WIDER WAR:
AMERICAN FORCE IN VIETNAM, INTERNATIONAL LAW, AND THE TRANSFORMATION OF ARMED CONFLICT, 1961-1977

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AMERICAN FORCE IN VIETNAM, INTERNATIONAL LAW, AND THE TRANSFORMATION OF ARMED CONFLICT, 1961-1977

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This dissertation examines the relationship between international law and the American use of military force during the Vietnam War. In doing so, it focuses on four major issues of wartime conduct: the crossing of international borders with force of arms; the classification and treatment of enemy detainees; aerial bombardment; and the unintentional killing of civilians. Each of these major issues forms the basis of a chapter in the dissertation, and each of these four chapters investigates both how law influenced American conduct of the Indochina conflict and how the application of force by the United States in Vietnam reshaped the legal architecture of war. The major historiographical debate concerning law and war in Vietnam focuses on whether or not the United States generally adhered to its legal obligations during the conflict. This project, in contrast, moves beyond the question of compliance to focus on the contested and contingent meanings of the law itself. A final chapter examines how American interpretations and innovations of law developed during the Vietnam War were crystallized into new, more diffuse parameters for the legitimate application of international violence in the years after the war. Those new parameters matter for how war is imagined and waged today.

BIOGRAPHICAL SKETCH

Brian Cuddy was born in Christchurch, New Zealand, and completed his schooling and undergraduate education in his hometown. At the University of Canterbury, Brian majored in History and Political Science before achieving First Class Honours in an interdisciplinary Diplomacy and International Relations degree program. After finishing at Canterbury in 2003, he studied for a Master's degree in International Relations at Yale University, during which time he also spent a summer as an intern with the Department of Peacekeeping Operations at United Nations Headquarters in New York City. Upon completing his time in New Haven, Brian spent an academic year as a Fox International Fellow at Sciences Po in Paris, France, before joining the New Zealand public service in 2006. As an analyst with the Department of the Prime Minister and Cabinet, Brian produced assessments of international political, economic, and strategic trends and events. In 2009, Brian commenced his doctoral studies in History at Cornell University, where his major field was U.S. history (with a focus on the history of American foreign relations); he also took minor fields in modern Chinese history (with a focus on China and the world), modern European history (with a focus on the history of international law), and International Relations (through Cornell's Government Department). During his time at Cornell, Brian was also affiliated with the Judith Reppy Institute for Peace and Conflict Studies. In 2016, Brian completed his dissertation, graduated from Cornell, and took up an academic position in the Department of Security Studies and Criminology at Macquarie University. Brian married his wife, Jessica, in 2006. They live with their three daughters, Lara, Gabrielle, and Rosemary, in Sydney, Australia.

For my parents

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My parents, Jerome and Veronica Cuddy, have helped me in many different ways leading up to, and over the course of, my doctoral studies, and so I dedicate this dissertation to them. Their support and love mean a lot to me. Thanks for everything, Mum and Dad. I am grateful, too, for the family support and encouragement of Maria, Nick, Evelyn, Rawiri, Liam, Ruadhán, Sharon, Guillaume, Cheryl, Gordon, Abe, Alice, and Lucy.

My two elder daughters, Lara and Gabrielle, first journeyed to Ithaca when they were 20 months and three months old, respectively; their younger sister, Rosemary, was born not long before we left. Following their Dad on his wild giraffe chase has not been easy, but they have done so with understanding, love, and laughter—and that has made all the difference. Jess has been with them, and me, all along the way. For that, and for so much else, I am truly thankful.

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LIST OF ABBREVIATIONS

ARVN	Army of the Republic of Vietnam
CIA	Central Intelligence Agency
DOD	Department of Defense
DRV	Democratic Republic of Vietnam, or North Vietnam
FRUS	*Foreign Relations of the United States*
GVN	Government of [South] Vietnam
ICRC	International Committee of the Red Cross
INR	Intelligence and Research Bureau, Department of State
JCS	Joint Chiefs of Staff
LOC	Line of Communication
MACV	U.S. Military Assistance Command Vietnam
NLF	National Liberation Front of South Vietnam
NSC	National Security Council
NVN	North Vietnam
PAVN	People's Army of Vietnam
POL	Petroleum, Oil, and Lubricants
POW	Prisoner of War
RVN	Republic of Vietnam, or South Vietnam
SVN	South Vietnam

1. INTRODUCTION

I

"The United States seeks no wider war." It was something of a signature phrase for Lyndon Johnson during the crucial year from about mid-1964 to mid-1965, in which the American president slowly but surely committed U.S. combat forces to fight in Vietnam. What exactly Johnson meant by the phrase *wider war* varied from speech to speech. Early on, it more often than not referred to a war no longer confined within the boundaries of South Vietnam, but one that spilled north over the demarcation line separating the two Vietnamese states. "It is true that there is danger and provocation from the North, and such provocation could force a response," Johnson explained to the press in July 1964, "but it is also true that the United States seeks no wider war."[1] When a perceived North Vietnamese provocation—the Gulf of Tonkin incident of early August 1964—prompted just such a response, Johnson made sure to stress that "our response, for the present, will be limited and fitting. … We still seek no wider war."[2]

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[1] Lyndon B. Johnson: "The President's News Conference," July 24, 1964. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=26393.

[2] Lyndon B. Johnson: "Radio and Television Report to the American People Following Renewed Aggression in the Gulf of Tonkin," August 4, 1964. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=26418. On the Americanization of the war in Vietnam, see: Fredrik Logevall, *Choosing War: The Lost Chance for Peace and the Escalation of the War in Vietnam* (Berkeley: University of California Press, 1999); David Kaiser, *American Tragedy: Kennedy,*

As his presidential campaign against the hawkish Barry Goldwater intensified, Johnson used the phrase to evoke even bigger conflicts. “We can seek a wider war,” he cautioned a crowd in Akron, Ohio, in October. “China is there on the border with 700 million men, with over 200 million in their army.”[3] But if he used the phrase to stoke fear of doing too much, he also used it to warn of doing too little. “To leave Vietnam to its fate would shake the confidence of all these people in the value of an American commitment and in the value of America’s word,” he explained to an audience at Johns Hopkins University in April 1965. “The result would be increased unrest and instability, and even wider war.”[4] Neither too much force, nor too little, was required to keep the war just the right size.

Johnson won the 1964 presidential election in a landslide, but four years later did not have the political strength to run again. China did not intervene directly in the Vietnam War (nor did the Soviet Union), but along most other axes—space, time, intensity—the war bulged, billowing out over neighboring countries, destroying many lives, and consuming Johnson’s political career. If the Vietnam conflict had a great effect on a great many places and people, however, it also had a significant effect on war itself—on the boundaries circumscribed around war that distinguish it from other forms of political violence, and on the norms and laws that work to keep the violence of war within those institutional bounds. As successive presidential administrations pulled and tugged at established limits on the use of force and the conduct of

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Johnson, and the Origins of the Vietnam War (Cambridge, MA: Belknap Press, 2000); Brian VanDeMark, *Into the Quagmire: Lyndon Johnson and the Escalation of the Vietnam War* (New York: Oxford University Press, 1991).

[3] Lyndon B. Johnson: "Remarks in Memorial Hall, Akron University," October 21, 1964. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=26635.

[4] Lyndon B. Johnson: "Address at Johns Hopkins University: "Peace Without Conquest."," April 7, 1965. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=26877.

hostilities, the institutional edges of war frayed. At the time (and still in hindsight), the overwhelming human cost of the Vietnam War obscured the toll taken on war as an institution. This dissertation aims to recover an understanding of how war changed as a result of the Vietnam conflict. It finds that the American experience in Indochina was an important inflection point in the institutional transformation of armed conflict—the widening of war—from the tightly-bound high-modern battlefield to today's expansive network of targets.

Whereas many studies of the changing character of war are driven by a technological determinism—in which new weapons periodically remake war[5]—this study focuses on questions of international law and legal doctrine, which can be seen, more-or-less, as proxies for understanding war as a feature of international society; it is law that allows us to see the institutional outline of war.[6] Given this focus on law, two basic questions drive the dissertation. First, how did international law influence the United States' use of military force during the Vietnam War? And second, how did America's application of force in that conflict reshape the legal architecture of war?

II

While broad questions of law and legal obligation implicitly underlie much of the Vietnam War historiography, close engagement with the intricacies of international law has not figured

[5] See, e.g., Max Boot, *War Made New: Technology, Warfare, and the Course of History, 1500 to Today* (New York: Gotham Books, 2006).

[6] International law on the use of force is generally divided into two categories: rules regarding the recourse to war—under what circumstances it is acceptable to use force—and rules regarding *how* force might be used in the conduct of hostilities. The latter category goes by the names of international humanitarian law, the law of armed conflict or, simply, the law(s) of war. It has two main sources, the Hague rules of 1899 and 1907 pertaining mainly to combatants; and the Geneva Conventions of 1949 pertaining mainly to non-combatants. The two 1977 Protocols Additional to the 1949 Geneva Conventions touch upon both sides of the combatant/non-combatant divide.

prominently in the historical literature on the war to date.[7] To the extent there has been a historiographical debate over international law in the Vietnam War, it has turned on the question of compliance: was the United States a deliberate and recurrent law-breaker in Vietnam or was it a law-abiding good international citizen? Scholars have lined up on this question much as they have on other questions regarding the war, with an anti-war "orthodox" school (so called because it emerged first, prior to the scholarly defense of the war, and remains the dominant perspective within the academy) facing off against a more hawkish "revisionist" school (which emerged later and suggests the war was winnable).[8]

In seeking to show the strategic and/or moral failure of the United States effort in Indochina, historians of the orthodox school have highlighted the systematic law-breaking of Americans involved in the war at all levels, and the widespread effects this lack of compliance had on both Vietnamese and American societies—and still has today. "Vietnam Still Matters," for the historian Marilyn Young because of America's failure to come to terms with the criminal acts it perpetrated there. She notes that "although the United States lost in Vietnam, it was not

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[7] On the importance of broad questions of morality (including legality) to early public and scholarly criticisms of the war, see: Gary R. Hess, *Vietnam: Explaining America's Lost War* (Malden, MA: Blackwell Publishing, 2009), p. 5.

[8] The pre-eminent historiographer of the war, Gary Hess, writes: "The predominant wartime dovish critique and hawkish defense evolved into what can be labeled the orthodox and revisionist interpretations of the war respectively. The gradual opening of thousands of presidential, diplomatic, and military documents of the Vietnam era over the past three decades has enabled scholars to write thoroughly researched works that examine American policy in greater depth and with sophistication. … The orthodox interpretation is represented in most of the scholarly writing, although it is also reinforced by the memoirs of some participants. The revisionist challenge to the orthodox school, however, has been advanced mostly by former military and civilian officials, but some journalists and scholars have made important contributions. Like the orthodox school, their writings reflect varying degrees of scholarly documentation, but in general orthodox scholarship is more firmly grounded. That is not to argue that their conclusions are necessarily more correct. And it is certainly not to suggest that their views necessarily have greater impact in American political culture." Hess, *Vietnam*, pp. 12-13.

defeated. Defeat in war in which criminal acts have taken place, or, because it was a war of aggression, constituted a violation of international law as such, has resulted in international trials, an acknowledgment of the crimes of war and crimes against humanity committed, even the payment of reparations to victims." Without such juridical closure, or at least something approaching an "extended period of national soul-searching," Young holds that "Vietnam still matters because the central issues it raised about the United States in the world over four decades ago remain the central issues today."[9] Nick Turse, who has argued that atrocities committed by American personnel in Vietnam were widespread throughout the war, concurs with Young. Believing that the law-breaking in Vietnam needs to be attributed to politicians and generals rather than to a few "bad apples," Turse concludes his recent book with a call for closure: "The crimes committed in America's name in Vietnam ... have never been adequately faced. As a result, they continue to haunt our society in profound and complex ways."[10]

International law is also important as a background feature for the revisionist school, which emphasizes that the United States was right to fight in Vietnam and that it could have won had the American people, politicians, or generals done things differently. Guenter Lewy's account of the war—the first and perhaps still the most influential revisionist work—tracks American policies and procedures in Vietnam against a reading of the Hague Rules and Geneva Conventions. He finds that the United States had a decent, albeit not perfect, record of complying with the laws of war.[11] Focused more specifically on the operations of the National Liberation

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[9] Marilyn Young, "Introduction: Why Vietnam Still Matters," in John Ernst and David Anderson (eds), *The War That Never Ends: New Perspectives on the Vietnam War* (Lexington: University Press of Kentucky, 2007), pp. 1 – 11 at pp. 6 and 11.

[10] Nick Turse, *Kill Anything That Moves: The Real American War in Vietnam* (New York: Picador, 2013), p. 261.

[11] Guenter Lewy, *America in Vietnam* (New York: Oxford University Press, 1978).

Front (NLF) within South Vietnam, and the American counterinsurgency campaign to expose and destroy the NLF's political infrastructure, Mark Moyar argues forcefully that U.S. actions were both effective and fell within legal bounds.[12]

Debating the question of whether or not American actions fell within legal bounds is important. But compliance is not the only question worth asking about law, and a corresponding assessment of law's value based on whether states comply with it or not is a poor picture of law's full role in international politics and war. As Helen Kinsella, a political theorist of the law of war, has noted, the "framing" of law on questions of compliance "excludes an analysis of the very politics that informs and produces international institutions and international order."[13] She quotes the international lawyer Martti Koskenniemi, who similarly suggests that the single-minded focus on compliance "silently assumes that the political question—what the objectives are—has already been solved."[14]

What scholars such as Kinsella and Koskenniemi suggest is that law works not only as an alternative to, or a check upon, the violence of war. It also works to structure that very violence, making some forms of war acceptable while tainting others as out of bounds. In drawing the lines of *legitimate* violence, the law of war highlights the norms and expectations of world politics. As the Italian scholar Alessandro Colombo writes, "Contrary to the growing tendency to

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[12] Mark Moyar, *Phoenix and the Birds of Prey: Counterinsurgency and Counterterrorism in Vietnam* (Lincoln: University of Nebraska Press, 2007 [1997]), pp. 209-10, 229-30, 285, and 289. For other prominent revisionist works, but which focus less on law, see: Harry G. Summers, Jr., *On Strategy: A Critical Analysis of the Vietnam War* (New York: Presidio Press, 1982); and Lewis Sorley, *A Better War: The Unexamined Victories and Final Tragedy of America's Last Years in Vietnam* (Orlando: Houghton Mifflin, 1999).

[13] Helen M. Kinsella, *The Image before the Weapon: A Critical History of the Distinction between Combatant and Civilian* (Ithaca, NY: Cornell University Press, 2011), pp. 4-5.

[14] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (Cambridge, UK: Cambridge University Press, 2002), p. 485.

consider war as the opposite of social order, by looking at war we can even grasp those features of social order which might be hidden or concealed in peace."[15] The international laws of war have been, and continue to be, a fundamental expression of values—a defining statement on the social order of the international community.

What normative boundaries does law provide? The principal line is between murder and war—meaning, as the legal scholar David Kennedy strips away the euphemisms, "that killing, maiming, humiliating, wounding people is legally privileged, authorized, permitted, and justified."[16] The military historian Martin van Creveld explains that "different societies at different times and places have differed very greatly as to the precise way in which they draw the line between war and murder; however, the line itself is absolutely essential. Some deserve to be decorated, others hung. Where this distinction is not preserved society will fall to pieces, and war—as distinct from mere indiscriminate violence—becomes impossible."[17] As van Creveld implies, determining combatant status—who deserves to be decorated, who hanged, for killing in war—is one of the most vital social functions of the law of war, and the line between combatants and civilians is less obvious than we might first think.

The law of war draws lines not just around people; it also circumscribes the temporal and spatial dimensions of violence—in its most classical form, through the institution of pitched battle. "Like an Aristotelian drama," writes legal historian James Q. Whitman, "the classic pitched battle was strictly limited in time and place. Fought on a defined field, it was supposed to

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[15] Alessandro Colombo, "Unequal War and the Changing Borders of International Society," paper presented at the annual meeting of the International Studies Association, 15 February 2009, New York, http://citation.allacademic.com/meta/p313566_index.html (accessed 30 March 2014).

[16] David Kennedy, *Of War and Law* (Princeton, NJ: Princeton University Press, 2006), p. 8.

[17] Martin Van Creveld, *The Transformation of War* (New York: The Free Press, 1991), p. 90.

last one day and no more, beginning in tension at dawn, ending in exhaustion at dusk, and so (in the best of circumstances) terminating the war by the time night fell."[18]

Even in the subsequent age of total war some legal outlines remained. While the strategic bombing and general devastation of World War II blurred the distinction between combatant and civilian, the war nonetheless saw some limitation of means—notably the reciprocal avoidance of poison gas—and was also bounded in time, as highlighted by one of the twentieth century's most prominent strategic thinkers, Thomas Schelling: "The principal boundary to violence was *temporal*; at some point the war was stopped though both sides still had a capacity to inflict pain and cost on the other. Surrender or truce brought the common interest into focus, putting a limit to the losses. But until surrender or truce, the use of force was substantially unbounded."[19]

Although an assessment of legal compliance is an important consideration in this dissertation, then, its chief contribution is less to adjudicate the question of whether the U.S. abided by or broke the law than to move beyond this binary altogether. In this work, law is less an objective standard that is either met or not, than a contested concept whose meanings evolve. It seeks to uncover how the use of law—and then the law itself—changed as a result of the Indochina conflict and what those changes meant for post-Vietnam modes of warfare and the institution of war itself—the who, when, where, and how of legitimate killing.

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[18] James Q. Whitman, *The Verdict of Battle: The Law of Victory and the Making of Modern War* (Cambridge, MA: Harvard University Press, 2012), p. 4.

[19] Thomas C. Schelling, *Arms and Influence* with a new preface and afterword (New Haven, CT: Yale University Press, 2008 [1966]), p. 129.

III

If this dissertation looks to put the historiography of the Vietnam War in a new legal light, it also attempts to inject an appreciation of the Vietnam War into the historiography of international law. The Indochina conflict was the most prominent and important asymmetric war the United States fought in the twentieth century, but its significance has generally been neglected by international legal historians, perhaps because of the perception that law played no significant role in American foreign-policy making regarding the war. Geoffrey Best, one of the leading historians of the law of war, states in one of his now-standard accounts of the development of international humanitarian law that the Vietnam War "raised few new questions of principle."[20]

Not all historians, however, have neglected the Vietnam War-era as a turning point in the history of international law. The broad field of critical legal studies has produced important work that holds the early to mid-1960s to be a significant inflection point within the general post-World War II evolution of international law in both US foreign policy in particular and world politics more generally. Martti Koskenniemi's book, *The Gentle Civilizer of Nations*, one of the key pieces of scholarship on the twentieth-century fate of public international law in world politics, identifies the mid-1960s as the fulcrum of a pivot away from legal formalism to a more policy-oriented legal pragmatism.[21] The Harvard international law scholar David Kennedy sees

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[20] Geoffrey Best, *Humanity in Warfare* (New York: Columbia University Press, 1983 [1980]), p. 371.

[21] Koskenniemi, *The Gentle Civilizer of Nations*. Koskenniemi suggests there were three basic components of this transformation of international law: geographically its center shifted from Europe to the United States at a time when the United States had primary responsibility for re-establishing and managing the institutions of international order; professionally its practitioners moved from the formalism that had until then characterized the discipline to a policy-oriented pragmatic stance that downplayed the earlier focus on courts and codes; and intellectually it turned towards realism—with some scholars disavowing law and joining the construction of the new discipline of International Relations, and others incorporating the ideas of interwar legal realism from the U.S. domestic scene into the study of international law. Samuel Moyn has labeled *Gentle Civilizer* a "classic." See Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: The Belknap Press of Harvard University Press, 2010), n. 3, p. 293.

the early 1960s as a time of renewal in the discipline of international law in the United States—as a time when the field developed a new consensus after going through a disputatious and anxiety-ridden period from the 1940s through the late 1950s.[22]

While the work of Koskenniemi, Kennedy, and others is an important starting point for identifying change over time, its focus on shifts in international legal scholarship and on international lawyers in the academy obscures some of the changes happening within U.S. foreign policy.[23] There is little appreciation in this body of literature for what lawyers within the U.S. foreign policy and military bureaucracies contribute to the shifting legal framework of war, or how non-legal officials using law reinterpret it as they go. But what government lawyers, and non-lawyer officials using the law, debate and do in the midst of often fast-paced and stressful events matters. This dissertation is focused on understanding the changing relationship of law and war from their perspective.[24]

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[22] See, among other Kennedy works, "When Renewal Repeats: Thinking against the Box," in Wendy Brown and Janet Halley (eds), *Left Legalism / Left Critique* (Durham, NC: Duke University Press, 2002), pp. 373-419.

[23] A partial exception to the focus on academic lawyers is Abraham Sofaer, who served as State Department Legal Adviser from 1985 to 1990. Coming from a different political and professional position than critical legal studies, Sofaer has nonetheless also identified the early-to-mid 1960s as a time when a new American approach to considering the legality of using force in international affairs crystallized. In particular he pinpoints an approach developed during Abe Chayes' tenure as State Department Legal Adviser in the Kennedy Administration and articulated by Chayes in a 1965 article. Sofaer has written at least two articles in which he identifies (and promotes) this flexible view of international law expounded by Abram Chayes. See: Sofaer, "International Law and Kosovo," *Stanford Journal of International Law*, vol. 36, no. 1 (Winter 2000); and Sofaer, "The International Court of Justice and Armed Conflict," *Northwestern University Journal of International Human Rights*, vol. 1, no. 4 (Fall 2003). For the original Chayes article that inspired Sofaer's views, see: Chayes, "A Common Lawyer Looks at International Law," *Harvard Law Review*, vol. 78, no. 7 (May 1965). Sofaer is only a partial exception to the focus on academic lawyers, however, because he concentrates on Chayes' academic rather than government work (although, to be sure, the former was influenced by the latter, and vice versa).

[24] Neither is it, therefore, a study of law as it involved the ordinary American soldier, sailor, or Marine engaged in military operations in or around Vietnam. As a consequence of the focus on policy, questions relating to the behaviour of American troops, including the incidence of atrocity, massacre, and torture, are mostly left aside. These questions are hugely important, but they are extensively covered elsewhere, most recently by Nick

Given this stated focus of the dissertation, it is based less on readings of the secondary literature than on an appreciation of the internal U.S. government record. A heated debate over all manner of legal issues involved in the Vietnam War was carried on among (mostly university-based) legal scholars during the 1960s and 70s while the war was still raging.[25] But that debate was only peripherally aware of the discussions and interpretations being developed within the Kennedy, Johnson, and Nixon Administrations. While some of the official government legal opinions and memoranda were made public, others were not released at the time. It is now possible with the passage of time and declassification of documents to uncover them, although it requires "combing through the archives," a task that the French historian Arlette Farge insists must be "performed without haste, and necessarily so. One cannot overstate how slow work in the archives is, and how this slowness of hands and thought can be the source of creativity."[26]

That has certainly been the experience with this project: only in the tedium of the archive have any insights emerged. To be sure, those insights have needed sharpening (and sometimes dumping) before becoming first hypotheses and then (still-fragile) conclusions. But process-tracing and pattern-recognition are the methodological mainstays of this project, and the discernment of processes and patterns has only happened during the sustained slog of archival research, principally at U.S. government archives (presidential, federal, and military), but also at

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Turse, *Kill Anything That Moves*. For a rejoinder to Turse, see Gary Kulik and Peter Zinoman, "Misrepresenting Atrocities: *Kill Anything That Moves* and the Continuing Distortions of the War in Vietnam," *Cross-Currents: East Asian History and Culture Review*, E-Journal No. 12 (September 2014), http://cross-currents.berkeley.edu/e-journal/issue-12 (accessed 25 April 2016).

[25] Key moments in this debate were marvellously captured by Richard Falk in his four-volume edited collection on the war: Richard Falk (ed.), *The Vietnam War and International Law* 4 vols. (Princeton, NJ: Princeton University Press, 1968, 1969, 1972, 1976).

[26] Arlette Farge, *The Allure of the Archives* trans. Thomas Scott-Railton (New Haven: Yale University Press, 2013), p. 55.

the archives of key American ally the United Kingdom, the archives of the International Committee of the Red Cross (an NGO mandated to play a type of guardian role with regard to international humanitarian law), and the private papers of key government lawyers, including two State Department Legal Advisers.

IV

This dissertation cannot do justice to the whole gamut of legal issues at play during, and after, the Vietnam War, and rather than try, it selectively focuses instead on three (or four) key questions of war and law: *when* do states have the right to use force across sovereign borders? *who* should be considered a lawful enemy combatant with prisoner-of-war rights? and *what* can be lawfully targeted (and *where*) by artillery and aerial bombardment?

Chapter 2, "New Frontiers," opens the dissertation not in Southeast Asia but in the Caribbean. After the 1961 events of the Bay of Pigs, and prompted by those events, a debate ensued among Kennedy administration officials on the role law should play in combating the perceived problem of indirect aggression—whereby through infiltration, subversion, and supplying arms to domestic opposition, the Communist powers were seen to be attacking the governments of vulnerable pro-Western or unaligned countries (Section I). Because none of these actions amount to a clear, cross-border use of force (i.e., direct aggression), they were not specifically proscribed by international law, leading some U.S. officials to question the extant scope and role of international law. The debate within the Kennedy administration over indirect aggression and international law (Section II) flared brightly and briefly for only a few months after the Bay of Pigs, but its effects persisted, including the shaping of the legal framework for the decision to increase significantly American support for South Vietnam in late 1961 and to

escalate substantially American involvement in 1965 (Section III). As the U.S. commitment to Saigon grew, the focus on developing an answer to the indirect aggression problem shifted from North Vietnam (which by 1965 was no longer deemed an indirect aggressor but a direct one) to Cambodia and the sanctuary it provided for Vietnamese Communist fighters. The evolution of American thinking, from the Johnson Administration (Section IV) to the Nixon Administration (Section V), regarding which legal doctrine should be used to justify US armed actions on Cambodian soil eventually led to the emergence (or perhaps reemergence) of new understandings of self-defense against aggression.

Chapter 3, "Making Enemies," considers how and why the United States agreed to apply the Geneva Conventions for the protection of war victims not just to captured North Vietnamese regular soldiers but also to guerrillas fighting for the southern insurgency, in effect making the latter lawful enemy combatants rather than domestic criminals. The complicated status of guerrilla fighters has been central to the development of, and disagreements over, the law of war since the mid-nineteenth century (Section I). The question emerged again in Vietnam when the president of the International Committee of the Red Cross wrote to each of the parties to the conflict requesting that they agree to adhere to the Geneva Conventions as they related to international armed conflict (i.e., not civil war, for which the conventions provided fewer protections). After a significant debate within the U.S. Administration (Section II), the United States agreed (although not unambiguously) to the ICRC request. This still left open the question of how the Geneva Conventions would work in practice, however, and out of a give-and-take political process involving the United States, the Republic of Vietnam, and the ICRC emerged understandings over the oversight role of the ICRC and the determination of combatant status (Section III). The chapter closes by speculating on why the United States agreed to such an

expansive and, on the face of it, generous interpretation of the status and rights of guerrilla enemy combatants (Section IV), with a particular focus on the idea of reciprocity (Section V).

Chapter 4, "Moving Targets," shows how the United States gradually expanded its definition of a "military objective" while maintaining its public commitment to restraint—by increasingly showcasing its efforts to minimize the number of civilian casualties resulting from its aerial bombardment of North Vietnam. The United States worked hard to present its war in Indochina—and particularly its bombing campaign against North Vietnam—as limited in both ends and means. The logic of reprisal prominently featured in 1964 and early 1965 as a signal for proving those limited intentions, but in February 1965 it was rejected as a legal doctrine on which to base American actions (Section I). As a consequence, it was no longer much help in setting and policing limits and, in any case, where the logic of reprisal surreptitiously persisted (Section II), it actually tended to enable rather than contain the drift towards ever-more northerly and capaciously-defined targets (Section III). State Department lawyers much preferred the doctrine of self-defense over reprisal—it better matched their proffered reason for going to war, for one—and mostly based their efforts to reign in Operation Rolling Thunder on the limits understood to be embedded within that doctrine (Section IV). Although the documentary record is opaque on this point, there was clearly a dispute between State Department lawyers and military officers over the nature and practical consequence of those embedded limits. The outcome of this disagreement left the State Department's understanding of self-defense, with its greater stress on spatial and target-category limits, without a clear foothold in the broader bureaucracy responsible for American targeting policies and practices. With the United States still needing to signal a respect for limits, but also wanting an expansive definition of military targets, the burden of proof increasingly fell on an American commitment to minimize civilian

casualties, including by not targeting them directly (Section V). Efforts to minimize civilian casualties became a proxy for limited intent.

If Chapter 4 shows how the rise of an American commitment to not targeting civilians was actually part of a broader shift in the legal geography of war, then Chapter 5 (perhaps better characterized as Chapter 4-and-a-half), "Changing Places," examines that shift in more detail, with the focus moving from the air war against North Vietnam to the ground war within the borders of South Vietnam itself. When Americans were sent to fight a war in which front and rear zone, civilian and combatant, legitimate target and populated village all merged into one undifferentiated space, they attempted to make the landscape legible by applying a conventional—and incredibly destructive—territorial paradigm of war (Section I) and its legal counterpart (Section II). Widespread criticism of the American conduct of the war, and particularly the seemingly indiscriminate killing of civilians, discredited the old territorial paradigm that had justified civilian casualties according to *where* they occurred and prompted the rise of a different, utilitarian understanding of civilian harm, in which noncombatant casualties were justified in relation to the military value of the objective attacked—the rule of proportionality (Section III). The fraught experiences of both waging and justifying the Vietnam War prompted the rise of a new legal geography of war that paired standalone targets (essentially unmoored from any prior territorial limits) with a new and forceful emphasis on the "Rule of Proportionality."

Chapter 6, "Wider War," explores the ways in which the new legal interpretations developed by the United States during the Vietnam War were incorporated into both the historical narrative and the legal letter of international law in the years after the war. For both the "Unwilling and Unable" doctrine (Section I) that emerged out of the American incursions into

Cambodia, and the "Rule of Proportionality" (Section IV), legal scholars and historians have constructed "long" narratives that locate the origins of these concepts in the nineteenth century or the middle ages, in the process obscuring the very contingent nature of their rise to prominence—a contingency rooted in the American experience of the Vietnam War. At the heart of this final chapter is the decade-long process of negotiating the 1977 Additional Protocols to the Geneva Conventions, which significantly reformulated the laws of war around combatant status and bombardment, among other issues. Even as (stemming from their Vietnam War experience on combatant status issues) they gave in to demands from the recently-decolonized states that national liberation movements and their guerilla fighters be accorded full belligerent and combatant status (Section II), the U.S. and its allies pushed to reinforce certain other legal interpretations, particularly the Rule of Proportionality, that they had voiced during the wars of decolonization (Section III).

With the signing of the Additional Protocols in 1977, the institution of war looked quite different from that assumed by the architects of the post-1945 international legal order—those who drafted the United Nations Charter, the 1949 Geneva Conventions, and the Nuremberg principles. In the late 1950s, U.S. officials largely thought future wars would be similar to the last one (Korea), with tanks rolling openly across borders, massed infantry formations competing for territory, and the legal infrastructure to match. Twenty years on, war as a social and legal institution was imagined quite differently. Armed conflict went from being still quite a bounded institution—one fought by a specified class of people in a particular place over a defined period of time—to a much more constant, diffuse, and ill-defined institution: a wider war.

2. NEW FRONTIERS

I

On April 19, 1961, the New Frontier reached its limit. The following afternoon, three months to the day after his inauguration and less than a year after proclaiming the New Frontier open, John F. Kennedy explained why American power had stopped at the water's edge of the Bay of Pigs on the southern coast of Cuba.[1] "I have emphasized before that this was a struggle of Cuban patriots against a Cuban dictator," President Kennedy told the American Society of Newspaper Editors three days after a brigade of Cuban exiles had invaded their homeland intent on sparking an uprising to overthrow its revolutionary leftist government—and a day after Cuban leader Fidel Castro's troops and militia had mopped up the remnants of that failed force while

[1] Or at least close to the water's edge. The *USS Essex* and the seven destroyers accompanying it seem to have been restricted to operating no closer than 30 miles from shore, and naval air cover was restricted to operating no closer than 20 miles from shore. Trumbull Higgins, *The Perfect Failure: Kennedy, Eisenhower, and the CIA at the Bay of Pigs* (New York: W. W. Norton & Company, 1987), p. 135. Cf. p. 117, where a 20 mile limit for the destroyers is mentioned. Some exceptions to these rules of engagement were permitted during the course of the operation, mostly to allow for the protection of the Cuban Brigade's retiring ships and landing craft, and for the rescue of some of the defeated invaders on April 19. *ibid*., pp. 142, 146-148. Important books on the Bay of Pigs include: Jim Rasenberger, *The Brilliant Disaster: JFK, Castro, and America's Doomed Invasion of Cuba's Bay of Pigs* (New York: Scribner, 2011); Peter Kornbluh (ed.), *Bay of Pigs Declassified: The Secret CIA Report on the Invasion of Cuba* (New York: The New Press, 1998); Peter Wyden, *Bay of Pigs: The Untold Story* (New York: Simon & Schuster, 1979); Howard Jones, *The Bay of Pigs* (New York: Oxford University Press, 2008).

Washington looked on. "While we could not expect to hide our sympathies, we made it repeatedly clear that the armed forces of this country would not intervene in any way," he continued. "Any unilateral American intervention, in the absence of an external attack upon ourselves or an ally, would have been contrary to our traditions and to our international obligations."[2] American power had limits—legal limits, Kennedy suggested to the newspaper editors—and the United States ran up against them at the Bay of Pigs.

The "traditions" Kennedy referenced in his remarks of April 20 were longstanding and fundamental to an American vision of itself in the world—and to a vision of a world molded on America. Since Jefferson's Declaration of Independence, and notwithstanding the violence wrought in its name, the United States had seen itself as a promoter of the rule of law, both within nation-states and in relations among them. The United States was committed in principle to the resolution of disputes not through war, but through democratic, diplomatic and judicial processes. This included a commitment to a legal framework for the use of force in world politics. Kennedy himself perpetuated this strain of American political thought in his Inaugural Address, exhorting "both sides" in the Cold War to "join in creating a new endeavor, not a new balance of power, but a new world of law, where the strong are just and the weak secure and the peace preserved."[3]

The more legally-specific "international obligations" Kennedy referenced presumably included inter-American treaties, the customary law principles stemming from the trials at Nuremberg and, ultimately, the Charter of the United Nations. In a Bay of Pigs-like situation,

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[2] John F. Kennedy, "Address Before the American Society of Newspaper Editors," April 20, 1961. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=8076.

[3] John F. Kennedy, "Inaugural Address," January 20, 1961. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=8032.

this varied assortment of legal ties all pointed in the same direction: the prohibition of the threat or use of force against the territorial integrity or political independence of any state.[4] With the models of Nazi Germany and Imperial Japan at the forefront of their minds, the architects of the post-1945 world order had prioritized the international community's ability to prevent or suppress the waging of aggressive war. The sanctity of sovereign borders had been enshrined in the legal order of the 1940s, and breaching those borders with force of arms—waging aggressive war—was considered the ultimate international crime. "Cuba is not an island unto itself," contended Kennedy to the editors. But, legally as well as topographically, it was. And on April 19, 1961, the New Frontier reached its limit, brought up short by much older spatial signifiers: sovereign borders.

The Bay of Pigs fiasco showed, then, something of an adherence to the American belief that the rule of law did, or should, matter for international politics and that America's global position depended to an extent on upholding it. President Kennedy had made it repeatedly clear prior to the invasion, both privately to government officials and publicly, that no uniformed US military personnel would be involved in an intervention in violation of Cuba's sovereignty. "I want to say that there will not be, under any conditions, an intervention in Cuba by the United States Armed Forces," he declared in a news conference on April 12. "This Government will do everything it possibly can, and I think it can meet its responsibilities, to make sure that there are

[4] The language is that of Article 2(4) of the United Nations Charter, which reads in full: "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." In 1950, the International Law Commission, responding to a 1947 request from the UN General Assembly, formalized the principles underlying the Nuremberg trial and judgment, including the characterization of "planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances" as a crime against peace. The Inter-American Treaty of Reciprocal Assistance (the Rio Treaty) of 1947 and the Charter of the Organization of American States (1948) both outlawed interference in the internal affairs of signatory nations.

no Americans involved in any actions inside Cuba."[5] But while the commitment to some form of legal order within the administration was not illusory, neither was it pure. There were clearly competing instincts about the place of law in U.S. foreign policy, each vying with the other in April 1961. While the tenor of Kennedy's speech was that American "traditions" and obligations" were complementary, some of his officials were coming to see the two as increasingly at odds with each other—as perceiving the American tradition of upholding the Rule of Law to be in tension with United States obligations to obey particular rules of law.

Kennedy was, of course, telling only half-truths to the newspaper editors gathered to hear him speak on April 20. While he had indeed held firm on the issue of direct U.S. military intervention, Kennedy had also given the go-ahead for an American-planned, American-supplied, American-trained mission. Far from a brave struggle of self-helping Cuban patriots, the Bay of Pigs invasion was a U.S. operation in more-or-less open violation of international law. Kennedy's focus on the absence of American military personnel in the invading force constituted, in the words of the scholar of international order R. J. Vincent, a "radical narrowing" of the doctrine of non-intervention.

The administration, moreover, could not plead ignorance of the legal issues involved. In March and early April, a State Department group led by Under Secretary Chester Bowles and including officials from the Office of the Legal Adviser and the Bureau of Intelligence and Research, met to discuss CIA plans for the Cuban invasion. These meetings led to a number of

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[5] John F. Kennedy, "The President's News Conference," April 12, 1961. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=8055. On Kennedy's adherence to this principal in private, see Higgins, *Perfect Failure*. Central Intelligence Agency officials, including Director Allen Dulles and Deputy Director for Plans Richard Bissell, seem to have thought that if it became apparent the invasion was going to fail, Kennedy would have authorized direct U.S. intervention on the premise that success was more important than abiding by international law. But Dulles and Bissell misread their president: Kennedy held firm regarding the non-use of direct American force.

memos from Bowles to his superiors recommending against the invasion, including on legal grounds.[6] Writing to Rusk on March 31, Bowles laid out some of the specific legal violations before summarizing the case in favor of a law-abiding superpower. The U.S. "is the leading force in and substantial beneficiary of a network of treaties and alliances stretching around the world," Bowles argued. "That these treaty obligations should be recognized as binding in law and conscience is the condition not only of a lawful and orderly world, but of the mobilization of our own power," he pressed, before concluding that "We cannot expect the benefits of this regime of treaties if we are unwilling to accept the limitations it imposes upon our freedom to act."[7]

The White House was seemingly uninterested in the advice of the Bowles group. When Dean Rusk walked past one of its meetings, seeing who was present he put his head in the door: "Chet," one member of the group remembered Rusk as saying, "the President doesn't want any more memos about Cuba."[8] This seemingly dismissive attitude regarding the place of law in U.S. foreign policy had a number of possible drivers: the inclinations of a hyper-masculine administration to view law as feminine and feminizing; an intellectual disdain among "the best and the brightest" for formal bureaucratic structures and dogmatic thinking, with which the profession of public international law was associated; and a sense of generational change—of the eclipse of the old and the beginning of something new.[9] Encompassing something of each of

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[6] Leonard C. Meeker, *Experiences* (Xlibris, 2007), pp. 215-216; Meeker, *Philosophy and Politics* (Xlibris, 2007), pp. 195-196.

[7] "Memorandum from the Under Secretary of State (Bowles) to Secretary of State Rusk," March 31, 1961, *Foreign Relations of the United States, 1961-1963, Vol. X, Cuba, January 1961–September 1961*, document 75.

[8] Meeker, *Experiences*, p. 215; Meeker, *Philosophy and Politics*, p. 196.

[9] On the Kennedy Administration and masculinity, see Robert D. Dean, "Masculinity as Ideology: John F. Kennedy and the Domestic Politics of Foreign Policy," *Diplomatic History*, Vol. 22, No. 1 (Winter 1998), pp.

these traits was a widely-held notion among self-described New Frontiersmen that the challenges the United States faced in 1961 were novel, that the law as it stood was outmoded in respect of them, and that the historical American vision of a world ruled by legal norms and procedures needed to evolve if it was to endure.

Although while on the 1960 campaign trail, Kennedy promoted the idea of a missile gap—a seeming divergence between the nuclear weapons delivery capabilities of the two superpowers—the mutual development of thermonuclear warheads and various mechanisms to deliver them actually led to more, not less, symmetry in superpower relations. With the advent of a secure second-strike capability on each side (that is, the ability to launch a nuclear strike after first being subjected to one), an effective deterrent was not much enhanced by still greater quantities of missiles. The fear that a conventional war between the superpowers would quickly escalate to the level of nuclear exchange only added to the effect of symmetry created by the thermonuclear revolution. All of this tended to make less likely the overt, cross-border German- and Japanese-like international aggression that the framers of the UN Charter and Nuremberg Principles had in mind in the mid-1940s. But underneath this high-level symmetrical stand-off, asymmetrical modes of warfare and political conflict persisted and by the end of the 1950s had become a prominent challenge. When Kennedy, in accepting his party's nomination for president on July 15, 1960, spoke of "unsolved problems of war and peace" awaiting the

29-62. One example of an American foreign policy practitioner and intellectual conceiving of international law as feminine is George F. Kennan, who was brought back into diplomatic service under Kennedy; see Kennan, *American Diplomacy* expanded edition (Chicago: University of Chicago Press, 1984 [1951]), p. 57. On the Kennedy White House's disdain for bureaucracy, see Andrew Preston, *The War Council: McGeorge Bundy, the NSC, and Vietnam* (Cambridge, MA: Harvard University Press, 2006), especially pp. 39-45. On the more formalist tendencies of public international law (as opposed to other, more pragmatic, strains of American law), see David Kennedy, "The Disciplines of International Law and Policy," *Leiden Journal of International Law*, Vol. 12 (1999), pp. 9-133 at pp. 17-37.

pioneers of a New Frontier, he was referring not just to the awe-inducing omnicidal potential of the thermonuclear revolution, but also to the dangers embedded within an ascendant asymmetric mode of warfare and its challenge to the legal order of world politics.[10]

Wars characterized by asymmetries were far from new in 1961—they had, rather, always been (and still are) the most frequent type of wars.[11] There are many names that describe them: raids, small wars, guerrilla wars, insurgencies, wars of national liberation, wars of occupation, irregular wars, colonial (or anti-colonial) wars, revolutionary wars, low-intensity conflicts, and operations other than war, among others. Each of these labels was (or is) particular to a certain time period, and each entails slightly different characteristics.[12] What makes them all fundamentally similar, however, is their asymmetric nature. These wars are not fought via the pitched battles of clashing state-led armies, whether the phalanxes of ancient city-states or the

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[10] "Beyond that frontier are uncharted areas of science and space, unsolved problems of peace and war, unconquered problems of ignorance and prejudice, unanswered questions of poverty and surplus. […] I believe that the times require imagination and courage and perseverance. I'm asking each of you to be pioneers towards that New Frontier." John F. Kennedy: "Address of Senator John F. Kennedy Accepting the Democratic Party Nomination for the Presidency of the United States - Memorial Coliseum, Los Angeles," July 15, 1960. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=25966. Important works on the thermonuclear revolution include: Francis J. Gavin, *Nuclear Statecraft: History and Strategy in America's Atomic Age* (Ithaca: Cornell University Press, 2012); Campbell Craig, *Destroying the Village: Eisenhower and Thermonuclear War* (New York: Columbia University Press, 1998); Robert Jervis, *The Meaning of the Nuclear Revolution: Statecraft and the Prospect of Armageddon* (Ithaca: Cornell University Press, 1989).

[11] The regulated clash of state-led armies in pitched battles was a prominent mode of war within Europe from the eighteenth through the twentieth centuries—and this early modern ideal type has heavily influenced thinking about war, especially in Europe and North America, through to the present. But even in the heyday of the Western Way of War, it was never the dominant mode. Colonial or small wars were much more frequent than intra-European wars, and even within Europe, partisan or guerrilla warfare played a part in the more formalized wars of European modernity, including the U.S. Civil War.

[12] Perhaps the most significant—and analytically confusing—difference is that while some of these labels refer to the desired *ends* of the war being waged, others refer to the *means* by which the war is fought. Dierk Walter, "Symmetry and Asymmetry in Colonial Warfare ca. 1500-2000: The Uses of a Concept." IFS Info 3/2005. Oslo: Norwegian Institute for Defence Studies, 2005, p. 9.

armored divisions of modern nation-states, but rather see two essentially unequal entities facing off against each other—or, rather, *not* facing off against each other, but with at least one side engaging in hit-and-run tactics that tend to avoid open battle.

Often the inequalities involved in these conflicts include a significant material power differential—asymmetric wars are generally those fought between "strong" and "weak" actors—but more than material measures of asymmetry are important.[13] Such disparities run both ways—the technological and organizational superiority of the "strong" side can sometimes be countered to an extent by a numerically superior "weak" side—and can also somewhat even out over the course of these conflicts as the "strong" side picks up on the ways of the "weak" side; hence counterinsurgency tactics tend to mirror those of insurgencies.[14] Just as fundamental to these conflicts are the spatial and legal asymmetries. Most asymmetric wars over the last 500 years have been colonial wars—wars between European imperial powers and extra-European polities. In these conflicts, one side with global reach and knowledge confronts another with a more geographically confined worldview and localized knowledge, and one side awards to itself the legal rights of a sovereign international actor while severely restricting the extent to which the other side can enjoy those rights.

The profession and body of rules known as public international law developed within the European inter-state community at a time when inter-state war dominated the modes of conflict in that continent. Indeed, the two institutions—public international law and modern European

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[13] As Walter writes, "asymmetry is not to be confused with unequal strength. In many cases an apparent strength can become a weakness and apparent weakness can be capitalized upon and turned into a strength. Asymmetry, therefore, means in the first place different quality, not necessarily also different quantity; and asymmetric war signifies not primarily the war between strong and weak, but a war in which the opponents are of a different kind and use different ways to achieve their aims." *ibid*., p. 9.

[14] *ibid*., pp. 19-22.

warfare—developed in tandem, and law was, to a large extent, what made intra-European conflicts symmetric. "Strong" states and "weak" states still faced off against each other in modern European warfare, but the key point is that they were both *states*, each of equal legal status, each entitled to the rights of belligerency, and each of whose soldiers and sailors were entitled to the protections of the laws of war.

Because asymmetric warfare tends to be a form of conflict between a state and a non-state actor, its legal regulation was quite deliberately limited. A major part of international law's perceived humanitarian value was in its reduction of war to a regulated contest between the easily-identifiable military agents of states. It was feared that to widen the ambit of law to include other conflicts and other actors was to invite more war. One implication of this, however, was that European states were able to treat the imperial context—in which most polities were not accorded the privileges and rights of European-style statehood—as an extra-legal zone. The "most striking asymmetry, bar none" in colonial wars, suggests Dierk Walter, was the discrepancy in the international legal status of the actors.[15]

Asymmetric warfare did not go entirely unregulated in international legal doctrine and state practice during the age of empires, but symmetric state-based war was clearly the dominant domain of public international law. In the wake of the inter-state slaughter of the two world wars, the state-centric orientation of public international law changed little. In addition to formally including the protection of civilians within international humanitarian law (IHL), the Geneva Conventions of 1949 did contain a provision (Common Article 3, so called because it was reproduced verbatim as the third article in each of the four conventions) on the applicability of IHL to conflicts not of an international character. But by-and-large, those who built the post-

[15] *ibid*., p. 16.

