viet-Nams have continued to build their separate institutions, and nations and international organizations have given diplomatic recognition to this political fact.

The State Department memorandum points out that sixty states have recognized the R.V.N.²¹ It has been admitted to membership in many of the specialized agencies of the U.N. In addition, the General Assembly has twice approved the qualifications of South Viet-Nam, under Article 4 of the Charter, for membership.²² The Security Council was blocked from recommending admission of the R.V.N. by Soviet veto.²³ The grounds of the Soviet opposition, however, are persuasive evidence of the existence of separate states in North and South Viet-Nam. The Soviet Union proposed simultaneous admission of both the R.V.N. and the D.R.V.N., indicating Soviet acceptance of the existence of two states in Viet-Nam.²⁴ The fact that the U.S. opposed this resolution indicates, with the benefit of hindsight, poor political judgment but does not lessen the impact of this evidence of Soviet acceptance of the existence of two states in Viet-Nam. It is noteworthy that this 1957 draft resolution of the Soviet Union came one year after the deadline for elections under the Geneva Accords, indicating no especial surprise on the part of the Soviets that such elections had not taken place, and no evident belief that the failure to hold elections changed the international status of either state. Whatever the rhetoric at Geneva, the Soviet Union's change of position from sponsoring the D.R.V.N. as the only legitimate government of Viet-Nam prior to the Accords, to an acceptance of two states and a resolution for the membership of both in the United Nations after the Geneva Conference, is powerful proof of the realistic Soviet appraisal of a continued existence of two states in Viet-Nam.²⁵

There is little question that the Republic of Viet-Nam possesses the requisite traditional factors of statehood: a government recognized by other states, a defined territory, people, and the capacity

²⁰ Moore & Underwood, *supra* note 1, at 249.

²¹ *Memorandum, supra* note 5, at 12.

²² 11 U.N. GAOR 1017, B(XI) (A/PV. 663) (Feb. 28, 1957); 12 U.N. GAOR 1144, B(XI) (A/PV. 709) (Oct. 25, 1957).

²³ U.N. SCOR (S/PV. 790) (Sept. 9, 1957); U.N. SCOR (S/PV. 843) (Dec. 9, 1958).

²⁴ See Devillers, *The Struggle for Unification of Vietnam, The China Q.* Jan.-March, 1962, reprinted in *Vietnam: History, Documents and Opinions* 211 (Gettleman ed. 1965).

²⁵ See 11 U.N. GAOR Annexes, Agenda Item No. 25, at 5-7, U.N. Doc. A/SPC/L. 9, A/3519 (1957). But see Moore and Underwood, *supra* note 1 at 264-65 and Wright, *supra* note 1, at 758.

to enter into international relations. Though it is questionable that a state must be possessed of a government immune to coup or more peaceful change to deserve recognition, Richard Falk makes note of the fact of the instability of the governments of the R.V.N. and the seeming solidity of the D.R.V.N. This can hardly be disputed, though, again its relevance to any conclusion regarding the international status of the R.V.N. is questionable. Bernard Fall has commented upon this in tracing the very different history of South Viet-Nam as opposed to the North.

"Much of what today is the Republic of Viet-Nam south of the 17th parallel has been 'Vietnamese' for a shorter span of time than the Eastern seaboard of the United States has been 'American.' This is a reality that cannot be simply talked away, for it affects the very fabric of the nation in times of stress and crisis, as in the 1960's."²⁶