1945 legal order were focused on the prevention and suppression of inter-state aggressive war such as had been conducted by Nazi Germany and Imperial Japan.

Various asymmetric tactics that did not rise to this legal standard, either because they were conceived and conducted entirely within the ambit of one state's jurisdiction or because whatever international dimension they did entail was not akin to the marching of troops across borders, were certainly concerning but were not considered fundamental to the post-1945 international legal order. During the lengthy debate on the definition of "aggression" that took place at the United Nations during the 1950s, various delegates raised the possibility of including "indirect aggression"—generally taken to include the asymmetric practices of infiltration and subversion—into any definition. But despite its consistent denunciation of Communist subversion in the 1940s and 1950s beginning with the case of Greece in 1947, the United States resisted such a move. To try to incorporate such asymmetric practices into the juridical concept of aggression would, thought U.S. lawyers and diplomats, only weaken the core imperative of outlawing overt *armed* aggression.[16]

That core imperative was implicit in the orientation of American military assistance, which generally channeled money and expertise into helping states protect their borders from external aggression rather than from internal unrest. And it was explicit in 1950s foreign policy pronouncements. The Eisenhower Doctrine held that the U.S. could furnish to a free nation of the Middle East "assistance and cooperation to include the employment of the armed forces of the United States to secure and protect the territorial integrity and political independence of such nations, requesting such aid, against *overt armed aggression* from any nation controlled by

[16] Julius Stone, *Aggression and World Order: A Critique of United Nations Theories of Aggression* (Berkeley, CA: University of California Press, 1958), p. 60.

International Communism."[17] For most of the 1950s, the Communist threat was still viewed through Korea-tinted glasses—of tanks rolling across recognized political demarcations, as in 1950 when North Korea invaded the South.

As the 1950s went on, however, the US became increasingly attracted to the legal language of indirect aggression or, as State Department would come to call it, sub-Korean aggression. While the thermonuclear revolution and post-World War II settlement were making large-scale international wars less likely, decolonization was gaining momentum and with it the incidence of asymmetric wars as a ratio of all wars was increasing. Between its founding in 1945 and the end of 1960, the number of United Nations member-states nearly doubled. Some of the processes leading to the establishment of new states were violent, in which case the fighting was generally characterized by asymmetric warfare. And some of those processes were peaceful, but which more often than not still resulted in a newly-independent country vulnerable to practices of indirect aggression. Either way, world politics faced an upswing in the number of small wars.

A quantitative increase in the number of asymmetric wars (or at least in the number of asymmetric wars that mattered to US foreign policy) was not enough, by itself, to press the US to change its longstanding legal view of aggression. Three qualitative shifts in the nature of asymmetric wars did, however, do just that. The first was the changing spatial dynamics of asymmetric wars. Whereas in colonial wars—the most common type of asymmetric war up until

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[17] Dwight D. Eisenhower, "Special Message to the Congress on the Situation in the Middle East," January 5, 1957. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=11007. Emphasis added. The paragraph immediately following the one cited reads: "These measures would have to be consonant with the treaty obligations of the United States, including the Charter of the United Nations and with any action or recommendations of the United Nations. They would also, if armed attack occurs, be subject to the overriding authority of the United Nations Security Council in accordance with the Charter."

the mid-twentieth century—the "weak" actor could not match the global reach of the colonial powers, since World War I and, especially, World War II, an increasingly prominent and effective transnational network of anticolonial actors—including national liberation movements, newly-independent states, international organizations, and liberal Western opinion-makers—allowed the "weak" actor greater access to global knowledge and material aid.[18] The second was the trend, driven by both poverty and ideology, towards radicalization of national liberation movements and newly-independent states in the late 1950s and 1960s.[19] And the third was the combination of these twin processes of transnationalization and radicalization of asymmetric actors with a relationship to world Communism, whose enmity of the U.S. together with its expertise in asymmetric tactics, both in theory (Lenin's vanguard, Mao's people's war, Che's *foco*) and practice (the fate of Eastern Europe after World War II), caused great concern in Washington.

Whereas in the colonial past asymmetric warfare had been the weapon of a weak localized opposition to imperial rule, in the decolonizing present of the late 1950s and early 1960s, it was seen as the weapon of a determined, global movement. Whereas the spatial and legal asymmetries of colonial warfare had generally favored the colonial power, Washington now fretted that the asymmetries of globalized and radicalized anticolonial (and postcolonial) warfare now disadvantaged the "stronger" power in terms of law. "The international rule of non-intervention confers advantages on an adversary who is able to bore from within," noted a mid-1961 draft report of the State Department's Policy Planning Council in a discussion on the

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[18] See, for example, Matthew Connelly, *A Diplomatic Revolution: Algeria's Fight for Independence and the Origins of the Post-Cold War Era* (New York: Oxford University Press, 2002).

[19] Odd Arne Westad, *The Global Cold War: Third World Interventions and the Making of Our Times* (New York: Cambridge University Press, 2005), pp. 91-109.

asymmetries negatively impacting on the American ability to wage the Cold War. A similar asymmetry also identified in the report was situations in which the "international rule against the use of external force to influence internal affairs confers advantages on an adversary working through fifth columns which often cloak themselves in nationalistic ambiguities."[20] Its hands tied by international obligations that clearly allowed action only against overt armed aggression, the United States perceived something of a decision between either openly breaking the law, or standing by while its Communist opponents infiltrated and subverted vulnerable countries at will.

These issues came to a head in early 1961. On January 6, Nikita Khrushchev made a speech defining wars of national liberation as sacred and inevitable, and pledging Soviet support for them. "The Communists support just wars of this kind whole-heartedly and without reservations," declared the Soviet leader, "and march in the van of the peoples fighting for liberation."[21] The speech, wrote Kennedy aide Arthur Schlesinger, "made a conspicuous impression on the new President, who took it as an authoritative exposition of Soviet intentions, discussed it with his staff and read excerpts from it aloud to the National Security Council." Schlesinger further noted Kennedy's alarm at Khrushchev's "declared faith in victory through rebellion, subversion and guerrilla warfare."[22]

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[20] "Approaches Toward New Political and Juridical Bases to Defeat Communist Aggression," Policy Planning Council draft report, June 9, 1961, Box 303, Presidential Papers of John F. Kennedy: National Security Files, John F. Kennedy Library, Boston, MA.

[21] N. S. Khrushchev, "For New Victories of the World Communist Movement: Results of the Meeting of Representatives of the Communist and Workers' Parties," January 6, 1961, reproduced in N. S. Khrushchov, *Communism—Peace and Happiness for the Peoples*, Vol. 1, 1961 (Moscow: Foreign Languages Publishing House, 1963), pp. 12-75, at p. 43.

[22] Arthur M. Schlesinger, Jr., *A Thousand Days: John F. Kennedy in the White House* (Boston: Houghton Mifflin Company, 1965), pp. 302, 303. William Taubman implies Eisenhower's dismissive reaction to Khrushchev's speech—"Khrushchev's tough talk was usually a substitute for, rather than a prelude to, tough

Kennedy's Inaugural Address and State of the Union message were, in part, a response to Khrushchev. On January 20, Kennedy warned that Washington would "oppose aggression and subversion anywhere in the Americas," and on January 30, he extended that warning to beyond the hemisphere, making a direct reference to Khrushchev's speech in remarking that the United States "must never be lulled into believing that either power [the Soviet Union or Communist China] has yielded its ambitions for world domination—ambitions which they forcefully restated only a short time ago. On the contrary, our task is to convince them that aggression and subversion will not be profitable routes to pursue these ends." But Kennedy's most forceful and elaborate rhetorical response to the Communist challenge of asymmetric warfare and indirect aggression came in his speech to the newspaper editors in the immediate wake of the Bay of Pigs. Conventional armies and nuclear armaments, Kennedy explained,

> serve primarily as the shield behind which subversion, infiltration, and a host of other tactics steadily advance, picking off vulnerable areas one by one in situations which do not permit our own armed intervention. […] We dare not fail to see the insidious nature of this new and deeper struggle. We dare not fail to grasp the new concepts, the new tools, the new sense of urgency we will need to combat it—whether in Cuba or South Viet-Nam. […] Too long we have fixed our eyes on traditional military needs, on armies prepared to cross borders, on missiles poised for flight. Now it should be clear that this is no longer enough—that our security may be lost piece by piece, country by country, without the firing of a single missile or the crossing of a single border.

The April 20 speech, therefore, was not simply an admission of the legal limits of American power. It was also the beginnings of, and a central reference point for, an effort by the Kennedy Administration to reimagine those limits in such a way to allow the United States to wage this "new and deeper struggle" more effectively. The president suggested that the law

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action," the former president noted privately—was more appropriate than Kennedy's reaction. William Taubman, *Khrushchev: The Man and His Era* (New York: W. W. Norton & Company, 2003), p. 487.

might need to bend or be broken: "let the record show that our restraint is not inexhaustible. … [I]f the nations of this Hemisphere should fail to meet their commitments against outside Communist penetration, then I want it clearly understood that this Government will not hesitate in meeting its primary obligations which are to the security of our Nation!" This statement meant different things to different people within the administration. It was central to a debate among administration officials on the role law should play in combating sub-Korean aggression—a debate that flared brightly and briefly in the few months after the Bay of Pigs, but whose effects persisted in the crafting of a legal framework for the use of force in Southeast Asia.

II

Kennedy's language suggested a willingness to tread outside the bounds of law if necessary, an interpretation bolstered by the gusto with which the administration embraced unconventional warfare capabilities. In stating to the newspaper editors his intention to "profit from this lesson," Kennedy specified that the US would "reexamine and reorient our forces of all kinds—our tactics and our institutions here in this community." Historians have generally narrowed the meaning of this statement to mean military forces, and in examining Kennedy's response to the "new and deeper struggle" have tended to focus on Kennedy's expansion and retooling of the special operations capacity of the US armed forces—symbolized by Kennedy's reissuing of the green beret as standard issue for US Special Forces.

Where historians have identified a legal component to Kennedy's focus on special operations, it has been their inherent lawlessness. By their very essence, this line of reasoning proceeds, Cold War-era Special Forces operated in the shadows of law, their covert nature not

merely a function of operational efficacy but also recognition of their illegality. Indeed, the perceived need to disguise the (US) identity of an illegal act's perpetrator sometimes overrode tactical considerations. The Bay of Pigs operation was a case in point: military planners wanted a more extensive landing operation that would have required more explicit US involvement, but these operational considerations were subordinated to the political imperative of disassociation.[23] After the Bay of Pigs failure, planning for clearly-illegal covert operations certainly intensified. Operation Mongoose, the plan to rid Cuba of the Castro regime, has been the most prominent to subsequently emerge. But the legal story of Kennedy's "new and deeper struggle" is not simply one of supporting illegal covert operations. Many of the more extreme elements of plans such as Mongoose were never implemented. Arguments against making covert operations the cornerstone of the American-led defense against subversion and infiltration were generally understood as sensible within the White House. More important still, the focus on special forces was much wider than just covert operations. Indeed, their (overt) counter-guerrilla function was generally perceived as more essential to defeating communist encroachments into vulnerable countries. Such a function was best performed in the context of a lawful operation. Much intellectual effort, therefore, went into articulating the legality of counter-guerrilla operations.

Covert operations planners probably tended both to accept implicitly the charges of illegality leveled at their operations, and to dismiss those charges as irrelevant to their task. But other proponents of small-scale guerrilla-type interventions pushed back against the notion that these operations were illegal. Held most prominently by Adolf Berle and Tom Mann, top Latin

[23] Or at least partly subordinated: the American attempt to both have its cake (a successful operation) and eat it (not have its role acknowledged) played a large role in the operation's failure. In the words of one historian, the Bay of Pigs operation was "too large to be covert even under the auspices of the CIA and too small to be effective, as the Joint Chiefs of Staff had rightly feared." Higgins, *Perfect Failure*, p. 172.

Americanists within the State Department, this view suggested that the US actions of April 1961 did not in themselves constitute subversion but were legitimate responses within the region's legal architecture to subversive activities from hostile extra-hemispheric powers. Where this school favored fight-fire-with-fire tactics, it did so *not* because of their ability to fly under the legal radar, but because of their perceived military efficacy or their diplomatic benefits. "As the plan emerged," Berle remarked in the wake of the Bay of Pigs, "it was considered to be an operation by Cubans to fire a shot for freedom in their own country," the public relations potential of which prompted the desire for US involvement to remain a secret.[24]

This difference of legal opinion regarding unconventional warfare emerged strongly in the work of the committee President Kennedy set up to examine Operation Zapata's failure, in which a stark binary developed between the competing objectives of being able to disavow American participation (non-attribution) and of overthrowing Castro (success). "Non-attribution was not altogether necessary," Berle told the Taylor Committee (formally the Paramilitary Study Group Meeting) on May 5:

> The conventions protecting against intervention did not apply because the Communists had intruded in this hemisphere, and second because Castro's government was an openly constituted totalitarian government which is clearly outside the provisions of the Treaty of Rio de Janeiro, that is. They attacked the Organization of American States, announced they would not be bound by the rules of the Treaty of Rio de Janeiro, and announced they were going to export the revolution. They had actually invaded two or three other states, and were in no position to claim the protections of the international system. This is still true. As far as non-attribution is concerned, we had assisted Cubans that wished to fight for freedom in their own country. As a matter of fact, it seemed that it was the last clear chance that Cubans would have to fight for freedom in their own country. The danger then, was not of non-attribution but of failure. Clearly it must not be an

[24] Memorandum for Record, Paramilitary Study Group Meeting, Eleventh Meeting, May 5, 1961, p. 2. Box 61a, National Security Files [NSF], Countries/Cuba/Subjects/Para-Military Study Group Taylor Report Part II/Meetings 9, 10, and 11, John F. Kennedy Library [JFKL].

> American invasion. The attribution of assistance to the Cubans by the United States under all circumstances did not seem too serious.[25]

Berle had earlier pressed this line within the State Department. On April 23, he drafted a telegram for all Latin American diplomatic posts. "US now considers dominance Castro regime by Sino-Soviet bloc established beyond possibility reasonable doubt," Berle wrote in clipped telegramese, continuing that the "US now considers situation that of intrusion of extra-continental power into Hemisphere menacing Hemisphere peace and security and calling for measures of Hemispheric defense, defense of neighboring countries threatened and conceivably of self-defense of US." Berle then reiterated, in more legalistic terms, Kennedy's threat of three days prior: "In this case if OAS fails to take multilateral action or authorize action by one or more powers those governments threatened or in need of defense or prepared assume responsibility implied in obligations to oppose extra-continental aggression may act on their own singly or in group. Distinction between 'intervention' in internal affairs of another State and defense against widening area of domination by extra-Hemispheric powers is vital one."[26]

But Berle's telegram represented more wishful legal thinking than Washington's formal position on its treaty obligations. Once made aware of the telegram, the Office of the Legal Adviser reacted quickly, firing off a memo to Secretary of State Dean Rusk. "The Circular Telegram in question contains important pronouncements on the interpretation of hemispheric agreements and on the rights of individual governments under international law. The Office of the Legal Adviser was not consulted concerning these statements. So far as I am aware, they do

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[25] *ibid*., pp. 2-3.

[26] Circular Telegram from the Department of State to All Posts in Latin America, April 23, 1961, *Foreign Relations of the United States* [*FRUS*] *1961-1963*, Volume X, Cuba, January 1961 – September 1962, Document 171.

not represent any considered Department view," chided Legal Adviser Abram Chayes. "Multilateralism as against the doctrine of unilateral intervention, is central to treaty relations among the American republics," he continued, succinctly summarizing his office's basic view.[27] For Chayes, his deputy Leonard Meeker, and the other lawyers in "L," as the Legal Adviser's office is known, multilateralism and international organization were central to the orthodox post-war American conception of international law.[28]

The Legal Adviser's office was busy in the wake of the Bay of Pigs and its defense of legal orthodoxy did not end with contesting Berle. It reacted, too, to another line of reasoning that emerged to justify waging unconventional warfare in situations of Communist infiltration and subversion, and particularly against Cuba. This position was grounded in morality rather than legality, positing the existence of a higher law and a US right to adhere to it rather than to mundane treaty rules. A week after Kennedy's speech to the newspaper editors, a National Security Council (NSC) meeting was held for which the State Department prepared a "Plan for Cuba." The plan recommended, among other things, the "development of a realistic, sound and honest moral posture based upon the President's April 20 statement, which must be able to withstand before world opinion and in the U.N., the distortions of an all-out Communist propaganda offensive and provide the justification for progressively more drastic actions against Castro."[29]

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[27] Chayes to the Secretary, Memorandum, "Circular Telegram 1661 to Latin American Diplomatic Posts Re Cuba," April 25, 1961, Box 8, Leonard C. Meeker Papers, Amherst College Library.

[28] The best published expression of this legal orthodoxy is probably Abram Chayes, *The Cuban Missile Crisis: International Crises and the Role of Law* (New York: Oxford University Press, 1974).

[29] Paper Prepared for the National Security Council by the Director of the Department of State Operations Center (Achilles), *FRUS 1961-1963*, Volume X, Cuba, January 1961 – September 1962, Document 182.

State Department lawyers took exception to this "higher law" argument, however, and again protested to Rusk. Regarding the "Plan for Cuba," Chayes and Meeker insisted that "Our moral and political posture cannot be divorced from our legal posture. It would be destructive of our whole position to plan in cold deliberation to break fundamental treaty or other obligations."[30] For "L," upholding the Rule of Law meant following the rules of law.

Due notice was paid to the lawyers' opinions, and the final version of the "Plan for Cuba" was supplemented accordingly, although Chayes and Meeker may have been surprised by the new language prompted by their objections to a moral stance not grounded in the law. Rather than commit US policy to following the law as it stood—the stance advocated by Chayes and Meeker—the revised plan now called for changing the law to suit US policy. One of several courses of action recommended in the final version of the plan was to "redefine and reinterpret what constitute aggression and what constitutes legal governments." The US should take the lead, the plan continued, in elaborating "a new doctrine in close association with certain Latin American and other friendly powers, which would spell out the concepts embodied in the President's speech of April 20. Such an interpretation of our obligations under the UN and OAS Charters is needed to enable us to justify publicly the actions which might be necessary to deal with Communist takeovers from within a country."[31] To the problem of square (policy) pegs and round (legal) holes, administration planners sought to square the hole.

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[30] Chayes to the Secretary, Memorandum, "Paper entitled 'Plan for Cuba,'" April 26, 1961, Box 8, Leonard C. Meeker Papers, Amherst College Library

[31] Paper Prepared for the National Security Council by the Director of the Department of State Operations Center (Achilles), *FRUS 1961-1963*, Volume X, Cuba, January 1961 – September 1962, Document 182. Although no copy of the draft of this document appears to exist, Chayes does not mention the suggested reinterpretation of international law in his memo of April 26 commenting on such a draft; had this "reinterpretation" idea been in the draft, it is inconceivable that Chayes would not have commented on it in his memo of April 26, hence my assertion that it was Chayes' opposition to the language of morality in the draft that led to Achilles to insert some language of law into the final (April 27) version of the plan.

Those planners, led by Assistant Secretary of Defense Paul Nitze, gave the "new doctrine" idea much more play in a revised and fuller planning document prepared for the following NSC meeting on May 5. Under the heading "Clarification of Juridical and Political Basis for the Protection of Free Nations against Communist Aggression," that paper sketched a much more expansive argument for change:

> The present basis of international law is grounded on the nation state system as it evolved largely in Europe, from the 15th to 19th centuries. The present situation involving the duality between a nation state system and loyalties to a political and organizational system that transcends nations and has worldwide pretensions (the communist system) presents wholly new problems which require the development and exposition of an entirely new juridical basis. Existing international law concepts, be they the rights of belligerents, interference in the internal affairs of another state, the legitimacy and recognition of governments or the definition of armed aggression, play into the hands of the communists while they tie the hands, or lead to confusion in the ranks, of those proposing to assist nations attempting to preserve their freedom.[32]

During the National Security Council meeting that considered this paper, Rusk was tasked to "prepare a report on a possible new juridical basis for effective anti-communist action."[33] "It was decided," Rusk's special assistant Theodore Achilles reported to Deputy Legal Adviser Leonard Meeker, "that the Department of State should push ahead on the elaboration of a new doctrine authorizing intervention."[34]

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[32] Paper Prepared for the National Security Council by an Interagency Task Force on Cuba, May 4, 1961, *FRUS 1961-1963*, Volume X, Cuba, January 1961 – September 1962, Document 202. The Task Force was headed by Paul Nitze and the language in this quote may well have come from Nitze himself: he took international law during a year of graduate studies at Harvard.

[33] Record of Actions, National Security Council meeting of May 5, 1961 (approved by the President on May 16), *FRUS 1961-1963*, Volume X, Cuba, January 1961 – September 1962, Document 205.

[34] Meeker, Memorandum of Conversation, "Summary of Ambassador Achilles Report on NSC Meeting, May 5, 1961," Box 8, Leonard C. Meeker Papers, Amherst College Library.

Proponents of the idea of developing a new doctrine to combat indirect aggression had managed to get the national security machinery to advance the idea to the next level—a more formal study of the issue. But the proponents, while able to have their views front-and-center in the Nitze-controlled Cuba paper, were actually in a minority in Washington. The majority view, especially in the Department of State, was skepticism as to the advisability and effect of any unilateral declaration of a doctrine that would substantially and immediately impinge on established international law regarding the use of force. This skepticism came through strongly in the paper prepared in response to the National Security Council's request, but even before that paper was finished, the Legal Adviser's office attempted to throw up some obstacles to the development of a new doctrine.

First, "L" tried to tone down the new doctrine idea in its comments on a draft of the Cuba paper circulated prior to the May 5 NSC meeting. Writing to Rusk's special assistant, Theodore Achilles, on May 1, Meeker suggested the following language for the Cuba paper:

> Develop "Kennedy Doctrine", on the basis of the President's April 20 statement concerning the threat to freedom from Sino-Soviet bloc non-military aggression, so as to give legal and political sanction to the various measures—diplomatic, economic, internal-security, political and psychological—proposed and/or adopted by the United States; under the doctrine so developed, these measures would be regarded as permissible and not excluded by the provisions of any inter-American treaties on non-intervention and abstention from pressures (such as Articles 15 and 16 of the OAS Charter).[35]

The absence of military action in Meeker's list of measures was no doubt deliberate. Recognizing the strength of opinion for a new doctrine in the wake of the Bay of Pigs, Meeker

[35] Meeker to Achilles, Memorandum, "Comments on Section 6B ('Steps to Isolate and Weaken Castro Regime')," May 1, 1961, Box 8, Leonard C. Meeker Papers, Amherst College Library.

did not think to oppose it outright. Rather he sought to soften it by channeling the idea of a new doctrine away from use of force issues. Meeker's proposed language was not included in the Cuba paper—possibly because in excluding (or, at least, not explicitly including) the use of military force as a measure to be covered by any new doctrine, he was proposing to strip the new doctrine idea of much of its intended purpose. It is clear from both the Cuba paper prepared for the May 5 meeting and the talk at that meeting that the any new doctrine idea was intended as a legal defense for using military force against instances of perceived indirect aggression.

Meeker again tried to divert the new doctrine idea into a dead-end when asked to suggest the names of some leading American lawyers to work on the formulation of the proposed new doctrine. The Cuba paper prepared by Paul Nitze in advance of the May 5 NSC meeting had already recommended the names of some "knowledgeable people in this field to propose a new political rationale and new set of legal principles appropriate to today's realities."[36] Meeker's suggestions excluded the more hawkish names on Nitze's list (indeed, the two lists had only one name in common), and whereas Nitze's list tended towards firm-based lawyers and non-international law specialists, Meeker's list favored university-based lawyers and/or specialists in public international law—people who would be more inclined to approach the idea of a new doctrine very cautiously.[37]

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[36] Paper Prepared for the National Security Council by an Interagency Task Force on Cuba, May 4, 1961, *FRUS 1961-1963*, Volume X, Cuba, January 1961 – September 1962, Document 202. Nitze's list comprised Dean Acheson, Herman Phleger, Eric Hager, Arthur Dean, Mike Forrestal, and C.B. Marshall.

[37] Meeker to Acting Secretary Bowles, Memorandum, "Group of Lawyers to Formulate New Juridical Basis for Effective Anti-Communist Action in the Americas," May 10, 1961, Box 8, Leonard C. Meeker Papers, Amherst College Library. Meeker's list comprised: Robert R. Bowie, Herbert W. Briggs, Benjamin V. Cohen, Jefferson B. Fordham, Stanley D. Metzger, Herman Phleger, Eugene V. Rostow, and Charles M. Spofford. As it happened, no such group was convened (at least as far as I can tell), presumably because of the strong message against the swift development of a new doctrine that was the heart of Hank Ramsey's policy planning paper (discussed below).

Two weeks after the directive to formulate a new doctrine, Meeker wrote to his boss Abram Chayes, then in Geneva for the opening of the International Conference on the Settlement of the Laotian Question, suggesting opposition to the idea in several quarters of the national security bureaucracy. George McGhee, head of the Policy Planning Staff—the State Department unit tasked with fulfilling the NSC's directive—agreed with Meeker "that this new theoretical approach would not be fruitful," telling the Deputy Legal Adviser: "If you can change it that easily, it isn't law." Walt Rostow, McGeorge Bundy's deputy in the White House, also "questioned the 'new doctrine' approach." As did Under Secretary of State Chester Bowles.[38]

Planners at the CIA were of a similar opinion. "It has occasionally been suggested that our vigorous, and often self-righteous, public support of this doctrine [of nonintervention] inhibits us in efforts to counter communist subversion and communist use of violence … and that we should therefore consider some modification of the doctrine," wrote Deputy Director of Plans Richard Bissell in early July. "The counter argument seems however not only to have more support within the U.S. Government but also to have greater validity," he continued, stating further that "although the open societies of the West are less successful than the communist societies in practicing covert intervention while publicly adhering to a doctrine of non-intervention, nevertheless the doctrine does exercise considerable restraint on the communists."[39]

Preparation of the NSC-mandated paper fell to the State Department's Policy Planning Staff, with the principal author most likely Hank Ramsey, a member of that staff. The paper evolved over several drafts, but its basic approach was to identify the major schools of thought

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[38] Meeker to Chayes, Letter, May 19, 1961, Box 8, Leonard C. Meeker Papers, Amherst College Library.

[39] Richard Bissell, Memorandum, "Basic Doctrine Re The Support of Violence Across Borders," July 6, 1961, sent to Walt Rostow under a covering memorandum of July 7, 1961, Box 326, NSF, Meetings and Memoranda[M&M]/Staff Memoranda[SM]/Rostow/Guerrilla and Unconventional Warfare, July 1, 1961, to July 15, 1961, JFKL.

regarding the problem of sub-Korean aggression as they existed within Washington, outline the premises and policy proposals of each school, and to steer readers in a clear direction as to which was preferable: a pragmatic school that advocated avoiding the twin extremes of ignoring the law entirely and of the United States taking it upon itself to change international law.[40]

The paper first sought to counter the influence of those advocating "a 'fight fire with fire' approach [that] would depart from international law in favor of military force and covert operations."[41] Such an approach was inadvisable, Ramsey and his planning staff colleagues argued. It would "jeopardize what restraints international law now places on Bloc conduct," and thereby "create dangerous precedents." The planning staff argued at some length that international law itself was not the problem. Indeed, the Free World had enjoyed most of its successes when it operated within the purview of international law. The US should "not unilaterally jeopardize what tenuous influences international law may now exert on Soviet conduct." Additionally, a "fight fire with fire" approach "would ultimately degrade us to a moral equivalency with the communists. It does not offer constructive long-range solutions and it would deny us opportunities of finding them through a strategy of cooperative involvement with many countries which now respect and are willing to work with us. The end of this tunnel would be something approximating international anarchy, with most restraints on communist conduct

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[40] The final version of the paper, PPC [Policy Planning Council] 61-6: "Approaches Toward New Political and Juridical Bases to Defeat Communist Aggression," July 24, 1961, Box 303, NSF, Subjects/Policy Planning, JFKL. A draft (identified as the second draft) is also on file: "Approaches Toward New Political and Juridical Bases to Defeat Communist Aggression," June 9, 1961, Box 303, NSF, Subjects/Policy Planning, JFKL. The draft emphasized the inadvisability of the purely juridical or new doctrine approach; the final version emphasized the inadvisability of the "fight fire with fire" approach, i.e. ignoring law altogether. My analysis is drawn from both the draft and the final version. Hank Ramsey is identified as the author of the draft version of the paper; the final version was issued collectively by the Policy Planning Council.

[41] "Approaches Toward New Political and Juridical Bases to Defeat Communist Aggression," July 24, 1961, p. 11.

removed, in which we might come out second-best in a naked power struggle due to loss of allies and to the restraints which our own society would place on illegal and immoral activity on any major scale."[42]

The paper, especially in its draft version, also chided those who would forcefully advocate for a new doctrine—"a juridical approach [that] would seek to remedy our difficulties by new doctrinal codifications." The planning staff were wary of a "juridical gimmick" that would be a poor solution to a complex problem.[43] The new doctrine approach not only "presupposes a political consensus which might be developed over time but which does not now exist," but it also presented "a problem of evenhandedness, i.e. we cannot make a set of rules applicable only to ourselves or designed to establish an asymmetry in our favor."[44] As with its critique of the "fight fire with fire" approach, the planning staff insisted that international law as it stood was not the problem, and that an attempt to unilaterally modify international law might only back-fire, giving the Communists an excuse to shake off whatever restraints international law did have on their behavior. This view was shared by Richard Bissell of the CIA.[45]

Although not involved directly in the preparation of this paper, the Office of the Legal Adviser read and expressed agreement with the draft version (which was much more critical of the "juridical" approach than the final version would be). The independence of "underdeveloped countries" susceptible to indirect aggression was best "pursued with the help of friendly free-

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[42] *ibid*., pp. 1-2, 14-15, 17, and 11-12 respectively.

[43] *ibid*., p. 13. See also the draft of June 9, 1961, p. 24.

[44] "Approaches Toward New Political and Juridical Bases to Defeat Communist Aggression," July 24, 1961, p. 9.

[45] Bissell, "Basic Doctrine Re The Support of Violence Across Borders," July 6, 1961.

world countries and international institutions," Chayes wrote to the Director of Policy Planning in support of the paper's line of reasoning. [46]

The idea of developing new doctrine through unilateral declaration or quick codification never went away entirely—the administration's urge towards unilateral pronouncement reappeared most prominently in a presidential speech on Latin America four days before Kennedy's assassination—but by-and-large the Office of the Legal Adviser and their bureaucratic allies were successful in steering Kennedy and the NSC away from a quick-fix approach to the legal issues at stake. As with its earlier opposition to a lawless covert operations approach, Berle's legally-dubious unilateralist approach, and the "higher law" approach based on America's superior moral position, the Office of the Legal Adviser stood its ground in support of an orthodox interpretation of the international legal order of 1945. The center held. But the center also shifted as the quest to find a legal remedy to indirect aggression was pursued along a different path.

After the initial furor over the Bay of Pigs subsided, much of the heat went out of intra-administration debates over indirect aggression, intervention, and international law. The Policy Planning Staff's paper on the issue probably achieved its purpose of blunting the enthusiasm of those advocating swift implementation of a new doctrine. And, following Khrushchev's early-June ultimatum on the status of Berlin, European affairs no doubt captured the attention of high-level officials. Rather than attempt to resolve the perceived legal asymmetries working against

[46] Chayes to George C. McGhee (S/P), Memorandum, "S/P Paper on 'Approaches Toward New Political and Juridical Bases to Defeat Communist Aggression,'" Box 8, Leonard C. Meeker Papers, Amherst College Library. This memo was drafted by Meeker but sent under Chayes' name. The memo indicates that Chayes also attended "the Secretary's planning meeting on June 15," at which the draft paper was discussed.

US interests by elaborating a formal doctrine, the administration seems to have tacitly accepted an approach put forward by the opponents of the new doctrine idea.

That approach was to deal with the problems of subversion and infiltration "pragmatically" or "politically." Rather than unilaterally declare a new understanding of American legal obligations or bring the international community together to craft or codify a law against indirect aggression, the United States would deal with situations together with other countries on a case-by-case basis and over the long-run. "By far the better plan," Meeker characterized the consensus view of himself, McGhee, Bowles, and Rostow, "is to try and work out pragmatic arrangements in different parts of the worled [sic] where the indirect aggression problem is serious."[47]

Once elaborated upon in the Policy Planning Staff's paper, this political or pragmatic approach still suggested that new law might develop, but that it could happen only in the course of time, as the United States slowly bent the opinion of the international community towards a consensus view (or multiple consensus views based on different configurations of the international community) on a right to intervene in order to defeat indirect aggression. "A strategy of cooperative involvement is the most feasible approach to defeating sub-Korean aggression," wrote Hank Ramsey, "because it would build on the international restraints now operative, place us in a better position to win essential support for new juridical bases, and permit pragmatic and inductive approaches—bilaterally and multilaterally—to the defense and development problems of individual countries."[48]

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[47] Meeker to Chayes, Letter, May 19, 1961, Box 8, Leonard C. Meeker Papers, Amherst College Library.

[48] "Approaches Toward New Political and Juridical Bases to Defeat Communist Aggression," July 24, 1961, p. 26.

In implementing this "pragmatic" or "political" approach, however, development of a new understanding regarding the right to use force against indirect aggression now became more of an operational matter. Perhaps as a result, the locus of discussion on indirect aggression moved from the lawyers and policy planners in State to the CIA, where Deputy Director of Plans Richard Bissell was leading an inter-agency team in the preparation of a paper on Guerrilla Warfare with the help of James Cross of the Institute for Defense Analysis and—the key official—Walt Rostow of the White House.

In early July, as Ramsey was still drafting the policy paper on inadvisability of devising a purely juridical approach to the problem of indirect aggression, Rostow elaborated on his ideas for a pragmatic legal justification to Bissell. Taking as his starting point the inadvisability of doing away with, or attempting to sharply modify, the doctrine of non-intervention, Rostow described to Bissell (who then put Rostow's thoughts in writing) "an ingenious application and extension of the doctrine." [49] That application and extension entailed the US treating indirect aggression "as a form of aggression morally equivalent to the military crossing of a border." In such situations, the US would "generally favor the use of international control machinery to halt" the indirect aggression, except if such machinery was prevented from operating or ineffective in its operation. In those cases, the US would reserve the right to employ force proportional to the level of force used by the (indirect) aggressor and to use force only to the point where the subversive aggression ceased. But, importantly, this use of force did not have to be restricted to the defense of the victim's territory. The US would also "feel free to incite and support violence within the aggressor's territory." [50]

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[49] Bissell, "Basic Doctrine Re The Support of Violence Across Borders," p. 1

[50] *ibid*., p. 2-3. These self-imposed limits were, however, not without their own limits: "in taking such action the U.S. will not deny itself (or its friends) the advantage of the tactical offensive, nor will it limit itself to

Such an approach would put "a premium on acquiring persuasive proof that subversive violence is being employed in a particular situation. The test set up in this doctrine is that support is being provided and control exercised across a border."[51] If the United States was going to steer governments and groupings of governments towards recognizing the problem (and illegality) of indirect aggression without unilateral pronouncements or international conferences, then the evidentiary basis of their claims had to be robust. In a further draft of their Guerrilla Warfare paper, Rostow, Bissell, and Cross agreed that, given the lengths gone to by Communists to deny and hide their involvement, such "proof positive of alien aggression will be extremely difficult to establish and universally acceptable criteria of culpable interference will be hard to arrive at."[52]

It was Rostow who suggested the means to overcoming these great difficulties: an intensive investigation of the situation in Vietnam. "Our current effort with respect to Hanoi's offensive against Viet-Nam should provide a test as to whether persuasive evidence can be mobilized on the external training, infiltration, and control of a guerrilla operation," wrote Rostow. "Beyond such quasi-legal evidence, it will be important to foster beliefs and attitudes, both among governments and peoples, which will encourage the general assumption that aggression has indeed taken place."[53] Kennedy's linking of Cuba and Vietnam in his April 20

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weapons of the enemy's choosing. Specifically, it will feel free to incite and support violence within the aggressor's territory and to use weapons in which it has an advantage, but will endeavor to avoid major escalation of the scale of violence or sophistication of the weapons," p. 2.

[51] *ibid*., p. 3.

[52] "Rostow Redraft of Cross Draft," August 15, 1961, p. 27, NSF, Box 326a, M&M/SM/Rostow/Guerrilla and Unconventional Warfare, August 15, 1961, to August 31, 1961, JFKL.

[53] Ibid, p. 27. Rostow made this notation in hand on an earlier draft produced by Cross: Draft Paper, August 3, 1961, NSF, Box 326, M&M/SM/Rostow/Guerrilla and Unconventional Warfare, August 1, 1961, to August 14, 1961, JFKL.

speech had now been more fully realized. The bureaucratic process of debating and developing a legal justification for intervention against indirect aggression over late April, May, June and July had traveled from the Caribbean to Southeast Asia. It had reached a point where, if the US hoped to lay the foundations for a pragmatic, evidentiary-based approach to combating indirect aggression around the world, it had to prove its case in Vietnam.

III

In the context of this bureaucratic process to realize legal bases for confronting subversion and infiltration, the Jorden Report of 1961 takes on new meaning. Formerly a *New York Times* correspondent, William Jorden joined the State Department's Policy Planning Staff in August 1961 and was immediately assigned the task of documenting infiltration by North Vietnamese forces into South Vietnam.[54] Jorden's final report, issued by the State Department in December 1961 as *A Threat to the Peace: North Viet-Nam's Effort To Conquer South Viet-Nam*,[55] is generally taken to be the justification for American and South Vietnamese abrogation of the Geneva Accords of 1954 and for the United States increasing the number of American military advisers in South Vietnam above the force-level limit (685 personnel) theretofore accepted by the United States.[56] It was certainly that, but its richly detailed narrative of individual cases of infiltration and introduction of supplies from North to South, replete with extensive

[54] Editorial Note, *FRUS 1961-1963*, Volume I, Vietnam 1961, Document 122.

[55] Department of State, *A Threat to the Peace: North Viet-Nam's Effort To Conquer South Viet-Nam*, 2 parts (Washington, DC: US Government Printing Office, 1961).

[56] See, for example, George Herring, *America's Longest War: The United States and Vietnam, 1950-1975* Fourth Edition (New York: McGraw-Hill, 2002 [1979]), p. 101.

documentation, seems out of proportion to what the Legal Adviser's office had been intimating since at least mid-April would be a relatively straightforward legal move.[57]

Read in the context of Rostow's attempted "ingenious application and extension of the doctrine" of non-intervention, however, the Jorden Report—and Rostow's continued insistence on its production and its importance since at least late June,[58] i.e., around the same time he articulated his "application and extension"—makes more sense. Not just an excuse to temporarily suspend two treaty articles, it was a foundation stone in the building of a legal case for wider war—a war that extended beyond the territorial markers of South Vietnam in Indochina and, more generally, a more permissive global environment for the waging of interminable, diffuse, low-level armed conflict.[59]

Rostow's approach ran into problems, however, with the Office of the Legal Adviser, which remained opposed to readings of the law, such as Rostow's, that were inconsistent with an orthodox interpretation of the United Nations Charter.[60] In a November 1961 memo prepared at the time the United States was considering a qualitative step-up in the support it provided Saigon, Chayes maintained Rostow's basic premise—that Washington should be able to respond legally to low-level violence so long as the means remained limited—but preferred to place geographic limitations on American actions rather than Rostow's somewhat imprecise standard

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[57] Memorandum on the Substance of Discussion at a Department of State-Joint Chiefs of Staff Meeting, Washington, April 14, 1961, *FRUS 1961-1963*, Volume I, Vietnam 1961, Document 29.

[58] *FRUS 1961-1963*, Volume I, Vietnam 1961, p. 201, n. 2.

[59] If, as the historian Marilyn Young has argued, the Vietnam War was partly about inculcating a public tolerance for never-ending limited wars, then the justifications—including legal justifications—for those wars become crucial.

[60] Memorandum From the Legal Adviser (Chayes) to the Secretary of State, November 16, 1961, FRUS 1961-1963, Volume I, Vietnam 1961, pp. 629-635, esp. pp. 634-635 on the concepts of hot pursuit, armed attack, and aggression.

of proportionality whereby force could be used up to the level of force used by the subversive enemy and to the point where the subversive aggression ceased. Whereas the Rostow doctrine implicitly left all enemy territory open for a military response—a precursor, perhaps, to his later enthusiasm for an expansive air campaign against North Vietnam—Chayes proposed a tiered understanding of the sanctity of sovereign territory.

Chayes first ruled out "direct attacks against Hanoi and similar strategic centers deep inside North VietNam." The Legal Adviser argued that "in the absence of overt aggression by means of armed attack against South VietNam, such action would go beyond permissible self-defense under general international law and would be contrary to the United Nations Charter." Aggression, noted Chayes, came in various forms, of which only armed attack—"a direct external attack upon one country by the armed forces of another"—could legally trigger the right to self-defense enshrined in Article 51 of the UN Charter.[61] Armed attack, Chayes further specified, "has been expressly or implicitly limited to exclude indirect aggression," and "in cases of aggression that fall short of armed attack … it would not be consistent with the purposes of the United Nations for the United States as a UN member to proceed to the use of armed force to defeat acts which it considers aggressive."[62]

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[61] Memorandum From the Legal Adviser (Chayes) to the Secretary of State, November 16, 1961, FRUS 1961-1963, Volume I, Vietnam 1961. In such a situation, the attacked country (South Vietnam) would have the right both to defend itself (individual self-defense) and to request assistance (in this case, from the United States) in defending itself (collective self-defense). Only rarely was it feared that South Vietnam might not invite the United States to come to its defense (or that Saigon might request the United States to cease its assistance). And the argument that South Vietnam was not a separate country, made by both domestic and international opponents of the Kennedy, Johnson, and Nixon administrations, was given little credit by U.S. officials, who pointed to the dozens of countries which had recognized Saigon as proof of that government's legitimacy, and who argued that the demarcation line separating North and South Vietnam, while not a sovereign border, was nonetheless an internationally-recognized delimitation with much the same function with regard to international law on the use of force.

[62] Memorandum From the Legal Adviser (Chayes) to the Secretary of State, November 16, 1961, FRUS 1961-1963, Volume I, Vietnam 1961.

But while he refuted any legal basis for "long-range attacks into North Vietnam," Chayes nonetheless allowed that shallower incursions into North Vietnamese territory could be legally justified. In relation "to operations undertaken against bases near the border in North Viet-Nam and Laos which are being used as a sanctuary and for supply purposes by the Viet Cong," he argued that "it would seem justifiable under international law principles relating to hot pursuit to follow the enemy across the border and attempt to destroy his bases of operations adjacent to the border. Such operations would have to be appropriately related to the act provoking them, proportionate in their effects and limited to action necessary to obtain relief."[63]

This differentiated approach led, eventually, to divergent understandings of self-defense within the American effort in Indochina—one premised on defending against armed attack against North Vietnam and another premised on defending against the enemy use of sanctuaries in neutral Cambodia. With regard to North Vietnam, Chayes' judgment that indirect aggression from the North was not enough to trigger a legal justification of self-defense more-or-less remained in force through 1962, 1963, and 1964. A June 1964 memorandum on the legal basis for deploying US troops to Vietnam, sent to President Johnson by Dean Rusk, mentioned in passing that "it is difficult to characterize North Vietnamese actions in South Viet-Nam as 'armed attack' within the meaning of the Southeast Asia Treaty and the U.N. Charter."[64] The attempt to promote a legal right to use force against indirect aggression using North Vietnamese

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[63] Memorandum From the Legal Adviser (Chayes) to the Secretary of State, November 16, 1961, *FRUS 1961-1963*, Volume I, Vietnam 1961, pp. 629-635.

[64] Dean Rusk, Memorandum for the President, "Legal Basis for Sending American Forces to Viet-Nam," 29 June 1964 (covering "Memorandum on the Legal Basis for Sending American Forces to Viet-Nam," 26 June 1964), Doc. 10, Folder 2 (Vol. XIII, 6/64-7/64, Memos), Box 6, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas. The substantive memorandum listed no author—presumably it was prepared in the Office of the Legal Adviser—but did note that "this memorandum has been reviewed in the Department of Justice and approved by Mr. Schlei, Assistant Attorney General in charge of the Office of Legal Counsel."

subversion of South Vietnam as a test case basically failed, and was abandoned in 1965 as the air campaign against North Vietnam was regularized.

In 1965, the United States rested its legal case for Operation Rolling Thunder on different grounds. North Vietnamese infiltration and attacks were no longer considered indirect aggression, but according to US lawyers had increased in intensity and scope to where they could now be classified as an armed attack—i.e., direct aggression—under the meaning of the United Nations Charter. Writing in February 1965, Chayes successor as Legal Adviser, Leonard Meeker, wrote that "the whole course of conduct of North Viet-Nam, particularly as it has evolved in recent months, adds up to open armed attack within the meaning of Article 51—armed aggression carried on across international frontiers." From attempting in the early 1960s to use Vietnam as a test case to establish a general right to respond with force to indirect aggression, the United States was now using the well-established right to respond to direct aggression (or armed attack) to argue its case in Vietnam. "What began as covert and indirect aggression," wrote Meeker, "has become open armed aggression."[65]

Some doubted whether the facts allowed for this interpretive shift. The quasi-legal evidence the United States had gathered in support of its effort to prove North Vietnamese indirect aggression had not convinced the international community, and the threshold standard for proving armed attack was higher still. At the same time (February 1965) as the Legal Adviser formally switched the US interpretation of North Vietnamese aggression from indirect to direct, one of the lawyers in his office wrote to McGeorge Bundy that the United States had not done

[65] Leonard C. Meeker, Memorandum for Mr. McGeorge Bundy, "Legal Basis for United States and South Vietnamese Air Strikes," 11 February 1965 (covering "Legal Basis for United States Actions Against North Viet-Nam"), Doc. 214, Folder 4 (Vol. XXVIII, 2/9-19/65, Memos [2 of 2]), Box 13, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

enough to convince: "The world has a picture of a situation in South Viet-Nam that is primarily internal with some—but not decisive—direction and assistance from the North."[66] Another public relations effort written by Bill Jorden, the 1965 white paper *Aggression from the North*, attempted to make the case.

The effects of this shift in interpretation of the nature of North Vietnamese aggression, and the legal debates surrounding it, would from early 1965 onwards be felt most fully in the debates over the air war against North Vietnam as the United States struck deeper into North Vietnamese territory. These debates are covered in chapter three below. But the debates over indirect aggression did persist, in somewhat different form, with the rise of a similar problem in a third country—Cambodia—where a separate debate over the meanings of self-defense emerged out of Chayes' advocacy for a legal right of hot pursuit. Chayes' 1961 arguments were made regarding sanctuaries located in North Vietnam and Laos, but it was in Cambodia where they would face their biggest test. The remainder of this chapter traces the legal arguments surrounding Cambodia and the sanctuary it provided the Vietnamese Communist enemy.[67] The shifting legal justifications over the right to use force on Cambodian territory were not only important for the course of the Vietnam War, but they also played a part in the creation of new parameters for the legitimate use of American military power in world politics that matter today.

The violation of Cambodian sovereignty during the Vietnam War was a significant issue for the United States because the Vietnamese communists used Cambodian territory as a base

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[66] Carl F. Salans to McGeorge Bundy. Memo. "Viet-Nam: Option C Negotiations." 6 February 1965. Document 11, Folder 4, Box 8, Papers of Paul C. Warnke (John McNaughton Files), Lyndon B. Johnson Presidential Library, Austin, Texas.