That South Viet-Nam could be a viable state if hostilities were to cease, however, can hardly be doubted. The offer as evidence of lack of stability of regime the fact that, under pressure of planned assassination of village leaders, massive influx of refugees from the North, and warfare from guerilla and regular forces, governments may be less than stable, should be no more surprising than it is impressive. It should be remembered that the years directly following the Geneva Convention were years of significant progress for the R.V.N. From 1956 to 1960, per capita food output was dropping 10 percent in the North and rising 20 percent in the South. By 1963 per capita food production had risen 30 percent in the South. In 1958, the production of textiles rose by 20 percent in the R.V.N. South Viet-Nam's per capita gross national product in 1960 was estimated at \$110 as compared with \$70 in the North. This was accomplished during a time of influx of just under a million refugees from the North, and rising terrorism in the countryside.²⁷ Some political progress is represented by a Vietnamese government which has lasted for two years, the longest since Diem. Elections were held in September, 1966, for delegates to a constitutional convention. Over 80% of the registered voters participated, under threat of Viet Cong reprisals. Since then a constitution has been drafted and approved, and national elections have taken place. Almost five million people voted in spite of the most intense terror campaign by the Viet Cong in the national history. Though the elections did not offer to the voters all the candidates which significant portions of the population might have supported, the elections were considerably better than those held in the North.²⁸ Former Ambassador Henry Cabot Lodge reported recently that

²⁶ Fall, *supra* note 12, at 16.

significant progress had been made in securing portions of the population from Viet Cong control.

The percentage of population largely under Viet Cong domination has decreased from about 23 to about 17. We agree with the Viet Cong that they lost control of more than one million people between December, 1965, and December, 1966.²⁹

Two facts stand out above the others in reaching a decision regarding the autonomous nature of the two Viet-Nams: First, their histories have been different, with incredibly few times in which they have been united in any sense. Second, this separate existence has continued and has become increasingly sharply divergent during the last twelve years. Richard Falk concedes that "a decade of *de facto* independence (affirmed by diplomatic recognition) now gives South Viet-Nam a strong claim to existence as a political entity. . . ."³⁰

The final tests of statehood must depend upon present-day realities. And the reality now is that there are two independent international entities in Viet-Nam.

The Nature of the Conflict in South Viet-Nam

Even if it is concluded that under traditional criteria of international law the Republic of Viet-Nam is a sovereign state, the identity of the combatants in South Viet-Nam must be established to determine the nature of the conflict there.

In the South, regular elements of the North Vietnamese Army (P.A.V.N.) are allied with the irregular forces of the National Liberation Front, the Viet Cong.³¹ The N.L.F. is an indigenous southern movement which developed in reaction to Diem, or an organization created and controlled by the D.R.V.N. If the former is correct, it is hard to avoid the clarification of the hostilities in Viet-Nam given by Richard Falk, that it is an "externally abetted internal war" in which the violence takes place "primarily within a single political entity, regardless of foreign support for the contending factions."³² International law, according to Falk, should be read

²⁷ See U.S. Dep't of State, *Aggression From the North*, (1965), reprinted in *Senate Comm. on Foreign Relations, 89th Cong., 2d Sess., Background Information Relating to Southeast Asia and Vietnam* 171-95 (2d rev. ed. 1966).

²⁸ Fall, *North Viet-Nam: A Profile*, 14 PROBLEMS OF COMMUNISM, July 1965, at 13-25.

²⁹ Lodge, *We're Winning in Vietnam*, Saturday Evening Post, July 29, 1967, at 6.

³⁰ Falk, *supra* note 1, at 1130.

³¹ Some commentators describe the National Liberation Front as the "political arm" of the Viet Cong. Others use the term interchangeably. The terms will be used interchangeably here.

³² Falk, *supra* note 1, at 1122.

as demanding of intervening states that they refrain from spreading hostilities beyond the confines of the country directly involved.

The "legally permitted response to intervention" would be "restricted to counter-intervention; an intervening nation whose own territory is not the scene of conflict may not attack the territory of a state intervening on the other side."⁸³ Falk proposes three models of civil strife. Type I is a Korea-style, direct and massive attack by one political entity across the borders of another. Type II is a Spanish Civil War situation involving substantial foreign intervention in an internal war. Type III is a civil war in which the outcome is largely independent of foreign intervention.⁸⁴ Falk states that the United States is treating Viet-Nam as a Type I situation when in actuality it is Type III or at most Type II, permitting under international law only counter-intervention in response to intervention by an outside state.

Falk's categorization and analysis must proceed on the assumption that the original "contending factions" to which intervening states give support are indeed indigenous groups seeking power. If one of these factions is not only supported but created and directed from an intervening states, then any analogy to civil war becomes strained indeed. A war could hardly be termed "internal" or "civil" in which a "contending faction" was first created and then controlled and directed, then later supplied and supported by an intervening state.

The vital question regarding the origin and nature of the N.L.F. finds Professor Falk and the Department of State at opposite extremes, both quoting Bernard Fall as an authority for their conclusions. Falk records that:

Later in 1954 the Saigon regime under Premier Diem ruthlessly suppressed all political opposition. Observers agree that organization of an underground was an inevitable reaction to this suppression and that the N.L.F. at its inception included many non-Communist elements.⁸⁵

Falk then quotes Fall as an authority for this conclusion regarding the origin of the N.L.F.⁸⁶

Falk's version of the timing of the creation of the N.L.F., presumably directly following Diem's repressive measures which began in late 1954 and alleged to be the major motivating factor leading to its creation, is disputed by the Department of State:

As Professor Bernard Fall has pointed out, the Viet Cong "operated until December, 1960, as simply an extension of the then

⁸³ *Id.* at 1123.

⁸⁴ *Id.* at 1126.

⁸⁵ *Id.* at 1130.

⁸⁶ Fall, *Viet Cong — The Unseen Enemy in Viet-Nam*, in *THE VIET-NAM READER* (Raskin & Fall eds. 1965).

existing Communist underground apparatus." In September of 1960, the Third National Congress of the Lao Dong (Communist) Party meeting in Hanoi adopted a resolution urging a creation of a "Front" to achieve "unity" of all Viet-Nam. That resolution stated "our people there [in South Viet-Nam] must strive to establish a united bloc of workers, peasants and soldiers and to bring into being a broad national united front" with some bourgeoisie elements. The so-called National Liberation Front obediently made its appearance in December of 1960. . . . From time to time it is asserted that the N.L.F. was actually created within South Viet-Nam prior to this time.³⁷

The State Department document further points out that neither the September or December statements in Hanoi made any reference to an already-existing organization in the South even though it would obviously be to their advantage to emphasize any "home-grown South Vietnamese" element of the N.L.F.³⁸

The State Department document continues:

Professor Fall has concluded that "the wholly artificial nature of the National Liberation Front" at its very inception "is perhaps best shown by the fact that until April 13, 1962, it had not disclosed the names of its alleged leaders, in spite of the fact that its program had been made public almost at the inception of the Front." When the names of some leaders were finally revealed it became clear that none had ever occupied any significant position in South Vietnamese political life either before or after 1954.

The document concludes that the Front is no more than Hanoi's instrument designed to impose upon South Viet-Nam a Communist government; that the Front bears no resemblance "to genuine nationalist rebel organizations that have operated in other countries such as Algeria." Though its membership "undoubtedly includes genuine South Vietnamese nationalists," this cannot obscure "the central fact that its leadership and direction comes from Hanoi and is Communist."⁴⁰ As further evidence of this, the Department of State again quotes Fall regarding the now well substantiated fact that the military leaders of the N.L.F. "get their orders directly from Hanoi." Further, that the Legal Committee of the International Control Commission concluded after an extensive investigation in 1961 and 1962 that the N.L.F. was "under the leadership" of the North Vietnamese Communist Party."⁴¹

Jean Lacouture has concluded that the N.L.F. was created by action taken by the Third Congress of the Lao Dong (Communist

³⁷ U.S. Dept't of State, *Dealing with the N.L.F. as a Path to Peace in Viet-Nam*, 1 (Unpublished).

³⁸ *Ibid.*

³⁹ *Id.* at 1-2.

⁴⁰ *Id.* at 2-3.

⁴¹ *Id.* at 3.