[67] The focus is still on the justifications for known uses of force across borders; while illicit secret and covert uses of force are important, both for Cambodian sovereignty and for international law on the use of force, they are not covered here.

area for their war against the Saigon regime and its American (and other) allies,[68] and because Cambodia was not a belligerent in the war, but was rather a declared neutral. Although the concept of neutrality had perhaps diminished since the golden age of public international law in the late nineteenth and early twentieth centuries, it was still a significant issue in international life. In late 1967, Averell Harriman wrote to LBJ that

> I well remember the horror felt throughout the civilized world when in 1914 the Kaiser violated the neutrality of Belgium. Of course the present situation in Cambodia as we see it is very different. But the world at large (and a substantial section of the American public) has not yet been presented with convincing evidence that expanding the war into 'a tiny, helpless country' is justified.[69]

Not everyone had Harriman's long memory of international politics, but the immediacy of decolonization no doubt ensured that the self-determination, sovereignty, and territorial integrity of newly independent countries such as Cambodia (and those still seeking an end to colonialism) were visceral and sensitive issues in international politics even without adding in the relevant laws of neutrality and belligerency. The United States was therefore cognizant of the need to provide appropriate justification when in the course of military operations its forces crossed, or fired, into Cambodian territory, especially when loss of Cambodian life resulted.

The debate over how to justify violating Cambodian sovereignty during Johnson's presidency tended to center on the doctrine of hot pursuit. There is no general international legal

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[68] This chapter also leaves aside the legal position of the Vietnamese communists with respect to their presence in Cambodia, but the fact that Hanoi refused to acknowledge its use of Cambodian territory for much of the war suggests North Vietnamese officials were certainly cognizant of the legal and diplomatic problems surrounding the use of that territory.

[69] W. Averell Harriman to the President and the Acting Secretary. Memo. "Violation of Cambodian Borders." 15 December 1967. Doc. 24, Folder 2 (Cambodia Vol. IV 10/65 – 9/67 Memos), Box 237, Vietnam Country File, National Security File, Lyndon B. Johnson Presidential Library, Austin, TX.

right of hot pursuit on land; neither treaty nor customary law allows state agents such a right to violate the sovereignty of another state in order to apprehend a wrongdoer absent a particular agreement between the two states concerned.[70] International law specialists within the U.S. Government were well aware of the illegality of hot pursuit on land during the Vietnam War era,[71] and were often quick to reject requests and arguments regarding hot pursuit that came from U.S. military commanders—but some still articulated a right of hot pursuit on occasion. Indeed, the crucial legal memorandum from the State Department Legal Adviser, Abram Chayes, justifying Kennedy's beefing up of the American commitment to South Vietnam in late 1961 posited just such a right.[72] Why did he do so?[73]

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[70] Nicholas M. Poulantzas, *The Right of Hot Pursuit in International Law* (Leyden: A. W. Sijthoff, 1969), esp. pp. 11-13. In the international law of the sea, it is legal for a state's agents to engage in the hot pursuit of another state's vessel from its own territorial waters into the high seas, but not into the waters of another state.

[71] See, for example, the backgrounders prepared for the testimony of John McNaughton, Assistant Secretary of Defense for International Security Affairs and a former General Counsel of the Department of Defense to the Fulbright-chaired Senate Foreign Relations Committee regarding Rules of Engagement in Southeast Asia: Folder 1, McNTN VIII – Fulbright "Rules of Engagement" Briefing (1964-1966) (1) , Box 4, Paul C. Warnke Papers (John McNaughton Files), Lyndon B. Johnson Presidential Library, Austin, TX. See esp. document 13, "Rules of Engagement for SEA and Operational Directives," which notes U.S. forces, consistent with international law, only had authority (i) to fire upon enemy based in Cambodia when those enemy were themselves firing from the Cambodian side of the border, i.e. authority to *return* fire only and not to engage in hot pursuit, and (ii) to cross into Cambodia as a maneuver of self-preservation only *while engaged with the enemy*; document 14, "Approved JCS Rules of Engagement, Southeast Asia," which notes (albeit in a discussion more about air and sea forces than land forces) the technical legal definition of "hot pursuit," prefers the term "immediate pursuit," and notes that the two terms "are not synonymous…. The term 'immediate pursuit' exists by Washington definition and has no technical legal meaning"; and document 33, "Discussion of Hot Pursuit," which notes that "immediate pursuit is a term coined in Washington to satisfy the need for a concept of pursuit which has no technical legal meaning."

[72] Memorandum From the Legal Adviser (Chayes) to the Secretary of State, November 16, 1961, *FRUS 1961-1963*, Volume I, Vietnam 1961, pp. 629-635.

[73] Chayes was not an international lawyer by training, and so may have been ignorant of the technicalities of hot pursuit in international law; but others in his office would certainly have been aware of them. On the related point of authorship, Ronald Ratton suggests that it was not Chayes who drafted the memo, but rather his deputy, Leonard Meeker. Ronald R. Ratton, "The Long, Slow Struggle: An Analysis of the Legal Advice at the Beginning of the Vietnam War," in Ross A. Fisher, John Norton Moore, and Robert F. Turner (eds.), *To Oppose Any Foe: The Legacy of U.S. Intervention in Vietnam* (Durham, NC: Carolina Academic Press, 2006),

The very availability, and ease, of the alternative justification of self-defense may have been the reason Chayes grasped for a legal right of hot pursuit. Hot pursuit, as Chayes described it, allowed for a much narrower range of military action than did self-defense, thereby having more potential to avoid an escalatory spiral.[74] Moreover, Chayes also had an eye on the implications of particular justifications not just for the conflict in Vietnam, but for the international legal order more generally. For Chayes, recourse to justifications of self-defense tended "to trivialize the whole effort at legal justification" and made "the occasion for forceful response essentially a question for unilateral national decision that would not only be formally unreviewable, but not subject to intelligent criticism, either."[75] Arguments of self-defense should only be employed when an armed attack was underway or clearly imminent—i.e. the traditional *Caroline* criteria: "instant, overwhelming, leaving no choice of means and no moment for deliberation."[76] Hot pursuit was probably seen as the lesser of two evils.

Nonetheless, the legal gymnastics involved in sustaining the idea that a right of hot pursuit existed absent an explicit agreement with the Cambodian government would clearly also have trivialized the law. Chayes' legal advice regarding hot pursuit never became the public position of the United States. Acknowledged American violations of Cambodian borders were generally remedied by apologies (such as the one issued after a raid on the Cambodian border

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pp. 329-372 at p. 338, n. 47. As a self-described "Common Lawyer" with a more pragmatic approach to international law than some of his colleagues, Chayes may also have been seeking to innovate. This is a very real possibility, but it still leaves unexplained Chayes' purpose in innovating when a much more obvious legal justification—self-defense—was available to him.

[74] Ratton reaches the same conclusion in "The Long, Slow Struggle: An Analysis of the Legal Advice at the Beginning of the Vietnam War," p. 349.

[75] Abram Chayes, *The Cuban Missile Crisis: International Crises and the Role of Law* (New York: Oxford University Press, 1974), p. 65 and pp. 64-66 more generally.

[76] "The Caroline Case," *The Avalon Project: Documents in Law, History and Diplomacy*, http://avalon.law.yale.edu/19th_century/br-1842d.asp (accessed 29 July 2016).

village of Chantrea in March 1964) and indemnities, rather than with the assertion of legal rights. U.S. statements acknowledging its respect for Cambodian neutrality, territorial integrity, and political independence—and implicitly denying itself a right of hot pursuit—were issued periodically.[77]

IV

Even before the major build-up of U.S. troops, American military leaders were pushing their civilian superiors to allow (or at least lobby Saigon to allow) South Vietnamese troops the right to pursue NLF fighters across the Cambodian border. Concerned at the existence of a Vietnamese Communist "safe haven" in Cambodia, the Joint Chiefs of Staff (JCS) petitioned Secretary of Defense Robert McNamara for just such a right in March 1965. "Prohibition against 'hot pursuit' has resulted in increased VC incidents along the Cambodian border without punitive reaction by Vietnamese forces," wrote the chiefs to McNamara, observing that once "the VC cross into Cambodia, RVN forces are required to cease fire in order to respect the National border. The VC then take the RVN forces under fire with mortars and small arms." Such incidents, cautioned the chiefs, "have resulted in the capture and death of friendly personnel including accompanying US advisors." The chiefs argued that South Vietnamese troops (and, presumably, their US advisors) should be able both to return fire coming from

[77] For a detailed examination of U.S.-Cambodian relations, see the work of Kenton Clymer: *The United States and Cambodia, 1870-1969: From Curiosity to Confrontation* (London: RoutledgeCurzon, 2004); *The United States and Cambodia, 1969-2000: A Troubled Relationship* (London: RoutledgeCurzon, 2004); and the single-volume, abridged version, *Troubled Relations: The United States and Cambodia since 1870* (DeKalb, IL: Northern Illinois University Press, 2007).

Cambodia, and to cross into Cambodian territory "while actively engaged with VC forces," including for the purpose of recovering prisoners.[78]

In response to "considerable reference recently to the doctrine of hot pursuit and its application to the Viet-Nam situation," quite possibly including the JCS memo to McNamara, the State Department's Office of the Legal Adviser sought to set the record straight on the doctrine of hot pursuit. Writing to Benjamin Read, who had previously worked as an attorney in "L" and was now Dean Rusk's Executive Secretary, Acting Legal Adviser Leonard Meeker expressed concern at recent contentions that "the United States would be justified in pursuing Viet-Cong elements into Cambodia on the basis of the doctrine of hot pursuit." "Hot pursuit in international law," wrote Meeker, "has nothing to do with hostilities or with defense against armed attack." Clarifying that hot pursuit was a law-of-the-sea doctrine which allowed a state to pursue a violator of that state's domestic law "from its own waters onto the high seas and to seize him there even though outside its own territorial jurisdiction." Relevant only to the high seas (i.e., international waters), hot pursuit as a doctrine did not apply to the territories of other states: "hot pursuit must terminate once the violator has entered the territory of his own or another state." The relevant international law had been codified not long before in Article 23 of the 1958 Geneva Convention on the High Seas. "Thus," wrote Meeker, "the doctrine of hot pursuit would give the Government of the Republic of Viet-Nam the right to pursue North Vietnamese, Chinese Communist, or Cambodian vessels from South Vietnamese territorial waters onto the

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[78] Earle G. Wheeler (for the Joint Chiefs of Staff), Memorandum for the Secretary of Defense, "Constraints Against Hot Pursuit of Viet Cong Across Cambodian Border," 6 March 1965, Doc. 29, Folder 2 (JCS Memos, Vol. I [2 of 2]), Box 193, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas. This was not the first time the Joint Chiefs of Staff had recommended this course of action, with Wheeler writing in the same memo that the chiefs, "in considering courses of action for Southeast Asia, have previously recommended permitting Vietnamese Armed Forces to pursue and destroy VC forces which cross into Cambodia."

high seas, and to seize them there, for violations of Vietnamese laws. Pursuit could not be conducted within North Vietnamese, Chinese, or Cambodian territory under the doctrine of hot pursuit."[79] With this memo, Meeker forcefully overturned his predecessor's understanding that a right of hot pursuit did exist in international law.

If there was no legal recourse to a doctrine of hot pursuit, then how could the United states and its allies deal with the problem of Cambodia providing a sanctuary for their enemies? Meeker and his assistant attorneys in "L" had recently developed an argument justifying airstrikes against the North that rested on the doctrine of self-defense (see above and, more generally, Chapter 3 below). "Pursuit into Cambodia, however, would be very difficult to justify as a self-defense measure given the facts as we presently know them," stated Meeker. The right to launch airstrikes at targets inside North Vietnamese territory rested on the fact that North Vietnam was engaged in "aggression by means of armed attack" upon the territory of South Vietnam and that, as a consequence, Saigon was well within its Article 51 right of self-defense to request the United States to take self-defense measures (e.g., airstrikes) to meet this aggression. The same argument would be difficult to make regarding Cambodia. "We could not make a convincing case that Viet-Cong activities along the Cambodian border amount to 'armed attack' within the meaning of Article 51 of the UN Charter," wrote Meeker, noting that the "difficulty is compounded by the necessity of showing that it is Cambodia which is committing aggression by armed attack against South Viet-Nam." Since this was clearly not the case, Meeker noted that "it would seem at least necessary to show Cambodian Government connivance in the use of its territory as a base for armed attack before the GVN (and the U.S.) would be justified in using

[79] Leonard Meeker to Benjamin Read, Memorandum, "'Hot Pursuit' in Viet-Nam," 24 March 1965, Doc. 176, Folder 3 (Vol. XXXI, 3/12-31/65, Memos (A) [1 of 3]), Box 15 [1 of 2], Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

armed force against Cambodian territory."[80] Even this somewhat lesser standard would, however, have been difficult to meet. While Prince Norodom Sihanouk, head of the Cambodian state, was perceived by many in Washington and Saigon to be pro-Communist, he was nonetheless assiduous in proclaiming Cambodia's neutrality and seeking to preserve its independence, sovereignty, and territorial integrity. Proving his "connivance" was difficult.

Intelligence regarding Vietnamese Communist use of Cambodian territory, and Cambodian complicity thereof, was subject to competing assessments throughout the war. The Defense Intelligence Agency assessed, in October or early November 1965, that "there is sufficient data on hand to conclude that the lower echelons of the Cambodian military and the civil services have knowledge of Viet Cong activities and in many cases actively collaborate with them," and that "Cambodia's present political position added to recent admissions of agreements with the NFLSVN indicates growing complicity and collusion between the RKG [i.e., Cambodia's central government] and the Viet Cong."[81] The early official combined Intelligence Community estimate, issued by the United States Intelligence Board in October 1965, was more circumspect. The USIB assessed that "there is no question that the Cambodian government has taken an attitude increasingly favorable to the Communists in the Vietnamese situation," but that "there is no hard evidence … that the central Cambodian government has actively provided logistic support to the Viet Cong." While local levels of government may have

[80] Leonard Meeker to Benjamin Read, Memorandum, "'Hot Pursuit' in Viet-Nam," 24 March 1965.

[81] Defense Intelligence Agency, "Viet Cong Use of Cambodian Territory," undated, enclosed as Appendix A to Joint Cheifs of Staff, Memorandum for the Secretary of Defense, JCSM-812-65, "US Policy and Actions to Deal with Cambodian Support of the Viet Cong," 12 November 1965, Doc. 85d, Folder 2 (Vol. 45, 1/1-20/66, Memos (A)), Box 26, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

more actively assisted the Vietnamese Communists, "central government policy, while generally favorable to the Viet Cong, stops short of military support."[82]

Press reports, and private conversations with journalists, only further clouded the issue. In September 1965, the French journalist Bernard Fall gave his assessment of the situation in a meeting with State Department officials: "A brisk smuggling trade exists along the Cambodian-Viet-Nam border, with rice moving to South Viet-Nam and various American imports finding their way to the Cambodian market. The smuggling is advantageous to both sides and many local arrangements exist to protect it. Occasionally, some uninformed ARVN commander intrudes on the happy smugglers, usually believing he is dealing with Viet Cong. Some Americans share this delusion. There is much mistaking of legitimate Cambodian movement on their side of the border as being Viet Cong." There were "no indications, or reasons to believe," Fall concluded, "that there had been any kind of significant North Vietnamese troop movements through Cambodia."[83] At the end of 1965, Fall's fellow journalist Stanley Karnow visited the border region with the co-operation of the Cambodian Government—"I was not [the] victim [of a] conspiracy to mislead me," insisted Karnow—and reported there was little to suggest much in the way of enemy use of the territory. Moreover, Karnow noted, the prospect of the war

[82] USIB Memorandum, USIB-D-24.7/4A, "Infiltration and Logistics—South Vietnam," 28 October 1965, pp. 28-29, Doc. 98, Folder 2 (Vol. XLII, 11/65, Memos (A) [2 of 2]), Box 24, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[83] Memorandum of Conversation, "Current Views of Bernard Fall," 21 September 1965, Doc. 201, Folder 6 (Vol. XL, 9/1-25/65, Memos (C)), Box 22, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

"expanding into Cambodia terrifies Cambodians," and that Sihanouk was "desperately trying [to] demonstrate Cambodian innocence."[84]

Intelligence problems regarding Cambodia persisted for the duration of the war, as indicated by a meeting three years later (October 1968), convened "to establish a factual base for any decisions which might be necessary in connection with Communist use of Cambodian territory." An NSC staffer's description of the meeting is revealing: "It quickly became evident that there is no consensus on the extent, the significance to the Communist cause, or the physical routes used in channeling Communist supplies through Cambodia. Bill Bundy was visibly upset at the disarray, and what he viewed as a failure of the intelligence community to pursue this problem with sufficient vigor and purpose."[85]

The lack of legal justification as supported by hard evidence was, however, only one reason for Washington's desire to proceed cautiously with regard to the use of force on Cambodian territory. Such actions might only push Sihanouk (further) into Communist arms, opening up his country to much greater use by Vietnamese Communist forces. Washington viewed Sihanouk as capricious and feared that, given further violations of Cambodian territory, he might "lend himself to vastly greater use of Cambodia in support of VC."[86] Were this to occur, "the VC/NVN forces would find it far easier than at present to use the extensive and well-

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[84] State Dept to Amembassy Saigon, Cable, State 1847, 30 December 1965, Doc. 28, Folder 6 (Vol. XLIV, 12/20-31/65, Cables), Box 25, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[85] Memorandum From Marshall Wright of the National Security Council Staff to the President's Special Assistant (Rostow), 15 October 1968, *Foreign Relations of the United States 1964-1968, Volume XXVII, Mainland Southeast Asia; Regional Affairs*, Doc. 252.

[86] State Dept to Amembassy Saigon, Cable, State 1175, 30 October 1965, Doc. 65, Folder 1 (Vol. XLI, 9/25/31/65, Cables), Box 23, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

adapted Cambodian territory for base areas, for refuge, for training and for infiltration of men and supplies into South Vietnam. The requirements for U.S. and GVN military force to cope with the situation would be correspondingly greater."[87] A wider war would not only bring public relations problems, in other words, but real strategic and operational problems, too. On the flip side, a cordial attitude towards Sihanouk might see him put more distance between himself and the Communists, especially if combined with US battlefield victories. "Essentially," Washington cabled to its Saigon mission, "we continue to believe that there is no useful purpose served by aggravating US or GVN relations with Cambodia, and that there may over time be gains in preserving a cool and correct position."[88] (While they tended to dislike Sihanouk, Washington and Saigon saw him as, at heart, a Cambodian nationalist who for the sake of his country, and his position of power within it, would attempt to curry favor with whichever side appeared to be winning in Vietnam.) Any border incidents that arose should be dealt with "on correct basis by continued low key explanations and apologies along lines initiated at time Chantrea incident in March 1964."[89]

Despite the political, diplomatic, and military reasoning of officials in Washington, and while cognizant of the lack of clear-cut intelligence, Americans on the ground in South Vietnam continued to believe the enemy use of Cambodian territory to be a major—and growing—problem that required attention. As the American troop build-up progressed, and with, in the words of three NSC officials, "the war scorching Cambodia's borders," the JCS, the U.S.

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[87] State Dept to Amembassy Saigon, Cable, State 3212, 26 April 1966, Doc. 23, Folder 1 (Vol. 51, 4/9-30/66, Cables (A)), Box 30, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas. This cable was tagged "For Ambassador Lodge from Secretaries Rusk and McNamara."

[88] State 1175.

[89] State 1175.

Ambassador to Saigon, Henry Cabot Lodge, and the U.S. military commander in South Vietnam, William Westmoreland, all became more insistent on the need for revised authorizations to cross the Cambodian border in pursuit of enemy forces. [90]

In November, just prior to the Battle of Ia Drang, the Joint Chiefs again wrote to McNamara requesting expanded authorizations. Citing both the USIB and DIA intelligence studies, the chiefs argued that "by permitting its country to be used as a source of supply, as a sanctuary, and for military facilities, Cambodia has forfeited its claim of neutrality." The Joint Chiefs "recognize a risk of antagonizing Prince Sihanouk by any forceful action, with a possibility that Cambodia may seek a closer relationship with Communist China," but insisted that the "possible benefits derived from GVN/US observance of the inviolability of the Cambodian border must be weighed against the violation of South Vietnamese sovereignty by VC incursions into SVN and their use of Cambodia as a sanctuary." South Vietnam's "fundamental right of self-defense is compromised by a policy that prohibits effective counteraction," stressed the chiefs, and "the use of Cambodian territory by the VC, with immunity to pursuit, unduly inhibits field commanders in the defense of their areas and forces." The Joint Chiefs asked McNamara to authorize at once "GVN/US operations into Cambodia in immediate pursuit of VC forces which are withdrawing into Cambodian territory," and to consider at a later date conducting "overt air and/or ground cross-border operations into Cambodia against confirmed LOCs and facilities which support the VC insurgency." [91]

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[90] James C. Thomson, Jr., D. W. Ropa, and Chester L. Cooper, Memorandum for Mr. Bundy, "Two Weeks in Asia," 7 December 1965, Doc. 161, Folder 1 (Vol. XLIII, 12/1-17/65, Memos (A) [1 of 2]), Box 25, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas. On Lodge, see: Anne Blair, *Lodge in Vietnam: A Patriot Abroad* (New Haven: Yale University Press, 1995).

[91] David L. McDonald (Acting Chairman, for the Joint Chiefs of Staff), Memorandum for the Secretary of Defense, JCSM-812-65, "US Policy and Actions to Deal with Cambodian Support of the Viet Cong," 12

In the immediate wake of the Battle of Ia Drang, Lodge took also took up the call, writing directly to LBJ recommending that Westmoreland be authorized to "carry out tactical air and B-52 strikes agsinst known and suspected Viet Cong-North Vietnamese base areas along Cambodian-South Vietnam border." Lodge saw "no political or other objections to execution of such strikes up to border itself" and urged "as a corollary that South Vietnamese ground forces not be dissuaded from destroying base areas in hot pursuit operations even though they lie astride border with Cambodia." As some justification, Lodge offered that the border was "ill-defined" and, in places, "in dispute."[92]

The reply came not from LBJ but via a joint message from the departments of State and Defense on 20 November. Washington agreed with Lodge that there were no impediments to the use of force "up to border itself," but baulked at explicitly allowing the right of hot pursuit, preferring instead (as Meeker had insisted back in March) that any action across the Cambodian border be based on the right of self-defense. "While doctrine of hot pursuit can be strongly supported by analogy," wrote Acting Secretary of State George Ball, "there is no possible doubt on justification of self-defense." In a compromise of sorts, then, Washington approved various "self-defense measures," including "authority to US/GVN units to return fire, to eliminate fire coming from Cambodia, and to maneuver into Cambodian territory as necessary to defend selves while actively engaged in contact with PAVN [People's Army of Vietnam]/VC units." Artillery and close air support operations were acceptable, "as long as such units are actually engaged with US or GVN forces," but engaging Cambodian forces or attacking base areas was not, "other

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November 1965, Doc. 85d, Folder 2 (Vol. 45, 1/1-20/66, Memos (A)), Box 26, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[92] Lodge to LBJ, Cable (unnumbered), 20 November 1965, Doc. 144a, Folder 4 (Vol. XLII, 11/65, Memos (B) [2 of 2]), Box 24, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

than in circumstances where justification of self-defense exists in terms of continuing engagement and direct threat to GVN or US forces."[93] A more formalized version of these authorizations was sent to the theater command from the Joint Chiefs of Staff the next day.[94]

In real terms, these authorizations did little to amend key passages from the existing Rules of Engagement for Southeast Asia promulgated in April.[95] Nonetheless, the authorizations did clarify the types of situations when the Cambodian border might be crossed, or fired across, and they did, importantly, give some clarity to the international legal questions involved. Meeker's March memo to Read had tried to do three things: disabuse American officials of the notion that the United States and South Vietnam had a right of hot pursuit into Cambodian territory; emphasize the centrality of the doctrine of self-defense to any justification for using force on Cambodian territory; and suggest that a justification based on the right of self-defense under Article 51 of the UN Charter would be difficult to sustain in the absence of proof that the Cambodian government was actively assisting Communist forces on its territory. Washington

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[93] State Dept to Amembassy Saigon, Cable (State/Defense Message), State 1399, 20 November 1965, Doc. 142, Folder 4 (Vol. XLII, 11/65, Memos (B) [2 of 2]), Box 24, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[94] JCS to CINCPAC, Cable, JCS 6900/210148Z NOV 65, 21 November 1965, Doc. 76, Folder 5 (Vol. XLII (11/1-22/65, Cables), Box 23, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[95] JCS to CINCPAC, Cable, JCS 009294/170122Z APR 65, 17 April 1965, Doc. 1, Folder 1 (Southeast Asia—Rules of Engagement, 8/64-4/65), Box 200, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas. Key passages as follow: "4. c. (1) In event US forces are attacked by hostile forces in South Vietnam, Thailand, North Vietnam, or SEAsia international waters/air space, US forces may conduct immediate pursuit over international waters or into territorial seas or air spaces of North Vietnam and Laos; and of Cambodia when actually engaged in combat"; "4. c. (5) US forces, which under the limitations of these rules enter unfriendly territorial land, sea, or air spaces in immediate pursuit, are not authorized to attack other unfriendly forces or installations encountered, unless attacked first by them, then only to the extent necessary for self-defense"; and "5. Nothing is these rules modifies in any manner the requirements of a military commander to defend his unit against armed attack with all means at his disposal. In the event of such attack, the commander concerned will take immediate aggressive action against the attacking force."

took on board Meeker's first two points while tiptoeing around the third. While *some* intelligence was available linking Sihanouk's government to active collaboration with the Vietnamese Communists, it was no slam dunk; and even if it were, political, diplomatic, and military calculations meant it was better not to drive Sihanouk into offering the Communists even more support. Shying away from the claim that Cambodia was the aggressor, or materially aiding an aggressor operating from its territory, left little recourse to an argument of self-defense based on Article 51 of the UN Charter.

The Johnson Administration's answer was to shift the grounds upon which a justification of self-defense could be reached. Rather than argue self-defense at the national level and invoke Article 51 to defend the territorial integrity, political independence, and sovereignty of the state, Washington argued instead that what was at stake was the right of a military unit to defend itself from an attack irrespective of where that attack was coming from. A commander had a duty to preserve the lives of his troops. If that meant firing or crossing into Cambodia, so be it. Of course, because self-defense was now operating at a lower level, the restrictions upon when it could be invoked were more stringent. Allied troops had to be actively engaged with enemy forces, and were to focus on those enemy forces, not any base areas or installations they might have come from or be retreating to. The lines between legitimate self-defense and taking advantage of an engagement to go on the offense or to pursue retreating opponents were, of course, very finely, even imperceptibly, drawn. "We recognize these distinctions might be most difficult to preserve," wrote Washington to Lodge in the 20 November message extending the new authorizations regarding Cambodia and the doctrine of self-defense, "but from political standpoint it is essential that this be done."[96]

[96] State 1399.

Lodge was instructed to play down in the press any instances in which South Vietnamese or American troops did actually use force on Cambodian territory and, where the press did get wind of such occasions, play up "that border terrain difficult and boundary lines hard to check completely against reported positions." If it were necessary to talk to the press, "spokesman should not repeat not be drawn into legal basis and justification for action taken," although in general "stress should be placed on theme that GVN and/or US forces were under attack and that measures taken were in self-defense." The "term 'self-defense' should be driven home, and terms such as 'immediate pursuit' or 'hot pursuit' should not repeat not be used."[97]

The November 1965 authorizations regarding the use of force on Cambodian territory, and the legal justifications upon which those authorizations rested, were at the time temporary, but they soon became routinized and remained in force, more-or-less intact, for the remainder of Lyndon Johnson's time in office. Of course, while the authorizations gave some scope to the use of force on Cambodian territory, they still prevented US and allied forces from attacking any Communist base or supply areas in Cambodia. For Lodge, Westmoreland, the Joint Chiefs, and others, then, the issue remained unsettled and, as a result, the doctrinal canard of hot pursuit proved incredibly difficult to quash.

After a late November visit to South Vietnam, where his ear was bent by Lodge on the issue, McNamara placed hot pursuit on his action list of follow-up items.[98] It was enough to worry State Department officials, with NSC staffers reporting a "sensitive point" to McGeorge

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[97] State 1399.

[98] JCS to CINCPAC, Cable, JCS 7787/032025Z DEC 65, 3 December 1965, Doc. 120, Folder 6 (Vol. XLIII, 11/23-12/19/65, Cables [2 of 2]), Box 24, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas. Item number 25 read: "Act on Lodge's recommendation re. hot pursuit by ARVN over Cambodian border. Comment: Now in work is authorization similar to that for SILVER BAYONET, for both ARVN and US forces.

Bundy in early December: "State's Cambodia experts have been alarmed in recent days at pending decisions that might bring intentional U.S./GVN attacks against Cambodian territory. Their chief point is simply that so far (a) there appears to be no major increase in the limited use of Cambodian territory, and (b) there is absolutely no evidence—and never has been—of Cambodian government tacit or overt support for such Communist use of Cambodian territory." (Writing in the margin next to point (a), Bundy exclaimed that "they must be looking at different stuff from the rest of us.")[99]

Perhaps encouraged by McNamara's visit, and the Defense Secretary's willingness to hear out Lodge on hot pursuit, Westmoreland soon pushed the issue again. Within three weeks of the Silver Bayonet (i.e., the 20 November) authorizations, Westmoreland was asking for more, writing to his superiors that "it is perfectly clear to us that the border areas of Cambodia now contain motorable infiltration routes, command centers, base training and supply areas." While "we will not be able to produce the kind of evidence which would stand up in court against those who insist on such proof … to us it is painfully clear and quite obvious what has happened. Sihanouk does not control his border area." Westmoreland requested that Washington set particular limits upon how far within Cambodian territory force could be used when engaged with the enemy (he recommended up to ten kilometers for artillery and airstrikes and up to two for the maneuver of ground troops), and authorize both air and ground reconnaissance to locate, and direct air and artillery strikes against, enemy forces and installations up to ten kilometers inside Cambodia. The second request implicitly extended beyond an authorization based on the self-defense of American and South Vietnamese military units. Aware of this, Westmoreland—

[99] James C. Thomson, Jr., D. W. Ropa, and Chester L. Cooper, Memorandum for Mr. Bundy, "Two Weeks in Asia," 7 December 1965.

explicitly backed by Lodge—argued that the actions were a "necessary" and "integral part of our efforts for the defense of South Vietnam and not because we seek a wider war." [100] They were attempting to shift the legal stakes back to an Article 51 justification of national self-defense.

Washington's initial reply pushed back against the certainty of Westmoreland's assessments of the facts—"the Intelligence Community recently examined this problem in detail on the bases of all intelligence available here from all sources" and "while noting clear evidence that limited logistical and safe haven use occurs, also cited extensive intelligence gaps"—and requested Westmoreland to provide the intelligence evidence for his claims of Communist use of Cambodian territory.[101] A further reply, a joint message from State and Defense, more-or-less reiterated the terms of the 20 November authorizations ("we are reluctant to go beyond authority summarized Deptel 1399"), but did note that for "self-defense purposes" there was no need to "impose rigid 2-kilometer territorial limit" or an "arbitrary 10-kilometer limit."[102] The implicit denial of authority to hit Communist installations or base areas within Cambodia absent some form of ongoing engagement (in which self-defense might then be justified) was formalized several days later by the Joint Chiefs. The Joint Chiefs stressed that advance approval was required for actions against Cambodia except those emergency situations in which the right of self-defense could be exercised, although they fudged the question somewhat as to the level at

[100] COMUSMACV to CINCPAC, MACV 43199/091149Z DEC 65, 9 December 1965, Doc. 113, Folder 6 (Vol. XLIII, 11/23-12/19/65, Cables [2 of 2]), Box 24, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[101] State Dept to Amembassy Saigon, Cable, State 1622, 10 December 1965, Doc. 79, Folder 5 (Vol. XLIII, 11/23-12/19/65, Cables [1 of 2]), Box 24, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[102] State Dept to Amembassy Saigon, Cable (State/Defense Message), State 1634, 11 December 1965, Doc. 73, Folder 5 (Vol. XLIII, 11/23-12/19/65, Cables [1 of 2]), Box 24, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

which the doctrine of self-defense was operating: "Authorities and procedures herein are established to provide for the defense of South Vietnam and the defense of US/allied forces. These authorities and procedures will not be applied toward widening the conflict in Southeast Asia."[103]

In response to the initial request for further intelligence (and, possibly, annoyed at Washington's denying Westmoreland's requests before having received that further intelligence), Lodge and Westmoreland bombarded Washington with field reports in which US and South Vietnamese units had recorded fire coming from Cambodia or enemies retreating into Cambodia. "As stated before," concluded Lodge and Westmoreland, "we do not have evidence that will convict Cambodia in a court of law of colluding with Hanoi and Viet Cong. Nevertheless, Cambodian territory is for a fact being used by Viet Cong and PAVN and Cambodian Govt is at least aware of this use. Its failure to control its own borders and absence of any official protests to Front or to Hanoi imply at least tacit approval of and consent to this use. Result is military requirement for US to take steps to counter advantage which this sanctuary has given to VC and PAVN."[104]

Two weeks later, while seeking instructions prior to an upcoming meeting with Premier Ky, Lodge pushed the issue of hot pursuit once again: "Would it be satisfactory for me to say that we agree that the use of Cambodia as a sanctuary is grossly improper, and that we and the Vietnamese must undoubtedly at the proper time take whatever action seems appropriate?" He

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[103] JCS to CINCPAC, Cable, JCS 8706/152351Z DEC 65, 15 December 1965, Doc. 114, Folder 6 (Vol. XLIII, 11/23-12/19/65, Cables [2 of 2]), Box 24, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[104] Amembassy Saigon to State Dept, Cable (Joint MACV/Embassy Message), Saigon 2149, "Cambodian Government Involvement with the Viet Cong," 15 December 1965, Doc. 14, Folder 5 (Vol. XLIII, 11/23-12/19/65, Cables [1 of 2]), Box 24, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

then noted his understanding of current U.S. policy, which, "although unannounced, is not to object to hot pursuit by the GVN into Cambodia. I also hear that the U.S. is planning some military operations of its own."[105]

The response to Lodge came from Rusk himself, noting that "I have given careful thought to just what you might say about our attitude toward the use of Cambodia as a sanctuary." Rusk first clarified existing policy: "At this stage, our policy is to authorize self-defense measures by US forces who find themselves in combat near the border. Deptel 1634 still remains effective." And despite any contingency plans being drawn up by the U.S. Military Assistance Command Vietnam (MACV, i.e., Westmoreland's command), "we here have not authorized and do not now contemplate actions going beyond those strictly necessary for self-defense." Rusk then reminded Lodge of the appropriate legal terminology: "Incidentally, as spelled out in Deptel 1399 and reiterated in Deptel 1634, we consider it terribly important to rest whatever we may be forced to do on grounds of self-defense and not to get into terminology of 'hot pursuit' which our lawyers tell us has no real standing for land warfare whereas self-defense can be much more forcefully sustained both legally and in practice." Rusk reaffirmed that "we continue to believe that, at least unless and until we have absolute proof of base areas or systematic use of Cambodian territory in major way, it would be most unwise from policy standpoint to go beyond strict self-defense. … Any act by GVN or US not clearly justifiable as self-defense might drive [Sihanouk] squarely into Peiping's or even Hanoi's arms and drastically increase the very use of Cambodia that now concerns us. Even militarily we have always thought it made little sense to open up hostilities on any significant scale with Cambodia, and from

[105] Amembassy Saigon to State Dept, Cable, Saigon 2338, 31 December 1965, Doc. 3, Folder 6 (Vol. XLIV, 12/20-31/65, Cables), Box 25, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

standpoint of third-country support and understanding it could be seriously damaging to do so." Rusk then instructed Lodge to talk through the US authorizations of self-defense with Ky, "while making absolutely clear they are strictly for use in case of clear need and really emergency-type situations."[106] Talk of exercising an operational right to self-defense had riled Sihanouk in recent days;[107] there was thus little appetite in Washington to extend the authorizations further than where they now stood.

Another push to take stronger measures against enemy forces in Cambodia, and to justify those measures on the basis of hot pursuit, came in April 1966, coinciding with the departure of

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[106] State Dept to Amembassy, Cable, State 1866, 1 January 1966, Doc. 48, Folder 1 (Vol. 45, 1/1-20/66, Cables), Box 26, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas. Lodge dutifully carried out his instructions, meeting with Ky two days later, but he dissented from Rusk's assessment of the strategic value inherent in a policy of restraint vis-à-vis Cambodia: "I do not share view … that vigorous military action will 'drive Sihanouk squarely into Peking or Hanoi's arms.' If he really thought we meant business and had blood in our eye, he would, I believe, move our way." Amembassy Saigon to State Dept, Cable, Saigon 2373, 3 January 1965, Doc. 29, Folder 2 (Vol. 45, 1/1-20/66, Memos (A)), Box 26, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas. And he was persistent thereafter in promoting his view of the situation, e.g., writing to Washington the following month reminding them of several "facts: (a) there are bases of great value to the Viet Cong in Cambodia; (b) the Cambodian Government has done nothing effective to prevent the use of their territory for this purpose; and (c) these bases are a direct and mortal threat to American soldiers who are in combat for the purpose of repelling aggression, and assisting South Viet-Nam in developing its self-determination. I cannot understand why a little sternness with Cambodia is not in order. … We can be aware of the need to avoid provocation but not to the point where we do not take the protective measures necessary." Amembassy Saigon to State Dept, Cable, Saigon 3083, 23 February 1966, Doc. 16, Folder 3 (Vol. 47, 2/66, Cables), Box 27, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[107] See, e.g., CIA, Weekly Report: The Situation in South Vietnam, 29 December 1965, Doc. 240, Folder 5 (Vol. XLIII, 12/15-31/65, Memos (B) [3 of 3]), Box 25, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas (pp. 16-17: "Prince Sihanouk has responded with predictable heat to announcements that allied forces in South Vietnam in exercising the right of self-defense might take action across the Cambodian border. Accusing the United States of seeking excuses for military intervention in Cambodia, Phnom Penh has called upon the 1954 Geneva signatories to make clear their intentions should the US violate Cambodian borders, reserved the right to appeal to the UN, and declared that all border incursions will be repulsed"); see also: CIA, Weekly Report: The Situation in South Vietnam, 5 January 1966, Doc. 150, Folder 4 (Vol. 45, 1/1-20/66, Memos (B) [2 of 2]), Box 26, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

McGeorge Bundy as National Security Advisor and his replacement by Walt Rostow, and following some late March radio broadcasts by Sihanouk publicizing an offer to the NLF for the use of Cambodian territory and hospitals for the treatment of their wounded and the (indirect) provision of some food aid.[108] Writing to Rostow in mid-April, R. C. Bowman, an NSC staffer, suggested that the "present authorization for action in self-defense in Cambodia … does not go far enough. If US forces were authorized immediate pursuit into the border regions, the VC would have to stop using those areas as bases for military attacks, since to do otherwise would increase the risk to their key supply lines."[109] Several days later, Westmoreland, with the support of Lodge, requested expanded authority to send reconnaissance teams into Cambodia . "In view of the pressing requirement for additional intelligence information," wrote Westmoreland, "it is essential that prompt action be taken to expand the present effort. The increased effort will be designed not only to collect tactical information but to prove complicity of the Cambodian Government."[110] Another several days later, and Lodge was writing to Rusk and McNamara. Given the belief of US military and civilian officials in South Vietnam that the need to take action against Cambodian territory was only increasing in urgency, Lodge noted that "I believe there is a need to begin establishing on an urgent basis justification for any action we may undertake." Lodge recommended a substantial public relations campaign to prepare the ground

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[108] On Sihanouk's public broadcasts, see: Amembassy Saigon to State Dept, Cable, Saigon 4120, 21 April 1966, Doc. 188, Folder 2 (Vol. 51, 4/9-30/66, Cables (B)), Box 30, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[109] R.C. Bowman to Walt Rostow, Memo, "Rules of Engagement, SEA," c. 12 April 1966, Doc. 3a, Folder 1 (Southeast Asia—Rules of Engagement, 8/64-4/65), Box 200, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[110] COMUSMACV to CINCPAC, Cable, MACV 13329/171250Z APR 66, 17 April 1966, Doc. 100, Folder 1 (Vol. 51, 4/9-30/66, Cables (A)), Box 30, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas. In this message, Westmoreland also laid out the reconnaissance actions he had already taken within existing authorities.

for "defensive retaliation against some of the more glaring cases of VC use of Cambodian territory," and suggested that such a campaign "begin in the very near future so that picture will emerge over the next few weeks prior to specific US military action in preference to releases of this [intelligence information] on the eve of any military effort on our part. Latter alternative would seem to be artificial justification after military action has been determined." While aware of Washington's "reservations in challenging Sihanouk publicly on use of his territory by VC," Lodge assessed that the "situation has developed to state where security of our military forces is becoming involved."[111]

Rusk and McNamara held to the established line, responding that "it would not in present circumstances be in the overall U.S. interest to go beyond existing authorizations to U.S. commanders to attack across the Cambodian border in self-defense" and that "when and if it becomes necessary for a U.S. commander to use existing authority to attack across the Cambodian border in self-defense, the key justification, in terms of public and international opinion as well as law, will be clear and demonstrable evidence that the VC/NVN forces concerned were using Cambodian territory *in the particular instance*." General evidence unmoored from any particular U.S. operation (i.e., of the sort Lodge and Westmoreland had produced), would therefore not be enough, in Rusk and McNamara's thinking, to gain international support for such an operation. "On the contrary," the secretaries continued, "it could be counted on to provoke shrill claims that we were preparing pretexts for 'aggression' against Cambodia," which would have the adverse effect of tying American hands even further with regard to action in Cambodia. And "as to military operations … not directly justified by self-defense, we believe there is a very serious question whether such actions are in the United

[111] Saigon 4120.

States interest at this juncture." The risk of crossing the Cambodian border was acceptable to Washington "where the right of *immediate* self-defense is involved," but not for any broader operation. Washington reiterated its view that a wider war involving Cambodian territory would, militarily, favor the Communists.[112]

In addition to the strategic imperative demanding restraint, Rusk and McNamara noted that "questions of law and of international and domestic opinion also weigh heavily with us," and expressed skepticism that the information then available could "bring about any significant shift in the present climate of opinion." The United States needed to gather more direct, rather than circumstantial evidence, and such evidence "should also reflect violation of accepted principles of neutrality. As matters stand, some of our best evidence relates to shipment of food to VC/NVN forces. However, these are not repeat not unneutral acts in the sense of violating duties of neutrals under international law. Nor is the treating of VC/NVN wounded."[113]

In late 1967, military and public pressure increased on the United States to deny to its enemies the use of Cambodia as a privileged sanctuary. Arguments regarding hot pursuit were renewed by, among others, Westmoreland, Eisenhower, and some members of congress. The U.S. public position remained, however, the disavowal of any right of hot pursuit into Cambodian territory. Some implicit public and explicit private comments by Cambodian head of state Prince Norodom Sihanouk seemed to raise the possibility of an agreement regarding hot pursuit, but these never found public legal expression and were, in any case, subsequently refuted by Sihanouk. In early January 1968, advice to U.S. officials came from the Office of the

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[112] State 3212. Emphases added.

[113] State 3212. When Lodge visited Washington the following month for consultations, Rusk and McNamara pushed the same line in person. See: Robert S. McNamara, "Agenda Item 3a. Rules of Engagement—Cambodia," May 1966, Doc. 214c, Folder 3 (Vol. 52, 5/1-14/66, Memos (B)), Box 31 [2 of 2], Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

Legal Adviser to avoid discussing the legal basis for U.S. action in Cambodia whenever possible and, if such a discussion had to happen, to refrain from referring to a (non-existent) right of hot pursuit and instead to ground U.S. action upon the doctrine of self-defense.[114]

The Office of the Legal Adviser stressed that self-defense as a justification for action in Cambodia had a very narrow application: "In situations where hostile forces are locked in close combat and one enters the territory of a neutral state it may be necessary for the other also to do so in order to defend itself. In air combat this is particularly true in view of the speed of modern aircraft, but the necessity may also arise to return fire into neutral territory or actually to move land forces across the border during an engagement with hostile forces, particularly when the engagement occurs in remote areas where the armed forces of the neutral state are not available to intern the hostile forces entering its territory."[115] This was an important message for while it merely reaffirmed existing policy and authorizations, it may well have been the first time operational self-defense—the self-defense of military units immediately engaged by the enemy—was given a formal legal imprimatur. The Office of the Legal Adviser had clearly played an important role in the development of the justification of operational self-defense, but there is a sense of hesitancy in the record of policy discussions and debates—a sense that the argument of operational self-defense, while resting on surer legal footing than the doctrine of hot pursuit, should be publicized reluctantly and only if necessary—and no formal legal

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[114] State Dept to New Delhi. Cable. State 1575. 6 January 1968. Document 78, Folder 4, Cambodia 5 E (2) a 1/68 – 10/68 (1 of 2), Box 92, Vietnam Country File, National Security File, Lyndon B. Johnson Presidential Library, Austin, TX. This cable gives the Office of the Legal Adviser's "legal views on basis for actions of U.S. forces in Cambodia," notes that the term hot pursuit is "misleading" as the traditional doctrine of hot pursuit relates solely to specific circumstances at sea and "has no application to pursuit across land frontiers of states," and advises that "the only legal basis for pursuit of hostile vessels, aircraft, or land forces into the territory of a neutral state is the right of self-defense."

[115] i*bid.*

memorandum laying out the legal grounds of, and limits to, operational self-defense was produced; the January 1968 cable was the closest "L" came. That might be because operational self-defense rested less on international law, i.e., the right of national self-defense provided by Article 51 of the UN Charter, than on analogies to municipal law rights of self-defense, as articulated later that year (1968) in an anonymous Note in the *Columbia Law Review.*[116]

Whatever the reason for not elaborating the grounds and parameters of the right of operational self-defense, some U.S. officials, notably William Bundy, took the January 1968 advice from the Office of the Legal Adviser to mean that the right of pursuit was part of the right of self-defense. On 12 January, the same day that Sihanouk and presidential envoy Chester Bowles released a joint communiqué, in which the U.S. again gave assurances of its respect for Cambodia's sovereignty, neutrality and territorial integrity, Bundy told journalists that this agreement would not bar U.S. forces from exercising the right of self-defense which included that of hot pursuit across a border. Other officials suggested self-defense and hot pursuit were virtually interchangeable.[117] This was a misreading of the advice from State Department lawyers, but shows again how difficult it was to quash entirely talk of hot pursuit.

Indeed, such language may even have been used in a meeting between Johnson and Richard Nixon at the end of 1968. After Nixon had defeated Hubert Humphrey in that year's presidential election, but before he had assumed office, Johnson met with the president-elect to discuss foreign policy matters generally and the Vietnam War in particular. That meeting coincided with another push by the Joint Chiefs and MACV (now headed by Creighton Abrams)

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[116] "International Law and Military Operations Against Insurgents in Neutral Territory," *Columbia Law Review*, Vol. 68, No. 6 (June 1968), pp. 1127-1148, esp. pp. 1134-1138.

[117] Poulantzas, *The Right of Hot Pursuit in International Law*, pp. 34-35. Some legal scholars also take the view that hot pursuit can be collapsed into a right of self-defense, but the most authoritative statement, Poulantzas, rejects this.

to allow U.S. forces to operate within Cambodia.[118] While no record exists of the Johnson-Nixon meeting, the briefing notes provided to Johnson by Walt Rostow for it included a query as to whether the United States should "permit hot pursuit some modest distance into the Cambodian sanctuary."[119]

Despite Rostow's suggestion, and irrespective of what Johnson said to Nixon in December 1968, the record of the Johnson Administration with regard to Cambodia is nonetheless clear. In the face of insistent pressure from the leading U.S. military and diplomatic personnel on the ground in South Vietnam, the administration, citing the advice of its lawyers and weighing other political and strategic factors, repeatedly refused to permit deeper strikes into Cambodia beyond those allowed under a strictly-circumscribed doctrine of operational self-defense. Meeker's legal opinion—that strikes upon Communist base areas within Cambodia would be illegal absent Phnom Penh's complicity in attacks that emanated from those base areas—stood for the duration of the Johnson administration. It would not, however, last long under a new president.[120]

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[118] See, e.g., Memorandum From the President's Special Assistant (Rostow) to President Johnson, 12 December 1968, *Foreign Relations of the United States 1964–1968, Volume VII, Vietnam, September 1968–January 1969*, Doc. 253.

[119] Memorandum From the President's Special Assistant (Rostow) to President Johnson, 12 December 1968, *Foreign Relations of the United States 1964–1968, Volume VII, Vietnam, September 1968–January 1969*, Doc. 252.

[120] While much of the Vietnam War literature is focused on the pre-Nixon era, the amount of significant scholarly work on the war as waged by, and during, the Nixon Administration is increasing and includes: David F. Schmitz, *Richard Nixon and the Vietnam War: The End of the American Century* (Lanham, MD: Rowman & Littlefield, 2014); Jeffrey Kimball, *Nixon's Vietnam War* (Lawrence, KS: University Press of Kansas, 1998); Jeffrey Kimball, *Vietnam War Files: Uncovering the Secret History of Nixon-Era Strategy* (Lawrence, KS: University Press of Kansas, 2004); Lien-Hang T. Nguyen, *Hanoi's War: An International History of the War for Peace in Vietnam* (Chapel Hill, NC: The University of North Carolina Press, 2012); and Pierre Asselin, *A Bitter Peace: Washington, Hanoi, and the Making of the Paris Agreement* (Chapel Hill, NC: The University of North Carolina Press, 2002).

V

Nixon, a lawyer, had little regard for international law, but was initially cautious with regard to Cambodia. The overthrow of Sihanouk in a coup led by his own prime minister, Lon Nol, in March 1970, however, gave Nixon an opening to act upon the advice of Abrams and others that significant operations be launched against the Cambodian sanctuaries. On April 30, he delivered a televised address from the White House informing the American people of his decision to launch an incursion into, or invasion of, Cambodia in order to destroy the enemy sanctuaries.[121] The new Cambodian government, however, while more pro-American than Sihanouk, was nonetheless still committed to maintaining Cambodian neutrality and so did not formally invite U.S. forces into the country. A process of finding an alternative justification for the U.S. and South Vietnamese action therefore ensued. That process ultimately saw the Nixon administration recast the spatial and temporal dimensions of legal justification regarding cross-border use of force.

Nixon's basic justification for the Cambodian incursion was the need to protect U.S. forces based in South Vietnam.[122] While this was sold more as a constitutional law justification and, even, as a strategic and moral imperative, "protect the troops" nonetheless had some resemblance to international law arguments of self-defense. Administration officials initially latched on to this to argue that the situation in Cambodia had changed dramatically and

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[121] On the Cambodian incursion, see: William Shawcross, *Sideshow: Kissinger, Nixon and the Destruction of Cambodia* (New York: Simon & Schuster, 1979); and John M. Shaw, *The Cambodian Campaign: The 1970 Offensive and America's Vietnam War* (Lawrence: University Press of Kansas, 2005).

[122] See National Security Decision Memorandum (NSDM) 57 and NSDM 58, *FRUS 1969-1976* Vol. VI, Vietnam, January 1969-July 1970 (Washington, D.C.: Government Printing Office, 2006), Doc. 260 and Doc. 270 respectively.

dangerously in the ten days before April 30.[123] This did not really match the *Caroline* critera—"instant, overwhelming, leaving no choice of means and no moment for deliberation"—but it clearly sought to convey a sense of the imminence of the threat and the necessity for action. It stretched credulity, however, to think that the situation had changed so completely in 10 days. Moreover, briefers sometimes undercut the argument of imminent threat by noting the invasion had been weeks in planning.[124]

By the time an official legal justification was issued, the temporal and spatial stakes had shifted. The Legal Adviser, John Stevenson, denied that the imminence of the threat from the Cambodian sanctuaries was at issue, instead collapsing the justification for the Cambodian incursion into the broader justification for the U.S. presence in South Vietnam. Stevenson reported to a lawyers' forum that "Since 1965 we and the Republic of Viet Nam have been engaged in collective measures of self-defense against an armed attack from North Viet Nam." He continued:

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[123] "In the ten days after the President's April 20 speech in which he announced plans for withdrawal of 150,000 American troops within a year, the North Vietnamese changed completely the military situation in Cambodia. They moved out of their sanctuaries and threatened to form a belt of military force down the entire 600-mile length of the Cambodia-South Vietnam border. Any even mild success of the plan would result in an unacceptable threat to American and allied forces in Vietnam, and particularly to those forces which remained after our next withdrawal increment had departed for home." Alexander P. Butterfield (Deputy Assistant to the President) to Members of the Cabinet. Memo with encl. (personal). "Key Points Concerning the Cambodian Operation." May 13, 1970. Folder 11 (Subject Files: Cambodia – Memorandums re. Cambodia [1 of 4]), White House Special Files / Staff Member Office Files / Charles W. COLSON, Subject Files, Box 42, Richard Nixon Presidential Library, Yorba Linda, CA.

[124] See, e.g., William E. Timmons to Henry Kissinger. Memo. May 13, 1970. Folder 4, Box 585, Cambodian Operations (1970), National Security Files, Richard Nixon Library, Yorba Linda, CA. Timmons wrote: "A Senator called me to report on the Hill briefing last Tuesday. He believed you made a good sell, thought Alexis Johnson talked much too long, but he brought out several apparent conflicts in General Vogt's briefing.… He recalls Vogt saying that the Cambodian operation required a number of weeks to put into movement. The implication is that that it was planned and started even before the President's withdrawal address from San Clemente…. This Senator wants to be helpful and reported these observations so our briefers can be talking the same line."

> Increasingly since that time the territory of Cambodia has been used by North Viet Nam as a base of military operations to carry out that attack, and it long ago reached a level that would have justified us in taking appropriate measures of self-defense on the territory of Cambodia. … The right was available to us, but we refrained from exercising it in the hope that Cambodia would be able to impose greater restraints on enemy use of its territory.[125]

In collapsing the Cambodian theater of war into the South Vietnamese theater, Stevenson's *post hoc* legal justifications for the Cambodian incursion transformed the temporal and spatial stakes of use of force law. Issues of the timing of the Cambodian incursion were not irrelevant, but under Stevenson's rationale they became questions of policy rather than law. The right had technically existed for Stevenson since 1965. Issues of preemption, imminence, and necessity therefore faded away.[126] Or they became second-order legal issues: Stevenson may have rejected the applicability of the legal concepts of pre-emption and imminence to the Cambodian incursion, but he nonetheless stressed a 60-day time limit on U.S. troop presence in Cambodia. Not without some legal logic—in particular, as a manifestation of the principle of proportionality—this time limit, along with other self-imposed limits, was nonetheless perceived more as a political obligation.[127]

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[125] Cited in Donald T. Fox (ed.), *The Cambodian Incursion: Legal Issues*, Proceedings of the Fifteenth Hammarskjöld Forum, Published for the Association of the Bar of the City of New York (Dobbs Ferry, NY: Oceana Publications, 1971), p. 31.

[126] In response to Chayes, who critiqued Stevenson's report at the forum, Stevenson emphasized that "this action should in no way be equated with preemptive action." He stressed again that "in the present situation we very clearly had a continuing armed attack from Cambodia against South Viet Nam and our troops in South Viet Nam. This is clearly a question of armed attack and not of preemptive strike. I think that is a terribly important distinction" Cited in Fox (ed.), *The Cambodian Incursion: Legal Issues*, p. 44.

[127] "The United States has imposed severe limits on the activities of its forces. They will remain in Cambodia only a limited time—not beyond July 1, in a limited area—not beyond twenty-one miles from the border and with a limited purpose—to capture or destroy North Vietnamese supplies, to destroy base installations and to disrupt communications. To the maximum extent possible, we have directed our forces at enemy base areas and have tried to avoid civilian population centers. We have limited our area of operations to that part of

While these self-imposed limits, especially the 60-day rule, would have a significant afterlife (see chapter six), the most significant aspect of Stevenson's memo was the reshaping of self-defense. Already weakened by their confusion with hot pursuit, the Johnson-era geographical restraints associated with self-defense—which would only permit limited ground maneuvers into Cambodia while engaged with the enemy and only if necessary—were now dissolved as Stevenson based his arguments on the defense of South Vietnam as a political entity rather than on the specific defense of U.S. and South Vietnamese troops.

In making his legal argument, Stevenson was implicitly following National Security Advisor Henry Kissinger, who argued, as a point of strategy, much the same thing. "Strategically," Kissinger wrote in his memoirs, "Cambodia could not be considered a country separate from Vietnam."[128] And following from this strategic assessment came Kissinger's moral assessment of the situation. When three of his subordinates on the NSC staff proposed a continuation of the Johnson-era policy of only "defensive cross-border operations," Kissinger rejected their premise of "shallow cross-border penetration of a few miles as essential, but deep penetrations as indefensible." It was, wrote Kissinger some years after the fact, "a distinction whose moral significance continues to escape me."[129] Such strategic and moral obfuscation at the heart of the administration, combined with the absence of legal advice from Kissinger's NSC,[130]

Cambodia from which Cambodian authority had been eliminated and which was occupied by the North Vietnamese." Stevenson cited in Fox (ed.), *The Cambodian Incursion: Legal Issues*, p. 32.

[128] Henry Kissinger, *White House Years* (Boston: Little, Brown and Company, 1979), p. 486.

[129] Kissinger, *White House Years*, p. 494.

[130] A year earlier, when the Nixon Administration was facing its first major foreign policy test—the downing of a US Navy EC-121 reconnaissance aircraft by North Korea—Nixon asked Kissinger if there were any lawyers on the NSC staff. Kissinger replied in the negative, and the situation appears unchanged one year later, notwithstanding the fact that the three staffers who were opposed to a major incursion were operating in line with the Johnson Administration's legal logic. In April 1969, of course, Nixon was less after good faith legal advice than a legal justification for possible next steps: "The President said to find a way that international law

created the necessary space for Stevenson to bring a much more expansive doctrine of self-defense to bear on the issue of Cambodian neutrality than had held place in the Johnson Administration.

Stevenson's memo included a brief history of the claimed right to remedy through self-help a neutral's failure to prevent illegal use of its territory by another belligerent. [131] This history covered much of the same doctrinal territory as did the discussions of hot pursuit, but grounded in national self-defense, Stevenson's justification lacked the limits associated with both hot pursuit, as Chayes had laid down in 1961, and of operational self-defense, as the Office of the Legal Adviser had formalized them in 1968.

Stevenson noted that "it was impossible for the Cambodian Government to take action itself to prevent these violations of its neutral rights. … In these situations, the question arises: What are the rights of those who suffer from these violations of Cambodian neutrality?" Citing a number of cases from the nineteenth century and the World Wars, as well as legal texts from the eighteenth century through the late 1950s, Stevenson developed an argument that if a neutral government did nothing to oppose the use of its territory by a belligerent in time of war, the opposing belligerent could enter the neutral's territory for the purposes of self-help. "We all recognize that, whatever the merits of these views prior to 1945," summed up Stevenson in perhaps the key passage in his important memorandum, "the adoption of the United National Charter changed the situation by imposing new and important limitations on the use of armed force. However, they are surely authority for the proposition that, assuming the Charter's

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can be breached. The U.S. became a great nation by breaking international law." Record of a Telephone Conversation Between President Nixon and the President's Assistant for National Security Affairs (Kissinger), *Foreign Relations of the United States 1969-1976, Vol. XIX, Part 1, Korea, 1969-1972*, Document 8.

[131] Stevenson in Fox (ed.), *The Cambodian Incursion: Legal Issues*, pp. 29-31.

standards are met, a belligerent may take action on a neutral's territory to prevent violation by another belligerent of the neutral's neutrality which the neutral cannot or will not prevent, providing such action is required in self-defense."[132] Stevenson's "cannot or will not" formulation subsequently shifted to an "unwilling or unable" formulation, which is the language Kissinger used in 1979 to defend the Nixon Administration's actions in Cambodia: "it was taken for granted (correctly) that we had the right to counter North Vietnam's blatant violation of Cambodia's neutrality, since Cambodia was unwilling or unable to defend its neutral status."[133] The "unwilling or unable" legal doctrine is now a regular feature of US foreign policy, but to so glibly (and by no means correctly) take the right for granted obscures the fact that in 1970 Stevenson overturned, or at least heavily reinterpreted, the preceding decade of official legal advice on the matter and the policy that was, in part, informed by that advice. "Unwilling or unable" was, to a great extent, invented in 1970 in the context of the Cambodian Incursion.

[132] Stevenson in Fox (ed.), *The Cambodian Incursion: Legal Issues*, p. 31.

[133] Kissinger, *White House Years*, p. 246. In this particular instance, Kissinger was discussing the secret bombing of Cambodia initiated well prior to the ground incursion of 1970, but his logic is the same and as a supporting reference he cites Stevenson's 1970 memo.

3. MAKING ENEMIES

I

State officials faced with an asymmetric enemy have not infrequently claimed international law in general, and the laws of war in particular, to be outdated and in need of revision. Paul Nitze and the other members of the Interagency Task Force on Cuba adopted this stance in the wake of the Bay of Pigs episode when they wrote that the rise of "the communist system," and its attendant techniques of indirect aggression, "presents wholly new problems which require the development and exposition of an entirely new juridical basis."[1] Four decades later, Attorney General Alberto Gonzales hewed to the same line when he wrote to President George W. Bush that "the war against terrorism is a new kind of war" unlike "the traditional clash between nations adhering to the laws of war," and that "this new paradigm renders obsolete Geneva's [i.e., the Third Geneva Convention of 1949 on the Protection of Prisoners of War] strict limitations on questioning of enemy prisoners and renders quaint some of its provisions requiring that captured enemy be afforded such things as commissary privileges, scrip (i.e., advances of

[1] See Chapter 2, above.

monthly pay), athletic uniforms, and scientific instruments."[2] Such claims tend to be built on the assumption that irregular warfare, as its name suggests, has been external or tangential to the historical development of the laws of war—rules which were designed primarily to regulate conventional, inter-state war. But this assumption is misplaced: irregular warfare has, in fact, long been at the heart of the development of the laws of war.

It was the problem of how to deal with an irregular enemy that led to the 1863 Lieber Code, the first major attempt to put on paper the extant universe of the laws of war. As commander of the Union Army's Department of the Missouri (and later, for a time, all of the Union's armies as General-in-Chief), Major General Henry Halleck was confronted by Confederate guerrillas who "engaged in indiscriminate violence against Union soldiers, prisoners, and civilians alike."[3] This irregular warfare, which only became more prevalent the further Union forces advanced into the South, failed to match Halleck's understanding of war as a stable, rule-bound institution that ran along clear legal lines.[4] The problem became acute in April 1862, when the Confederate Congress passed the Partisan Ranger Act, which allowed the commissioning of officers to form bands of partisans to fight for the Confederacy. Legal theory and practice up until that time held that such commissions—indicating, as they did, sponsorship by a recognized sovereign authority—would have been enough to guarantee that Confederate

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[2] Alberto R. Gonzales, Memorandum for the President, "Decision Re. Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban, 25 January 2002, http://nsarchive.gwu.edu/torturingdemocracy/documents/20020125.pdf (accessed 21 April 2016).

[3] John Fabian Witt, *Lincoln's Code: The Laws of War in American History* (New York: Free Press, 2012), p. 189.

[4] Just prior to the American Civil War, Halleck wrote *International Law: Or, Rules Regulating the Intercourse of States in Peace and War* (New York: D. Van Nostrand, 1861), in which, according to historian John Fabian Witt, Halleck "described a law of war that had proved capable of channeling war into fixed and durable configurations." Witt, *Lincoln's Code*, p. 188.

irregulars and partisans be given the same rights and prisoner-of-war protections afforded to regular Confederate soldiers, notwithstanding the otherwise-unacceptable violence wrought by the irregulars. "The stakes were very real" for Halleck, writes the legal historian John Fabian Witt, for "if the Union were to execute men carrying Confederate commissions, the Confederacy would retaliate in kind against Union soldiers in Confederate custody."[5] Halleck turned to Francis Lieber, a former dining companion and in 1862 a professor at Columbia College in New York City, to help him solve the dilemma.

Lieber responded to Halleck's request with an essay, *Guerrilla Parties Considered with Reference to the Laws and Usages of War*, which subordinated the formal question of commissions to more fundamental (for Lieber, at least) questions of combatant status. For Lieber, "determining whether a fighter qualified as a soldier required careful consideration of the relevant criteria in light of the underlying goals of the laws of war: uniforms or badges that separated fighters from civilians; an organized command structure that could enforce discipline and the rules of combat; and the institutional capacity to take and keep prisoners."[6] These new criteria "substituted functional considerations for the formal question of whether a fighter had been commissioned by one of the warring sides," writes Witt, noting that "Lieber grasped that war had overflowed its eighteenth-century political constraints, and that in the sprawling and disorganized wars of the modern age, the laws of war would need reorganization."[7] Witt might well be exaggerating to suggest Lieber was operating entirely from first principles—European custom and usage more than likely influenced his drafting on this question—but wherever they

[5] Witt, *Lincoln's Code*, p. 193.

[6] Witt, *Lincoln's Code*, p. 194.

[7] Witt, *Lincoln's Code*, p. 194.

came from, Lieber's ideas as to combatant status were quickly taken up by Halleck and the Union.[8] And, several months later, Halleck again turned to Lieber to draft a more general code of the laws and usages of war, key parts of which built on his earlier guerrilla war essay.[9]

Issued in May 1863, General Orders No. 100 of the United States War Department, otherwise known as the Lieber Code, was the first major systemization of the laws of war in the modern era, and it would not be the last. Whereas the doctrines of the law of war had been quite settled (and, as a result, mostly unwritten) prior to the mid-nineteenth century, the American Civil War and the Franco-Prussian War engendered a doctrinal "break," according to the legal historian James Q. Whitman, prompted at least in part by "the new problems of widespread guerrilla" war that became apparent in those two conflicts.[10] The complexity of those problems tended to promote the production of written codes, and Lieber was soon joined by the Swiss German lawyer Johann Caspar Bluntschli in the formulation of "seminal doctrines on the

[8] At the 1874 Brussels conference on the laws of war, the Italian delegate noted (without opposition, it seems) that customary law recognized four conditions that conferred lawful combatant status: that combatants be led by a responsible person; that they wear a uniform or a distinctive sign; that they carry arms openly; and that they follow the laws of war. Cited in Isabel Hull, *A Scrap of Paper: Breaking and Making International Law during the Great War* (Ithaca: Cornell University Press, 2014), p. 61. If those conditions—very similar to those Lieber articulated in 1863—were considered customary law by 1874, then some doubt might be cast on Witt's claim to Lieber's novelty. On the flip side, of course, understandings of European customary law in 1874 would have been influenced by Lieber's 1863 work.

[9] Witt notes that a key impetus for the commissioning of the Lieber Code was the question of slavery and its relationship to the laws of war. As a well-known proponent of the view that belligerents need not respect (and, indeed, had no authority to apply) the enemy's laws authorizing slavery, Lieber argued that any fugitive slave who presented himself or herself to a Union commander was necessarily free. Such a legal doctrine arrived at the right time for a Lincoln Administration looking to ground Emancipation upon particular legal foundations. See, Witt, *Lincoln's Code*, pp. 223-229. Still, it is likely that Lieber's earlier work on guerrilla war and combatant status also played into his being picked as the principal drafter of the code.

[10] James Q. Whitman, *The Verdict of Battle: The Law of Victory and the Making of Modern War* (Cambridge, MA: Harvard University Press, 2012), p. 237.

problems of irregular warfare and the occupation of hostile territories."[11] The need to clarify points of disagreement and align legal expectations within the European states-system soon led to significant multilateral conferences in 1874 (Brussels), 1899 (Hague I), and 1907 (Hague II). The Hague rules of land warfare (hereafter the Hague Rules), initially drafted at Brussels, finalized as one element of the first Hague Peace Conference and updated at the second, emerged out of sharp disagreements on the status of irregular fighters.

The debates and disagreements that persisted through each of the three conferences generally pitted those large land powers likely to occupy territory in time of war against smaller powers likely to be the ones resisting such occupation, and they occurred against the backdrop of the Franco-Prussian War, which had exposed deep divisions over the rights of popular resistance to an invading force and the status of guerrilla fighters (*franc-tireurs*). Questions of lawful belligerency were therefore of utmost importance, and they turned on the definitions of occupation and combatant status. Because armed resistance in an occupied territory was akin to insurrection—i.e., illegal and subject to harsh punishment—Germany (and, to a lesser extent, Russia and Austria-Hungary) wanted a very loose definition of occupation. Because smaller powers tended to rely on militias, volunteers, and in the case of invasion, a general call-to-arms (the *levée en masse*)—all of which were legal in unoccupied areas—they wanted a much stricter definition of occupation. Conversely, in contested (i.e., unoccupied) areas, the small states wanted a looser definition of combatant status to allow as much manpower as possible to be brought to bear against an invading force, while the major land powers wanted a very strict

[11] Whitman, *The Verdict of Battle*, p. 237. Bluntschli's important work was *Das moderne Völkerrecht der civilisirten Staten* (Nördlingen: Beck, 1872).

definition of combatant status, i.e., where militias or volunteers were used, they should essentially look and act like a regular army.[12]

The Hague Rules codified the four essential qualities of a lawful combatant: "To be commanded by a person responsible for his subordinates; To have a fixed distinctive emblem recognizable at a distance; To carry arms openly; and To conduct their operations in accordance with the laws and customs of war."[13] The rules further specified that these four conditions applied not only to regularly-constituted armies, but also to militias and volunteer corps (Art. 1), but that popular resistors (in unoccupied territory) who had no time to organize themselves in accordance with all four conditions need only respect the laws and customs of war (i.e., adhere to the fourth condition) to be regarded as legitimate belligerents (Art. 2). The updated rules of 1907 tightened the requirements for popular resistance somewhat to also include the third condition—carrying arms openly.[14] The agreement on the features of combatant status, however, masked irreconcilable differences over the question of occupation, or differentiating between a *levée en masse* and an insurrection, and whether or not there existed a legal right to the latter. This disagreement was papered over by the famous Martens Clause, which left the fate of popular resistors within an occupied territory "under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience" (preamble).[15] The Hague Rules, then,

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[12] Hull, *A Scrap of Paper*, chap. 3.

[13] Convention with Respect to the Laws and Customs of War on Land (Hague II, 29 July 1899), Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land, Art. 1, http://avalon.law.yale.edu/19th_century/hague02.asp (accessed 22 March 2016).

[14] Convention Respecting the Laws and Customs of War on Land (Hague IV, 18 October 1907), Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land, Art. 2, http://avalon.law.yale.edu/20th_century/hague04.asp (accessed 22 March 2016).

[15] Hull, *A Scrap of Paper*, chap. 3.

built on the Lieber Code by articulating the four essential features of a combatant, thereby allowing states to determine who among their irregular foes were lawful combatants and who were unlawful. But the rules also left significant questions unanswered.

While the Hague Rules regulated the meaning and conduct of war among the (mostly European) states, the Geneva tradition within the laws of war regulated the treatment of victims of war. The original Geneva Convention (1864) sought to provide basic protections for wounded soldiers. This was supplemented in 1906 by a convention offering similar protections to sailors and, in 1929, by a convention regulating the treatment of prisoners of war. In 1949, each of these three conventions was renegotiated and updated, and a fourth convention on the protection of civilians was added.[16] The International Committee of the Red Cross (ICRC) plays a guardian-type role with regard to the Geneva Conventions. While each iteration of the conventions was ultimately negotiated and concluded by sovereign states, the ICRC helped to usher in those changes, it provides the definitive legal commentaries on the conventions, and it has a particular oversight role with regard to the Third Convention (on the treatment of prisoners of war).

At the negotiations for the 1949 Conventions, the question of combatant status was again central. Articles 1 and 2 of the 1907 Hague Rules were incorporated into the Third Convention, but the delegates to the 1949 conference went further than their 1899 and 1907 counterparts in according prisoner-of-war status to captured members of resistance forces operating within occupied territory, so long as they met the four now-standard criteria of combatant status (Art.

[16] The formal titles for each of the 1949 Geneva Conventions are: Convention (I) for the Amelioration of the Wounded and Sick in the Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; and Convention (IV) relative to the Protection of Civilian Persons in Time of War. The texts of each convention are available at: http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/ (accessed 9 April 2014).

4). "The extension of Geneva protection to resistance fighters was an enormously acrimonious issue during the revision process," writes the diplomatic historian William Hitchcock, "driven by the experience of World War II, when German army and security forces refused to recognize resistance fighters as legitimate combatants."[17] This extension was opposed by the United Kingdom, "looking forward to an era of colonial policing and national liberation movements, rather than backward to a time of heroic underground movements," albeit mostly unsuccessfully. The UK did "win a small point" in ensuring all four criteria had to be met by resistance fighters and not just the two criteria that applied to the *levée en masse* (carrying arms openly and conforming to the laws of war); resistance fighters also had to wear a distinctive emblem and have an identifiable commander in order to be eligible for prisoner-of-war status.[18] In cases of doubt over whether someone was eligible to be a prisoner of war or not, Article 5 of GC III mandated that a determination be made by a competent tribunal.

Those enemies captured and detained who were deemed ineligible for prisoner-of-war status would ordinarily be deemed civilians engaging in unlawful violence, i.e., criminals. But some basic protections were still afforded to spies and saboteurs as part of GC IV (on the civilian population), at least when the detaining power was in occupation of foreign territory; on its own territory, domestic law was presumed to apply (Art. 5). As Hitchcock summarizes the importance of this provision, "even the most loathed or vulnerable captives—a spy or a terrorist—forfeited only his right to communicate with the outside world and that only temporarily. He did not forfeit a right to trial, nor could his captors treat him harshly. He must at all times be treated

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[17] William I. Hitchcock, "Human Rights and the Laws of War: The Geneva Conventions of 1949," in Hitchcock, Petra Goedde, and Akira Iriye (eds), *The Human Rights Revolution: An International History* (New York: Oxford University Press, 2012), pp. 93-112 at p. 99.

[18] Hitchcock, "Human Rights and the Laws of War," p. 100.

'with humanity.'"[19] And, in cases of war not of an international character (i.e., civil wars, rebellions, insurgencies), Common Article 3, which appeared in all four 1949 conventions afforded to both combatants and civilians basic protections against murder, mutilation, torture, and cruel, humiliating, or degrading treatment.

The 1949 Geneva Conventions gave much greater legal protection to those resisting an occupying force, but rarely in the years after 1945 would armed conflict resemble the legal outlines of Nazi occupation in World War II. To be sure, anticolonial nationalists pushed the argument that colonialism was effectively a very-lengthy wartime occupation, but the imperial powers took refuge under the banner of sovereignty and generally refused to recognize their opponents in the wars of decolonization as lawful belligerents, treating them instead as traitors and criminals. Imperial powers were even reluctant to acknowledge the applicability of Common Article 3, despite its injunction that it "shall not affect the legal status of the Parties to the conflict," out of reluctance to accept ICRC oversight and international publicity.[20]

That questions of the combatant status of those other than uniformed members of regularly-constituted militaries have been at the heart of the development of the laws of war in the modern era is indicative of the high legal stakes involved. With lawful combatant status comes the privilege to kill, an act that outside of war would ordinarily be considered murder. Whether an individual combatant is determined to be lawful or not, then, potentially matters a great deal to that individual; it can mean the difference between being charged as a criminal or merely being detained for the duration of the conflict with all the privileges and protections due a prisoner of war. But combatant status determinations also have broader social and political

[19] Hitchcock, "Human Rights and the Laws of War," p. 102.

[20] See, e.g., Fabian Klose, *Human Rights in the Shadow of Colonial Violence: The Wars of Independence in Kenya and Algeria* translated by Donna Geyer (Philadelphia: University of Pennsylvania Press, 2013 [2009]).

significance. The military historian Martin van Creveld explains that "different societies at different times and places have differed very greatly as to the precise way in which they draw the line between war and murder; however, the line itself is absolutely essential. Some deserve to be decorated, others hung. Where this distinction is not preserved society will fall to pieces, and war—as distinct from mere indiscriminate violence—becomes impossible."[21] As van Creveld implies, determining combatant status—who deserves to be decorated, who hung, for killing in war—is one of the most vital social functions of the law of war, and as the history sketched above suggests, the line between combatants and civilians is open to contestation.

That states (and non-state actors) have long preferred to contest the line between lawful combatant and criminal, rather than simply ignore it, speaks to its significance as a marker of international legitimacy. By successfully marking particular fighters (its own and its opponent's) as belonging to a certain category, a state can build international legitimacy for its cause and actions. Similarly, by treating what the world sees as legitimate combatants in ways that contravene international standards, a state can undermine itself. The Geneva Conventions are the most adhered to treaty in the history of international law not necessarily because states who sign up to the conventions intend on complying with the letter of each, but because adherence is a mark of sovereign status and legitimacy within international society. While the legal right to wage war has changed dramatically in the era of the United Nations Charter, armed conflict is still one method of international dispute resolution. Where a party to a conflict follows the laws of war, and in particular legal stipulations about the determination and treatment of various classes of persons within war, the international community recognizes that some form of legal order is present in what might otherwise appear as lawless violence. Adherence to the Geneva

[21] Martin van Creveld, *The Transformation of War* (New York: The Free Press, 1991), p. 90.

Conventions, then, not unlike adherence to the United Nations Charter, is something of a baseline standard for membership within the international community (or, in some phrasings, "civilized society").

It was important, then, for the United States and its allies fighting in Vietnam to be seen as meeting these standards. As detailed in Chapter 1, the professed reason for fighting in Vietnam was the collective self-defense of South Vietnam against an armed attack from North Vietnam in accordance with Article 51 of the UN Charter. That is, Washington perceived itself to be fighting to uphold the international legal order by resisting aggression. It was therefore also important to be seen as upholding the international legal order in the ways the war was waged. Indeed, the two layers of legal order were intimately connected. When ICRC President Samuel Gonard wrote to the parties to the conflict requesting their concurrence that the Geneva Conventions applied in Vietnam, Dean Rusk therefore responded positively.

Rusk's (seemingly) automatic acceptance of the writ of the Geneva Conventions in Vietnam sits incongruously with the sense of Vietnam as a dirty and atrocity-filled war. And, indeed, the basic narrative of international humanitarian law in the Vietnam War is that the Geneva Conventions were adhered to almost perfectly in theory while wilfully ignored in practice. "The failure of the Geneva Conventions to compel respect for its articles was lamentable and disappointing," writes Hitchcock, "but at no point in the Cold War era were the articles themselves subject to dispute."[22] The intellectual historian Sam Moyn has gone further and offered an explanation for the discrepancy between easy acceptance in theory and casual

[22] Hitchcock, "Human Rights and the Laws of War," pp. 94-95. Hitchcock compares this situation to the early twenty-first century, when the articles were subject to dispute, particularly by the Department of Justice's Office of Legal Counsel during the first term of the George W. Bush Administration.

disregard in practice. American "generosity" in accepting "full-spectrum formal obligations" was possible, writes Moyn, "because levels of patriotic engagement were high enough at the time, traditions of debate around the laws of war weak enough, that current contestation over means and methods of conflict was simply unimaginable. Accordingly, combined with the conduct that followed, such affirmations suggest not that American allegiance to powerful humanitarian norms was high, but instead that no one—including the war's critics—regarded the international law of war as a threatening constraint."[23]

The comparative ease with which the United States accepted the application of the Geneva Conventions to the war in Vietnam, however, belied a significant internal debate between the key departments in Washington (State and Defense) and the American operational agencies in Saigon (the American Embassy and the United States Military Assistance Command, Vietnam [MACV]), the outcome of which left the applicable texts of the conventions less clear than what the historical accounts of Hitchcock and Moyn suggest. When Secretary of State Rusk wrote to ICRC President Gonard on 10 August 1965 acknowledging that American forces would be bound by the provisions of the conventions, it was not—at that point—an uncomplicated acceptance of "full-spectrum formal obligations."[24] Why the United States accepted the application of the Geneva Conventions to the conflict in Vietnam, and the process by which the United States settled on its somewhat-ambiguous reply to Gonard, bears closer examination.

[23] Samuel Moyn, "From Antiwar Politics to Antitorture Politics" (November 29, 2011). Available at SSRN: http://ssrn.com/abstract=1966231 or http://dx.doi.org/10.2139/ssrn.1966231 (accessed 11 March 2014), p. 12.

[24] For the text of Rusk's letter to Gonard, see *The Department of State Bulletin*, Vol. LIII, No. 1368 (13 September 1965), p. 447.

II

Upon receipt of a mid-June 1965 letter from the International Committee of the Red Cross appealing to belligerents in the Vietnam War to ensure the full application of the Geneva Conventions, the State Department, and in particular the Department's Office of the Legal Adviser, wanted a quick and prompt response from both the United States and South Vietnam recognizing the applicability of the conventions to the armed conflict in Vietnam.[25]

The American agencies in Saigon were less enthusiastic. More attuned to the Saigon regime's thinking on the war, the American Embassy and MACV doubted both the feasibility and the desirability of making a formal statement recognising application of the conventions to the war. "GVN [Government of Vietnam] still does not consider itself belligerent," wrote the agencies in a combined cable, "and it considers the Viet Cong to be insurgents and criminals rather than soldiers in war. ... Recent influx of U.S. troops and conduct of military operations against North Vietnam have not in GVN eyes changed fundamental character of Viet Cong insurgency." The U.S. diplomatic and military officials in Saigon doubted the Thieu-Ky regime would be willing to publicly proclaim adherence to the conventions for fear of "upgrading of Viet Cong insurgency into formal military operation thus boosting international status of Viet Cong and of Liberation Front."[26] Given the government's Premier, Air Vice Marshal Nguyen Cao Ky, had given a speech in June exhorting "all people" to "enthusiastically strive to kill the

[25] The United States signed the Geneva Conventions in 1949 and ratified them in 1955. The Republic of Vietnam and the Democratic Republic of Vietnam acceded to the conventions in 1953 and 1957 respectively.

[26] American Embassay Saigon to State Department. Cable. Saigon 4356 (2 sections). 24 June 1965. Document 38, Folder 3 (Vol. XXXVI, 6/22-30/65, 1 of 2), Box 19, Vietnam Country File, National Security File, Lyndon B. Johnson Presidential Library, Austin, Texas. That the Embassy and MACV took a unified stance on the applicability of the laws of war to the Vietnam conflict may have been helped by the fact the American ambassador to South Vietnam at the time, Maxwell Taylor, was a career Army officer.

enemy," thereby obliterating the principle of distinction at the heart of the laws of war, the Saigon Mission's scepticism was warranted.[27]

A public announcement acknowledging the applicability of the conventions would, moreover, unnecessarily open up both Washington and Saigon to "hostile press criticism." The agencies delicately noted that the South "Vietnamese military, particularly at local and provincial level, in heat of engagement or immediately thereafter, do on occasion subject Viet Cong to physical or mental pressures to obtain intelligence." Convinced of the value of this intelligence (and belying the argument that torture only occurred "in the heat of engagement"), the South Vietnamese were unlikely to cease these practices, thought the Embassy and MACV. And given that photos showing such South Vietnamese practices had already appeared in the Western press, formally accepting the applicability of the Geneva Conventions would only put the United States in an "impossible position" since the press would "take considerable satisfaction in belabouring U.S. officials at all levels on this subject."[28]

The potential for bad press was heightened because the American military had a policy of turning over all prisoners taken to the South Vietnamese. Article 12 of the Third Convention specifies that a country handing over captured combatants to a third party retains full responsibility for ensuring those detainees retain their Third Convention rights as Prisoners of

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[27] Foreign Broadcast Information Service, "Nguyen Cao Ky Speech," FBIS 77, 19 June 1965. Document 395, Folder 2 (Vol. XXXV, 6/13-30/65, Memos [D], 2 of 2), Box 19, Vietnam Country File, National Security File, Lyndon B. Johnson Presidential Library, Austin, Texas. On the principle of distinction, see Helen M. Kinsella, *The Image before the Weapon: A Critical History of the Distinction between Combatant and Civilian* (Ithaca: Cornell University Press, 2011).

[28] Saigon 4356.

War. Given this, argued the Embassy and MACV, it was inadvisable "to assume legal obligation which we cannot enforce and live up to."[29]

Finally, the American agents in Saigon argued that just as formal adherence to the Geneva Conventions would not do much to alter the behaviour of its ally, neither would it do much to alter the behaviour of the enemy. Reciprocity is one of the key reasons often cited in support of abiding by the conventions: treating enemy detainees in a humanitarian manner that accords with the Third Convention is likely to help ensure similar such treatment of those detained by the enemy. But "[g]iven Viet Cong mode of living and ideology," continued the cable, "[w]e see no reason to believe any announcement on our part will lead to improved treatment of U.S. detainees."[30] In effect rehearsing the argument that international law is only effective in a shared cultural context (i.e. "the West") and that neither Communist ideology nor "Asiatic" mentality was compatible with the liberal sentiment of international law, the men on the spot argued that there was little hope in expecting much in the way of reciprocity.

Given all this, the Embassy and MACV suggested an alternative: "informal adherence on U.S. part without formal announcement." Any (minor) benefits that might accrue from the effects of reciprocity would still be possible through an informal understanding with the DRV

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[29] Saigon 4356. The full text of Article 12of the Third Geneva Convention reads: "Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them. Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody. Nevertheless if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with."

[30] Saigon 4356.

and NLF. Such an understanding would allow the U.S. to maintain its image as a rule-abiding world power. And—the real benefit—it might make it easier not to consider enemy personnel captured by American armed forces to be official Prisoners of War, thus relieving the United States of its Article 12 responsibilities—that is, of ensuring the humane treatment of detainees even if those detainees are handed over to a third party.[31] If this suggestion for only informal application of the conventions was deemed inappropriate in Washington, the Embassy and MACV suggested a fall-back alternative: formally apply only Common Article 3 of the Geneva Conventions, with its less stringent standards.[32]

The State Department reply, drafted by Legal Adviser Leonard Meeker and approved by Rusk himself, made clear that informal adherence in "spirit" was not an option. Washington recognized that formal adherence would supply an expanded target for press criticism, but was unmoved. ("On this score," wrote Meeker, "we think remedy has to be improvement in GVN standards."[33]) The Legal Adviser was similarly unfazed regarding the lack of reciprocity that might ensue, in effect rehearsing the argument that ICRC President Gonard would make to US diplomats the following year that international humanitarian law "does not know the notion of reciprocity."[34] But whereas Gonard and the Red Cross movement rejected reciprocity as a basis

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[31] *ibid*.

[32] Common Article 3 of the Geneva Conventions, so called because it is replicated verbatim as the third article across all four conventions, mandates minimum standards for the treatment of war victims in conflicts not of an international character. Those minimum standards are due process, the collection and care of the sick, and the prohibition of murder, torture, the taking of hostages, and humiliating and degrading treatment. On the origins and significance of Common Article 3, see Hitchcock, "Human Rights and the Laws of War: The Geneva Conventions of 1949," pp. 103-106.

[33] State Department to Saigon. Cable. State 3048. "Geneva Conventions." 25 June 1965. Document 65, Folder 3 (Vol. XXXVI, 6/22-30/65, 1 of 2), Box 19, Vietnam Country File, National Security File, Lyndon B. Johnson Presidential Library, Austin, Texas.

[34] Gonard cited in Geneva to State Department. Cable. Geneva 714. 9 August 1966. *Foreign Relations of the United States 1964-1968*, Vol. IV, Vietnam 1966, Document 207.

for fulfilling legal obligations because of their concern "to alleviate the suffering of all victims of conflict regardless of relative positions of contending parties,"[35] Meeker rejected it because of his concern that the United States make war in conformity with its declared justification. "In conflict which we regard and have publicly characterized as armed aggression from North," declared Meeker and Rusk, "it is inconsistent for South Vietnamese to maintain that this is primarily internal conflict."[36]

In the back-and-forth between Washington and the its representatives in Saigon over how to recognize the applicability of the Geneva Conventions to the Vietnam Conflict, something of a middle way was forged. The Embassy and MACV dutifully followed instructions and approached the South Vietnamese Foreign Minister Tran Van Do to pressure his government to announce the applicability of the Geneva Conventions to the conflict on Vietnam. Meanwhile, the State Department relented somewhat to allow a measure of ambiguity to creep into the formal American response to the ICRC.

The State Department rejected outright the Saigon Mission's suggestion of informal adherence to the conventions. In successive drafts of what would become the official U.S. position, lobbed back and forth between headquarters and post, Saigon substituted the word "principles" for the more concrete "provisions" in a line describing what it was, exactly, about the Geneva Conventions that the United States was agreeing to abide by, only for Washington to scratch the change and revert back to the original phrasing.[37]

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[35] *ibid*.

[36] State 3048.

[37] *First draft*: State Dept to Saigon. Cable. State 217. 24 July 1965. Document 116, Folder 6 (Vol. XXXVII, 7/65, Cables, 2 of 2), Box 19, Vietnam Country File, National Security File, Lyndon B. Johnson Presidential Library, Austin, Texas. *Second draft*: Saigon to State Dept. Cable. Saigon 371. 4 August 1965. Document 52, Folder 1 (Vol. XXXVIII, 8/1-12/65, Cables, 1 of 2), Box 21, Vietnam Country File, National Security File,

But the State Department was less categorical with the Mission's alternative suggestion of adhering only to Common Article 3. Meeker and Rusk did not agree outright to a formal statement that only Common Article 3 would apply to American forces in the field, but they were willing to craft a formal announcement so as to leave ambiguous whether the United States was adhering to the conventions in full, or only to the minimum standards of Common Article 3. "Such announcement need not specify whether we regard Article 3 alone as applicable or whether we consider that all provisions of conventions are to be applied because of international character of conflict," wrote Meeker. "Instead, announcement could state that US and GVN are applying the provisions of these humanitarian conventions and expect other parties to conflict to do the same."[38] The United States was certainly going to adhere to the provisions—not merely the principles—of the conventions, but exactly which provisions were to be left undefined.

Such ambiguity between full compliance and Common Article 3 compliance may have helped with the fudging of combatant status and detainee rights issues. Meeker suggested the Embassy talk the South Vietnamese into formal adherence by noting that "application of conventions would not unduly restrict GVN in dealing with guerrillas and terrorists; under [Article 4 of the Third] Convention, persons not bearing arms openly, not wearing distinctive sign, or not abiding by rules of war, may be tried and punished for their crimes under South Vietnamese law."[39] Moreover, Meeker might have added, because of their (assumed) South Vietnamese nationality, such persons were not Protected Persons under Article 4 of the Fourth

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Lyndon B. Johnson Presidential Library, Austin, Texas. *Final text*: Dean Rusk to Samuel Gonard (President, ICRC). Letter. 10 August 1965. Reprinted in *The Department of State Bulletin*, Vol. LIII, No. 1368 (13 September 1965), p. 447.

[38] State 3048.

[39] State 3048. In the same cable, Meeker also encouraged the Embassy to flag to the Saigon regime that "application of the Conventions would have no effect on legal status of Viet Cong and would not imply recognition of Hanoi regime."

Convention, [40] and because of their capture on South Vietnamese territory they had few rights under Article 5 of the Fourth Convention (dealing, essentially, with spies and saboteurs) other than humane treatment. Detainees probably would have had more rights under Common Article 3 than under the full conventions, a message which Meeker did not have the Embassy pass on to the South Vietnamese government.[41] Conversely, the responsibilities of the United States for prisoners handed over to South Vietnam were less clear under Common Article 3. In short, ambiguity with respect to which conventions applied could allow the side classifying the conflict as international (the United States) to benefit from the reduced duties inherent in Common Article 3 and the side classifying the conflict as internal (South Vietnam) to benefit from the exclusions specified in the full conventions that related to international conflicts. While there is nothing to suggest this level of legal intricacy was ever deployed, the general strategy of ambiguity was no doubt seen as potentially being something of a screen for South Vietnamese detainee policy.

Meeker also let two drafting changes suggested by the Embassy pass into the final text of the US announcement. The first renamed the category of those due rights under the conventions: "prisoners" became "captives taken in combat." This change in terminology was probably proposed in order to avoid any automatic association between detainees and Prisoner of War

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[40] Nationals of a Party to a conflict who are "in the hands" of their own government are not covered, writes the official ICRC commentator of the Conventions, because the Convention "remains faithful to a recognized principle of international law: it does not interfere in a State's relations with its own nationals." Jean S. Pictet, *Commentary on the Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958), p. 46.

[41] Pictet's commentary (*ibid*.) suggests that the right to a fair trial is inherent in the meaning of the Fourth Convention, Article 5, but the language of the article itself suggests otherwise: "In each case, such persons shall nevertheless be treated with humanity, and *in case of trial*, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention" (emphasis added). Meeker's reference to a trial under South Vietnamese law is probably less indicative of any belief that Article 5 mandated this than in his commitment to the rule of law and due process in general.

status. It may have also been intended to give the South Vietnamese more leeway in determining combatant status. The Embassy's proposed wording was retained for the final text.[42]

The second change proposed by the Embassy, on advice from South Vietnamese Foreign Minister Do, was to remove a line stating that the United States would communicate with the ICRC "to work toward the effective application of the provisions of the Conventions in Viet Nam."[43] Do felt this might put the United States in an awkward position "between local Vietnamese commanders and ICRC representatives." Deputy Ambassador U. Alexis Johnson concurred, and felt that any step taken to minimize ICRC oversight, at least in the immediate future, would be wise: "When US and GVN replies [to the ICRC] dispatched, we will merely have established our public position and problems of implementation will still remain. While we can and will actively work on these, quality of performance at lower echelons likely be poor for some time. From ICRC point of view it might be best, following receipt US and GVN replies, to concentrate efforts on DRV and NLFSVN." [44] The line in question was indeed dropped from the final draft, although a more general reference to communicating further with the ICRC on the latter's "traditional and valuable humanitarian mission" was retained.[45]

In short, Rusk's letter to Gonard formally acknowledging the applicability of the Geneva Conventions attempted to escape prying international eyes by subtly minimizing the role of the ICRC, to allow for the continuation of the combatant classification and detention policies that were already in place (under a domestic law regime), and to satisfy the American legal

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[42] State 217; Saigon 371; Rusk to Gonard.

[43] State 217.

[44] Saigon to State Dept. Cable. Saigon 382. 5 August. Document 52, Folder 1 (Vol. XXXVIII, 8/1-12/65, Cables, 1 of 2), Box 21, Vietnam Country File, National Security File, Lyndon B. Johnson Presidential Library, Austin, Texas.

[45] Rusk to Gonard.

conscience as to its policy of handing over captives to the Saigon regime. At least some American officials, however, clearly understood that signing up to the Geneva Conventions in Vietnam would have consequences for the American conduct of the war.