Party of North Viet-Nam) at Hanoi in September, 1960,⁴² but this was done in response to pressures from old Viet-Minh fighters still in the South, in eastern Cochinchina,⁴³ with the N.L.F. actually coming into existence in December, 1960.⁴⁴ Lacouture believes that the N.L.F. in late 1960 was the "result of a hasty compromise between Southern democrats desirous of gaining the sympathy of the masses" and "communist cadres anxious to maintain their contact with the North,"⁴⁵ but that after the creation of the Peoples Revolutionary Party (PRP) in January, 1962, Ho Chi Minh had the means within the N.L.F. to control it "with a genuine nucleus of militants . . . which in effect was a counterpart of the Lao Dong . . ."⁴⁶

Bernard Fall has made direct comment upon the theory that the conflict in the South began as an internal response to political repression of Diem, and the competing proposition that it was instigated by North Viet-Nam after a policy decision was reached in September, 1960, at the Third Party Congress of the Lao Dong in Hanoi. Fall stated that the evidence would indicate that the conflict in the South was instigated from the North, but at an earlier time than claimed by the State Department.⁴⁷ He stated that neither of these theses . . . explains the highly methodical nature of insurgent operations in South Viet-Nam as early as 1957."⁴⁸ Hundreds of village officials had been assassinated by 1957. This alone is no proof of Northern instigation of terrorism in the South. But Fall noted that:

...these were clustered in certain provinces, suggesting more than random pattern. In fact, the geographic pattern of these insurgency incidents closely paralleled that of alleged South Vietnamese violations of the 1954 cease-fire charged in North Vietnamese complaints to the International Control Commission, providing a *prima facie* case for the existence of close coordination between the Communist guerillas in South Viet-Nam and the North Vietnamese intelligence apparatus.

This leaves still a third hypothesis regarding the origins of the insurgency in South Viet-Nam, namely, that the D.R.V.N., as a Communist state occupying a sensitive position on the outer perimeter of the bloc, looked upon its South Vietnamese neighbor as a legitimate target for Communist subversive activities, and that the

⁴² LACOUTURE, VIETNAM: BETWEEN TWO TRUCES 55 (Kellen & Carmichael transl. 1966).

⁴³ *Id.* at 54.

⁴⁴ *Id.* at 56.

⁴⁵ *Id.* at 55.

⁴⁶ *Id.* at 59.

⁴⁷ Fall, *South Viet-Nam's Internal Problems, Pacific Affairs*, Sept. 1958; *Viet Cong — The Unseen Enemy in Viet-Nam*, in *THE VIET-NAM READER* (Raskin & Fall eds. 1965).

⁴⁸ Fall, *supra* note 28, at 23; Trager has documented this organized violence immediately after the Geneva Accords, prior to the abortive scheduled elections of 1956. F. Trager, *supra* note 14, at 117-21.

growth of internal tensions there elevated South Viet-Nam from a "random" objective of Communist subversion to a direct "target of opportunity".⁴⁹

Recent information from independent commentators whose observations were made in Viet-Nam confirm the control exercised by the North over the Viet Cong. Georges Chaffard, reported for *Le Monde* and *L'Express*, French publications which could hardly be called pro-American regarding our Viet-Nam involvement, stated that prior to 1965 he had believed that the Viet Cong was an independent organization, even though supplied from Hanoi, possessing "political autonomy." However, events of the past two years, including a tour of duty in Hanoi, have convinced him that the Viet Cong are controlled from Hanoi. He reported the sighting of a North Vietnamese minister and a general who were inspecting rebel territory in the South as but one of many specific indicators of complete Northern control and direction of the Viet Cong. Further, the name "National Front of South Vietnam" is used in Hanoi only when speaking to outsiders, but when the Communists in Hanoi speak themselves, the N.L.F. is designated as the "Regional Committee of Nam Bo," the old name of the Vietminh organization of the South prior to 1954. For the leaders at Hanoi, Chaffard concludes, "nothing has changed" since the war against the French.⁵⁰

It is submitted that this testimony, based upon long-time observation of events in Southeast Asia, including prolonged tours of duty in North Viet-Nam, is more reliable as being based upon many specific and verifiable events, than the admittedly rather vague impressions to the contrary recorded recently by Harrison Salisbury.⁵¹