The back-and-forth between Washington and Saigon over Rusk's letter to Gonard shows that, rather than blithely taking on commitments it had little intention of following, the United States did care about its legal obligations, how they were interpreted, how other states viewed them—and, importantly, how they built upon each other in the construction of a legal edifice that supported the American presence in Vietnam. The Vietnam War *had* to be considered an international armed conflict—with all that entailed for the conduct of the war and the application of the Geneva Conventions—because the United States was in Vietnam helping to defend an ally against an armed attack across an internally-recognized demarcation line. While making Rusk's letter deliberately ambiguous suggests that Washington wanted to reserve for itself particular decisions on the circumstances in which its commitment would be legally binding, publicly acknowledging the applicability of the Geneva Conventions—"the cornerstone of the law of war" and "the most adhered-to treaties in history," according to a recent commentary[46]—had both symbolic value and legal consequence.

Part of that legal consequence was the need to persuade South Vietnam to follow suit and formally adhere to the Geneva Conventions. After some back and forth between the US Mission in Saigon and the South Vietnamese government, this was achieved. Saigon originally informed the ICRC that South Vietnam government could agree to the applicability of the conventions

[46] Gary D. Solis, "An Introduction to the 1949 Geneva Conventions," *Geneva Conventions* (New York, Kaplan Publishing, 2010), pp. 1-47 at p. 1.

only in principle.[47] But in August 1965 South Vietnamese Foreign Minister Do eventually delivered his government's formal agreement on the applicability of the Geneva Conventions to the conflict in Vietnam, albeit with a tacit understanding that Do "could give no assurance on actual compliance at local level."[48] The letter stated the Republic of Vietnam was "fully disposed to respect the provisions of the Geneva Accords [sic] and to make an active contribution to insure their application."[49] Washington and Saigon had now both agreed to apply the Geneva Conventions in Vietnam, but it was an open question how such agreement, accompanied as it was by deliberate ambiguity and tacit understandings, would play out in practice. And as Washington and Saigon would soon find out, another part of the legal consequence of acknowledging the applicability of the Geneva Conventions is that the International Committee of the Red Cross would expect and them to comply with the conventions. Uninterested in an ambiguous reading of the text, the ICRC pushed the United States and South Vietnam on combatant status and prisoner-of-war issues.

The process by which the United States and South Vietnam, prodded by the ICRC, moved from acceptance of the Geneva Conventions to implementing concrete measures that would put the two parties in compliance with them was the result of US and South Vietnamese policy decisions that were far from automatic. The outcome of that process was also, ultimately,

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[47] Do recounted his two-week-old conversation with an ICRC representative (Durand) to Alexis Johnson on 5 August, which Johnson then reported back to Washington: Saigon 382.

[48] For the text of South Vietnam's letter to the ICRC, see: Saigon to State Dept. Cable. Saigon 441. 11 August 1965. Document 6, Folder 1 (Vol. XXXVIII, 8/1-12/65, Cables, 1 of 2), Box 21, Vietnam Country File, National Security File, Lyndon B. Johnson Presidential Library, Austin, Texas. For the tacit understanding, see: Saigon 382.

[49] Saigon 441. Compare the translation into English made by the International Committee of the Red Cross, *International Review of the Red Cross*, Vol. 5/No. 54 (Sept., 1965), p. 478.

surprising in that the two allies instituted an expansive reading of which enemy combatants would qualify for prisoner-of-war status under the Third Convention.

III

While Washington and Saigon may have been hoping that Do's letter to Gonard would placate the ICRC and bring the debate over the place of the Geneva Conventions in the Vietnam War to a quiet conclusion, in practice it had rather the opposite effect. With the question of the applicability of the conventions settled, at least to *its* satisfaction, the ICRC, seeking to play its traditional wartime role as auditor of prisoner-of-war conditions, turned immediately to the question of compliance. Pressure quickly built upon Saigon to provide the ICRC with the names of prisoners it held, and to allow ICRC representatives to visit those prisoners unaccompanied by South Vietnamese officials. Under these circumstances, the studied ambiguity that had characterized the American acceptance of its Geneva Convention obligations in Vietnam became difficult to sustain. Washington could either shield South Vietnam from prying international eyes, but in the process put its own commitment to the international legal order under a spotlight, or it could push a reluctant South Vietnam to comply with the conventions in deed as well as word; it could not easily do both.

The choice facing Washington was made starker in late September by a series of events that threatened a sequence of reprisal and counter-reprisal leading to more-or-less lawless violence. On 26 September, the National Liberation Front executed two American military prisoners, Captain Humbert R. Versace and Sergeant Kenneth Roraback, in retaliation for the public execution in Danang four days earlier of three alleged NLF agents by the South Vietnamese government. The following day, 27 September, Radio Hanoi announced publicly for

the first time that North Vietnam regarded all US pilots captured in North Vietnam as "criminals caught in the act," and that the pilots would be tried for violation of local North Vietnamese law.[50] The timing of this latter announcement suggested it was something of a response to the Danang executions and a tacit statement of support for the NLF executions, but neither set of executions was mentioned explicitly by Hanoi and the announcement only publicized a position the Democratic Republic of Vietnam had articulated to the ICRC a month earlier.

In a letter dated 31 August 1965 from Bui Tan Linh, the acting head of the Cabinet, writing on behalf of the Minister of Foreign Affairs, North Vietnam did not explicitly reject the application of the Geneva Conventions to the conflict in Vietnam *in toto*, but did basically reject their application regarding US airmen detained by Hanoi. North Vietnam denounced Washington's "undeclared war of aggression in South Viet Nam" and "surprise attacks on the Democratic Republic of Viet Nam, in flagrant violation of the Geneva Agreements of 1954 on Viet Nam and the rules of international law." As a result, Hanoi understood attacks on its territory "as acts of piracy and regard the pilots who have carried out pirate-raids, destroying the property and massacring the population of the Democratic Republic of Viet Nam, as major criminals caught *in flagrante delicto* and liable for judgement in accordance with the laws of the Democratic Republic of Viet Nam." North Vietnam affirmed that "captured pilots are well treated" and that those pilots (and other air crewmen) were able to correspond with their families *if* they observed DRV regulations, but Hanoi did not acknowledge the formal applicability of the Third Geneva Convention to U.S. personnel in its hands and refused ICRC access to the

[50] Both events were summarized by the CIA in its weekly report on South Vietnam; see: Central Intelligence Agency, "Weekly Report: The Situation in South Vietnam," OCI No. 0639/65, 29 September 1965, Doc. 197, Folder 4 (Vol. XLI, 9/25-10/31/65, Memos (B) [2 of 2]), Box 23, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

prisoners.[51] Wanting the world to denounce Washington and Saigon for their alleged violations of the Geneva Conventions, Hanoi was unwilling to acknowledge the applicability of the conventions to enemy prisoners in its hands.

The North Vietnamese position on U.S. pilots, combined with the Front's execution of Captain Versace and Sergeant Roraback (which followed the execution in June of another U.S. serviceman, Sergeant Harold Bennett), prompted calls for reprisals. Especially vocal was the new U.S. Ambassador to South Vietnam Henry Cabot Lodge, who replaced Maxwell Taylor in Saigon in late August 1965.[52] Lodge wrote to Washington on 30 September that the executions "confront us again with the difficult problem of how to respond to the Hanoi/Viet Cong tactic of killing U.S. prisoners in an effort to cause us to spare the lives of Communist terrorists and agents." This problem was only exacerbated by North Vietnam's implied "threat to try and sentence U.S. pilots in DRV custody and to use them as hostages to bargain not only concerning future treatment of Viet Cong terrorists and agents convicted in the South but also concerning future U.S. air operations against North Vietnam." He noted three possible responses to the threat of further executions: "(a) submit to it tactically; (b) ignore it; [or] (c) retaliate against it to a level of violence calculated to induce the communists to become reluctant to employ it freely."[53] Lodge favored option (c).

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[51] For an unofficial English translation of Hanoi's letter, see: *International Review of the Red Cross*, Vol. 5/No.55 (Oct., 1965), pp. 527-528.

[52] To call Lodge the "new" Ambassador is something of a misnomer: he served previously in the same post from 1963 to 1964.

[53] Amembassy Saigon to State Dept, Cable, Saigon 1109, 30 September 1965, document 55, Folder 1 (Vol. XLI, 9/25-31/65, Cables), Box 23, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

Submitting to the enemy tactic posed political, strategic, and legal problems for Lodge. First, it would involve persuading the government on Saigon "to declare a de facto moratorium on execution of convicted Viet Cong terrorists and agents by commuting or indefinitely suspending death sentences." Although Lodge did not elaborate, the implication is that this would have been a hard sell politically, which was no doubt true: on 27 September, South Vietnamese Premier Ky had told the press that both private and public executions of convicted NLF agents and sympathizers would continue as a necessary deterrent.[54] Moreover, in the American press release condemning the executions of Versace and Roraback, Washington had supported the South Vietnamese right to conduct the Da Nang executions: "The Viet Cong's brutal conduct can in no way be justified as a reprisal for the Vietnamese Government's recent execution of three civilian, non-uniformed Viet Cong agitators," announced the State Department, further noting that the "agitators were executed following a trial by a military tribunal, in accordance with established Vietnamese law and judicial procedure, in which they were convicted of fomenting public violence."[55]

Lodge's second problem with submitting to the Front tactic of executing Americans to induce a halt to executions of Front agents or sympathizers was strategic, and it echoed Ky's emphasis on the need for executions as a deterrent. Suspending executions would, according to Lodge, "no doubt facilitate recruitment of terrorists by the Viet Cong since they would have virtual assurance of escaping the death penalty for their crimes, including the murder of

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[54] Cited in Central Intelligence Agency, "Weekly Report: The Situation in South Vietnam," OCI No. 0639/65, 29 September 1965, Doc. 197, Folder 4 (Vol. XLI, 9/25-10/31/65, Memos (B) [2 of 2]), Box 23, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[55] State Dept to Amembassy Saigon, Cable, State 867, 26 September 1965, Doc. 90, Folder 1 (Vol. XLI, 9/25-31/65, Cables), Box 23, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

Americans in South Vietnam by terrorism."[56] The pressure this would bring to bear on the US to retaliate in kind raised a third, legal, problem for Lodge: if the United States were to engage in tit-for-tat reprisal killings, "such retaliation would of course put us in violation of the 1949 Geneva Conventions" and it would also leave Washington without a legal "remedy should Hanoi and the Viet Cong start executing American prisoners in retaliation for U.S. air raids against the North or against Viet Cong base areas."[57]

Lodge skipped over his proffered second option—ignoring future executions of US servicemen—perhaps because he understood the pressures for the United States to do *something* that might prevent Americans being killed. That something—option (c)—"would involve convincing the communists that they had chosen a tactic which would not only fail to achieve their purposes but would bring down upon them a level of punishment they might otherwise avoid." Lodge suggested two main possibilities: war crimes trials ("while we would not violate the 1949 Geneva Conventions by retaliating against prisoners held by our side, we would hold the top Hanoi and front leadership responsible for crimes against our people and would bring them to justice by means available to us") and reprisal air strikes against "a new type of target in North Vietnam as an indication to Hanoi that we consider executions of U.S. prisoners as an illegal warlike act."[58] In a bid to induce better treatment of Americans in enemy hands, Lodge proposed to punish, or threaten to punish, the enemy until they came around.

In an initial, holding, response to Lodge's cable, the State Department agreed "that we can neither submit tacitly to these actions or threatened actions, nor can we ignore them." But the

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[56] Saigon 1109.

[57] Saigon 1109. Article 13 of the Third Convention prohibits reprisals against prisoners of war.

[58] Saigon 1109.

issue, for State, was to find a response that did not merely punish the enemy for its wrongdoing, but also engendered better treatment (and a halt to executions) of U.S. servicemen in enemy hands. The problem, stressed by State, was "to find ways and means of bringing effective pressure against DRV and VC to move them to treat prisoners in accordance with 1949 Geneva Conventions" while at the same time doing "everything possible to reaffirm and emphasize to [the] world [the] clear distinction between … terrorists and prisoners of war" and allowing South Vietnam "to go on treating VC terrorists in accordance with Vietnamese law."[59]

The State and Defense departments determined that such ways and means would not include reprisals or any particular emphasis on war crimes trials, but would instead consist of actions such as public statements, the selection of a Protecting Power, diplomatic approaches, and negotiating a favorable resolution at the upcoming International Red Cross movement conference in Vienna. But in order for any of these actions to be effective, or even viable, the United States had to demonstrate its own commitment to the decent treatment of detainees as expressed by the Geneva Conventions. Any initial hope that Rusk's and Do's August letters to Gonard might have been enough to demonstrate this commitment, and to bring the debate over the place of the Geneva Conventions in Vietnam to a quiet conclusion, was quickly dispelled. Far from placating the ICRC, the letters acknowledging the application of the conventions simply spurred the ICRC to pressure the parties into letting the Swiss organization play its traditional wartime role as a neutral auditor of prisoner-of-war conditions. The option of shielding South Vietnam from international (and especially ICRC) oversight was, therefore, considered an inappropriate policy path; officials thought it would have cast the United States in

[59] State Dept to Amembassy Saigon, Cable, State 1015, 13 October 1965, Doc. 79, Folder 1 (Vol. XLI, 9/25-31/65, Cables), Box 23, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

bad international light and strangled at birth Washington's policy prescriptions—publicity, Protecting Powers, diplomacy, and conference resolutions—aiming at better treatment of US prisoners. Abba Schwartz succinctly summed up the majority view among American officials: "The U.S. position must be squarely on the side of the Conventions."[60]

With the question of the applicability of the conventions settled, the ICRC had turned immediately to the question of compliance. In the tacit understanding that accompanied his letter formally acknowledging the validity of the conventions to the conflict in Vietnam, Do had disavowed any influence over achieving actual compliance with the conventions at lower levels of the Saigon regime. This did not stop the ICRC's delegate-general for Asia, André Durand, from pushing Do and his Foreign Ministry to exercise just such influence. In particular, Durand and his ICRC colleagues insisted that Saigon supply it with the names of prisoners held by the Republic of Vietnam, allow its representatives to visit South Vietnamese prisoner-of-war camps in order to interview prisoners about the conditions of their detention, and conduct those interviews free from the oversight of South Vietnamese officials.

Durand quickly "got everybody's back up" in the Foreign Ministry, according to a summary of a September conversation between Secretary General Phan Van Thinh[61] and Abba Schwartz, US Assistant Secretary of State for Security and Consular Affairs, during which Thinh detailed the South Vietnamese government's dissatisfaction with the local ICRC representative. Durand was "too demanding, tried to move too fast, and insisted embarrassingly on meetings with Chief of State General Nguyen Van Thieu and Prime Minister General Nguyen Cao Ky," recounted Thinh, making it difficult for Foreign Office officials "to convince military and

[60] Schwartz to Cooper. Memo. "Viet-Nam and the ICRC." 25 October 1965.

[61] Alternatively spelled Phan Van Tinh; Thinh is the more frequent spelling.

provincial officials of desirability cooperation with ICRC." Thinh also alleged that Durand's team had asked "political" questions during the interviews it had been allowed to conduct with prisoners.[62]

Implicitly underlying these issues of personnel, protocol, and perceived politicization, however, was a more fundamental question of fairness. South Vietnamese officials—particularly at lower levels of the bureaucracy—seemed to be irked that the ICRC expected so much of them and so little of their northern counterparts. Given this lack of symmetry, Thinh noted that "many Vietnamese could not understand why ICRC had made contribution to Communists of 50,000 Swiss francs."[63]

South Vietnamese complaints were heard out by American officials such as Schwartz, and the American Embassy in Saigon often proved a receptive audience, but in general Washington was unsympathetic to the South Vietnamese position. While expressing concern over the ICRC posing "political" questions to prisoners, for example, Schwartz's basic message to Thinh, the Foreign Ministry, and the broader South Vietnamese government was to fall in line with the ICRC. He encouraged Thinh not to let "any personality problems which might arise in regard to local ICRC Representative affect GVN attitude to ICRC" and that while protocol might prevent Durand gaining access to Thieu or Ky, the government "might indicate latter would be pleased receive high level rep from Geneva for discussions." Schwartz also noted that the ICRC's contribution to the communists had been matched—in line with the Red Cross principle of universality—by an equal contribution to the South Vietnamese Red Cross. The ICRC's

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[62] Amembassy Saigon to State Dept, Cable, Saigon 817, 9 September 1965, Doc. 30, Folder 3 (Vol. XL, 9/1-25/65, Cables), Box 22, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[63] Saigon 817.

inactivity in the North, moreover, was not the fault of the ICRC, which was "trying very hard" to work with the North Vietnamese government on Geneva Convention and prisoner-of-war issues. Ultimately, Schwartz stressed, "nonperformance of other side was not justification for nonperformance by Free World country.[64]

By late September, the Americans were getting somewhere, at least with the South Vietnamese Foreign Ministry. As before, Do was reluctant to promise more than he felt he could deliver—only the military could ensure the application of the Geneva Conventions in any meaningful way—but US Embassy officials still felt that by letting "Do carry the ball in his own way," the South Vietnamese foreign minister would soon be able to convince his colleagues in the military to supply the requisite lists of prisoner names to the ICRC.[65]

Washington put pressure on Saigon not only because South Vietnamese non-compliance with the conventions would have set back US plan for ensuring better treatment of Americans in enemy hands, but also because until South Vietnam complied with ICRC requests Washington itself—by dint of the policy of handing over all detainees to the South Vietnamese authorities—was skirting the law. As soon as the ICRC had received Rusk's 10 August letter, it replied requesting lists of military personnel captured and the free passage of its delegates to visit prison camps and to speak freely with the prisoners.[66] Until South Vietnam provided lists and allowed visits, the ICRC considered the United States to be in violation of its Geneva Convention

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[64] Saigon 817.

[65] Amembassy Saigon to State, Cable, Saigon 994, 22 September 1965, Doc. 9, Folder 3 (Vol. XL, 9/1-25/65, Cables), Box 22, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[66] Gonard to Rusk, letter, 19 August 1965, ACICR B AG 202 223-007.

obligations whenever it handed detainees over to South Vietnam, and it harried the United States on this point.[67]

Article 12 of the Third Convention provided the basis of the ICRC's position: "Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention."[68] The ICRC therefore wanted the United States to set up its own prisoner-of-war camps, at least until South Vietnam fell into line with the conventions. Writing to Lodge in mid-October, André Tschiffeli of the ICRC's mission in Saigon pressed for the establishment of camps under "le contrôle, l'administration et la responsabilité" of the United States.[69] The United States appears to have considered—ever so briefly—the possibility of establishing its own camps, but quickly discounted that option in favor of doubling down on South Vietnam to comply with the Conventions and to cooperate with the ICRC.[70]

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[67] See, e.g., J.-P. Maunoir to Délégation du CICR Saïgon, Note No. 1556, "application des Conventions," 29 September 1965, ACICR B AG 202 223-003 ("il faut éviter qu'ils soient transférés au gouvernement viet-namien tant que les promesses d'application des Conventions ne sont pas honorées"); André Tschiffeli, Note au CICR No. 189, "Entretiens à l'Ambassade des USA de Saigon," 29 September 1965, ACICR B AG 202 223-007; J. de Preux to Tschiffeli, Note No. 1557, 5 October 1965, ACICR B AG 202 223-003.

[68] Art. 12 continues: "When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody.

Nevertheless if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with." Thus, even if Washington (and the ICRC) were satisfied that Saigon was appropriately applying the conventions to transferred detainees, the United States still had some residual responsibility for any persons its forces had initially detained.

[69] Tschiffeli to Lodge, letter, 15 October 1965, ACICR B AG 202 223-007.

[70] "In the meanwhile, consideration should be given to having U.S. forces keep prisoners they actually capture." Schwartz to Cooper. Memo. "Viet-Nam and the ICRC." 25 October 1965. Of the varying reasons for not establishing American-supervised camps, one was specified by a South Vietnamese senior official to the

By late October, Schwartz wrote to Washington (after talks with the ICRC in Geneva) that the situation regarding Saigon's compliance with the Geneva Conventions was "rapidly approaching a critical state." The ICRC reported that "the GVN has failed to comply with the conventions in a number of important ways," such as furnishing lists of prisoners to the ICRC and allowing unescorted ICRC prisoner camp visits. The matter was "acute" because the ICRC "may publicly criticize the GVN for failure to comply with the conventions" which "would reduce the GVN's already precarious standing in the eyes of many other countries," and because "as long as GVN compliance is incomplete U.S. military forces in Viet-Nam are obligated not to turn over prisoners they take to GVN custody."[71]

The concern around Saigon's foot-dragging peaked in the latter half of November. In a meeting with Schwartz, the ICRC's Executive Director Roger Gallopin laid out the situation bluntly: North Vietnam's record of compliance with the Geneva Conventions was, to date in the conflict, better than the records of South Vietnam and the United States.[72] (Comments such as these from the ICRC prompted US officials, both in Washington and Saigon, to deride a supposed ICRC tendency "to view Prisoner problem in legalistic terms" and "to concentrate on *pro forma* bureaucratic requirements of Geneva Conventions rather than basic issue of how to assure more humane treatment of prisoners on both sides"; despite American dismissiveness,

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ICRC in November: "En ce qui concerne l'article 12 applicable aux américains, le point de vue vietnamien est que les troupes américaines sont aux orders de Gouvernement vietnamien, comme des mercenaires (mot utilisé dans la conversation), et doivent donc remettre leurs prisonniers vietnamiens ou à détenir des vietnamiens …." Tschiffeli to ICRC Geneva, Note No. 226, "application des Conventions," 5 November 1965, ACICR B AG 202 223-003.

[71] Schwartz to Cooper. Memo. "Viet-Nam and the ICRC." 25 October 1965. *FRUS 1964-1968*, Vol. III, Vietnam, June – December 1965, Document 182.

[72] Schwartz-Gallopin Memcon, 29 November 1965, ACICR B AG 202 223-003: nous n'avons reçu jusqu'ici ni listes, ni autorisations de visites avec ou sans entretiens sans témoin. Le CICR doit, par consequent, constater que, dans les faits, la RDVN applique mieux les Conventions que les Etats-Unis et la RVN puisqu'il a au moins reçu quelques lettres, des photos et des nouvelles des prisonniers américains au Nord."

comments such as Gallopin's were nevertheless effective at motivating the United States to act.)[73] Rusk himself sent a direct message to Lodge, writing that "I am deeply concerned about limited degree of GVN compliance with Geneva Convention on treatment of prisoners." He continued: "As you know, US is responsible under GC for treatment of prisoners transferred from US to GVN custody. Matter is urgent for sake of GVN and US image abroad and as it affects plight of US prisoners held by DRV and VC." Rusk instructed Lodge to raise the issue with Prime Minister Ky and to press for Saigon's compliance with the ICRC's request for lists of prisoners and unaccompanied visits to prisoners of war. [74]

At his meeting with Lodge, Ky played down the differences between his government and the ICRC, attributing it to his Ministry of the Interior, "who complained that the local delegates of the Red Cross did not want to be accompanied by Vietnamese prison officials," and suggested "that there was no reason why they should be accompanied," thus opening the door to cooperation with the ICRC. Ky insisted South Vietnam had nothing to hide, telling Lodge that "we treat our prisoners better than we do our own soldiers."[75]

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[73] Amembassy Saigon to State Dept, Cable, Saigon 1888, 26 November 1965, Doc. 56, Folder 5 (Vol. XLIII, 11/23-12/19/65, Cables [1 of 2]), Box 24, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[74] State Dept to Amembassy Saigon, Cable, State 115, 12 November 1965, Doc. 48, Folder 5 (Vol. XLII, 11/1-22/65, Cables), Box 23, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas. For Lodge's initial reply to Rusk, see: Amembassy Saigon to State Dept, Cable, Saigon 1725, 15 November 1965, Doc. 10, Folder 5 (Vol. XLII, 11/1-22/65, Cables), Box 23, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[75] Amembassy Saigon to State Dept, Cable, Saigon 1831, 22 November 1965, Doc. 1, Folder 5 (Vol. XLII, 11/1-22/65, Cables), Box 23, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

Ky shortly afterwards endorsed a Foreign Ministry brief on the Geneva Conventions.[76] By early December, the Ministry of the Interior had been ordered to fall into line.[77] And by that time, South Vietnam's military was well on the way to issuing instructions to its troops regarding the Geneva Conventions and the treatment of detainees.[78] After some final prodding by Washington to not only comply with ICRC requests but to also release some PAVN detainees in (tacit) return for the release of Smith and McClure, Saigon issued a statement on 19 December announcing its intention to give the ICRC "une premiere liste de prisonniers de guerre Viet-Cong," to allow camp visits by the ICRC "de voir un certain nombre de ces captifs," and to release a certain number of North Vietnamese POWS.[79] Three days later, an ICRC Red Cross delegation was allowed to visit a camp in Bien Hoa Province.[80]

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[76] I have not located the brief itself in US files, but it is referred to in several places, including: State Dept to Amembassy Saigon, Cable, State 1342, 16 November 1965, Doc. 43, Folder 5 (Vol. XLII, 11/1-22/65, Cables), Box 23, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas; Memorandum for Mr. Bundy, "Two Weeks in Asia," 7 December 1965, Doc. 161, Folder 1 (Vol. XLIII, 12/1-17/65, Memos (A) [1 of 2]), Box 25, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[77] Memorandum for Mr. Bundy, "Two Weeks in Asia," 7 December 1965.

[78] In early November, Thinh reported to Tschiffeli that "les instructions à la troupe sont sur le point de sortir de presse et d'être diffusées dans les unités." Tschiffeli to ICRC Geneva, Note No. 226, "application des Conventions, 5 November 1965, ACICR B AG 202 223-003.

[79] Saigon's forthcoming press statement was transmitted to Washington on the 18th: Amembassy Saigon to State Dept, Cable, Saigon 2197, 18 December 1965, Doc. 3, Folder 5 (Vol. XLIII, 11/23-12/19/65, Cables [1 of 2]), Box 24, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas. The prisoners released were allowed to choose between remaining in South Vietnam or repatriation to the North. See: Central Intelligence Agency, "Weekly Report: The Situation in South Vietnam," OCI No. 0651/65, 22 December 1965, Doc. 241, Folder 3 (Vol. XLIII, 12/15-31/65, Memos (B) [1 of 3]), Box 25, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[80] Central Intelligence Agency, "Weekly Report: The Situation in South Vietnam," OCI No. 0652/65, 29 December 1965, Doc. 240, Folder 5 (Vol. XLIII, 12/15-31/65, Memos (B) [3 of 3]), Box 25, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

Tied up in the problem of gaining South Vietnamese compliance with the Geneva Conventions and cooperation with the ICRC was another important problem: which detainees were to be accorded official prisoner-of-war status? As one lawyer who served at MACV headquarters in Saigon observed in 1968, "one of the biggest problems of the 'shadow war' is the classification of those picked up during military operations. Is everyone dressed in black pyjamas who is picked up during a sweep operation to be classified as a prisoner of war? Obviously not—but who is?"[81] As Meeker had written mid-year when trying to convince the US Mission and the South Vietnamese government that acknowledging the sway of the Geneva Conventions in Vietnam would not be overly onerous, "application of conventions would not unduly restrict GVN in dealing with guerrillas and terrorists; under [Article 4 of the Third] Convention, persons not bearing arms openly, not wearing distinctive sign, or not abiding by rules of war, may be tried and punished for their crimes under South Vietnamese law."[82]

As expressed by Meeker's legal analysis, Washington's initial inclination, then, was not to treat members of the southern insurgency as legitimate combatants but as criminals. Whatever its legal merit, Meeker's advice that guerrilla fighters could still be processed through the South Vietnamese criminal justice system went unheeded. Rather, a policy was developed that gave prisoner-of-war status not just to captured North Vietnamese regulars, but also to southern

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[81] Gardiner M. Haight, "The Geneva Conventions in the Shadow of War," *U.S. Naval Institute Proceedings* (Sept., 1968), pp. 43-51 at p. 46. See also p. 45: "The drafters envisioned soldiers in uniform, fixed enemy lines, belligerent powers, protecting powers, and all the trappings of conventional warfare. They did not envision counterinsurgency, guerrilla type warfare where the enemy soldier mingles with the populace, wears a coolie hat, wraps his weapons in oilcloth, hides it in a rice paddy during the day, and takes it out to set up ambushes at night. As a result, we are often left with nothing but the spirit of the Conventions and common sense upon which to base our actions."

[82] See above; State 3048.

guerrillas captured in the course of battle.[83] It was, in many senses, a remarkable policy, given that the guerrillas generally wore no uniform (except the oft-cited "black pyjamas" worn by many Vietnamese); carrying arms became, in essence, the key criterion for assigning prisoner-of-war status. How and why this policy came about, however, has not been adequately explained. It was possibly prompted by the ICRC. That organization was sympathetic to the idea that producing lists of prisoners of war would not be easy in a conflict in which many combatants on one side wore no uniform. Nonetheless, writing to the ICRC delegation in Saigon at the end of September 1965, committee member Jean-Pierre Maunoir suggested that, for the moment, Saigon could still accord POW status to captured members of the PAVN. Moreover, wrote Maunoir, members of the NLF forces who were captured in uniform, or in something approaching a uniform, should also be treated the same as those PAVN soldiers accorded POW status. Both classes of detainees—PAVN and recognized NLF fighters—should be available for visits by the ICRC.[84]

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[83] "Because of the nature of the enemy in Vietnam and the difficulty of fitting him into the PW categories, PW status has been expanded to include captured VC who, if only the letter of the Conventions were being followed, would not be entitled to full protection. PWs are considered to include all those who qualify under the Article 4 criteria just set forth, and, in addition, persons who are captured while actually engaging in combat or a belligerent act, other than an act of terrorism, sabotage, or spying, and also any member of a VC local force, guerrilla, or self defense unit who has participated in combat whether he is captured in combat or not. In effect, then, a determination of PW can be based upon the detainee's status or actions." Haight, p. 47.

[84] J.-P. Maunoir to Délégation du CICR Saïgon, Note No. 1556, "application des Conventions," 29 September 1965, ACICR B AG 202 223-003: "Nous concevons bien que dans un conflit qui oppose les forces gouvernementales principalement à des combattants sans uniforme la confection de listes de prisonniers de guerre ne constitue pas une tâche facile. Il semble cependant que, dans l'immédiat, le gouvernement de Saïgon ne devrait pas éprouve de difficultés à accorder le statut de PG aux membres des forces armées de la République démocratique du Viet-Nam don't on annonce périodiquement la capture. De même ceux des membres des forces FNL qui sont capturés en uniforme, ou avec un semblant d'uniforme devraient pouvoir aux aussi bénéficier d'un traitement analogue à celui des PG. Pour ces deux catégories, nous souhaiterions vivement que les visites de camps ou de prisons puissant commencer sans tarder, et même sans attendre l'établissement des listes qui suppose un travail préparatoire qui risqué de prendre encore du temps."

Two months later, the United States was still considering the issue. In a late November cable, the key agencies in Washington noted that the "entitlement of VC irregulars under 4(a)(2)" was a "more difficult problem," and promised a further message addressing that problem. (The cable's principal purpose was to stress the importance of according POW status to captured PAVN personnel, as was their right under Article 4(a)(1) of III Geneva Convention, in order to, among other reasons, "lend substance to press reports of capture of authentic PAVN soldiers.")[85] What that further cable said, or even if it were sent, remains unclear, but within a fortnight Saigon had issued instructions to its troops not only to treat detainees in accordance with the Geneva Conventions but to do so without making a distinction between North Vietnamese regulars and NLF irregulars.

IV

What accounts for these US actions, first, in pressuring its ally in Saigon to implement the Geneva Conventions rather than to shield its ally and, second, to accord prisoner-of-war status to guerrillas? Given the lack of enemy adherence to the Geneva Conventions, or respect for the ICRC, one might expect the United States to have been more sympathetic to the South Vietnamese complaints of unfairness. Among the few military lawyers who were part of these policy decisions, helped to implement them, or were otherwise well-informed about them, and wrote about these decisions during or shortly after the war, a few explanations have emerged.

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[85] State Dept to Amembassy Saigon, Cable (Joint State/Defense message), State 1495, 29 November 1965, Doc. 90, Folder 5 (Vol. XLIII, 11/23-12/19/65, Cables [1 of 2]), Box 24, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas. If such a further message were written, I have, unfortunately, been unable to locate it. Its approximate timing, however, combined with the earlier indications (e.g., Schwartz's 25 October memo cited above) of Washington's openness to attributing lawful combatants status to the NLF, suggest that such a message would provide key insights into Washington's legal understanding of NLF combatants.

Howard S. Levie, a senior military lawyer in the 1950s turned academic in the 1960s, published an influential article in 1968 on prisoner of war issues, with a focus on the maltreatment of POWs. Levie took for granted the American motivation for applying the Geneva Conventions, citing Rusk's August letter to Gonard that the United States "has always abided by the humanitarian principles enunciated in the Geneva Conventions and will continue to do so." Applying the conventions was above all a humanitarian gesture—something of a sign of American generosity and magnanimity. For Levie (among others) American actions *had* to be motivated by humanitarianism and generosity because the other major potential motivation, reciprocity, was absent in the Vietnam War. Noting that neither North Vietnam nor the NLF replied positively to the ICRC's mid-1965 approach to the parties to the conflict, and the recent history of Communist approaches to the Geneva Conventions, Levie judged that Communist countries in general "are not ready to comply with their [i.e., the Geneva Conventions] provisions, for they are either not concerned about obtaining reciprocal treatment for their captured personnel, or, possibly, they may assume that by their present method they will still obtain humane treatment for Communist personnel without any need to reciprocate—which is what has actually occurred in both Korea and Vietnam."[86]

For Levie, the very foundation of the good treatment of prisoners of war in accordance with the conventions was reciprocity. While a spirit of humanitarianism and generosity might persist for a while, in the face of non-reciprocal gestures and actions by the enemy, it could not last indefinitely. Levie thought that "eventually the other side in international armed conflicts, and the established government in civil armed conflicts, will refuse to apply the Convention until

[86] Howard S. Levie, "Maltreatment of Prisoners of War in Vietnam," *Boston University Law Review*, Vol. 48 (1968), pp. 323-359 at p. 327.

confirmation of the fact that it is being applied by the Communist side." Levie suggested that "in the long run," such a policy might "prove to be more humanitarian to the greater number of persons." While the argument would be made "that the obligation to comply with the Convention does not depend upon reciprocity, but upon the undertaking made to all the other parties thereto, and also that the Convention creates individual rights which may not be withdrawn because of the failure of one side to comply," at some point those states engaged in an armed conflict against non-compliant Communist countries "will undoubtedly tend to take the position that there must be a point at which the refusal of the Communist side to comply with the provisions of the Convention releases the other side from its obligations thereunder."[87] How, Levie argued, "can armed conflict be conducted with different rules controlling the actions of the two contending sides?" Such an argument held, for Levie, irrespective of whether the full III Convention, or just Common Art. 3, applied to any given conflict; "unilateral compliance" could hardly be expected. [88]

For Levie, it was clear that there was little, if anything, in the way of reciprocal respect for prisoners of war in enemy hands. While Levie acknowledged that little was known about how US prisoners in NLF hands were treated, he stressed the illegal reprisal executions of Bennett, Versace, and Roraback as evidence of a lack of respect for international law and of a lack of reciprocity in the treatment of enemy prisoners.[89] The legal violations enacted by North Vietnam were perhaps less egregious, but the parading of captured Americans through the streets of Hanoi in defiance of III Convention was for Levie a similar example of the lack of reciprocity that held

[87] Levie, "Maltreatment of Prisoners of War in Vietnam," pp. 327-328.

[88] Levie, "Maltreatment of Prisoners of War in Vietnam," p. 334; also p. 359.

[89] Levie, "Maltreatment of Prisoners of War in Vietnam," pp. 353-358.

during the Vietnam conflict.[90] Gardiner Haight, Chief of the International Law Division in MACV's Office of the Staff Judge Advocate from 1967 to 1968, highlighted a longer list of enemy actions as proof of the absence of any reciprocity in the conflict, noting NLF torture and the killing of prisoners in addition to the illegal reprisal execution (or murder) of American servicemen, the parading of American pilots through the streets of Hanoi, and the coercion of those same pilots to appear at staged press conferences.[91] "Considering this catalogue of violations," wrote Haight shortly after finishing his assignment in Vietnam, "the disregard in practice of the Communist enemy in Vietnam for the Geneva Conventions is abundantly clear."[92] Reciprocity simply did not hold in Vietnam.[93]

So why, given the lack of reciprocity, did the United States continue to prize compliance with III Convention? And prize compliance it did: "American servicemen must continue to observe the provisions of the Geneva Conventions," exhorted Haight, "*for whatever reason*."[94]

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[90] Levie, "Maltreatment of Prisoners of War in Vietnam," pp. 342-344. Article 13 of the Third Geneva Convention (1949) stipulates that "prisoners of war must at all times be protected … against insults and public curiosity."

[91] Haight, pp. 50-51. Levie did touch upon torture and killing of prisoners, but his article focused on other aspects of POW treatment under the Conventions.

[92] Haight, "The Geneva Conventions in the Shadow of War," p. 51.

[93] While Haight made no sounds that U.S. actions were based in any way upon an idea of reciprocity, he did state that US servicemen should be aware of the conventions because if they became prisoners of war "every serviceman should have prior knowledge of his rights under the GPW and the rules and regulations he will be required to follow during his imprisonment by the enemy." This was only a secondary reason, however: knowledge of the conventions was necessary so that US servicemen would know how to treat the enemy in their hands. Haight, "The Geneva Conventions in the Shadow of War," p. 45. More significantly, on the same page, Haight reproduced Col. George F. Westerman's analysis (see below) on signs of NLF reciprocity: "As an interesting sidelight, in spite of protestations by the enemy that the Geneva Conventions do not apply, captured documents reveal that the Viet Cong have issued instructions to their forces concerning the treatment of prisoners, which, in many instances, closely approximate those given U.S. troops." But he offers no commentary upon this "interesting sidelight" and is generally dismissive of the NLF's treatment of prisoners.

[94] Haight, "The Geneva Conventions in the Shadow of War," p. 51. Emphasis added.

For good measure, he listed some possible reasons: "the sanctity of international obligations, humanitarian motives, discrediting of enemy propaganda, obtaining the co-operation of captives, or inducing other enemy troops to surrender."[95] He might have added experience of World War II to the list, which figured as a driving force at high levels of the U.S. military. Writing to the ICRC's Claude Pilloud in January 1966, Harvard Law School professor R. R. Baxter, an important figure in American law-of-war matters, shared news of a recent trip to Washington: "My talks with military lawyers in Washington encouraged me considerably about the compliance with the law of war in Vietnam. The present Chief of Staff of the Army [Harold Johnson] was a POW during the Second World War and therefore has a somewhat livelier appreciation than most of the victims of warfare. He has been most insistent on compliance with the Conventions and apparently a very healthy influence on the Armed Forces."[96]

All these possible motivations generally fall into two categories: generosity driven by American ideals; and practicality driven by American interests. Regarding the former, Haight was not alone in suggesting the United States was motivated by a sense of legal obligation and humanitarianism. To show that the decision to accord NLF fighters prisoner-of-war status was driven by generosity and enlightenment, military lawyers such as Haight and George Prugh, Westmoreland's Staff Judge Advocate from 1964 to 1966, liked to quote ICRC representative Jacques Moreillon speaking—off the record, but nonetheless cited by Americans—at a US conference of judge advocates in Saigon in May 1966:

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[95] Haight's dismissal of reciprocity-based compliance was somewhat compromised, however, by his concluding sentence, in which he implied another good reason to comply with the Third Convention was that such compliance might induce reciprocal compliance from the other side: "Hopefully, one day the enemy will be persuaded to reciprocate in the treatment of all captured Americans in the 'shadow war' in Vietnam." Haight, "The Geneva Conventions in the Shadow of War," p. 51.

[96] R. R. Baxter to Claude Pilloud, Letter, 20 January 1966, ACICR B AG 202 223-012.

> The MACV instruction [to accord POW status to NLF irregulars] … is a brilliant expression of a liberal and realistic attitude. … This text could very well be a most important one in the history of the humanitarian law, for it is the first time … that a government goes far beyond the requirements of the Geneva Convention in an official instruction to its armed forces. The dreams of today are the realities of tomorrow, and the day those definitions or similar ones will become embodied in an international treaty … will be a great one for man concerned about the protection of men who cannot protect themselves. … May it then be remembered that this light first shone in the darkness of this tragic war of Vietnam.[97]

However real the sentiment behind statements such as Moreillon's, the United States certainly wanted to appear generous, law-abiding, and enlightened to the rest of the world. Compliance with the Geneva Conventions and co-operation with the ICRC were seen as key parts of the campaign to win over international public opinion, or at the least counter Hanoi's propaganda campaign. The 1965 International Red Cross Vienna Conference was a key public relations moment, and its presence on the diplomatic calendar clearly spurred the United States to achieve some form of South Vietnamese compliance that could be trumpeted in Vienna. In his September 1965 meeting at the RVN Foreign Ministry, Schwartz "stressed the importance of the Vienna Conference which would be a big forum for attracting much attention in Western Europe where the prestige of the ICRC President matched that of the Secretary General." Adding that Hanoi "would try to exert political pressures by all means" at the conference, including the use of "atrocity photographs," Schwartz cautioned that "US and GVN should be well prepared to

[97] Prugh, *Law at War*, pp. 66-67; Haight, "The Geneva Conventions in the Shadow of War," p. 47. On the comments being off the record, see Jacques Moreillon to J. P. Maunoir, Letter (with attachments), 5 February 1969, ACICR B AG 202 223-015.

reply."[98] When Lodge approached Ky in November to push Saigon to acquiesce in the face of ICRC demands, he stressed the "propaganda advantage of appearing humane and civilized."[99]

The political utility in having the ICRC on side as the United States waged the battle for international public opinion was also not lost on at least some officials. As Abba Schwartz reported in October 1965:

> It hardly needs saying that the ICRC as a private Swiss organization with unique legal and international responsibilities acts independently on the basis of its own judgment consistent with its well known principles. What may be less obvious is that constituted this way and behaving this way the ICRC is almost certain to serve our own interests. Plainly, this is a point to be made quietly. Any prospects for success the ICRC may have in the delicate undertakings that it is broaching in connection with the Viet-Nam conflict would be shattered if the other side were given public cause to doubt its independence. But the facts remain that individually and collectively the ICRC is, in the most basic sense, on our side. This is very specifically true of the President, Samuel Gonard, formerly the commanding general of the Swiss armed forces, and of his leading associate of the Committee, Vice President Jacques Freymond, Director of the Graduate Institute of International Studies in Geneva. (Freymond's views on wars of national liberation, and the urgent need for the countries of Europe to find ways to get together on a united policy for the West to fight them, as expressed in a paper he wrote for a recent Ford-sponsored conference, are wholly congenial to U.S. policy—and somewhat unusual coming from a European intellectual.) … Our present relationship with the ICRC is such that it can best be served by maintaining an open channel of discussion with them, with occasional nudges from us to point them in directions we consider fruitful and/or essential. And by getting the GVN to comply with the Conventions.[100]

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[98] Saigon 817. In the end, it seems Hanoi boycotted the conference.

[99] Saigon 1831.

[100] Memorandum from the Administrator, Bureau of Security and Consular Affairs (Schwartz) to Chester L. Cooper of the National Security Council Staff, "Viet-Nam and the ICRC," 25 October 1965, *Foreign Relations of the United States, 1964-1968, Volume III, Vietnam, June-December 1965,* Document 182.

While there were clearly diplomatic benefits, then, to complying with the conventions and getting the ICRC on side, there were also less visible military benefits to implementing the conventions and establishing a generous detainee classification policy, even in the face of enemy non-compliance. In addition to the desire to encourage surrender and defection on the part of the enemy, and to gain information out of detainees, Haight identified a particular interest-based reason for extending prisoner-of-war status to captured NLF fighters. As Haight explained, the Third Convention "was designed with the thought in mind that to be classified as a prisoner of war was a most desirable status and one to which most captives would aspire, the feeling being that the most likely alternative would be immediate execution without many of the amenities. However," he continued, "one of the anomalies of the Vietnam War is that this is not the case. There, the most likely alternative to PW status is a determination that the person captured was a civil defendant, which probably means that he had some remote, non-combatant VC connection and for which he may be subject to a short prison term under the laws of Vietnam. This is vastly preferable to spending the duration of the war in a PW camp. So there we have the situation where the so-called preferred status under the Convention amounts to a lengthy, indeterminate sentence and the less favourable, non-PW, status amounts to not much more than punishment for a misdemeanour. Obviously, this anomaly complicates any attempted resolution of the classification problem."[101]

Prugh made a similar argument, although regarding the establishment of a POW classification and detention system rather than (as Haight was commenting upon in 1968) its by-then usual operation. "After June 1965 the prison population steadily rose until by early 1966 there was no space for more prisoners in the existing jails and prisons. The practical effect of this

[101] Haight, p. 46.

was that as new prisoners were confined others had to be discharged. Average time of confinement for all prisoners, including Viet Cong, was about six months. Thus a few months after apprehension a Viet Cong member could be, and usually was, back in operation, while had he been a prisoner of war he would have been restrained 'for the duration.'"[102]

The mixing of Viet Cong suspects with common criminals in South Vietnamese civilian jails also, in Prugh's estimation, "enabled Viet Cong agents to foment resentment against the government of the Republic of Vietnam and to proselitize their fellow prisoners; it also increased a Viet Cong's chance for early release as part of the normal inflow-outflow of the prison population."[103] "Three possible ways of alleviating the overcrowded conditions in the prisons, brought on by the escalation of the war, were suggested: a prisoner of war camp construction program; a broadening of the prisoner of war concept beyond the terms of Article 4 of the Geneva Prisoner of War Conventions so as to include more Viet Cong in the prisoner of war category; and the establishment by the Vietnamese government of re-education centers to separate and rehabilitate suspects who either did not qualify for prisoner of war status or were to be brought before a criminal court as civilian defendants."[104] All three were implemented.

Explanations of US policies based on generosity (either absolute generosity or generosity driven more by enlightened self-interest in the pursuit of a positive international image) and military common sense are both compelling. But the documentary record suggests they cannot

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[102] Prugh, *Law at War*, p. 64. Similarly, Prugh notes, due to the "chronic difficulty" of feeding this large number of prisoners, "many prisoners were released after a short time simply because they could not be fed." *ibid*., p. 64.

[103] Prugh, *Law at War*, pp. 64-65.

[104] Prugh, *Law at War*, p. 65.

fully explain US policy choices, and that actually a concern with reciprocity—generally dismissed, most vehemently by Levie—*did* play a leading role in US policy decisions.

When debating whether to accept the applicability of the Geneva Conventions to the Vietnam conflict, officials at the US embassy in Saigon had argued the pointlessness of accepting the Conventions on the logic that it would likely improve the treatment of Americans in enemy hands (see Section II above: "given Viet Cong mode of living and ideology … we see no reason to believe any announcement on our part will lead to improved treatment of U.S. detainees"). Lodge had thought the enemy might be persuaded to fall into line regarding appropriate treatment of detainees, but that physical punishment (striking new targets in North Vietnam) and threats (war crimes trials) were the best means of inducing compliant enemy behaviour. And yet the strategy adopted implicitly rejected both these logics, being instead based on the premise that better enemy treatment of Americans was possible and that the best way to do it was to prove American and South Vietnamese commitment to the humane treatment of its own detainees. In September 1965, confronted with the execution of U.S. uniformed personnel, the threat of further executions, and its man on the spot urging a tough response that, while not in kind, would nonetheless still have exacerbated tensions around the issue of detainees and their rights, Washington followed the path of restraint. The United States settled on a strategy of attempting to induce reciprocity (i.e., decent treatment of U.S. personnel in enemy hands) through a display of forbearance combined with international pressure.

The initial, holding response Washington had given Lodge's late-September cable promoting war crimes trials and reprisal air strikes had laid out a need "to find ways and means of bringing effective pressure against DRV and VC to move them to treat prisoners in accordance with 1949 Geneva Conventions" while at the same time doing "everything possible

to reaffirm and emphasize to [the] world [the] clear distinction between … terrorists and prisoners of war" and allowing South Vietnam "to go on treating VC terrorists in accordance with Vietnamese law."[105] In further, more substantive, responses to Lodge's cable, Washington laid out the stepping stones of a policy response that clearly followed the path of forbearance. Washington feared that, in part given that North Vietnam was already using a war crimes rationale to claim a right to try US prisoners, for the US and South Vietnam to use a similar rationale might rebound negatively upon US pilots being detained by North Vietnam: "Our people, whom they hold, might … catch main impact of this." And while North Vietnam following through with its threat to begin trials of US detainees was the most worrying potential outcome, a US decision to adopt a war crimes framework might more generally hamper "efforts to open up approaches to DRV through ICRC to establish contact with US prisoners and explore prisoner exchanges." [106] The idea of retaliating by way of reprisal air strikes against North Vietnam, which had been suggested before by the American Embassy in Saigon, was once again shelved by Washington (see Chapter 4 for a more detailed discussion of this issue).[107] State and the Pentagon reasoned that an alternative series of actions (noted above: publicity, diplomacy, a Protecting Power, a Vienna Conference resolution) "might in combination, exert meaningful pressure" on North Vietnam. This reasoning was based on the intuition that as "both recognized government and party to Geneva Conventions," North Vietnam was susceptible "to political and

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[105] See above; State 1015.

[106] State Dept to Amembassy Saigon, Cable, State 1165, 29 October 1965, Doc. 68, Folder 1 (Vol. XLI, 9/25-31/65, Cables), Box 23, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas. As of writing, this cable unfortunately remains heavily redacted; declassification in full has been requested.

[107] State Dept to Amembassy Saigon, Cable, State 1226, 4 November 1965, Doc. 55, Folder 5 (Vol. XLII, 11/1-22/65, Cables), Box 23, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

psychological pressures from established governments and international organs like ICRC." An encouraging sign in this regard was that North Vietnam had thus far only *threatened* to try US prisoners, and had "taken great pains to persuade ICRC of humane treatment given US prisoners."[108]

But to pressure North Vietnam, either directly or indirectly through international public opinion, meant first having its own house in order. On this front, "GVN non-compliance inhibits our ability to take public or private actions to obtain better treatment for American military personnel held by the Viet Cong and the DRV," wrote Schwartz in October. "The GVN attitude on this subject, while understandable in light of what their country has endured at the hands of the Viet Cong, and conceivably explainable to someone on the spot who can see at first hand the character of this ugly war, is however virtually certain to be unacceptable as a permanent answer to the ICRC's repeated entreaties on this subject." Schwartz listed some indications that Hanoi, while still refusing to formally acknowledge the applicability of the Geneva Conventions, was moving in the direction of practical acceptance. North Vietnam "already is substantially complying with important parts of the prisoners Convention by furnishing in some instances at least names, photographs, statements, and mail," noted Schwartz, and even more pressure would come on Saigon is Hanoi took "specific public steps to comply formally with the Conventions. It is by no means out of the question that the DRV will do this. From their own point of view there is little reason (beyond their own fanaticism) why they should not."[109]

Schwartz expanded on this analysis a few weeks later: "The DRV has substantially complied with several provisions of the Conventions by allowing some mail and packages to go

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[108] State 1165.

[109] Schwartz to Cooper. Memo. "Viet-Nam and the ICRC." 25 October 1965.

to and from U.S. prisoners. It has also sent photographs of prisoners and has said it treats them humanely. It has not so far conducted war crimes trials that it has threatened, nor have any Americans been executed. Thus the main gap in DRV compliance appears to be their refusal so far to permit visits to prisoners by the ICRC. Since they hold relatively few U.S. prisoners, and if in fact prisoners are well treated, there is every reason for them to invite the ICRC to make such visits."[110] Of course, U.S. prisoners held by Hanoi were by no means well treated, with evidence of torture later emerging, and the ICRC was never invited to Hanoi at any point in the war, but for Schwartz (and other US officials) in late 1965, a North Vietnamese invitation to the ICRC seemed imminent and such an invitation would have only shown up the United States and South Vietnam as scofflaws.[111] "The possibility of an ICRC visit to North Viet-Nam," wrote Schwartz, "also makes more acute the problem of achieving GVN compliance with the Geneva Conventions."[112]

Around the same time, Rusk noted that "We have an obligation to our soldiers and citizens to take every action not detrimental to security that increases likelihood American prisoners will receive satisfactory treatment. Leverage we can bring to bear on DRV and VC through ICRC and other international efforts depends to considerable extent on degree to which US and GVN standards of prisoner treatment meet requirements of Geneva Conventions. I believe that substantial compliance by GVN and USG with Convention and publicity given such

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[110] Abba Schwartz, Memorandum, "Viet-Nam and the ICRC," 15 November 1965, Doc. 104, Folder 2 (Vol. XLII, 11/65, Memos (A) [2 of 2]), Box 24, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[111] Its maltreatment of American prisoners might not have been the only reason Hanoi barred the ICRC from its territory. While technically neutral, the ICRC was nonetheless seen as a Eurocentrist organization, and part of an international legal order complicit with imperialism. These claims were not without grounds, as Schwartz's message (see above) heralding the ICRC's pro-US bias makes clear.

[112] Schwartz, Memorandum, "Viet-Nam and the ICRC," 15 November 1965.

compliance constitute one of best available protections against further mistreatment American prisoners." Indeed, Rusk thought that compliance with the conventions on the part of the United States and South Vietnam "would have high potential for reciprocal benefits for American prisoners and for favourable publicity."[113] Having settled on a strategy aimed at establishing some reciprocity in the treatment of prisoners, the United States more-or-less consistently pursued it thereafter. As Prugh (who otherwise underplayed the motivating role of reciprocity) noted, "U.S. policy was for the United States to do all in its power to alleviate the plight of American prisoners. It was expected that efforts by the United States to ensure humane treatment for Viet Cong and North Vietnamese Army captives would bring reciprocal benefits for American captives."[114]

One of the key goals of the strategy was to get North Vietnam and/or the NLF to agree to prisoner exchanges. The desire to promote the possibility of prisoner exchanges with Hanoi and the NLF may have been one of the key substantive reasons pushing Washington towards a policy of forbearance and Geneva-Convention compliance, but there was also a procedural reason to acquiesce to ICRC requests: the ICRC was one possible interlocutor with the North on the question of prisoner exchanges, and so it was advisable to stay in the Swiss humanitarians' good books.[115] "We are aware of dangers and disadvantages inherent in prisoner exchanges," the State

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[113] State 115.

[114] Prugh, *Law at War*, p. 63.

[115] For a time from September 1965, the ICRC emerged as a serious possibility to act as an intermediary between Washington and Hanoi (as well as between Washington/Saigon and the NLF) regarding a possible prisoner exchange. See, e.g., Amembassy Saigon to State Dept, Cable, Saigon 770, 6 September 1965, Doc. 37, Folder 3 (Vol. XL, 9/1-25/65, Cables), Box 22, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas; State Dept to Amembassy Saigon, Cable, State 794, 19 September 1965, Doc. 53, Folder 3 (Vol. XL, 9/1-25/65, Cables), Box 22, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas; Amembassy Saigon to State, Cable, Saigon 994, 22 September 1965, Doc. 9, Folder 3 (Vol. XL, 9/1-25/65, Cables), Box 22, Vietnam Country File, National

Department wrote to the US Mission in Saigon upon a receipt of a cable from Lodge worrying that US policy might encourage VC recruitment and the taking of US personnel as hostages, "and we are not sanguine that DRV will be receptive, but we believe approach by ICRC, as humanitarian organization, holds better prospects than even informal governmental contacts."[116] Both Lodge and State also thought that an approach through the ICRC would be more "palatable" to Saigon, especially in terms of making contact with the NLF.[117]

Even though the United States held no prisoners of its own, it was nonetheless willing to push Saigon to release its prisoners if Washington thought some reciprocal benefits might accrue. When, in December 1965, Washington feared that war crimes trials of captured US airmen were imminent, it once again pushed for South Vietnamese compliance with the conventions and ICRC requests: "we have reliable indications that DRV may proceed soon to try US airmen now held prisoner in Hanoi," wrote the State and Defense departments to the Embassy in Saigon, which "lends added urgency to need for GVN and US record to be as favorable as possible on POW issue." Washington also pushed Saigon to make a reciprocal gesture for the recent release of two Americans held by the NLF, writing that "you should also explore with GVN desirability of prompt release of more than two PAVN prisoners to bona-fide ICRC representatives." A statement announcing the release of these prisoners "would not

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Security File, Lyndon Baines Johnson Library, Austin, Texas; State Dept to Amembassy Saigon, Cable, State 857, 24 September 1965, Doc. 47, Folder 3 (Vol. XL, 9/1-25/65, Cables), Box 22, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas; Schwartz to Cooper. Memo. "Viet-Nam and the ICRC." 25 October 1965; State Dept to US Mission Geneva, Cable, State 896, 26 November 1965, Doc. 92, Folder 5 (Vol. XLIII, 11/23-12/19/65, Cables [1 of 2]), Box 24, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas; State Dept to Amembassy Saigon, Cable, State 1647, 13 December 1965, Doc. 71, Folder 5 (Vol. XLIII, 11/23-12/19/65, Cables [1 of 2]), Box 24, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[116] State 794. Lodge's cable was Saigon 770.

[117] State 794; also Saigon 770. The idea was palatable to South Vietnamese Foreign Minister Do: Saigon 994.

highlight fact of PAVN presence in SVN although it would identify those released as PAVN soldiers," and although "statement would not link release of PAVN soldiers to VC release of McClure and Smith, this inference would undoubtedly be widely drawn; therefore, it believed preferable for public relations purposes to release more than two PAVNs." The United States was pushing for reciprocal action even as it wanted to provide cover for denying its actions (or those of its ally) were based on a principle of reciprocity.[118]

While pushing for an international propaganda advantage as an end in itself played some motivating role in this proposal, State and the Pentagon made clear that the primary motivation for showcasing US and South Vietnamese compliance and generosity to the world was to put pressure on Hanoi to make reciprocal gestures. "Our objective in seeking these actions is … to put GVN and US in as favorable a light as possible with international opinion and with ICRC so that, as result these actions and other diplomatic moves … DRV may be dissuaded from proceeding with trials or at least greatest possible contrast can be created between DRV and GVN treatment of POWs."[119] Establishing an international propaganda advantage over Hanoi was a consideration, then—and when Saigon finally agreed to US requests to comply with ICRC demands and release some PAVN prisoners in a tacit reciprocal gesture, the US certainly tried to play these moves for all their propaganda worth—but it was clearly a subsidiary consideration; Washington's primary goal was to induce reciprocal good behaviour from Hanoi.[120] Publicity for

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[118] State Dept to Amembassy Saigon, Cable, State 1672, 15 December 1965, Doc. 69, Folder 5 (Vol. XLIII, 11/23-12/19/65, Cables [1 of 2]), Box 24, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[119] State 1672.

[120] On Washington's plan for a press campaign to achieve "maximum publicity" for South Vietnam's actions, including to play up the contrast with North Vietnamese actions (or non-actions), see: State Dept to Amembassy Saigon, Cable, State 1704, 17 December 1965, Doc. 67, Folder 5 (Vol. XLIII, 11/23-12/19/65,

compliance was seen as a vital way of getting better treatment for US prisoners, putting pressure on the DRV not to follow through with its threats to try US airmen, and, perhaps, to manufacture a prisoner exchange.[121]

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It seems, then, that reciprocity was indeed an important part of the logic driving US policy on prisoner-of-war and combatant-status issues. But the reciprocity aimed at was not purely that of a two-player game-theoretic type in which the US and North Vietnam, or the US and the NLF, took turns at making strategic choices for (or against) co-operation. The United States was also reciprocally committed, by way of a multilateral treaty regime that centered on the UN Charter and the Geneva Conventions, to the international community more generally.[122] This sense of reciprocal obligation was in operation in August, when Washington, against the wishes of the US Mission in Saigon, pushed through a positive reply to Gonard's June letter requesting full compliance with the Geneva Conventions. Because the US had justified its use of force in Vietnam under the UN Charter's right to respond to an *international* armed attack, Washington felt compelled to accept the stronger Geneva Convention regime relating to international armed conflicts rather than the weaker (Common Article 3) regime relating to non-international armed conflicts. This sense of reciprocal obligation to a multilateral legal order—and the accompanying

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Cables [1 of 2]), Box 24, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[121] This was not universally accepted within the American bureaucracy, with Schwartz suggesting that a more softly-softly approach through the ICRC might do more to induce North Vietnam, and perhaps the NLF, to cooperate. Schwartz to Cooper. Memo. "Viet-Nam and the ICRC." 25 October 1965.

[122] These two versions of reciprocity are on display in two key texts on prisoner-of-war (and similar) issues: James D. Morrow, *Order within Anarchy: The Laws of War as an International Institution* (New York: Cambridge University Press, 2014) (game theory); and Mark Osiel, *The End of Reciprocity: Terror, Torture, and the Law of War* (New York: Cambridge University Press, 2009) (global contract).

fear that to pull one block out of the legal edifice of the American war effort might lead the entire structure to collapse—was also in play on questions of who should be classified as a prisoner of war.

US officials tended to lump the southern insurgency together with North Vietnamese aggression. The overriding belief among those in both Washington and Saigon was that the NLF was simply a cover for, and directed by, Hanoi; it was an organization typical of campaigns of indirect aggression and subversion. In response to the executions of Versace and Roraback, State publicly declared that the "acts show utter disregard for humanitarian principles and for the provisions of the 1949 Geneva Prisoners of War Convention, of which the Viet Cong's masters, the Hanoi regime, are an adherent."[123] George Prugh, the Staff Judge Advocate for MACV for some time and, later, historian of the role of lawyers in the war, pushed this interpretation of the decision: "Although North Vietnam made a strong argument that the conflict in Vietnam was essentially an internal domestic struggle, the official position of the United States, stated as early as 1965, and repeated consistently thereafter, was that the hostilities constituted an armed international conflict, that North Vietnam was a belligerent, that the Viet Cong were agents of the government of North Vietnam, and that the Geneva Conventions applied in full. This view was urged upon the government of South Vietnam, which acceded reluctantly, but subsequently came out in full support of the conventions."[124]

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[123] State 867. Such an announcement was previewed just before the executions, when State wrote to the US Embassy that in "regrettable event VC or DRV executes another American prisoner, strongly protest to ICRC on basis DRV's adherence to 1949 Geneva Conventions," again suggesting the Hanoi's adherence to the Conventions implied some sort of legal obligation on the part of the NLF. State Dept to Amembassy Saigon, Cable, State 857, 24 September 1965, Doc. 47, Folder 3 (Vol. XL, 9/1-25/65, Cables), Box 22, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[124] Prugh, p. 63.

While the United States tended to lump the NLF and North Vietnam together, it had also expressed a commitment to do "everything possible to reaffirm and emphasize to [the] world [the] clear distinction between … terrorists and prisoners of war" and to allow South Vietnam "to go on treating VC terrorists in accordance with Vietnamese law."[125] This commitment soon ran into problems. If most enemy detainees were being classified and processed as domestic criminals, then the argument that the aggression was international—i.e., coming principally from the North—tended to lose some of its weight.

US officials were keen to publicize the fact that regular force North Vietnamese troops from the PAVN were among those captured by South Vietnamese, US, and allied forces. Data was, however, hard to come by ("Can Mission give us at least general estimates of numbers of DRV prisoners held by GVN, VC prisoners held by GVN," the State Department asked in September), and there were doubts that Hanoi would ever lay claim to their own people captured by the enemy ("Hanoi is likely to deny any responsibility for prisoners held by VC and show little interest in getting back any prisoners held by GVN"). [126] On 22 September, Thinh, the foreign ministry senior official, "said GVN calculated it held 69 communist prisoners who qualified as POW's under 1949 Geneva Conventions."[127] A month later, the figure being bandied about had only increased by five.[128] These figures worried Abba Schwartz, one of whose greatest concerns was that "the narrowness of the GVN category of prisoners undermines our thesis that this is more than a civil war. Our critics can be expected to fasten on to the fact that only 74 of

[125] See above; State 1015.

[126] State 794.

[127] Saigon 994. In the same meeting with American Embassy officias, "Thinh also expressed opinion DRV and VC would consider any GVN prisoners they held as deserters rather than prisoners."

[128] Schwartz to Cooper. Memo. "Viet-Nam and the ICRC." 25 October 1965.

the thousands of prisoners captured or in custody represent an external force [and therefore formally classified as Prisoners of War] and use this as further evidence of DRV non-involvement."[129]

Part of the solution to this problem was to make a greater effort to distinguish the North Vietnamese regular from their southern irregular counterparts ("in view of recent reports of capture of uniformed PAVN [i.e., North Vietnamese] personnel," ran a joint State-Defense message, "believe it important that all such personnel be included on POW lists furnished ICRC," including for the purpose of lending "substance to press reports of capture of authentic PAVN soldiers"),[130] but another solution was to blur the distinction between the two classes of combatants. Writing in October 1965, Schwartz noted that "a change in definitions so that the bulk of prisoners taken in military operations be classified in the first instance as subject to the protection of the Conventions should not cause serious inconvenience. Since education or indoctrination programs free of duress are not proscribed by the Conventions the Chieu Hoi program could continue. Individual terrorists convicted of specific acts could still be charged as criminals and handled outside the Conventions. Refugees who are rehabilitated could of course be freed to return to their villages." But perhaps most importantly, Schwartz continued, by "altering the language of the definition large numbers of detainees could be classified as affiliated with Viet Cong-DRV armed forces fighting in South Viet-Nam against the GVN. This would not only have important legal and propaganda advantages, it would also square with the facts as we know them."[131]

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[129] Schwartz to Cooper. Memo. "Viet-Nam and the ICRC." 25 October 1965.

[130] State 1495.

[131] Schwartz to Cooper. Memo. "Viet-Nam and the ICRC." 25 October 1965.

Schwartz was not the only one who had begun to advocate for including NLF irregulars within the formal prisoner-of-war designation At this point, in late October 1965, the Washington-based agencies also began to push an approach that considered the NLF in its own right and not simply as an adjunct of Hanoi.[132] (This new approach did not necessarily mean that Washington stopped believing that the NLF was an agent of Hanoi, only that it started believing there was tactical benefit to be had from acting upon the proclaimed distinction.) In the wake of the NLF executions of Roraback and Versace, the State Department rejected linking NLF executions of Americans with US retaliation against the North. State and Defense instead proposed a differentiated approach based on the "practical distinction" between the DRV and the NLF. If North Vietnam was deemed to be susceptible to pressure applied indirectly through international public opinion, Washington's plan for influencing NLF treatment of prisoners entailed more direct action, unmediated by international opinion or an international organization—but still, importantly, eschewing the path of reprisal heralded by Lodge. Because the NLF were "neither recognized government nor party to the Geneva Conventions," and because North Vietnam disclaimed (disingenuously, according to many) any control over the NLF, Washington preferred the path of encouraging NLF defections through the Chieu Hoi (or Open Arms) program, and while Saigon would maintain the right to try and punish NLF

[132] While Maunoir's note of 29 September (see end of Section III above) is the first time the idea of recognizing the legitimacy of NLF fighters was raised by the ICRC, it is not entirely clear when the issue began to be discussed within American official circles. It was likely around the same time, however, given that Schwartz, writing on 25 October, referenced a State Department cable, Deptel 863, of 25 September that seems to have contained a similar idea. As of this writing, I have not been able to access Deptel 863. See n. 4, document 182, *FRUS 1964-1968, Vol. III, Vietnam, June-December 1965*.

criminals, Washington wanted there to be no "undue emphasis on fact they are guilty of war crimes."[133]

The desire to play down the NLF's status as war criminals—as unlawful combatants, or terrorists, engaged in treasonous violence against the South Vietnamese state—was the first major sign that Washington was reconsidering its legal understanding of the NLF and those who fought for it. Up until this time, the United States had strenuously backed Saigon's right to treat NLF personnel as criminals in accordance with South Vietnamese law. This cable did not officially change that position, but its encouragement to play down the NLF's criminal (i.e., unlawful combatant) status was a noteworthy step in the direction of officially affording NLF fighters prisoner-of-war status when captured. And it was a herald of things to come. A month later, and the lawyers in "L" were seriously considering the combatant status of NLF fighters (see end of Section II above). And by the end of the year it was more-or-less a done deal.[134]

The United States may have been more motivated, then, by a sense of reciprocity that was rooted in multilateral treaty obligations—and in particular a determination to preserve the

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[133] State 1165. Much of the discussion regarding the strategy for inducing better NLF treatment of prisoners in this cable is, as noted above, redacted.

[134] It does not seem like the US was—or, at least, US officials in Washington were—necessarily the driver of this process, too. While "L" was still thinking over the issue of NLF combatant status in late Novemmber, already on 5 November, Phan Van Thinh informed Tshiffeli and some of his ICRC colleagues that the South Vietnamese government intended to establish a classification scheme that consisted of three parts: political prisoners, saboteurs (including terrorists and subversives), and prisoners of war, with the latter category covering all those captured during combat and being part of an organized military force. Tschiffeli to ICRC Geneva, Note No. 226, "application des Conventions," 5 November 1965, ACICR B AG 202 223-003: "le Gouvernement a l'intention d'établir un classement des détenus soit, à part naturellement les condamnés de droit commun qui ne nous concernent en rien, les prisonniers politiques, les 'saboteurs' (on comprendrait sous cette appellation également les organisateurs d'attentats et d'actes d'agression disperses), enfin les 'prisonniers de guerre', soit les gens faits prisonniers lors de combat et faisant partie d'unités combattantes organisées. Nous avons essayé de définir clairement ce dernier groupe, à savoir quels sont les signes d'idenitification de ces combattants, et notamment savoir si des papiers militaires (livrets, cartes d'identité, orders de mission etc.) étaient suffisents pour faire admettre leur porteur comme 'prisonnier de guerre'."

legal stakes for which it had gone to war—but there are still signs that some elements of direct reciprocity did emerge regarding the treatment of prisoners in the US-NLF "game" that was the Vietnam War. Prisoner releases and exchanges occurred, although always with a certain propaganda element to them (in late November 1965 the NLF released two US prisoners, both of whom had shown "repentance" during their captivity, and stressed that it treated US prisoners well "despite U.S. aggression against Vietnam and crimes U.S. aggressors have committed against mankind.")[135] And one knowledgeable military lawyer wrote in 1967 that "a series of captured documents reveal that the Viet Cong have issued instructions to their forces concerning the treatment of prisoners, which, in many instances, are identical to, or closely approximate those of the United States."[136]

The classification and detention system no doubt "worked" in other ways, too, and the classification scheme was certainly open to manipulation. Non-combatant members of the NLF (the political cadres at various levels, often labelled the Viet Cong Infrastructure, i.e., those who would become the focus of Operation Phoenix), could still be processed through the South Vietnamese domestic justice system, for example. So could "terrorists" and "saboteurs," categories whose definitions could be wide-ranging. The new system, with its string of ICRC-visited prison camps, did protect *some* combatants in the war, but to what extent US and South Vietnamese policies regarding the Geneva Conventions reduced levels of torture and violence against detainees outside the formal POW prison camp system is unclear. The temptation, then,

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[135] Liberation Radio broadcast of 27 November cited in Amembassy Saigon to State Dept, Cable, Saigon 1911, 27 November 1965, Doc. 53, Folder 5 (Vol. XLIII, 11/23-12/19/65, Cables [1 of 2]), Box 24, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas. The prisoners, Claude D. McClure and George E. Smith, who had been captured at the same time as Versace and Roraback, were released via Cambodia.

[136] Colonel George F. Westerman, "International Law Protects PWs," *Army Digest* (Feb., 1967), pp. 32-39 at p. 35.

is to ask if any of it mattered. Did the detailed instructions, pocket cards, "Know Your Enemy" posters, and ICRC prison visits amount to much at a practical level? How can we reconcile the detailed policy documents and forthright cables from Washington demanding compliance, with the Vietnam War's reputation as bloody and brutal? Did the debates among hair-splitting lawyers and diplomats matter much to the way the war was waged? Perhaps only at the edges. But the debates and decisions around the Geneva Conventions and the classification of combatants and prisoners of war mattered in other ways, too. They mattered when, in the mid-1970s, the international community gathered at Geneva to revise the law of armed conflict to take account of the wars of decolonization and of the newly-decolonized world more generally. Where powerful European countries were wary of a treaty that expanded the definition of lawful combatants to include guerrilla fighters in many situations, the US was more open to discussions on this point, and was able to broker a consensus of sorts on who counted as a legitimate combatant worthy of prisoner-of-war status. In all likelihood, that was only possible because of the experience of the Vietnam War, in which Washington put into practice a broad definition of combatant status—without the sky falling on its head.

4. MOVING TARGETS

I

In the spring of 1965, the economist and strategic theorist Thomas Schelling delivered a series of lectures at Yale University on the "diplomacy of violence." Schelling's term suggested a disavowal of what he viewed as the common tendency to conceive of peace and war as two distinct realms—the former dominated by diplomats talking their way to a settlement, the latter controlled by soldiers fighting their way to victory. Thinking through the effects of two revolutions—the technological "revolution in explosive power" and, in the United States, the "revolution in the relation of military to foreign policy" that was collapsing the perceived line between war and diplomacy—Schelling considered how armed force, or the threat to inflict pain using that force, might be used not to achieve victory in the traditional sense but as a bargaining tool to compel opponents to take a particular course of action. "The power to hurt is bargaining power," noted Schelling. "To exploit it is diplomacy—vicious diplomacy, but diplomacy."[1]

As with any other diplomatic actor engaged in negotiation, then, violence *talked*. It spoke in a particular idiom, to be sure, but was by no means inarticulate. Indeed, for Schelling, violence

[1] The lectures were later published as *Arms and Influence* (New Haven: Yale University Press, 2008 [1966]). The three quotes are from p. xiv and p. 2.

was often much more lucid than other forms of communication. And with his keen ear for the changing tone of conversation over Vietnam—the timeframe in which he was preparing his lectures neatly tracked the period in which key American commitments to Saigon were made—Schelling thought that Johnson's response to the Gulf of Tonkin incident the previous August was pitch-perfect. Implicitly agreeing with those who thought the American airstrikes against North Vietnamese patrol boats and naval installations were "neatly tailored in scope and in character" and "unusually fitting," Schelling further noted that "this was an almost aesthetic judgment" and that "if words like 'repartee' can be applied to war and diplomacy, the military action was an expressive bit of repartee." President Johnson's speech to the nation on the evening of August 4 characterized the strikes as an effort to prove American resolve in both supporting Saigon and avoiding a "wider war," but for Schelling the president's words were no rhetorical match for the air strikes. The "deeds were articulate"; the words "not nearly as precise and explicit as the selection of targets and the source and timing of the attack." Johnson's address "reinforced the message delivered by aircraft," but "that night's diplomacy was carried out principally by pilots, not speechwriters."[2]

Schelling was so enamored of the American action in response to the Gulf of Tonkin incident because in communicating a message it also established the parameters of conversation. "A good way to describe the American response is that it was *unambiguous*. It was articulate. It contained a pattern. If someone asks what the United States did when its destroyers were attacked in the Gulf of Tonkin, there is no disagreement about the answer. One can state the time, the targets, and the weapons used. Nobody supposes that the United States just happened to have an attack on those North Vietnamese ports planned for that day; and nobody is in any doubt

[2] Schelling, *Arms and Influence*, p. 142.

about precisely what military action was directly related to the attack on the destroyers."[3] By acting as it did, the United States signaled its intent to act with restraint—to observe certain boundaries. Indeed, by acting as it did it helped to establish, or at least reinforce, those boundaries.

Most wars have occurred within certain limits. Even the so-called total wars of the twentieth century operated within temporal bounds: "at some point the war was stopped though both sides still had a capacity to inflict pain and cost on the other. Surrender or truce brought the common interest into focus, putting a limit to the losses. But until surrender or truce, the use of force was substantially unbounded." With the advent of nuclear weapons, however, temporally bookending war might not be enough; the course of the war itself would have to be restrained. And as the Korean War showed, it could be: "a prolonged , tightly bounded, energetic, and purely military campaign is at least a possibility in the nuclear era," noted Schelling, "because it actually occurred." In the Korean War, limits were observed on the types of weapons used (no nukes, no gas), the nationality of combatants, and the geography of violence (U.S. ground forces or bombers never crossed the Yalu River).[4] The limits tended to be absolute, or at least clear, lines: no gas, rather than some forms of gas; no Soviet-uniformed personnel, rather than some such personnel; no crossing the Yalu, rather than some types of crossing. They fulfilled Schelling's criteria for the crafting of war by convention and tacit understanding: "The proposals have to be simple; they must form a recognizable pattern; they must rely on conspicuous landmarks; and they must take advantage of whatever distinctions are known to appeal to both sides. National boundaries and rivers, shorelines, the battle line itself, even parallels of latitude,

[3] Schelling, *Arms and Influence*, p. 145. Emphasis in original.

[4] Schelling, *Arms and Influence*, pp. 129-130.

the distinction between air and ground, the distinction between nuclear fission and chemical combustion, the distinction between combat support and economic support, the distinction between combatants and non-combatants, the distinction among nationalities, tend to have these 'obvious' qualities of simplicity, recognizability, and conspicuousness." Schelling argued that limits were more likely to be respected if they were "qualitative and not matters of degree—distinctive, finite, discrete, simple, natural, and obvious."[5]

Such boundaries, of course, were not destined to hold in all future nuclear-era limited wars. In the end, the Korean War was "only one possibility, one pattern, one species of a variegated genus of warlike relations, and no more a model of what 'limited war' really is than the first animal the Pilgrims saw reflected the wildlife of North America."[6] Korea, moreover, had been a much more traditional—"battlefield" in Schelling's terminology—war, in which such clear and unambiguous limits were more readily available.[7] Vietnam was different. As discussed in chapters two and three, there was no clear or obvious understanding as to where the line of aggression or armed attack was drawn, or who qualified as combatants. Vietnam appeared more as a potentially undifferentiated plane of violence. "What happens to a 'limited war' if there are no natural stopping places," wondered Schelling, "no readily perceived limits, that both sides can acknowledge, no particular reason for confining the activity at one point rather than another along some quantitative scale?"

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[5] Schelling, *Arms and Influence*, pp. 137-138.

[6] Schelling, *Arms and Influence*, p. 131.

[7] The limits were, of course, a matter of perspective. Koreans, both from the North and the South, would hardly have agreed that the war was limited, or that the bombing of towns and cities represented the discrete use of violence for bargaining and signalling.

In light of this concern, the American attacks on 4 August appealed as a signal of limited violence. While the attacks certainly communicated a message of the potential harm that the United States could inflict, they also implicitly promised a certain symmetry. "There is an idiom in this interaction," described Schelling, "a tendency to keep things in the same currency, to respond in the same language, to make the punishment fit the character of the crime, to impose a coherent pattern on relations." This tendency, in turn, "helps to set limits and bounds. … It avoids abruptness and novelty of a kind that might startle and excessively confuse an opponent. It maintains a sense of communication, of diplomatic contact, of a desire to be understood rather than misunderstood." In the final analysis, "it was as *an act of reprisal*—as a riposte, a warning, a demonstration—that the enterprise appealed so widely as appropriate."[8]

While the term *reprisal* invokes legal terminology, Schelling's sense of limits—either those like the Yalu or "no gas" that provided clear all-or-nothing boundaries, or "the measured cadence" of limited bombing that allowed for the establishment or maintenance of a coherent pattern—was not built on a strong legal foundation. Law was certainly useful for Schelling. His boundaries or thresholds often had a "legalistic quality" to them, and some were even legal boundaries themselves, e.g., the Geneva Protocol on gas warfare or the Geneva Convention on prisoners of war, although in either case their virtue lay not in their legalness but in their thereness; as pre-arranged codes, they offered the parties to a conflict easily-identifiable boundary lines. "The sheer arbitrariness undoubtedly helps," noted Schelling. "The Geneva code already existed, like the thirty-eight parallel, the Korean shore line, or the Yalu River, and did not need to be proposed, only accepted." But whatever Schelling's view of the fundamental nature of the lines or thresholds he was describing, as a practical matter U.S. officials making

[8] Schelling, *Arms and Influence*, pp. 146-147, p. 149, and p. 145. Emphasis added.

decisions about the Vietnam War in 1964 and 1965 were necessarily concerned with them both as strategic precept and legal rule.[9]

Although Lyndon Johnson's speech of August 4, 1964, never formally characterized the American air strikes as reprisals,[10] Schelling was not the only one to use that term, and much of the initial (i.e., 1964 through early 1965) discussion around air operations against North Vietnam, at least amongst civilian officials, was grounded in the rhetoric of reprisal. Indeed, the discussion of reprisal was present even earlier: Abram Chayes' November 1961 legal memorandum, discussed in Chapter 2, which struck down the legal case for long-range air strikes into North Vietnam while nonetheless allowing for shallow incursions in hot pursuit, subsumed both categories of action under the heading "Retaliatory Attacks."[11] As Perry Pickert, a perceptive reader of the earliest release of key government documents, noted, "the logic of reprisal was present in Vietnam well before the decision to bomb the North."[12] The first significant opportunity for reprisal action after the Gulf of Tonkin incident presented itself on 1 November 1964, with an NLF attack on the Bien Hoa American air base, killing five Americans

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[9] Schelling, *Arms and Influence*, pp. 183 (measured cadence), 135 (legalistic quality), and p. 140 (did not need to be proposed, only accepted).

[10] They and the Flaming Dart I strikes were both formally justified as measures of self-defense under the UN Charter, with letters being written to the Security Council to that effect accompanying both sets of strikes. Leonard C. Meeker, Memorandum for Mr. McGeorge Bundy, "Legal Basis for United States and South Vietnamese Air Strikes," 11 February 1965, Doc. 214, Folder 4 (Vol. XXVIII, 2/9-19/65, Memos), Box 13 [2 of 2], Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas. See also: Leonard C. Meeker (State Department Legal Adviser), quoting Senator William Fulbright, "The Legality of United States Participation in the Defense of Viet-Nam: Text of Legal Memorandum," Department of State Bulletin Vol. LIV, No. 1396 (March 28, 1966), pp. 474-489 at p. 486.

[11] Memorandum From the Legal Adviser (Chayes) to the Secretary of State, *Foreign Relations of the United States 1961–1963, Volume I, Vietnam, 1961*, Document 261.

[12] Perry L. Pickert, "American Attitudes Toward International Law as Reflected in 'The Pentagon Papers,'" in Richard A. Falk (ed.), *The Vietnam War and International Law, Vol. 4, The Concluding Phase* (Princeton, New Jersey: Princeton University Press, 1976), pp. 49-93 at p. 78. On the same page, Pickert also noted that "In terms of the policy debate of 1964, the principle of reciprocity was phrased as the Rostow thesis, namely, 'covert aggression justifies and must be fought by attacks on the source of the aggression,'" i.e., the doctrine which we saw Walt Rostow first develop back in mid-1961 (see Chapter 2 above).

and wounding seventy-six others. Because the attack happened two days before the U.S. presidential election, Johnson decided not to respond. But he did respond to the February 7, 1965, attack on the American air base at Pleiku, which killed nine Americans. The reply, Operation Flaming Dart I, entailed strikes against North Vietnamese barracks, supply bases and assembly points on 7, 8, and 11 February and, after the NLF responded by hitting a hotel billeting U.S. personnel, Flaming Dart II was launched later that month.

On 7 February, the same day as they were launched, the Johnson Administration was already looking past the tit-for-tat Flaming Dart raids and reaching for a regularized bombing program that would respond not to individual acts of violence but to the "pattern of aggression" emanating from the North. In a memo passed to Johnson late that evening, National Security Advisor McGeorge Bundy recommended shifting to a "policy of graduated and continuing reprisal," with Pleiku having "produced a practicable point of departure for this policy of reprisal." Bundy described this policy of "sustained reprisal" as one "in which air and naval action against the North is justified by and related to the whole Viet Cong campaign of violence and terror in the South."[13]

While at the outset matching particular actions with specific reactions was desirable—"the problem was," as Perry Pickert noted, "to have a credible justification for the *first* bloodletting"[14]—the aim of sustained reprisal was ultimately to move past a strict tit-for-tat model. "We are convinced that the political values of reprisal require a continuous operation,"

[13] Memorandum From the President's Special Assistant for National Security Affairs (Bundy) to President Johnson, 7 February 1965, *Foreign Relations of the United States 1964–1968, Volume II, Vietnam, January–June 1965*, Document 84. Previous drafts of this memo were entitled "A New Approach to Retaliation."

[14] Pickert, "American Attitudes Toward International Law as Reflected in 'The Pentagon Papers,'" p. 80.

wrote Bundy. “Episodic responses geared on a one-for-one basis to ‘spectacular’ outrages would lack the persuasive force of sustained pressure.” And, so, Bundy continued:

> Once a program of reprisals is clearly underway, it should not be necessary to connect each specific act against North Vietnam to a particular outrage in the South. It should be possible, for example, to publish weekly lists of outrages in the South and to have it clearly understood that these outrages are the cause of such action against the North as may be occurring in the current period. Such a more generalized pattern of reprisal would remove much of the difficulty involved in finding precisely matching targets in response to specific atrocities. Even in such a more general pattern, however, it would be important to insure that the general level of reprisal action remained in close correspondence with the level of outrages in the South. We must keep it clear at every stage both to Hanoi and to the world, that our reprisals will be reduced or stopped when outrages in the South are reduced or stopped—and that we are not attempting to destroy or conquer North Vietnam.

While stepping away from an explicit tit-for-tat strategy, then, the policy of “sustained reprisal” nonetheless did aim at maintaining certain limits to the air campaign against North Vietnam. “A program of sustained reprisal, with its direct link to Hanoi's continuing aggressive actions in the South, will not involve us in nearly the level of international recrimination which would be precipitated by a go-North program which was not so connected,” advised Bundy.[15] Describing the policy of sustained reprisal as a “new norm in counter-insurgency,” Bundy’s innovation was the next chapter in the story begun in mid-1961 of attempting doctrinal innovation to combat indirect aggression.[16] But like many of the previous ideas in this vein, Bundy’s ran up against both legal and military issues.

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[15] Memorandum From the President's Special Assistant for National Security Affairs (Bundy) to President Johnson, 7 February 1965, *Foreign Relations of the United States 1964–1968, Volume II, Vietnam, January–June 1965*, Document 84.

[16] The policy would, thought Bundy, “set a higher price for the future upon all adventures of guerrilla warfare, and it should therefore somewhat increase our ability to deter such adventures. We must recognize, however, that that ability will be gravely weakened if there is failure for any reason in Vietnam.” Memorandum From

In international law, reprisals have both a very important and a sharply defined place. Their importance stems from the fact they are one of the few mechanisms for ensuring and inducing compliance with the law by another party. Absent a sovereign with police power, states are often required to take matters into their own hands; the customary law of reprisal allows them to do that. Reprisals are sharply defined, however, because they deploy otherwise-illegal force that carries a risk of the conflict descending into a state lawless violence. As Isabel Hull explains, "reprisals could just as easily destroy the law as uphold it; they hit the innocent rather than the guilty; they used methods otherwise held to be illegal; they were hard to distinguish from mere revenge; and they could lead to vicious spirals of counter-reprisal."[17] In customary international law a reprisal is an otherwise-illegal act (e.g., killing a prisoner of war, bombing a city) that responds to a legal violation perpetrated by an enemy *and* with the sole aim of bringing the enemy's behavior back within lawful bounds. Technically, reprisal is distinct from both retaliation (a more overarching term that covers any response to a hostile act) and retorsion (a legal response to an unfriendly act).[18] In the discussions over bombing policy against North Vietnam, American officials rarely seemed to be aware (or interested) in the distinction between the terms *reprisal* and *retaliation*, and tended to use the two terms interchangeably.

The lax use of the language of reprisal, however, entailed several consequences for the legal framework for the bombing of North Vietnam as it evolved over the remainder of the Johnson Administration. ("The extension of law as rhetoric," wrote Pickert, "distorted the

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the President's Special Assistant for National Security Affairs (Bundy) to President Johnson, 7 February 1965, *Foreign Relations of the United States 1964–1968, Volume II, Vietnam, January–June 1965*, Document 84.

[17] Isabel V. Hull, *A Scrap of Paper: Making and Breaking International Law during the Great War* (Ithaca, New York: Cornell University Press, 2014), p. 276; see also Schelling, *Arms and Influence*, pp. 168-169.

[18] Hull, *A Scrap of Paper*, p. 277.

principles and techniques of customary international law.")[19] The first consequence was to cast doubt generally on the legality of American bombing north of the demarcation line that split Vietnam in two. Washington's actions, noted Pickert, "represented the classic use of reprisal. The Americans asserted that the Northern support of the Viet Cong was illegal and began a graduated series of coercive acts to prompt the North to cease and desist. It may be argued whether or not the American view was correct, but granting American assumptions, the coercion was proportional and it must be admitted that South Vietnam had grounds for complaint." A major problem, however, was that this "classic" use of reprisal stood on uncertain legal foundations in the post-1945 era of international law. While some form of response to Northern infiltration might have been warranted, any action had to be filtered through the UN Charter with its severe restrictions on the use of force. As Abe Chayes had argued in 1961, these restrictions could not be relaxed for retaliatory attacks upon the territory of North Vietnam. "The limited use of force in reprisal is highly questionable under the law of the Charter," wrote Pickert.[20]

A second consequence of the lax use of reprisal language was to cast doubt over the nature of the targets being struck in North Vietnam. The United States wanted to make it clear from the outset that all its strikes against North Vietnamese territory were directed at legitimate *military* targets. But reprisals had traditionally been understood as otherwise-illegal acts directed against non-combatant citizens (either civilians or soldiers *hors de combat*) of a state in order to pressure that state to desist from its illegal behavior. Using the language of reprisal cast some

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[19] Pickert, "American Attitudes Toward International Law as Reflected in 'The Pentagon Papers,'" p. 91.

[20] Pickert, "American Attitudes Toward International Law as Reflected in 'The Pentagon Papers,'" p. 91. See also: John Norton Moore, "Law and National Security," *Foreign Affairs*, Vol. 51, No. 2 (Jan., 1973), pp. 408-421 at p. 410. In addition to the UN Charter's restrictions, the scope of legitimate reprisal action has been narrowed in the twentieth century by the laws that regulate the conduct of hostilities and the treatment of war victims; for example, the Third Geneva Convention of 1949 made it illegal to take reprisal actions against prisoners of war.

doubt over the military nature of the targets being struck inside North Vietnam and might, then, have served only to engender further confusion over, and highlight the shaky foundations of, the legal case for American action in Vietnam more generally. As two analysts of the air war over North Vietnam wrote (distinguishing between reprisal and retaliation), "reprisal raids could have opened the door to consistent and unjustifiable attack upon civilian objects in North Vietnam. It is admirable that the United States Air Force never sought to justify on this tenuous and debatable ground the use of an estimated seven million tons of bombs over Indochina."[21]

A third legal problem with the language of reprisal as the United States used it in early 1965 was the morphing of tit-for-tat retaliatory strikes into a policy of "sustained reprisal." If the language of reprisal *tout court* was problematic, then the idea of "sustained reprisal" was even more so given its oxymoronic quality. Bundy's attempted distinction between sustained reprisal and an all-out air campaign simply did not hold up. Operation Rolling Thunder, begun in March 1965, bore little resemblance to the precisely-matched strikes of August 1964 and the Flaming Dart strikes of the previous month. Keen observers certainly doubted the resemblance. Pickert understood that with the initiation of Rolling Thunder "the concept of reprisal was dropped and the air action was just another aspect of the war." Adding to this impression was the lack of any spectacular reprisal response to the NLF bombing of the American Embassy in Saigon at the end of March 1965.[22] Schelling came to the same conclusion (albeit on strategic, rather than legal grounds). Reprisals, he said, "differ from the kind of continuous coercive warfare that was introduced by the bombing of North Vietnam in February 1965. That was a bombing campaign,

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[21] Hamilton DeSaussue and Robert Glasser, "Air Warfare—Christmas 1972," in Peter D. Trooboff (ed.), *Law and Responsibility in Warfare: The Vietnam Experience* (Chapel Hill: University of North Carolina Press, 1975), pp. 119-139, at p. 124.

[22] Pickert, "American Attitudes Toward International Law as Reflected in 'The Pentagon Papers,'" p. 87.

not an isolated event. It was not in response to any particular act of North Vietnam but was an innovation in a war that was already going on, an effort to raise the costs of warfare to North Vietnam and to make them readier to come to terms."[23]

Each of these three points were no doubt on the mind of State Department lawyers in early 1965 as they formulated their legal justification for American military action in Vietnam, and it did not take long for them to react to the proposed policy of "sustained reprisal." On February 11, Leonard Meeker, the State Department Legal Adviser, wrote to McGeorge Bundy gently critiquing the logic of reprisal as Bundy had laid it out to the president four days earlier. Meeker suggested that the United States avoid "reliance on theories of reprisal or retaliation, which are less readily available under contemporary international law than they were before the Charter," and noted the "inconsistency in U.S. reliance on reprisal or retaliation with respect to Vietnam when we have been publicly critical of such justifications in other circumstances—for example, in the Near East in situations involving Israel and the Arab states." Meeker further thought that his own proposed legal basis for the air strikes, based on the right of collective self-defense under the UN Charter, would be "politically more appealing in presenting our case to other governments and in the court of public opinion around the world."[24] Meeker's advice won out and reprisal never constituted a formal legal rationale for launching air strikes against North Vietnam. But while the language of reprisal and retaliation was struck from the official American vocabulary of justification, the underlying logic of reprisal proved much harder to dislodge.

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[23] Schelling, *Arms and Influence*, p. 170.