George A. Carver, Jr., has written that the N.L.F. from its inception has been the creation and the creature of the North Vietnamese Lao Dong Party, and that the leadership of the N.L.F. often hold official positions in the Lao Dong Party.⁵² Further, that a major proportion of the Viet Cong personnel are former Viet Minh members withdrawn to the North after the Accords and subsequently infiltrated into South Viet-Nam. Without this infiltration Carver states that the Viet Cong "could never have been developed."⁵³ Carver concludes that though there are South Vietnamese nationalists in the N.L.F., "as an organization . . . the N.L.F. is a contrived political mechanism with no indigenous roots, subject to the ultimate control of the Lao Dong Party in Hanoi."⁵⁴

⁴⁹ Fall, *supra* note 28, at 23.

⁵⁰ Chaffard, *Who Controls at Viet Cong?*, 4 CHICAGO TODAY 41 (Spring, 1967).

⁵¹ See H. Salisbury, *Behind the Lines* — Hanoi 159-74 (1967).

⁵² Carver, *The Faceless Viet Cong*, 44 FOREIGN AFFAIRS 364 (1966).

⁵³ *Id.* at 370.

⁵⁴ *Id.* at 372.

Douglas Pike, in one of the most recent and most impressive books on the identity of the Viet Cong, concluded that the organization of the N.L.F. was accomplished by the Communist Party of North Viet-Nam with the creation of cadres of southerners living in North Viet-Nam.⁵⁵ The critical element of the timing of this act of creation by the North is placed by Pike at 1959-1960, prior to the first of two equally critical decisions by the United States to change the nature of our participation in the struggle in Viet-Nam. The decision by President Kennedy to drastically enlarge the number of American troops (though still in the capacity of advisors) came in 1961. By that time, according to Pike, North Viet-Nam had created a revolutionary organization aimed at the destruction of the Republic of South Viet-Nam. Under the direction of the Lao Dong, southerners living in the North were organized into cadres and sent forth, with the Cao Dai and other dissident elements formed the N.L.F. "Instead of beginning with the organizations and creating the front it [the N.L.F.] began with the front and created the organizations and then assigned them the task" of accomplishing a revolution.⁵⁶ Though Pike acknowledges that conditions in the South were ripe for revolt, he has concluded that the N.L.F. is a classic version of the Communist front organization designed to destroy the government of the target country.⁵⁷

As late as 1962 and perhaps early in 1963, the N.L.F., though controlled from the top by the North and staffed in key positions by southerners who had gone North in 1954, still included within it a significant number of southern elements. And perhaps more importantly, the decision to depend dominantly upon a military victory in the South as opposed to a mixture of planned violence and political techniques had not been made. According to Pike, though the N.L.F. was not simply an indigenous organization, it was also no "robot-like instrument" of North Viet-Nam.⁵⁸ Pike reports that "the Northern take-over, or regularization, phase began in mid-1963 . . . and continued to the end of 1965, when the N.L.F. was taken over by cadres from North Viet-Nam and managed by them even down to the village level."⁵⁹ The initiation of complete militarization of the N.L.F. in late 1963 "included ordering thousands of North Vietnamese regular army soldiers to the South . . ."⁶⁰ The D.R.V.N. and the N.L.F. apparently believed that

⁵⁵ PIKE, *VIET CONG: THE ORGANIZATION AND TECHNIQUES OF THE NLF OF SOUTH VIETNAM* 74 (1966).

⁵⁶ *Id.* at 110.

⁵⁷ *Id.* at 80, 110.

⁵⁸ *Id.* at 82.

⁵⁹ *Id.* at 116.

⁶⁰ *Id.* at 164.

the United States would not choose to oppose a large number of P.A.V.N. regulars with the commitment of American combat units.