[24] Leonard C. Meeker, Memorandum for Mr. McGeorge Bundy, "Legal Basis for United States and South Vietnamese Air Strikes," 11 February 1965, Doc. 214, Folder 4 (Vol. XXVIII, 2/9-19/65, Memos), Box 13 [2 of 2], Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

II

Despite the early 1965 relegation of reprisal as a formal basis for American action against North Vietnam, two incidents in late June that year prompted deep discussion within U.S. officialdom about launching a reprisal strike: the execution of Sergeant Bennett (noted in Chapter 3 above) and the National Liberation Front (NLF) bombing of the My Canh restaurant in Saigon. Like the U.S. Embassy bombing of late March, no specific reprisal measures were launched in response to the two provocations.[25] McGeorge Bundy's report of a 26 June meeting of senior officials to Johnson, who was at his ranch in Texas, gives some insight into the decision not to launch retaliatory action.[26]

The officials were not principally concerned with any North Vietnamese or NLF reaction to a reprisal strike, but instead were worried about "international backlash," especially from London. Such an attack without prior warning "could easily drive [UK Prime Minister Harold] Wilson and others clear off the reservation," wrote Bundy, and "we would not look smart if a single act of reprisal gave them an excuse to jump ship." If given fair warning of any American decision to launch a reprisal strike, Britain and other U.S. allies were still likely to argue against such a strike, the officials thought. "Allies could point out that repeated executions of prisoners

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[25] The "high level decision" not to launch a reprisal strike in June 1965, together with the reasons for that decision, was reported to Saigon on 3 July in State Department Telegram 37. As at the time of writing, I have not located a copy of this cable, but it is referenced in two places, both suggesting its significance: Telegram from the President's Special Assistant for National Security Affairs (Bundy) to President Johnson, in Texas, 26 June 1965, *Foreign Relations of the United States, 1964-1968, Volume III, Vietnam, June-December 1965*, Document 22, n. 4; and State Dept to Amembassy Saigon, Cable, State 857, 24 September 1965, Doc. 47, Folder 3 (Vol. XL, 9/1-25/65, Cables), Box 22, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[26] Telegram from the President's Special Assistant for National Security Affairs (Bundy) to President Johnson, in Texas, 26 June 1965, *Foreign Relations of the United States, 1964-1968, Volume III, Vietnam, June-December 1965*, Document 22. The senior officials were Secretary of Defense Robert McNamara, Secretary of State Dean Rusk, Undersecretary of State George Ball, Chairman of the Joint Chiefs of Staff Earle Wheeler, National Security Advisor McGeorge Bundy, and his brother William Bundy, Assistant Secretary of State for East Asian and Pacific Affairs.

by Nazis in World War II were not used to justify specific reprisals. They could point out also that once we moved to measured air operations in North Vietnam after Pleiku we avoided specific acts of reprisals as in the case of the Embassy bombing."[27]

A "strenuous diplomatic effort" with "major friendly nations," key among them the United Kingdom, would probably have kept most Allies on side ("although not happy"), thought the senior officials. But even if Johnson were to decide on reprisal action, the officials counseled him "to downgrade the reprisal aspect" and couch the attacks in military terms as part "of our whole policy in Vietnam, and not in response to particular outrages." Herein lay something of a paradox. The officials did not want any potential strike to be manifestly recognizable as a reprisal, and yet they still wished for such a strike to perform the essential task of reprisal and send a (muffled, to be sure) message to the enemy. On this latter score, if a positive decision regarding reprisal action were taken, the officials recommended the target be "either power plant or POL [petrol, oil, and lubricants] depot in Hanoi-Haiphong area" because "no target outside this area is sufficiently important to be a noticeable departure from present Rolling Thunder pattern."[28] If a strike were ordered, the officials wanted it to be both quotidian and spectacular at the same time.

As the serious consideration given to reprisal in June indicated, the decision in February to move from a tit-for-tat strike policy to a more generalized air campaign over North Vietnam, and the corresponding (implicit) acceptance of Meeker's advice to base this more generalized

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[27] Telegram from the President's Special Assistant for National Security Affairs (Bundy) to President Johnson, in Texas, 26 June 1965, *Foreign Relations of the United States, 1964-1968, Volume III, Vietnam, June-December 1965*, Document 22.

[28] Telegram from the President's Special Assistant for National Security Affairs (Bundy) to President Johnson, in Texas, 26 June 1965, *Foreign Relations of the United States, 1964-1968, Volume III, Vietnam, June-December 1965*, Document 22.

campaign on the law of self-defense rather than the law of belligerent reprisal, did not end all discussion of reprisal. After especially egregious attacks by the NLF, the question of their use tended to reappear. Henry Cabot Lodge, especially, remained a vocal advocate of them and Washington agencies were careful not to dismiss the politically-influential Ambassador's calls outright, politely noting on one occasion that "we recognize basis of your arguments for taking reprisals which are reasonably proportionate against DRV" but wondering whether they would have the desired effect "particularly since bombing of DRV is now daily occurrence."[29] When the question of reprisal emerged once again in the wake of the executions of Captain Humbert Versace and Sergeant Kenneth Roraback towards the end of September 1965 (see Chapter 3 above), Washington did not explicitly reject Lodge's suggestion to launch reprisal strikes in response to any future executions, but simply noted that "regarding your proposals for reprisals … we do not believe decision should be taken in advance of situation."[30]

Another "situation" dutifully appeared in December 1965, when the NLF bombed the Metropole Hotel in Saigon, which was serving as a billet for U.S. personnel. Lodge wrote to Washington that "we have a duty to protect our own personnel against future terrorist attacks of this kind. For us to strike back, therefore, is not only a just punishment for an outrageous aggression but it may also head off another similar outrage. This is a worthy aim. I therefore recommend that we inflict some punishment on North Viet-Nam which we will state is a retaliation." Lodge left open what exactly might be struck in retaliation for the Metropole, although made some suggestions. "You in Washington are much better informed than I am," he

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[29] State 857.

[30] State Dept to Amembassy Saigon, Cable, State 1226, 4 November 1965, Doc. 55, Folder 5 (Vol. XLII, 11/1-22/65, Cables), Box 23, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas. The cable noted that "JCS to CINCPAC Message 5562, DTG 092317Z of 9 July, continued to reflect current planning on this subject." As of writing, I have not located that message.

wrote, "but some possibilities which seem to me to be worthy are bombing coal mines, textile mills, irrigation ditches, the coastal waterway between South China and North Viet-Nam, steel mills, fertilizer factories and any other unmanned objectives."[31] In effect, Lodge was recycling his idea from September (see Chapter 3 above) for reprisal air strikes against "a new type of target in North Vietnam as an indication to Hanoi that we consider executions of U.S. prisoners [Versace and Roraback] as an illegal warlike act."[32] A few months later and Lodge was still making the same case, but now he had progressed to suggesting some examples of the "new type of target" he had in mind.

Since February, Washington had considered and rejected the idea of launching specifically-designated reprisal strikes in the wake of several high-profile incidents: the bombing of the U.S. Embassy in March; the bombing of the My Canh restaurant and execution of Bennett in June; and the execution of Versace and Roraback in September. Now, after the Metropole bombing in December, Washington decided to meet the Lodge and his team half-way, writing to Saigon that a "strike should be carried out but that it should not repeat not be represented as 'reprisal' for Metropole incident." Elaborating on their reasoning for this position, the Washington-based officials essentially repeated Meeker's arguments from February for rejecting the legal logic of reprisal. They wrote that the "background" to rejecting use of reprisal was "that USG has repeatedly joined in denunciation of specific reprisal actions as in Yemen, Algeria, and Israel. Explicit reprisal rationale will also raise serious questions on future incidents. But basic

[31] Amembassy Saigon to State Dept, Cable, Saigon 2034, 7 December 1965, Doc. 95, Folder 6 (Vol. XLIII, 11/23-12/19/65, Cables [2 of 2]), Box 24, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[32] Amembassy Saigon to State Dept, Cable, Saigon 1109, 30 September 1965, document 55, Folder 1 (Vol. XLI, 9/25-31/65, Cables), Box 23, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

reason is … to avoid serious international repercussions for action that we believe is in fact distinguishable from cases we have denounced but that could not easily be separated in face of criticism."[33]

The all-clear was given for a strike on the Uong Bi thermal power plant (target #82 on the 94-target list described in section IV below), located 16 miles from Haiphong and the source of about 15 percent of North Vietnam's electricity supply; the Air Force historian Jacob Van Staaveren notes the Uong Bi power plant was considered North Vietnam's "most important industrial target."[34] After a number of weather delays the power plant was struck on 15 December and, after bomb damage assessment indicated much of the plant survived the initial attack, restruck on 22 December.[35] The strike, authorized in response to Lodge's request for a Metropole reprisal strike, was nonetheless officially subsumed within the regular Rolling Thunder bombing operation.[36]

Writing to the U.S. Mission in Saigon, the Washington agencies (State, Defense, National Security Council staff, United States Information Agency) instructed Lodge's team to "keep

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[33] State Dept to Amembassy Saigon, Cable, State 1602, 9 December 1965, Doc. 81, Folder 5 (Vol. XLIII, 11/23-12/19/65, Cables [1 of 2]), Box 24, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[34] Jacob Van Staaveren, *Gradual Failure: The Air War Over North Vietnam, 1965-1966* (Washington, DC: Air Force History and Museums Program, 2002), p. 203.

[35] Arthur McCafferty (Briefing Officer, White House Situation Room), Memorandum for the President, 15 December 1965, Doc. 148, Folder 1 (Vol. XLIII, 12/1-17/65, Memos (A) [1 of 2]), Box 25, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas; JCS to CINCPAC, Cable, "Special Restrike," 20 December 1965, Doc. 82, Folder 6 (Vol. XLIV, 12/20-31/65, Cables), Box 25, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas; Van Staaveren, *Gradual Failure*, p. 204. For bomb damage assessment of the restrike, see COMUSMACV to JCS, Cable, DTG 102340Z JAN 66, "Intelligence Spot Reports Ares," 10 January 1966, Doc. 73, Folder 1 (Vol. 45, 1/1-20/66, Cables), Box 26, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[36] Arthur McCafferty (Briefing Officer, White House Situation Room), Memorandum for the President, 15 December 1965, Doc. 148, Folder 1 (Vol. XLIII, 12/1-17/65, Memos (A) [1 of 2]), Box 25, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas; Van Staaveren, *Gradual Failure*, p. 203.

quiet that strike was originally recommended on straight reprisal basis. Our feeling is that Hanoi will get the point anyway, and some of press will speculate that choice of target was related to Metropole incident. What remains extremely important is that such speculation should not be able to refer to anything from authoritative sources." Given that justification of reprisal was off the table ("we recognize that relationship to VC sabotage of Saigon electric power system cannot be stated as current justification"), Washington instead instructed Embassy staff to make a "routine announcement" that the attack was carried out. In response to any questions that might arise, the Embassy was to note "that target is directly related to military installations in the area being used in support of continuing infiltration and aggression in the South by the North Vietnamese regime" and that the "whole targeting pattern of bombings in North is if course related to level of VC action in South" with the Metropole incident being only "one of acts indicating continued high level of terrorism" and infiltration.[37] (Speaking from Washington, McNamara toed the same line, declaring publicly that the attack was "representative of the type we have carried out and will continue to carry out. I would not characterize it as retaliatory, but I think it is appropriate to the increased terror activity.")[38] Embassy officials were further instructed to emphasize the attack's discriminatory qualities. It "would also be most helpful if spokesman could find occasion to point out that target not adjacent to any significant civilian area," wrote Washington, keen to promote the strike's legitimacy in any way it could.[39]

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[37] State 1602.

[38] Cited in Van Staaveren, *Gradual Failure*, p. 204.

[39] State 1602. The bomb damage assessment of the Uong Bi restrike recorded that "damages were not known to source but the city and surrounding area had no power that night. Bombs also fell on the city streets and nearby areas, causing some casualties and destroying a number of houses." COMUSMACV to JCS, Cable, DTG 102340Z JAN 66, "Intelligence Spot Reports Ares," 10 January 1966, Doc. 73, Folder 1 (Vol. 45, 1/1-20/66, Cables), Box 26, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

When a press report emerged, citing Air Force intelligence sources, on the direct link between the Metropole bombing and the Uong Bi strike ("We have a helluva lot more hotels than they have cities, the Air Force intelligence officer said"), Washington sent a sharp "please explain" message to Saigon.[40] The Embassy protested that they had made every effort "not to give newsmen … a lead which might have put them on to stories about our internal discussions on public presentation this strike," told the press that they "were not prepared to discuss whether this represented change of policy," and put the blame for the news reports on leaks at the operational, rather than diplomatic, level.[41] This episode shows the extraordinary sensitivity among US officials to the public presentation of the Uong Bi attack, a sensitivity that at one point even had American officials self-rationalizing their reprisal-by-another-name strike: "Fact is that selected target is one we might have hit soon in any event. We have in fact hit smaller electric power plants in past and therefore believe we need not state or imply any change in past policy but simply let action speak for itself."[42]

The Metropole/Uong Bi episode was the first time since the Flaming Dart strikes of February 1965 that the United States had engaged in something akin to a reprisal strike (even if, like Rolling Thunder's origins in the policy of "sustained reprisal," it was not publicly acknowledged as such). And it seems, also, to have been the last. Lodge put in at least two further bids for reprisal action. In early January 1966 he described "two indiscriminate terrorist attacks" in Saigon that "should be made the object of retaliation and should be so cited

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[40] State Dept to Amembassy Saigon, Cable, State 1677, 15 December 1965, Doc. 68, Folder 5 (Vol. XLIII, 11/23-12/19/65, Cables [1 of 2]), Box 24, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[41] Amembassy Saigon to State Dept, Cable, Saigon 2157, 15 December 1965, Doc. 13, Folder 5 (Vol. XLIII, 11/23-12/19/65, Cables [1 of 2]), Box 24, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[42] State 1602.

publicly."[43] And at the start of April 1966 he proposed a reprisal strike in the wake of the bombing of the Hotel Victoria, a makeshift U.S. officers' quarters in Saigon, which killed three Americans and wounded 113 others.[44] ("I visited the Hotel Victoria explosion this morning. It is markedly greater than any of the other explosions which I have seen. I am reliably informed that it is much greater than the explosion at the Embassy a year ago last March. I suggest that if there is some punitive action which we wish to take against North Viet-Nam, and we have been looking for an excuse, that the bombing of the Victoria this morning gives us such a pretext.")[45] But Washington demurred: "We appreciate point …. However, under present circumstances we do not propose to go ahead with such action. As you are aware, Hotel Victoria explosion coincides with expanded pattern of Rolling Thunder targets about to take place."[46] After April 1966, Lodge, perhaps getting the message from Washington, seems to have given up on requesting further retaliatory strikes.

As Lodge lost interest in the debate over the logic of reprisal in the bombing of North Vietnam, so has history. Whereas during and shortly after the war, some writers paid close attention to the question of reprisal—Schelling thought deeply about it as a strategic concept,

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[43] Amembassy Saigon to State Dept, Cable, Saigon 2420, 7 January 1966, Doc. 21, Folder 2 (Vol. 45, 1/1-20/66, Memos (A)), Box 26, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas. NB. This document (doc. 21) appears to have originally been placed in Folder 1, Box 26, of this collection, but was in Folder 2 when I visited the LBJ Library in January 2016.

[44] Casualty figures: Arthur McCafferty (Briefing Officer, White House Situation Room), Memorandum for the President, 1 April 1966, Doc. 258, Folder 1 (Vol. 50, 4/1-8/66, Memos (B)), Box 29, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[45] Amembassy Saigon to State Dept, Cable, Saigon 3630, 1 April 1966, Doc. 89, Folder 4 (Vol. 50, 4/1-8/66, Cables [2 of 2]), Box 29, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[46] State Dept to Amembassy Saigon, Cable, State 2940, 1 April 1966, Doc. 112, Folder 4 (Vol. 50, 4/1-8/66, Cables [2 of 2]), Box 29, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas. This cable, and its rejection of Lodge's proposal for retaliatory action, was approved personally by LBJ: Walt Rostow to LBJ, Memorandum, 1 April 1966, Doc. 261, Folder 7 (Vol. 50, 4/1-8/66, Memos (B)), Vietnam Country File, National Security File, Austin, Texas.

Pickert as a legal one—most recent interpretive works on the bombing of North Vietnam have neglected the question entirely.[47] On the surface, this makes sense: the United States never relied on reprisal as a legal justification for the bombing of North Vietnam, and only once after February 1965 did the logic of reprisal drive a particular target selection (the Uong Bi power plant in December 1965). But at another level the debates and decisions regarding reprisal had a not insignificant role in the evolution of targeting criteria during the Vietnam War. Over the course of the Johnson Administration, U.S. targets in North Vietnam tended to drift, both geographically (with target selections creeping northbound from the DMZ, up the Vietnamese panhandle, and ever-closer to the Hanoi-Haiphong region) and conceptually (with the category of "*military* targets" burgeoning over time). The logic of reprisal was one enabler of this steady upwards and outwards movement of American targets.

III

A primary concern of Johnson and his senior officials in launching Rolling Thunder was to not provoke active Chinese (or even Soviet) intervention into the war on behalf of North Vietnam. To that end, the fixed targets struck in the early phases of Rolling Thunder tended to be concentrated south of the 20th parallel, in what Americans labelled the Vietnamese panhandle. The logic for this was clear. While not all the trigger points for Chinese (and/or Soviet) entry into the war were obvious, it was fairly certain that the larger Communist powers would become

[47] See, e.g., Robert Pape, *Bombing to Win: Air Power and Coercion in War* (Ithaca, NY: Cornell University Press, 1996); Mark Clodfelter, *The Limits of Airpower: The American Bombing of North Vietnam* With a New Introduction by the Author (Lincoln: University of Nebraska Press, 2006 [1989]); Janina Dill, *Legitimate Targets? Social Construction, International Law and US Bombing* (Cambridge, UK: Cambridge University Press, 2015); Neta C. Crawford, "Targeting Civilians and U.S. Strategic Bombing Norms: Plus ça change, plus c'est la même chose?" in Matthew Evangelista and Henry Shue (eds), *The American Way of Bombing: Changing Ethical and Legal Norms, From Flying Fortresses to Drones* (Ithaca, NY: Cornell University Press, 2014), pp. 64-86.

directly involved in the war at a point in time where the North Vietnamese state seemed to be on the verge of collapse or conquest. Whereas a sustained attack on the Hanoi-Haiphong area might hasten the arrival of that point, a clearly limited air offensive against targets in the southern portion of North Vietnam was unlikely to threaten the survival of the North Vietnamese government or its ruling Communist party. The need for strategic restraint, or a "Clausewitzian brake," in the words Italian scholar Alessandro Colombo, was complemented by the normative framework in which the use of force was embedded—the doctrine of self-defense—which can be seen as something of a "Grotian brake."[48]

The doctrine of self-defense (further described in Section IV below), as promoted by Meeker and upon which the United States formally rested its position in Vietnam, complemented the Johnson Administration's strategic restraint by signaling limited intent: the purpose of any announced self-defense action was to repel the attack, not conquer the enemy. In an action with the public aim of turning back North Vietnamese aggression against the South, and not of defeating the North Vietnamese state *per se*, it made sense to focus on those military installations and depots which were judged to be directly related to the infiltration of troops and supplies into the South. Armed reconnaissance patrols along major transport lines did extend further north, although they were prohibited from getting closer than 10 kilometers to the Chinese border and from entering the "Northeast quadrant" (see Figure 1), which contained the capital Hanoi, the

[48] Alessandro Colombo has written of the historical complementarity (and contemporary divergence) of two forms of restraint, or what he labels respectively as Clausewitzian and Grotian "brakes." For a brief review of Colombo's major work, see Matthew Evangelista, "Some Wars Are More Unequal than Others," *International Studies Review*, Vol. 9, No. 1 (Spring, 2007), pp. 96-98. See also: Alessandro Colombo, "Unequal War and the Changing Borders of International Society," paper presented at the annual meeting of the International Studies Association's annual convention "Exploring the Past, Anticipating the Future," 15 February 2009, New York City, NY, http://citation.allacademic.com/meta/p313566_index.html (accessed 30 March 2014).

port city of Haiphong, most of the North's industry, and the densely-populated and agriculture-rich Red River delta with its supporting network of dikes.

The complementary logics of strategic and normative restraint were, however, both weaker than they initially appeared for a few reasons. First, the bombing was relatively ineffective at stemming the flow of arms and men into South Vietnam. Second, the U.S. military never bought either logic of restraint. Believing that the threshold for Chinese intervention was much higher than supposed by the civilian leadership ("Johnson: Do you think this will involve the Chinese Communists and the Soviets? Wheeler: No sir. Johnson: Are you more sure than MacArthur was?"),[49] and holding onto a different understanding of self-defense than the State Department lawyers (see Section IV below), US commanders on the ground and their chiefs back in Washington were inclined to hit North Vietnam harder and without regard for the territorially-circumscribed limits imposed by the Johnson Administration. Third, the logic of sustained reprisal or graduate overt pressure that underlay the transformation of the bombing campaign from a series of tit-for-tat operations to a more generalized, regularized air offensive implied that Rolling Thunder would automatically intensify over time.

As it did. Over the course of 1965, fixed target in North Vietnam were initially confined to the panhandle, then crept up to the northwest part of North Vietnam, and finally moved within the northeast quadrant itself (which remained off limits to armed reconnaissance missions with their authority to fire at "targets of opportunity"). Writing a memo to LBJ in January 1966, complete with enclosed map (reproduced at Figure 1) showing in color-coded dots the drift of

[49] Cited in Clodfelter, *The Limits of Air Power*, p. 97.

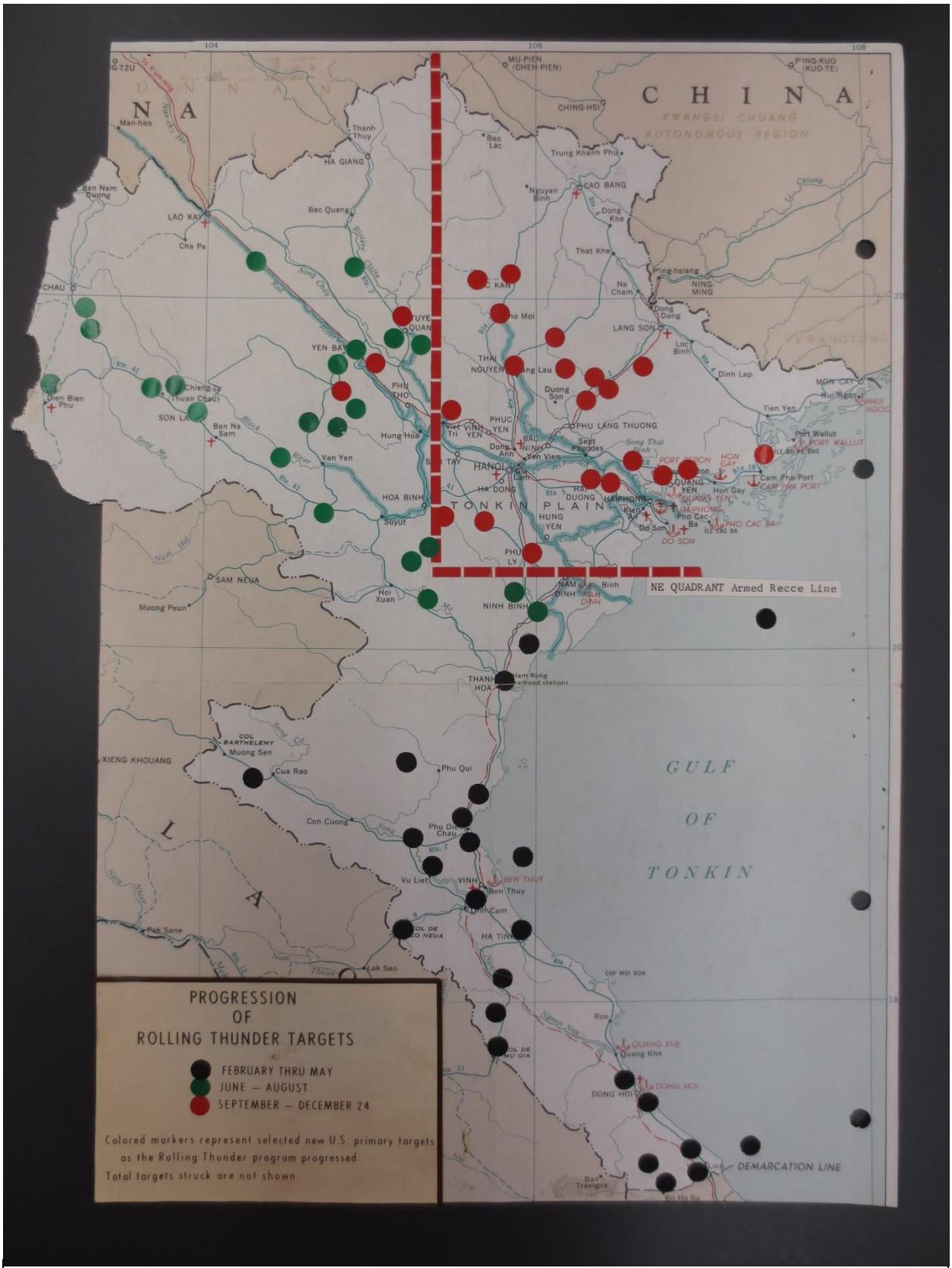

Figure 1: "Progression of Rolling Thunder Targets," Temporary Box 264 (oversize items), Vietnam Country File, National Security File, Lyndon B. Johnson Library, Austin, Texas.

targets northwards, George Ball called attention to both the drivers and implications of this.[50] "No matter how firmly we intend to limit our air offensive against North Viet-Nam," wrote Ball, "we will move inexorably toward the destruction of increasingly sensitive targets. This is not a question of bad faith on anybody's part. It is part of a process demonstrated over time: that a sustained bombing program acquires a life and dynamism of its own." In the eleven months since the shift to sustained bombing after the Pleiku incident, noted Ball, "we have gradually shifted from military targets located in the southern part of North Viet-Nam and directly associated with infiltration to targets in the Northeast Quadrant associated more with the economy of the country and its lifelines to China than with the movement of men and supplies to the South." As the bombing closed in on Hanoi and Haiphong, the United States was "steadily constricting the geographical scope of immunity" and Ball felt the pressure would only grow to mine Haiphong harbor, destroy POL supplies, destroy power stations, and attack airfields. To do so, however, would be misguided. "To bomb the energy sources of North Viet-Nam," for example, "would threaten the industrial life of the country," while "none of these attacks—on the harbor or POL or on the power stations—would," and here Ball quoted directly from a recent intelligence assessment, "in itself, have a critical impact on the combat activity of the Communist forces in South Viet-Nam." Given that the United States simply did not know, "even within wide margins of error," the threshold point for Chinese entry into the war, prudence and restraint were called

[50] George Ball to President Johnson, Memorandum, "The Resumption of Bombing Poses Grave Danger of Precipitating a War With China," 25 January 1966, Doc. 70b, Folder 6 (Vol. 46, 1/21-31/66, Memos (A) [1 of 2]), Box 26, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

for.[51] For Ball, even tit-for-tat reprisal held dangerous potential for escalation; "sustained reprisal" all but guaranteed it.

Throughout 1965, the Administration had attempted to downplay the reality of the movement in target location and type. Speaking at a Pentagon news conference in April, McNamara noted that "the air strikes have been carefully limited to military targets, primarily to infiltration targets. To transit points, to barracks, to supply depots, to ammunition depots, to routes of communication, all feeding the infiltration lines from North Vietnam into Laos and then into South Vietnam." In November, McNamara sought to explain the substantial geographical slide in targeting (see Figure 1) that had occurred since April: "there are two arms to the railroad between Hanoi and China. … Both of those rail lines have been bombed, as have been the parallel highway lines, just because these are infiltration routes, or routes supporting infiltration. As we said before, the bombing against North Vietnam is directed against military targets and particularly those targets are a part of, or associated with, lines of communication along which men and materiel flow into South Vietnam." The following month, after the strike on the Uong Bi power plant, McNamara reported the strike was "representative of the type of attacks we have been carrying out and will continue to carry out—attacks on military targets which are associated with the production of ammunitions of the type that are being infiltrated over the routes through Laos and into South Vietnam and, therefore, serving as the foundation of the logistical support for the Communist guerrillas in South Vietnam. This plant, as you know,

[51] George Ball to President Johnson, Memorandum, "The Resumption of Bombing Poses Grave Danger of Precipitating a War With China," 25 January 1966, Doc. 70b, Folder 6 (Vol. 46, 1/21-31/66, Memos (A) [1 of 2]), Box 26, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

furnishes power supply to the munitions plant in both Haiphong and Hanoi."[52] In McNamara's words, then, targets had drifted from infiltration lines running from Hanoi to South Vietnam, through supply lines running from China to Hanoi, to power plants that produced electricity for factories that produced military goods, all of which he had classified as "military targets."

The language of legitimate "military targets" was deployed to perform much the same function as the rhetoric of reprisal—to send a signal about Washington's limited war aims. The language was even deployed when the underlying logic was nonetheless still one of reprisal, i.e., the Uong Bi power plant strike. In cases such as this, the attempt to achieve two conflicting goals—maintaining a regular pattern that showcased limited intentions while simultaneously departing from that pattern in a spectacular show of Washington's determination to persist—showed just how elastic the idea of "military target" could be. And because the more spectacular, reprisal-like strikes were couched as nothing out of the ordinary, the targets they struck eventually became ordinary military targets, thus enabling targeting policies to move past previous geographic limits and category constraints. "In terms of law," wrote Pickert, "the technique of reprisal was distorted into a grotesque; rather than minimize the violence, it helped to maximize it."[53]

Despite questions from within the Administration (in the lead up to the Uong Bi strike, Lodge queried Washington as to "the question of whether this strike initiates change in past

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[52] Jack Valenti to President Johnson, Memorandum (covering press conference summaries), 4 February 1966, Doc. 186a, Folder 1 (Vol. 47, 2/66, Memos (B) [1 of 2]), Box 28 [1 of 2], Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[53] Pickert, "American Attitudes Toward International Law as Reflected in 'The Pentagon Papers,'" p. 90. Also see pp. 89-90, in which Pickert notes the United States "turned the reprisal into an instrument of escalating violence."

policy of avoiding industrial targets"),[54] an official "nothing to see here" attitude persisted for the rest of the war, including when regular targets were expanded to include major POL facilities in the Hanoi-Haiphong region in mid-1966 and to power plants and industry in late 1966.[55] Accidents occasionally happened (as in July 1965 when a hospital was mistaken for a barracks), for which briefers expressed regret, but as a rule, they said, the United States only struck military targets. "There has been on occasion a gradual change in types of targets in North Vietnam as we clean up one type and shift to another," McNamara told the press in early 1967. "Such changes do not represent a drastic change in policy."[56] The insistence that the United States only struck military targets gave Washington some cover as those targets broadened in reach and type.[57] But this steady movement upwards and outwards of American targets in North Vietnam also put targeting policies and practices increasingly out of the reach of international law—or, at least, out of the reach of State Department lawyers.

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[54] Amembassy Saigon to State Dept, Cable, Saigon 2074, 9 December 1965, Doc. 1, Unnumbered Folder (Reprisal Strike Power System, 12/65), Box 221, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[55] The military petitioning to strike power plants was premised on their belief that they were military targets: "Our Air Power is not being used to its maximum effectiveness. Many lucrative targets and target systems should be attacked to increase the pressure applied to the enemy. This is not the time for relaxation of pressure. A broadened target base designed to lead Hanoi to expect attacks anywhere, at any time, against any type of military target or activity that supports their aim is essential. The targets and freedom of actions proposed by the JCS for Rolling Thunder 52 are a first step towards this broadened target base. Implementation of RT 52 would again increase the pressure on NVN, although not using our air power to its maximum effectiveness. It is time now to tell Hanoi that no military target, no activity that helps sustain the NVN effort to prosecute the war, is free from attack." CINCPAC to JCS, Cable, DTG 261920Z OCT 66, 26 October 1966, Doc. 67, Folder 2 (Vol. 60, 10/66, Cables), Box 37, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas. Cf. JCS Chairman Earle Wheeler's comment to LBJ in June 1966 to the effect that power plants were not widely recognized as legitimate military targets. Cited in Clodfelter, *The Limits of Air Power*, p. 103.

[56] Secretary of Defense, Public Affairs Advisory Cable, DTG 162352Z MAR 67, 16 March 1967, Doc. 79, Folder 4 (Vol. 67, 3/1-19/67, Cables), Box 41, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[57] Janina Dill's logic of sufficiency vs logic of efficiency framework is useful for thinking about the elasticity of the concept of military target. See: *Legitimate Targets?* On the elasticity of targets in the Korean War, see Sahr Conway-Lanz, *Collateral Damage: Americans, Noncombatant Immunity, and Atrocity after World War II* (New York: Routledge, 2006).

IV

Two basic approaches to targeting can be discerned from the documentary record of the American bombing campaign against North Vietnam. The first emerged out of an American military not far removed from its experiences in World War II and the Korean War. An initial targeting plan was devised by the Joint Chiefs of Staff in April 1964, in the course of responding to a National Security Council instruction to draw up plans for both "retaliatory bombing strikes … on a tit-for-tat basis by the GVN against NVN targets (communication centers, training camps, infiltration routes, etc.)" and "graduated overt military pressure" on North Vietnam that "would go beyond reacting on a tit-for-tat basis" to "include air attacks against military and possibly industrial targets."[58] The list of targets incorporated into the April plan (Operations Plan or OPLAN 37-64) included airfields, bridges, supply and ammunition depots, petroleum storage facilities, and North Vietnam's "industrial base." The plan also entailed the mining of Haiphong Harbor, which encompassed North Vietnam's primary port facility.[59] In late May the JCS plan was modified with targets now described as having "maximum psychological effect on the North's willingness to stop the insurgency—POL storage, selected airfields, barracks/training areas, bridges, railroad yards, port facilities, communications, and industries."[60] The list was formalized and enumerated in August 1964 with the production of a revised list of 94 targets, including 82 fixed targets and 12 lines of communication (LOC).[61] The 94-target list would later be supplemented by further targets and targeting information in accordance with Washington's

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[58] Memorandum From the Secretary of Defense (McNamara) to the President, 16 March 1964, *Foreign Relations of the United States 1964–1968, Volume I, Vietnam, 1964*, Document 84. This memorandum was formally sanctioned by the President as National Security Action Memorandum No. 288, 17 March 1964, *Foreign Relations of the United States 1964–1968, Volume I, Vietnam, 1964*, Document 87.

[59] Clodfelter, *The Limits of Air Power*, pp. 45-46.

[60] Cited in Clodfelter, The Limits of Air Power, p. 46.

[61] Clodfelter, *The Limits of Air Power*, p. 51.

global targeting database, the Bombing (or Basic) Encyclopedia.[62] But the 94-target list remained the essential framework for targeting (especially of fixed targets) over the course of the war.

The inclusion of military, industrial, and transport infrastructure targets on the list indicated the bias of the US military (based on its recent history of fighting World War II and the Korean War) towards strategic bombing. It is clear, moreover, that an in-built assumption accompanied the development of 94-target list (and its predecessors of April and May 1964): that to identify a target was to approve of its destruction. Militaries devoted to winning wars identify targets whose destruction will aid in the pursuit of victory—or at least the achievement of the campaign's political objective—and the 94-target list was therefore delivered to McNamara *alongside* a plan to deliver a "sharp blow" to North Vietnam that entailed hitting most or all of the listed targets.[63] To identify something as a target assumed that it was targetable. Others, (including politicians, diplomats, and lawyers) with different perspectives on the issue and different interests to promote might not have agreed with the military's underlying premise but were nonetheless forced to work within the parameters of the target list as presented; from the outset, then, they were at something of a disadvantage in that they had to argue why something already assumed to be targetable in a general sense should not be targeted on any particular occasion.

This is not to say that the military assumptions embedded within the 94-target list were devoid of any consideration of politics, diplomacy, or law—and one prominent American

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[62] McNamara gave LBJ a snapshot of the target situation in October 1967: "There are 9,000 targets in the bombing encyclopedia; 5,000 of these are military targets; many of these are worthless; 1,700 of these have been hit; the JCS consider 400 to 600, presently 412, as 'important fixed targets'; there are only 24 of these 412 not authorized (that is 5.8%); nine of these targets are in the Haiphong area and about 15 in Hanoi." Notes of the President's Meeting with Secretary McNamara, Secretary Rusk, Walt Rostow, and George Christian, 4 October 1967, Box 1, Tom Johnson's Notes of Meetings, Lyndon Baines Johnson Library, Austin, Texas.

[63] Clodfelter, *The Limits of Air Power*, p. 51, also p. 47.

commentator has noted that the 94-target list received the approval of the Department of Defense General Counsel.[64] It is more to say, rather, that such considerations were of a different nature. We might imagine that, for the military, legal considerations in developing the 94-target list were of an operational or tactical nature. While we cannot know for sure, it seems likely that the 94 targets were vetted according to the laws of war on the conduct of hostilities, which would have focused the question on whether or not each of the targets could be linked in some way to some form of military activity or advantage, i.e., it was not a purely civilian target. And if each target on its own could legitimately be struck, then it was legitimate for all of them to be struck in the course of a "sharp blow." But civilian officials, including lawyers, were more concerned about targeting within broader strategic parameters, including the need to convey its sense of limited objectives to North Vietnam, its key allies, and the wider world. Initially the logic of reprisal served that purpose, but (as noted above) in February 1965 the State Department Legal Adviser Leonard Meeker, noting the dubious place of reprisals in the post-1945 international legal order, insisted on putting self-defense front-and-center. Meeker and other attorneys in "L," did not neglect the law relevant to the conduct of hostilities (they followed up on allegations that the United States targeted hospitals and sanitariums in North Vietnam, for example), but American responsibilities under the Charter were their primary concern.

Assisting South Vietnam in its defense against aggression from North Vietnam entailed a commitment to use force only to the point at which the aggression ceased. The military defeat or unconditional surrender of Hanoi was not an American objective. The doctrine of self-defense both mandated this limited approach as a point of law, and also allowed the United States to

[64] W. Hays Parks, "Rolling Thunder and the Law of War," *Air University Review*, Vo. 33 (1982). Parks suggests that McNamara, rather than the JCS, sought the General Counsel's legal advice on the 94-target list.

signal its limited intent. "We have refused to issue" a declaration of war, remarked Dean Rusk in 1966, "because it is legally superfluous and because it would carry the clear message that we were out to destroy Hanoi, thus increasing the risk of Chinese Communist intervention and a wider war."[65] It was not entirely clear, however, exactly what sorts of limits the doctrine of self-defense prescribed. Writing in his February 1965 memorandum, "Legal Basis for United States Actions Against North Vietnam,"[66] Meeker had stressed that the doctrine permitted "the use of force in a manner consistent with the purposes and principles of the [UN] Charter" (7, 8), but he was vague as to what that that meant. Certainly the actions taken had to be "defensive in character and designed to resist armed aggression" (8), had to be reported to the UN Security Council immediately (8, 9), and had to constitute "a limited and measured response, fitted to the situation that produced it" (9). He implied, further, that for a response to be measured and fitting it must be directed against "military targets" (1, 2, 5, 9). These conditions were still rather capacious, however, and the need for American use of force to be "proportioned with the design of sustaining Viet-Nam in its defense against aggression" (4) could still entail substantial use of force. This is what Walt Rostow argued in urging a more aggressive air campaign against the North in mid-1965, including hitting targets in Hanoi. America's "limited, legal objective"—restoration of the *status quo ante bellum*—should no longer be "confused" with "limitations of

[65] Dean Rusk to President Johnson, Memorandum, "Proposals that have been made concerning Viet-Nam and actions taken,"11 February 1966, Doc. 169a, Folder 1 (Vol. 47, 2/66, Memos (B) [1 of 2]), Box 28 [1 of 2], Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[66] Leonard C. Meeker, Memorandum for Mr. McGeorge Bundy, "Legal Basis for United States and South Vietnamese Air Strikes," 11 February 1965, Doc. 214, Folder 4 (Vol. XXVIII, 2/9-19/65, Memos), Box 13 [2 of 2], Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

means, short, of course, of using nuclear weapons or inflicting indiscriminate civilian casualties," wrote Rostow to Rusk in mid-1965.[67]

But Meeker did believe the doctrine of self-defense involved limitations in the waging of war short of targeting civilians as such or using nuclear weapons. He did not stress those limitations in February 1965, probably because his primary emphasis at that stage was on using the doctrine of self-defense to justify, rather than limit, the American war effort. But two years later he wrote, together with an assistant legal adviser in his office, George Aldrich, a much more extensive memorandum expanding on the limits to the use of force inherent in the doctrine of self-defense.[68] Meeker stressed, possibly in response to the way the military conceived of legitimate targets, that while the laws of war most certainly applied to the bombing of North Vietnam, they were not the only body of law that applied: "Both types of limitations apply" (6). This meant that certain practices that had been acceptable in World War II were not applicable to a situation of self-defense.[69]

Meeker and Aldrich began by reaffirming the limitations on intent inherent in the doctrine of self-defense: "military action in self-defense does not include destruction or subjugation of the aggressor, the pursuit of total victory or unconditional surrender. Measures taken in self-defense must be reasonably required for the more limited purpose of repelling the

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[67] Walt Rostow to Dean Rusk. Memo. "Hitting Hanoi Targets." 26 July 1965. Document 312, Folder 3, Box 20, Vietnam Country File, National Security File, Lyndon B. Johnson Presidential Library, Austin, Texas.

[68] Leonard C. Meeker, Memorandum for the Secretary and Under Secretary, "The Scope of Self-Defense in the Air War Against North Viet Nam," 18 April 1967, Box 10, Leonard C. Meeker (1937) Papers, Archives and Special Collections, Amherst College Library, Amherst, Massachusetts.

[69] "By the end of World War II, the international community had arrived at a point where the only apparent accepted limitation on use of air power in international hostilities was that air strikes must not violate the 'laws of war', and even saturation bombing of centers of civilian population was not considered a violation" (2). Elsewhere in the memo, Meeker gave "bombing a marked hospital" as an example of a law-of-war violation (4).

attack" (2). In practical terms, this meant that actions "must be aimed at military purposes that are directly related to turning back the aggression. General harassment of the aggressor or the infliction of indiscriminate damage on the aggressor's territory and population, in order to demoralize or exert pressure, does not qualify" (2, 4-5).

Determining what actions did qualify as self-defense was not easy in the present situation, and the two lawyers acknowledged Vietnam was "complex, because the North Vietnamese armed forces retained in the North are backstopping the aggression in the South and are the source for a continuing flow of replacement units in the aggression" (5). Certainly that allowed the United States the right to use force upon North Vietnamese territory. "To the extent that the attack by North Viet Nam cannot be adequately defended against in the South, the use of force against the North is permissible, provided that this use of force stays within the framework of self-defense" (5-6). Beyond that, however, there were "no easy answers"—only questions that "need to be asked and relevant data produced for consideration before decisions are reached" (6).

Those questions differed according to the type of target. Infiltration routes posed no particular problems: "The interdiction of roads, railways, canals and other means of communication used for sending men and supplies to South Viet Nam seems clearly justifiable as part of collective self-defense" (6). And neither did military installations: "Arms depots, military truck yards, and staging areas for the movement of North Vietnamese troops to the South are targets plainly satisfying the requirements of self-defense, in view of the sizable military forces infiltrated from the North" (7). Beyond that, however, questions of judgment became ever more important.

Striking petroleum stocks raised some questions, for instance, "since they are required for civilian uses in North Viet Nam unconnected with the aggression against the South." Various

considerations came into play. "The percentage of total petroleum consumption used in direct support of the aggression would be a consideration. So also the objective of the air strikes: to destroy all stocks, or those most closely connected with military uses. There is, moreover, the question of replacement of petroleum stocks intended for military use; if military needs can fairly readily be supplied through fresh imports even after the destruction of stocks and storage facilities, justification of air strikes becomes more difficult" (7). Similar questions arose with the lines of communication *into* North Vietnam, i.e., the roads and railways from China to Hanoi and the port of Haiphong, which were "less directly involved in the attack on the South than are the infiltration routes and are used for imports both of a military and non-military character." Since identification of individual loads of cargo as military or non-military was impossible, an overall determination should be made: "For example, if only twenty-five percent of the cargo imported at Haiphong consists of military equipment or materials used in furtherance of the aggression, attempts to destroy the port, prevent entry of ships, or prevent transshipment of cargo onto Hanoi, would raise serious legal problems" (7).[70]

In discussing industry more generally, Meeker argued along similar lines. Factories could be targeted if they were "producing items used in the aggression against the South and of real significance to that aggression."[71] If a factory mostly produced items "which were used for the civilian population but a small percentage of which were sent to the forces fighting in the South, a substantial question would arise whether that factory would be a legitimate target. … The percentage of production used for both military and civilian purposes would need to be

[70] This was leaving aside the further (and not unimportant) problem "of air strikes on a port are that hit shipping of third countries" (7).

[71] An arms production factory would, therefore, be a clearly legitimate target, but "a textile plant, although producing fabric used to clothe soldiers sent to the South would probably not be a legitimate target because the fabric would not be of sufficient significance to the aggression" (8).

examined, as well as the relative importance of the production to the support of the aggression against the South." If the military needs for the industrial product could "be readily met from other sources (e.g., Soviet aid)" then striking factories which produced that product, but which mostly produced goods for civilian consumption, "would be harder to justify" (8).

Out of Meeker's discussion of POL, LOC, and factories, then, emerged an argument that making *some* military contribution to the infiltration/aggression effort did not automatically make an object a legitimate military target. The relative weight of military vs. civilian production was an important consideration, as was the ease with which the produced goods could be sourced from elsewhere. This need for balancing tests was carried over into Meeker's discussion of power plants: "A power plant would be a legitimate target if it is used to produce power principally for a military activity or to run a factory which is itself a legitimate target. On the other hand, power plants used principally to provide power to cities or for other civilian needs would presumptively not be legitimate targets." In "the case of a plant supplying power to an electric grid system that can be used for any purpose," Meeker wrote, "the relative importance of electric power to support of the aggression and to civilian welfare would have to be considered" (8-9).

At the end of the range of targets Meeker discussed were Dikes and Cities. Generalized attacks on dikes were prohibited and while "an attack against a particular dike for a limited purpose" might be justifiable, "for example, destruction of a dike to render inoperable a section of canal used to carry supplies to South Viet Nam," even such limited action should not be taken lightly: "Many uncertain cases can be posited where the intent is appropriately limited but the predictable damage is much broader" (9). With regard to cities, Meeker wrote simply that

"however saturation attacks upon cities stand under the 'laws of war', they would be exceedingly difficult to justify as legitimate measures in the collective self-defense of South Viet Nam" (9).

Although careful to frame everything as a hypothetical, and to not put much (only cities, really) automatically out of targeting bounds, Meeker's memo can certainly be read as a criticism of much of the logic that went into selection of Rolling Thunder targets. Coming in April 1967, however, prompts the thought that it was both too late and too subtle. Nonetheless, it was important as an extended articulation of the doctrine of self-defense, and of what the doctrine meant at an operational level. Meeker was forceful in arguing that in its air campaign against North Vietnam, the United States should adhere to the restrictions inherent in the doctrine of self-defense, including by reprising his mid-1965 argument for the application of the Geneva Conventions to the Vietnam conflict. "Since we have rested our case on self-defense," Meeker warned, "military operations must stay within that framework if the case is to hold water" (1). He gave two other reasons for keeping American actions within the limits he had set out: the need to show clear "conviction that our aim is protection of South Viet Nam from aggression, not destruction or subjugation of the North" (1); and the concern for setting precedent. "International law is made only to a small extent by the writings of publicists," warned Meeker, "and in much larger measure by the actions of governments: what a great power such as the United States does on the world scene is going to be very influential in shaping the future international law; we have a heavy responsibility since precedents set today make the law of tomorrow" (1-2).

Although Meeker distributed the memo quite widely around senior levels of the State Department, there is no marking on it to suggest he circulated it beyond Foggy Bottom. An oblique comment by George Aldrich, however, suggests that the memo, or at least the ideas

within it, were presented to officials in the Department of Defense and a debate ensued over the nature of the restraints that should apply to the selection and striking of targets in North Vietnam.