Again, it should be noted that this major change in the nature of the struggle in the South preceded the second significant escalation by the United States, taken in early 1965. The eminent success of the North Vietnamese policy made the United States reaction necessary if the collapse of the government of the R.V.N. was to be avoided. The change in policy represented by the decision to rely primarily upon recognized units of the P.A.V.N. rather than upon fomenting a general uprising in the South evidently represented a victory by northern cadres over southerners who had previously favored the latter approach.⁶¹

P.A.V.N. forces in South Viet-Nam apparently "worked directly through neither the N.L.F. nor the P.R.P. but had a direct chain of command to Hanoi."⁶² Management of the N.L.F. after 1963 was had by "Hanoi-trained and indoctrinated Communists, perhaps Southerners but responsive to the wishes of the leaders" of the D.R.V.N.⁶³

Conclusion

From an examination of as many sources as could be obtained, this writer would draw one major conclusion. The National Liberation Front is not an indigenous South Vietnamese entity which is being supported by the North, but is rather an organization created and controlled by the D.R.V.N., though composed of non-communist South Vietnamese nationalists alienated by Diem and his successors, as well as communist cadres of former Viet Minh, some having remained in the South following the Geneva Accords and others having gone North for training and indoctrination, later to be sent South.⁶⁴

This is the critical point, rather than the undisputable fact that the Viet Cong is being supplied by the North. It may be argued that international law permits the intervention by an outside state on behalf of an indigenous insurgent group when such an insurgency reaches some degree of stability.⁶⁵ But it could hardly be argued that foreign support for a "contending faction" can be justified under international law and categorized as an "internal war," to be treated as civil war, when the "contending faction" is *first created* by the intervening state. This would be a classic

⁶¹ *Id.* at 107-08.

⁶² *Id.* at 137 n.2.

⁶³ *Id.* at 217.

⁶⁴ See Aggression from the North, *supra* note 27, at 171-97, for a complete account of Hanoi's activities against the R.V.N., including the origin of the N.L.F. and biographical sketches of its major figures.

⁶⁵ Falk, *supra* note 1.

application of the bootstrap doctrine, to turn international aggression into civil war by permitting a state to first create an insurgent force and then claim a right under international law to support such a force since it had an indisputable existence. Though more subtle in form than massive attack across the boundary of another state, it is nonetheless aggression by one state against another.

But when all this has been said regarding the origin and leadership of the Viet Cong, in the final analysis, when a negotiating position is being considered, the single most powerful point will be the percentage of the people in the Republic of Viet-Nam who support the National Liberation Front. That fact, more than origin and identity of leadership and control, must be dealt with in any realistic negotiation. While it would seem to be impossible to come by accurate estimates of the number of the population in the South which would identify with the N.L.F., it is exceedingly hard to believe that the huge preponderance of Allied troops could be withstood by the greatly outnumbered D.R.V.N. and Viet Cong troops without significant support from the countryside.

If, as Ambassador Lodge has reported, the portion of the population in South Viet-Nam controlled by the Viet Cong is indeed diminishing, and if that portion of the population which is not controlled by the Viet Cong identifies itself with the government in Saigon, then there is hope for an eventual settlement in Viet-Nam which would be in keeping with the interests of both the Republic of Viet-Nam and the United States. It should be emphasized, however, that the two qualifications named above are not synonymous with each other. Even if infiltration from the North can be eliminated or at least cut down so that the South Vietnamese themselves can handle the situation, and even if Viet Cong influence over the countryside is steadily eroded, the government at Saigon must gain the adherence of that portion of the population which lives in the countryside. Close to 85% of the population in South Viet-Nam lives outside the cities in the countryside. Without their allegiance, the government at Saigon will eventually find themselves in the same position that Chiang Kai-shek was in *via-a-vis* Mao in China before 1949, with a powerful military force much larger than the opposition, but without political roots in the countryside. Whether Ho Chi Minh will be able to duplicate Mao's triumph will depend as much upon the success of the Saigon government in winning the allegiance of the rural population as upon any other factor. Without the support of the peasants the government at Saigon will last no longer and exist no farther than there is military force to demand and enforce such a result.