In late 1968, as the clock was running down on the Johnson Administration, Aldrich wrote to Abram Chayes, Meeker's predecessor as Legal Adviser now back at Harvard Law School, with the idea of writing a book about the role of law in the Vietnam War. As the Office of the Legal Adviser's desk officer for East Asia, whose responsibilities included Vietnam and the war waged there by the United States, Aldrich posited himself as uniquely suited to write such a book. "I am probably the only person who has been involved in many of the principal decisions on all of the subjects dealt with in the enclosed outline," wrote Aldrich, enclosing a quite detailed (11-page) outline of the proposed book. [72]

On that outline, under the subject heading of aerial bombardment in North Vietnam, Aldrich first proposed to write about the "limitations imposed by self-defense theory on airstrikes," presumably as an opportunity to reprise the arguments made in his and Meeker's April 1967 memorandum. And in a succession of quick-fire bullet points, he gave an indication as to how those arguments of Aldrich and Meeker had been received around Washington and in the field: "argument with DOD on this question; difficulties of applying these limitations to specific targets; procedural impossibility of imposing legal limitations; purposes of the bombing inconsistent with these limitations."[73]

It is clear from this that State, or at least the department's Office of the Legal Adviser, pressed its case with counterparts in the Department of Defense, but failed to get far. Aldrich

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[72] George H. Aldrich to Abram Chayes, Letter (with enclosure), 5 December 1968, Folder 1, Box 51, Abram Chayes Papers (Series II, Subseries A), Harvard Law School Library, Cambridge, Massachusetts.

[73] George H. Aldrich to Abram Chayes, Letter (with enclosure), 5 December 1968, Folder 1, Box 51, Abram Chayes Papers (Series II, Subseries A), Harvard Law School Library, Cambridge, Massachusetts.

implies that the failure was due, in one part, to the incompatibility of the State Department's understanding of self-defense with the understanding prevalent in the military (and among others, too, such as Walt Rostow) that success could come (and perhaps only come) through the weakening of the enemy's industrial capacity and civilian morale in an attempt to induce North Vietnam's leaders to come to terms, either formally or tacitly. [74] To these conceptual inconsistencies, Aldrich noted that the failure was due, in another part, to procedural problems, probably a reference to the lack of legal oversight of the process that determined which targets would be struck in North Vietnam.[75] The final element of State's failure to convince Defense of its interpretation of targeting restrictions was the problem of application, presumably the difficulty of applying Meeker's careful balancing tests to specific targets, which might have been seen as too complex or unwieldy (as well as just too plain limiting) to put into operation.

Aldrich's letter to Chayes, and the book outline enclosed with it, contains only hints of the debate between the State Department lawyers and the Department of Defense over aerial bombardment and the limitations inherent in the right of self-defense (Aldrich explained to Chayes that "many issues are identified only cryptically—in part for security reasons"), but Aldrich did write forcefully of the need to eventually bring the debate, along with the whole gamut of legal issues prompted by the Vietnam War, into the open. Echoing Meeker's concern for the future, Aldrich wrote Chayes that "the precedents that have been set in Viet Nam are, in a

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[74] This debate was reproduced outside government, with similarly inconclusive results. "Can bombing be considered lawful because the attacking party has declared that the bombed enemy areas contain 'military' targets when such targets are, in fact, not distinctly and primarily essential to the enemy's military strength?" asked two analysts in 1975. "We think that it cannot," they answered, further noting that "any destruction that is not primarily and predominantly designed to weaken the enemy militarily is unlawful. When its foremost purpose is to coerce an immediate political settlement, it is illegal per se, even though military objects are targeted." Hamilton DeSaussure and Robert Glasser, "Air Warfare—Christmas 1972," p. 131 and p. 139. Channelling Clausewitz, members of the military (including lawyers) replied that all war is an extension of politics and that to therefore create such a fine distinction was somewhat absurd.

[75] The process, and its lack of lawyerly input, is summarized in Dill, *Legitimate Targets?* pp. 147-148.

strict sense, immutable. In a broader sense, however, their influence upon future actions can and will be affected by the ways in which they are reported, interpreted, and understood. One of the principal reasons I want to write this book is to put these precedents into perspective—to show how the issues arose, the factors that affected the decisions, including the procedures by which the decisions were made, and, in particular, the ways in which law was and was not an effective force for restraint. I think such a study could affect our views, and our actions, in future conflicts."[76] Shortly after writing to Chayes, Aldrich was appointed Deputy Legal Adviser, and his proposed book went unwritten. As Deputy Legal Adviser, Aldrich led the American delegation in the negotiations for the Additional Protocols to the Geneva Conventions, a position in which he had plenty of opportunity to shape the way the American legal interpretations emerging out of Vietnam became part of the international legal order (see Chapter 6). But on the question of what restraints upon the use of force were embedded within the doctrine of self-defense, Aldrich's interpretation, developed in partnership with his colleague Meeker and promoted in the face of DOD resistance, failed to gain much traction with those responsible for approving target strikes in Vietnam. Still, while the arguments of the State Department lawyers were kept well away from actual targeting practices, and while an expansive understanding of valid targets remained in place, the need to prove limited intent through strategic restraint persisted. In the absence (or rejection) of Meeker's series of self-defense balancing tests, other metrics for measuring restraint, and therefore legitimacy, would be needed.

[76] Aldrich to Chayes, Letter, 5 December 1968.

V

In October 1966, a RAND Corporation analyst, Oleg Hoeffding, produced a report on the air war against North Vietnam.[77] At the heart of the report was the tension embedded within Rolling Thunder between the dual desires of forcing North Vietnam to curtail its support of the southern insurgency and ensuring that the larger Communist powers did not intervene in the war directly.[78] The road to ensuring the latter, as noted above, was generally taken to be not threatening the survival of North Vietnam as a Communist state. Hoeffding observed that the high-level pledge not to destroy the Hanoi regime was expressed not just in words (which the Communist powers were wary of, in any case) but was also translated into adherence to concrete constraints at the tactical level. How credible these tactical constraints were in proving American commitment to its stated limited objective at the strategic level depended on "various audiences: the DRV itself, third parties (whether hostile, neutral, or friendly), and—last but not least—the U.S. public" (23).

One of the two primary tactical constraints Hoeffding observed in the prosecution of Rolling Thunder was the commitment to limit strikes to military targets. Deliberate strikes against civilians were widely seen as a tell-tale sign of expansive war aims, and so to engage in strategic bombing of cities would indicate a desire for victory that would surely be of concern to the larger Communist powers. As Assistant Secretary of Defense John McNaughton (the man who commissioned Hoeffding's report) noted in early 1966, "strikes at population targets (per

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[77] Oleg Hoeffding (The RAND Corporation), "Bombing North Vietnam: An Appraisal of Economic and Political Effects," pp. 23-24, Doc. 159, Folder 1 (Vol. 61, 11/66, Memos (A)), Box 38, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas. The report was unclassified and is now available online (http://www.rand.org/pubs/research_memoranda/RM5213-1.html, accessed 24 March 2016), but it was originally commissioned by the Department of Defense and Hoeffding had access to intelligence reports during its preparation.

[78] On this dual aim, see also the discussion of positive vs. negative objectives in Clodfelter, *The Limits of Air Power*.

se) are likely not only to create a counterproductive wave of revulsion abroad and at home, but greatly to increase the risk of enlarging the war with China and the Soviet Union."[79]

To not target civilians directly or to bomb cities indiscriminately, however, still left a lot of leeway with regard to target selection. Committing to striking only military targets left open the question of what, exactly, was a military target. "In contrast to other and more objective criteria, such as the Yalu River" noted the RAND analyst Hoeffding in Schelling-esque language, "'military objectives' are peculiarly subjective and stretchable" (24). "Military objectives," he explained, "can be defined as any installation or activity supplying inputs that contribute to final frontline military production. The backward linkages of the frontline are numerous and deep. The backward links also soon cease to be uniquely or mainly military as to destination of their output. There are no logical criteria for excluding any link from the definition, though one may attempt to rank them by 'military importance,' 'criticality,' etc." (24). (Meeker performed just such a ranking exercise according to his self-defense criteria.) Hoeffding assumed that the effectiveness of the bombing campaign in achieving its goal of forcing an end to Hanoi's campaign against Saigon would probably "be the greater the more the constraint definitions are stretched," i.e., implementing a more expansive definition of "military objective," or allowing a greater number of backwards linkages from the frontline, would give the military more leeway to use firepower in pursuit of victory. Given the "highly elastic" nature of the "military objective" concept, the United States had the opportunity to implement just such a definition. And under what McNaughton called "a 'military' cover,"[80] Washington steadily and

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[79] John McNaughton, "Some Observations about Bombing North Vietnam" (2nd draft, sent under covering note to McGeorge Bundy), 18 January 1966, Doc. 142b, Folder 2 (Vol. 46, 1/21-31/66, Memos (B) [2 of 2]), Box 27, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[80] Writing in early 1966, Assistant Secretary of Defense John McNaughton thought that a bombing program aimed at persuasion (rather than pure interdiction) should do two (among other) things: "Avoid undue risks

stealthily expanded the targets of their airstrikes across both space and type from early 1965 (see Sections II and III above). Officials always stressed the fact, in internal discussions and in public statements, that the United States never bombed civilian targets, thus providing a sharp (if somewhat contrived) contrast to the American position as moderate, restrained, and unchanging. The addition of new target locations and categories was always played down by noting the underlying *consistency* of always and only hitting military targets.

While a broad definition of military objective enabled Washington's target creep, and the launching of "truly painful strikes at 'military' targets,"[81] there was a downside to the elasticity of such targets, which Hoeffding duly noted. "On the other hand," he wrote, "the more generous the constraint definitions, the harder would it be to preserve the credibility of an asserted posture of restraint in objectives and targets" (23). In other words, the more things the United States subsumed under the "military objective" (or "military target") umbrella, the greater the doubt that would be cast on Washington's commitment to strategic-level restraint—to not bring down the North Vietnamese government. The further targets moved from purely military functions, the more potential there was to suspect the United States of targeting civilians more-or-less directly—a tell-tale sign of a shift in American war aims. In late 1965, a CIA estimate of the probable Communist reaction to US air attacks on North Vietnamese POL facilities noted that such a "course of action would represent a conspicuous change in the ground rules which the US

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and costs: the program should avoid bombing which runs a high risk of escalation into war with the Soviets or China and which is likely to appall allies and friends"; and "Maintain a 'military' cover: to avoid the allegation that we are practicing 'pure blackmail,' the targets should be military targets and the declaratory policy should not be that our objective is to squeeze the DRV to the talking table, but should be that our objective is only to destroy military targets." John McNaughton, "Some Observations about Bombing North Vietnam" (2nd draft, sent under covering note to McGeorge Bundy), 18 January 1966, Doc. 142b, Folder 2 (Vol. 46, 1/21-31/66, Memos (B) [2 of 2]), Box 27, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[81] John McNaughton, "Some Observations about Bombing North Vietnam" (2nd draft, sent under covering note to McGeorge Bundy), 18 January 1966.

has hitherto observed in prosecuting the war in Vietnam. Most of the eight principal remaining targets are in an area to which the US has accorded special status—a matter almost certainly understood by the Communists." With the two most prominent installations being in Hanoi and Haiphong, "the chances are that the US attack would inflict considerably larger numbers of civilian casualties than have yet been produced by US air attacks. … Thus, the Communists would unquestionably regard the proposed US attacks as opening a new stage in the war, and as a signal of US intention to escalate the scale of conflict."[82] Writing in late 1966, Hoeffding noted that, contra the CIA assessment, Hanoi-Haiphong POL sites *had* been successfully incorporated into the understanding of what constituted a legitimate military target (he put this down to POL's "strong and genuine 'military' flavor"), but that it might yet become "progressively harder" to preserve "the credibility of the 'military objective' designations." (25-26).

In order to maintain the credibility of its commitment to strategic-level restraint while broadening its definition of military target, then, Washington had to highlight its adherence to another tactical constraint. "In North Vietnam," wrote Hoeffding, "it seems likely that if escalatory target selection should branch out along [the] backward linkages, and more remote and less obviously 'military' links were to be classified as 'military objectives,' target selection would be increasingly constrained by the other criterion" that he had identified (24). That other

[82] Sherman Kent (Chairman, Board of National Estimates) to Director, Central Intelligence Agency, Memorandum, "Probable Reactions of the DRV, Communist China, and the USSR to US Air Attacks on Petroleum Storage Facilities in North Vietnam, at the Rate of Approximately Two Attacks per Week," 27 November 1965, Doc. 89, Folder 1 (Vol. XLII, 11/65, Memos (A) [1 of 2]), Box 24, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas. Writing one year later, NSC staffer Robert Ginsburgh similarly thought that a "reduction of constraints would lead to increased noncombatant casualties which might cause the Chinese to think that we were in fact out to target NVN population," although he concluded that "these risks are acceptable" so long as the population were not targeted directly and the ports were spared. His final judgement was that "the bombing of the north would be more productive and less costly if it were conducted with only those minimum constraints necessary to avoid indiscriminate killing of the population." Robert N. Ginsburgh to Walt Rostow, Memorandum, "To Bomb or Not to Bomb—and How Much?" 2 November 1966, Doc. 197, Folder 2 (Vol. 61, 11/66, Memos (B)), Box 38, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

criterion was "minimizing civilian casualties." Hoeffding perceptively identified the trade-off that was emerging at the heart of Washington's commitment to restraint (or, at least, of its commitment to being perceived as restrained): targets of ever-increasing distance from a purely military function could nonetheless be legitimately considered "military" *if* attacks on them took care to minimize civilian casualties.[83] The motivation to emphasize minimum civilian casualties was partly due, as Hoeffding suggested, to military calculation. If putting the spotlight on minimizing civilian casualties would allow the spotlight to come off target creep (both in terms of geography and category), then all the better, and from very early in the Rolling Thunder program all (fixed) target information included an estimate of the number of civilian casualties expected to result from a strike on that target.[84]

At every major step in the expansion of target categories (Hanoi POL in mid-1966, power plants later that year, Hanoi power plants in April/May 1967), advocates within the Administration of taking the step to a new level of targets argued their case at least in part on the basis of the minimal civilian casualties that would be involved. In April 1966, Rostow put the idea to LBJ that the United States "must increase the costs to Hanoi of continuing the war by going for oil or other precision target systems that hurt without killing an excessive number of

[83] In some ways, the United States was crafting a new distinction between the category *military* and the category *civilian*, or at least seeking to shift the stakes of what counted as "dual-use" objectives. Whereas Meeker's evaluation had proceeded along the lines of what a factory produced (and what percentage were military items), or where a particular line of communication led, i.e. something to do with the nature of the object, Washington was now suggesting that the key factor in determining the difference between a military object and a civilian object was a calculation of how many civilians would be harmed in a strike on the object in question.

[84] It is not entirely clear to me when this information began to be included on the 94-target list. It may have been prompted by the DOD General Counsel who, as noted above, supposedly cleared the list on the request of McNamara.

civilians."[85] The following month, he advised the President that an extension of target categories to include POL would require "a softening political-diplomatic track to reduce the noise level," including an emphasis on "low expected civilian casualties."[86] And another month later, in seeking to convince the more doveish Arthur Goldberg on the benefits of hitting POL sites, Rostow "pointed out (which is true) that a systematic attack on oil would almost certainly kill fewer North Vietnamese civilians than generalized harassment."[87] The following year, one of Rostow's key subordinates on the NSC staff, US Air Force officer Robert Ginsburgh, argued that "attacks on military targets, LOCs and repair facilities should proceed without geographic restriction but subject to the criterion that they not involve excessive civilian casualties." He went on to say that while Washington "could expect an increase in noise from attacking the remaining electric power and industrial plants because of their value and their location … since very few civilian casualties would be involved, the noise should be manageable."[88]

As Ginsburgh's comment indicates, the focus on minimizing civilian casualties was not purely a rhetorical exercise, and the need to manage noise over expanded target locations and categories led to policies and practices that did actually seek to reduce or minimize civilian casualties on the ground in North Vietnam. Targets on the 94-Target List which carried high

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[85] Walt Rostow to President Johnson, Memorandum, 5 April 1966, Doc. 227, Folder 7 (Vol. 50, 4/1-8/66, Memos (B)), Box 29, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[86] Walt Rostow to President Johnson, Memorandum, "The Politics and Diplomacy of Bombing POL," 10 May 1966, Doc. 199, Folder 1 (Vol. 52, 5/1-14/66, Memos (A)), Box 31 [2 of 2], Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[87] Walt Rostow to President Johnson, Memorandum, 16 June 1966, Doc. 49, Folder 4 (Vol. X (B), 6/66-2/67, Special Intell. Material), Box 51, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[88] Robert Ginsburgh to Walt Rostow, Memorandum (covering draft notes, "Military Options in Vietnam"), 20 February 1967, Doc. 86, Folder 3 (Vol. 66, 2/17-28/67, Memos (B)), Box 41, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

numbers of expected civilian casualties were queried, and often not authorized, by the Administration. Intelligence estimates of civilian casualty figures were commissioned, and included assessments that queried how the JCS came up with their figures of estimated casualties.[89] Operations involving the most sensitive targets (generally those located within Hanoi or Haiphong) were required to take extra precautions: the launching of an attack only in weather that permitted positive visual identification of the target; the use of experienced pilots; and particularly careful pre-briefs of those pilots.[90] In other words, while the focus on reducing civilian casualties might ultimately have been driven by the need to give "military cover" to the expansion of airstrike target locations and types, the commitment to reducing civilian casualties that this need induced was by no means illusory.

To be sure, Washington did try to take advantage of uncertainty about what, exactly, a *civilian* was. It dallied with something akin to the (juridically-discredited) idea of quasi-combatant, in which workers engaged in producing or transporting items with military significance were not considered true civilians. Such an understanding was implied when, for

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[89] See, e.g., Ray S. Cline (Deputy Director for Intelligence, CIA) to McGeorge Bundy, Letter (covering CIA Intelligence Report, "An Evaluation of Allied Air Attacks Against North Vietnam"), 8 November 1965, Doc. 9, Folder 4 (SEA Vol. VIII, 10/65-12/65, Special Intell. Material), Box 50, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas; Richard Helms (Director, CIA) to President Johnson, Memorandum, "Bombing Casualties in North Vietnam," 16 January 1967, Doc. 20, Folder 3 (SEA Vol. X (A), 6/66-2/67, Special Intell. Material), Box 51, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas. Note also that in mid-1966, the Defense Intelligence Agency established a new form of reporting involving analysis of post-strike photography. The "collateral damage" report surveyed photography of "damage caused by US strikes beyond the periphery of the target," and State Department INR analysts wanted more such estimates "to provide the Secretary with whatever information might be developed as to the effects of our military operations on North Vietnam civilian casualties, implications of attacks in populated areas, and damage and destruction of non-military targets." Bruce M. Lancaster to Benjamin H. Read, Memorandum, "Better Monitoring of Air Operations over NVN," 20 January 1967, Doc. 104, Folder 2 (Vol. 64, 1/67, Memos (B)), Box 40, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[90] See, e.g., the execution order for Rolling Thunder 52: JCS to CINCPAC, Cable, JCS 7735, 11 November 1966, Doc. 79f, Folder 2 (Vol. 63, 1/1-16/67, Memos), Box 39, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

example, Rostow wrote to LBJ in January 1967 highlighting a CIA assessment that "about two-thirds of the 18,000 civilians killed and injured by bombing were 'males engaged in truck-driving, bridge repair, and other war-related activities.'"[91] The RAND analyst Oleg Hoeffding posited that the "minimizing civilian casualties" criterion of restraint was perhaps just as flexible as the criterion of "military objective" given both that Hanoi "has involved its men, women and children in all kinds of para-military and war-supporting functions," and that the "tolerable maximum of 'minimized civilian casualties' is a point which anyone can fix for himself."[92] Nonetheless, in U.S. policy the category of civilian seems to have been less flexible than that of military target, and Washington's commitment to minimizing civilian casualties in North Vietnam was real—as other scholars are noticing.

The political scientist Neta Crawford argues convincingly that the Vietnam War was a real (though not unambiguous) turning point whereby "it became less acceptable among military professionals and the public to deliberately target civilians or strike in ways that could lead to foreseeable harm."[93] Crawford posits three possible explanations for this shift, all of which played some part, she argues, in developing new standards for the conduct of war. First, Crawford finds that a shift in normative beliefs—from thinking targeting civilians was morally justified as a way to end war quicker to a belief that targeting civilians was always morally wrong—partly drove the change. Second, Crawford argues that military leaders came to see bombing civilians as "unnecessary, ineffective, or counterproductive for its military objectives,"

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[91] Walt Rostow to President Johnson, Memorandum, 16 January 1967, Doc. 72, Folder 2 (Vol. 63, 1/1-16/67, Memos), Box 39, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[92] Hoeffding, "Bombing North Vietnam: An Appraisal of Economic and Political Effects," pp. 24-25.

[93] Crawford, "Targeting Civilians and U.S. Strategic Bombing Norms," p. 64. Cf. Sahr Conway-Lanz, in the same volume, who argues for greater continuity across time in American norms of noncombatant immunity.

contributing to the shift away from targeting civilians. Finally, Crawford argues that the need to maintain domestic and international support for a war led to political and military leaders conforming to the public understanding of the wrongness of targeting civilians.[94]

The archival record concerning the air war against North Vietnam most certainly supports the claim by Crawford that an important shift did occur during the Vietnam War, whereby tolerance levels for civilian casualties dropped sharply among both military professionals and the general public. And the record further suggests she is right that all three explanations posited for the shift operated in some way during the Vietnam War. Crawford's third explanation—that the need to secure domestic and international public support for the war effort drove the change—is especially powerful, and it complements rather than challenges the narrative of this chapter. Yes, American officials from Johnson on down did proclaim their commitment to minimal civilian casualties in order to keep the public on side with the war, as well as to counter claims made by opponents (often using North Vietnamese propaganda and publicity to support them) that the United States was directly targeting civilians in North Vietnam. (One of the charges brought forward by the Russell Tribunal was that the U.S. air war directly targeted civilians in North Vietnam). And in showing (as much as possible) the extent to which the U.S. military went to in order to avoid civilian casualties, Washington was able to retain much public support for the bombing campaign (or in the case of allies, prevent any prominent defections)—indeed, a not insignificant sector of U.S. public opinion wanted the air war to be waged more aggressively. But the public focus on civilian targeting also played into the Administration's hands, at least to some extent, in that the focus on the difference between military and civilian targets generally left unexplored—in the public debate, anyway—the shift that took place *within* military targets.

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[94] Crawford, "Targeting Civilians and U.S. Strategic Bombing Norms," pp. 65-68.

Another drawback of this explanation is that in focusing on public opinion it obscures the concern Washington had for North Vietnamese, Chinese, and Soviet perceptions of American actions. The requirement to minimize civilian casualties was designed as much to signal restraint to the Communist powers as anything else.

While Crawford's arguments are plausible, she also misses a key driver of the shift away from targeting civilians: that as much as any other reason, the prominence given to minimizing civilian casualties emerged out of a need to prove restraint in general, and limited war aims in particular. Civilian casualties became the measure of limited war—or, perhaps more accurately, they provided evidence that the United States was waging war in a measured manner. At a time when previously-established or alternative metrics—the doctrine of reprisal, Meeker's doctrine of self-defense—for understanding war as limited were rejected by, or strongly contested within, the administration, and at a time when another potential metric—the purely military status of targets—was being warped both spatially and conceptually, the number of estimated civilian casualties provided a clear unit of measurement by which to prove claims of limited intent regarding both ends and means. The concern for civilian casualties occurred not only because a norm against targeting civilians arose, but just as importantly because other norms of belligerent restraint were rejected.[95]

[95] This chapter has not discussed the Linerbacker operations of 1972—the two major air operations launched against North Vietnam during the Nixon Administration. While some authors see significant difference between Rolling Thunder and the Linebackers (e.g., W. Hays Parks on law-of-war issues), it might be better (as the analysis in this chapter suggests) to see the Linebackers as a culmination of the trends that emerged over the 3+ years of Rolling Thunder rather than a divergence from them. The use of precision-guided missiles enabled a greater concentration of firepower on Hanoi that had previously occurred, but the new technology did not drive—indeed, it *followed*—the conceptual shift to strikes directed not at cities per se but to a wide array of supposedly "military" targets within those cities. On the Linebacker operations in general, see: Stephen P. Randolph, *Powerful and Brutal Weapons: Nixon, Kissinger, and the Easter Offensive* (Cambridge, MA: Harvard University Press, 2007).

5. CHANGING PLACES

I

For foreigners who sought to comprehend Vietnam in the three decades after World War II, a not uncommon frame of reference was the sea. The journalist Bernard Fall first chronicled France's "war of vast empty spaces" in Indochina,[1] and after the French, Americans likewise imagined the land as a boundless, undifferentiated, ocean-like space. Henry Kissinger mused on the magnetic qualities of the Vietnamese landscape—a "distant monochromatic land, of green mountains and fields merging with an azure sea."[2] Karl Marlantes, both veteran and novelist of the American war, saw the Vietnamese jungle as "a gray-green sea," upon which his (fictional) company of Marines left no more mark "than a ship's wake,"[3] an image that recalls the American military advisor John Paul Vann's description of southern guerrillas as pushed into hiding "in the way a ship displaces water. The moment they departed, the guerrillas flowed back."[4] Ambassador

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[1] Bernard B. Fall, *Street Without Joy: The French Debacle in Indochina* Introduction by George C. Herring (Mechanicsburg, PA: Stackpole Books, 2005 [1961]), p. 6.

[2] Henry Kissinger, *White House Years* (Boston: Little, Brown and Company, 1979), p. 226.

[3] Karl Marlantes, *Matterhorn: A Novel of the Vietnam War* (New York: Atlantic Monthly Press, 2010), pp. 81 and 162. Also pp. 118-9 and 546.

[4] Neil Sheehan, *A Bright Shining Lie: John Paul Vann and America in Vietnam* (London: Jonathan Cape, 1988), p. 50.

Henry Cabot Lodge took up the metaphor when writing to LBJ in late 1966: "much of the land is to the Army what the ocean is to the Navy—something you move around on, but most of which you don't want to hold. What counts in this war is people."[5] For William Westmoreland, the American commander from 1964 to 1968, the war itself took on tidal characteristics: "the battle for Vietnam flows backward and forward across the homes and fields of the hapless rice farmer and the small town inhabitant," he wrote in 1965, buffeting the farmer and townsman by "factors and forces beyond his control."[6] Many others, rehearsing Mao Zedong, saw the Vietnamese people themselves as a vast body of water in which the guerrilla enemy swam like a fish.

Comprehending the physical, human, and martial landscape of Vietnam as a great expanse of water might have been a subtle reflection of the great void that existed in these foreigners' knowledge of the land and people they had come to "pacify"—perhaps not unlike the nineteenth century European explorers who applied maritime metaphors and measures to Africa and Australia.[7] The imperial claim to sovereignty that often followed exploration may have been absent in South Vietnam—the United States was there to preserve Saigon's dominion after all, not supplant it—but perhaps there was still some sense among those deployed to Vietnam in the 1960s of the earlier idea that oceans were spaces apart from regular rule, subject to their own legal framework, and that just such a conceptual framework might also apply to vast empty spaces on land.[8] Certainly some regulatory features of the war within South Vietnam bear a

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[5] Henry Cabot Lodge to President Johnson, Letter, 7 November 1966, Doc. 155c, Folder 1 (Vol. 61, 11/66, Memos (A)), Box 38, Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

[6] Military Assistance Command Vietnam [MACV] Directive 525-3, 7 September 1965.

[7] Dane Kennedy, *The Last Blank Spaces: Exploring Africa and Australia* (Cambridge, MA: Harvard University Press, 2013).

[8] Kennedy, *The Last Blank Spaces*, pp. 9-10.

striking resemblance to ideas of sea warfare—the free-strike zone, for instance, operated much like a war zone at sea to give fair warning of live (and often not especially discriminate) fire. At the very least, the response to the perceived oceanic expanse of Vietnam was similar to those earlier explorers as they sought to make the landscape legible through the application of rules and classificatory schemes developed in Europe.[9] The American military advisors and combat troops who came to fight the Communist insurgency in South Vietnam, and who encountered an unseen enemy indistinguishable from the physical and human landscape, often attempted to create a more circumscribed conflict out of that undifferentiated, disorienting environment.[10] They strove to make the war *conventional*.

This attempt to transform the empty, watery "war without fronts"[11] into a more conventionally circumscribed conflict is manifested in the legal and regulatory framework for the use of firepower which was applied to counterinsurgency combat operations in South Vietnam. Various line-drawing exercises were implemented with the aim of separating the insurgency from the civilian population upon which it relied for support, supplies and recruits. "The central idea," wrote one analyst of the war in 1968, "was to force the guerrillas to fight a positional war

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[9] Kennedy, *The Last Blank Spaces*.

[10] The intent to wage war conventionally took hold before the deployment of American ground forces, and various parts of the strategy were locally designed rather than externally imposed by Washington (the strategic hamlet programme, for example). But while Saigon's outlook on the war did not always match neatly onto the American vision, it was nonetheless shaped by the (conventional) nature of U.S. military aid: "the equipment America had to offer implied a mechanized style of fighting, and strategy set itself the objective of creating conditions in which to apply the tactics the equipment was designed for." Denis J. Duncanson, *Government and Revolution in Vietnam* (London: Oxford University Press & Royal Institute of International Affairs, 1968), p. 304.

[11] The term is a commonly-used descriptor of the war(s) in Vietnam and is the title of at least two books on the war: Bernd Greiner, *War without Fronts: The USA in Vietnam* trans. Anne Wyburd and Victoria Fern (New Haven, CT: Yale University Press, 2009); and Thomas C. Thayer, *War without Fronts: The American Experience in Vietnam* (Boulder, CO: Westview Press, 1985).

so that the superior firepower of the defence could be brought to bear on them; if a front could be established between friendly and enemy territory, Vietcong strength could be eroded."[12] The enemy would be made visible by first making the landscape legible.[13]

One such scheme that "promised to establish a conventional front line in the contest between the government and the guerrilla" was the strategic hamlet program. "Rather than giving the NLF [National Liberation Front] unrestricted access to the population, the new hamlets would create a physical and psychological barrier between it and the peasantry," explains the historian Philip Catton.[14] Such barrier-building aimed, in the words of South Vietnamese President Ngo Dinh Diem, to transform the insurgents into "a foreign expeditionary corps facing a hostile population."[15]

Agrovilles preceded strategic hamlets; "New Life" hamlets followed. Each had a similar purpose, as did the less-planned but—from the perspective of Washington and Saigon—not unwelcome refugee camps and concentration areas: the drawing of lines between the population and the anti-Saigon forces. Some people were forcibly evacuated from their homes. Other refugees (or Internally Displaced Persons, in today's terminology) were more-or-less driven away by military operations specifically designed for that purpose. And still others left not under such extreme duress, but to seek greater physical and economic security elsewhere. Perhaps twenty per cent of the population, or more, were refugees at one time or another in the second

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[12] Duncanson, p. 304.

[13] On legibility, see James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven: Yale University Press, 1998).

[14] Philip E. Catton, "Counter-Insurgency and Nation Building: The Strategic Hamlet Programme in South Vietnam, 1961-1963," *The International History Review*, Vol. 21, No. 4 (Dec., 1999), pp. 918-940 at p. 928.

[15] Cited in Catton, p. 929.

half of the 1960s.[16] To assist in moving on people and carving out lines, the land was sometimes also cleared of foliage, crops, and dwellings.[17]

The various programs and processes of population relocation often worked in tandem with the establishment of zones in which firepower could be employed more freely. And while such Free-Fire Zones (later renamed Specified Strike Zones) were meant to be established only after the civilian population had been removed from the area, this official sequencing was often blurred upon application. Indeed, early iterations of the Free-Fire Zone concept as used in Vietnam seem to have had the very purpose of emptying particular areas of civilians: in 1962, the Saigon regime was declaring some enemy-held regions to be "open zones," which were then subjected to random air and artillery bombardment in order to push the civilian population into government-controlled areas and strategic hamlets.[18]

Free-Fire Zones were somewhat different from these early "open zones," at least in theory. A Free-Fire Zone was an area designated by a South Vietnamese province (or district) chief into which air strikes and artillery fire could be launched without the otherwise-required prior approval of South Vietnamese authorities.[19] As with the strategic hamlet program, the

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[16] Guenter Lewy, *America in Vietnam* (New York: Oxford University Press, 1978), pp. 107-114. The twenty per cent figure is listed on p. 108.

[17] On crop destruction and defoliation see, e.g., Lewy, pp. 257-266. On burning dwellings see, e.g., Nick Turse, *Kill Anything That Moves: The Real American War in Vietnam* With a New Afterword (New York: Picador, 2014 [2013]), p. 32: "Whole villages might also be set aflame as a matter of policy, to drive people from an area and thereby deny guerrillas access to food, support and recruits. The idea was to separate the general population from the guerrillas in the most literal way possible. After being forcibly removed, villagers would often be sent to a government-run concentration area."

[18] Duncanson, p. 321; Lewy, p. 25. The earliest iterations of the concept seem to date to 1958, when "free areas" were established into which aircraft could jettison unexpended ordnance before landing. See Lewy, p. 226.

[19] Lewy, p. 106; Cecil B. Currey, "Free Fire Zones," in Spencer C. Tucker (ed.) *Encyclopedia of the Vietnam War: A Political, Social, and Military History* (New York: Oxford University Press, 2000), p. 140. Cf. Lewis M. Simons, who implies U.S. personnel created Free-Fire Zones at will: "Free Fire Zones," in Roy Gutman,

concept of Free-Fire Zones was designed, in the words of the scholar Cecil Currey, "to structure the conflict along conventional lines, with Communist and Allied forces separated and occupying distinct and identifiable zones."[20]

The attempt to make the military landscape legible was an incredibly violent process and the widespread use of American firepower in South Vietnam caused enormous harm to civilians.[21] It was, moreover, an interminable process, given that success in marking off the enemy proved elusive.[22] And despite the incomplete and uneven demarcation of enemy and civilian, firepower was often employed as if those lines had been clearly drawn. Much of the criticism directed at American military violence in Vietnam is founded in some manner on this latter point: that the U.S. applied its awesome array of modern weapons without due regard for the distinction between combatants and civilians. This critique often takes a further step, suggesting that the application of this violence was regularized within the U.S. military forces in Vietnam—that the indiscriminate use of American firepower was normal procedure. "Most of the time," the historian and journalist Nick Turse notes, "the noncombatants who died were not herded into a ditch and gunned down as at My Lai. Instead, the full range of the American arsenal—from M-16s and Claymore mines to grenades, bombs, mortars, rockets, napalm, and artillery shells—was unleashed on forested areas, villages, and homes where perfectly ordinary Vietnamese just happened to live and work."[23]

David Rieff, and Anthony Dworkin (eds.), *Crimes of War 2.0: What the Public Should Know* Revised and Updated Edition (New York: Norton, 2007), pp. 189-90.

[20] Currey in Tucker, p. 140.

[21] For a survey of the various attempts at estimating casualties, including civilians killed and wounded, see Turse, pp. 11-13.

[22] After outlining the goal of Free-Fire Zones (quoted above), Cecil Currey goes on to note that "in actuality, such divisions [between Communist and Allied forces] seldom occurred." Currey in Tucker, p. 140.

[23] Turse, p. 19.

How is it possible to reconcile this normalized use of seemingly indiscriminate firepower with the concern to avoid civilian casualties exhibited by high-level U.S. political and military officials?[24] Explanations for this divergence of rhetoric and practice around civilian casualties in Vietnam generally cluster into two sets of arguments, both of which emphasize the rules of engagement issued to American soldiers, marines and airmen who served in that war. The first set of arguments questions the application of the rules. A mild form of this argument is to suggest that the rules, while "virtually impeccable" themselves, had not been sufficiently promulgated to lower levels of command—"the assumption," in the words of Nuremberg prosecutor Telford Taylor, "that there must have been failures of training, indoctrination, discipline, and leadership."[25] A more stringent form of the argument is that commanders willfully turned a blind eye towards, and even encouraged, conduct not in accordance with the rules in order to protect their own men, punish those Vietnamese who harbored the enemy, and ensure a high "body count"—a measure upon which their effectiveness was unofficially assessed.[26] Variations of this argument suggest that the official rules could not compete with unofficial norms that dehumanized the enemy and encouraged illegal killing of Vietnamese.[27]

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[24] While it is easy to dismiss such concern, it was evident from an early stage of the war and was expressed in public fora, in private meetings, in detailed rules of engagement issued to U.S. military personnel, and in other official directives, reports, and memoranda. *Why* many U.S. officials exhibited such concern—e.g., out of respect for the laws of war, worry of a public relations fallout, strategic desire to win hearts and minds, a mix of these or something else entirely—is an important question, but not one that will be addressed here.

[25] Telford Taylor, Remarks, in "Vietnam and the Nuremberg Principles: A Colloquy on War Crimes," in Richard Falk (ed.), *The Vietnam War and International Law, Vol. IV: The Concluding Phase* (Princeton, NJ: Princeton University Press, 1976), pp. 364-373 at p. 367; "virtually impeccable" at p. 369. See also, Turse, pp. 30-31.

[26] Protect: Turse, pp. 57-58; punish: Taylor in Falk, pp. 369-70; body count: Turse, pp. 43-49.

[27] Turse, pp. 49-51.

The second set of arguments questions the legality of the rules of engagement themselves. One variant of this suggests that the rules were so filled with exceptions, or were so ambiguous, that illegal behavior could be accommodated to them quite readily and that, taken a step further, the rules, directives, and reports regarding the conduct of the war amounted to little more than a smokescreen or paper trail—an "exculpatory device"—that could cover up an underlying lack of concern for civilian casualties.[28] Another variant suggests that some of the rules were simply flat-out contrary to international law, in particular the establishment of Free-Fire Zones in which indiscriminate, and therefore illegal, use of firepower was condoned.[29]

American behavior is assumed to be illegal in both sets of arguments; the point at issue is whether that behavior was illegal because it contravened lawful rules of engagement, or whether it was illegal because it dutifully applied those rules which were, in turn, actually unlawful. A third approach, however, might look more closely at the law itself. Such an alternative approach might consider that the violence visited upon the people and environment of Vietnam did not occur despite the international legal framework but, in part, because of it. It would recognize that much of the violence enacted in Vietnam was regularized not just in the sense of being normal, but also in the alternative sense of being rule-based. It would understand that the legal framework applied by Americans in Vietnam was territorially derived and had at its heart the *defended places* test.

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[28] Turse, p. 54-56 and 58-59; also p. 233; "exculpatory device" at p. 54.

[29] Simons in Gutman, Rieff, and Dworkin, pp. 189-90; Turse, pp. 59-63, esp. n. 106 (cf. qualification on p. 60); Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* Fourth Edition (New York: Basic Books, 2006 [1977]), pp. 188-196, esp. p. 193. Walzer is concerned with morality rather than legality *per se*, but his argument is nonetheless relevant here.

II

The targeting rule that most clearly applied to war for much of the twentieth century was that of *defended places*, codified in Article 25 of the 1907 Hague Rules, and reproduced verbatim in the U.S. Army's 1956 Law of War Field Manual. It specifies:

> The attack or bombardment, by any means whatever, of undefended towns, villages, dwellings, or buildings, is forbidden.

The idea that a defended place could be legitimately attacked (and that civilians within that place could be legitimately harmed by way of such an attack) derives from siege warfare. The distinction between civilians and military personnel never existed for a fortified town under siege, wrote a leading American international lawyer in 1947, "in the sense that the starvation of civilians and their destruction by gunfire was not a violation of the rules of war." Once the attacking force physically entered the city, however, the distinction returned.[30] By the late nineteenth century, the bombardment of "fortified places" was generally deemed permissible while that of "open" or undefended towns was not.[31] But the development of long-range artillery and, especially, air power complicated this rule: an "open" town was traditionally considered as such only if it could be entered and occupied without opposition; where did that leave towns behind the front lines, inaccessible to ground forces but within the range of the new technologies?[32]

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[30] Philip C. Jessup, *A Modern Law of Nations: An Introduction* With a New Preface by the Author (Hamden, CT: Archon Books, 1968 [1947]), p. 215.

[31] See, e.g., Project of an International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874 (the Brussels Declaration).

[32] On this conundrum see, e.g., Hans Blix, "Area Bombardment: Rules and Reasons," *British Yearbook of International Law,* Vol. 49 (1978), pp. 31-69 at p. 41; Gerald J. Adler, "Targets in War: Legal Considerations," *Houston Law Review,* Vol. 8, No. 1 (Sept., 1970), pp. 1-46 at p. 26.

The question was first confronted in the field of naval warfare, where occupation of territory was similarly impossible. Article 2 of the 1907 Hague Convention on "Bombardment by Naval Forces in Time of War" recognized an exception to the undefended places prohibition. It reads (in part):

> Military works, military or naval establishments, depots of arms or war materiel, workshops or plant which could be utilized for the needs of the hostile fleet or army, and the ships of war in the harbour, are not, however, included in this prohibition. The commander of a naval force may destroy them with artillery, after a summons followed by a reasonable time of waiting, if all other means are impossible, and when the local authorities have not themselves destroyed them within the time fixed. He incurs no responsibility for any unavoidable damage which may be caused by a bombardment under such circumstances.

And so the defended places rule began to evolve into a "an extended defended-area concept" or a "constructively defended" places rule,[33] in which a particular town or area need not be fortified, garrisoned, or defended *per se* in order for it to be targeted; it simply needed to contain *military objectives*—things whose destruction would accrue some military advantage to the enemy. Such an understanding seemed to prevail during World War II, in which civilian casualties caused by area bombing well behind enemy lines were often justified on the basis of those areas containing military objectives—even if civilians, and their morale, were the real targets of that bombing.

The civilian destruction caused by the area bombing of World War II, together with the advent of nuclear weapons, led to calls for greater restraint in practices of bombardment. At the forefront of efforts to devise more fully developed legal controls on such practices was the International Committee of the Red Cross (ICRC), the Geneva-based humanitarian organization

[33] Both terms appear in Adler, p. 26.

that traces its roots back to Henri Dunant's post-battle tour of the bloody scene at Solferino in 1859, and which has had a special role to play in the development, dissemination, and observance of the various Geneva conventions. Those conventions protected various categories of war victims—initially sick and wounded soldiers (1864), then also sick and wounded sailors (1906), prisoners of war (1929), and civilians (1949, at which time the earlier three conventions were also updated)—but had nothing to say about how militaries produced such victims in the course of their campaigns. That was seen as the sole domain of states and of the Hague Rules they had agreed to amongst themselves.

Those same states therefore greeted with skepticism the ICRC's efforts in the mid-1950s to devise rules that would regulate how states could conduct armed conflict. In stepping out from its previously well-defined humanitarian habitat, the ICRC made some states—particularly those with, or in the process of developing, nuclear weapons—wary of the attempt to devise new rules for the conduct of hostilities. And despite couching those rules as the reaffirmation of existing principles, there was significant opposition to a number of them, including an early version of the rule of proportionality, which mandates that the foreseeable civilian harm of an attack must not be excessive in relation to the value of the military objective being attacked. [34] In 1955, the ICRC sought feedback from noted experts on an early version of its proposed regulations, the "Draft Rules for the Protection of the Civilian Population from the Dangers of Indiscriminate

[34] The ICRC's Draft Rules were influenced, in part, by draft rules for air warfare that had been developed before World War II but never ratified by States. Those draft rules included something akin to a geographically-bound version of the proportionality rule. For an overview of state practice and legal doctrine regarding bombardment, including pre-Vietnam War references to the rule of proportionality, see "Respect for Human Rights in Armed Conflicts: Existing Rules of International Law Concerning the Prohibition or Restriction of Use of Specific Weapons," United Nations General Assembly Doc. A/9215, Vol. I (7 November 1973), pp. 165-183, esp. n. 283 on p. 170 and p. 177.

Warfare." The two American experts consulted, Raymund Yingling and Richard Baxter, were both highly critical of incorporating the rule of proportionality into the laws of war.

Writing to Claude Pilloud of the ICRC's legal division in reference to the provision (Article 8) in the ICRC's 1955 draft rules that required precautions be taken to avoid harm or damage to civilians and their property disproportionate to the expected military advantage, Yingling noted that "Unlike things cannot be compared and the 'disproportionate' criterion is therefore illusory." Yingling also voiced concern that "whether any action will result in a military advantage and the extent of that advantage is at best an informed guess, the accuracy of which can only be tested by history." This resonated with his criticism of an earlier Article (4) which stated that a proposed attack upon a military objective must, to be lawful, "lead to a military advantage sufficient to justify the attack." Such a requirement would be impossible to apply, wrote Yingling,

> since it involves subjective factors and variables and therefore has no precise connotation. The military authorities ordering an attack presumably do so on the judgment that the game is worth the candle, otherwise the attack would not be made, unless we assume that war is a desultory business in which the military authorities destroy merely for the purpose of destruction. The military commander, on the basis of the information he has, takes action which he thinks will be worth militarily the expenditure of the men and materiel involved. The outcome may prove his judgment was good or bad, but the legitimacy of his conduct must be determined by rules applicable prior to the time his action is taken, not subsequently. And even if successful what destruction justifies what military advantage?

"For these reasons," i.e., the subjectivity of the judgment and the lack of any meaningful comparison between military advantage and civilian loss, he concluded, "the proposed test does not seem suitable as a rule of action."[35]

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[35] Raymund T. Yingling to Claude Pilloud, "Comments on the Draft Rules for the Protection of the Civilian Population from the Dangers of Indiscriminate Warfare," XIXth International Conference of the Red Cross –

Baxter, too, was critical of the rule of proportionality. His reasoning was, in part, similar to Yingling's. The idea of military advantage was generally "impossible to assess," particularly in the chaotic context of battle. "If we knew," Baxter wrote to Pilloud, "that the destruction of the plant manufacturing steel tubing would stop all locomotive production in the enemy territory for sixteen days, three hours, and forty-two minutes, how many civilians could one kill accidentally in the process without violating the article? To state the question in concrete terms is to demonstrate the uncertainty of the rule."

But he also went beyond Yingling to argue that the rule of proportionality, as expressed in the draft rules, was designed not simply to reaffirm existing principles but to "alter existing positive law in such a way as to limit the freedom of action of belligerents. For example, the licitness of the bombardment of defended towns, including civilians and non-military objectives, which is impliedly recognized by Article 25 of the Hague Regulations, would no longer be recognized. So also would the provisions of Convention No. IX of the Hague of 1907 concerning Bombardment by Naval Forces in Time of War be changed." Rather than couch the new rules as mere reaffirmation of existing principles, Baxter thought it would be better to acknowledge them as the new and more drastic controls on belligerent activity they were actually designed to be.[36]

In opposing the incorporation of the rule of proportionality into international law governing the conduct of hostilities, Yingling and Baxter were generally in tune with the broader American public consciousness of the time, which eschewed the principle of proportionality

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New Delhi, 21st January – 5th February 1957 (folder), Records Relating to the Red Cross and Geneva Conventions, 1941-1967, Office of the Legal Adviser Decentralized (lot) Files, Record Group 59: General Records of the Department of State, National Archives and Records Administration, College Park, Maryland, United States.

[36] R. R. Baxter to Claude Pilloud, "Comments on the 'Draft Rules for the Protection of the Civilian Population from the Dangers of Indiscriminate Warfare,'" 7 October 1955, ACICR B AG 051 Pj 009.03, Archives of the International Committee of the Red Cross, Geneva Switzerland.

while holding tight to a (place-based) principle of intentionality regarding civilian death and destruction.[37] And in casting doubt on the viability of the ICRC's overall attempt at revising the laws of war, they, and Washington more generally, were in good company with the rest of the world. A resounding silence met the ICRC's request for comment on revised Draft Rules (1956) sent to States party to the Geneva Conventions and national Red Cross societies in advance of the 1957 International Red Cross Conference in New Delhi, and the ICRC let the matter drop.

That Yingling and Baxter were in the mainstream of 1950s thinking about proportionality should come as no surprise. Neither was a novice on questions of international humanitarian law. Yingling was one of the key U.S. officials involved in negotiating the 1949 Geneva Conventions, and was the acknowledged in-house State Department expert on the laws of war. And although Baxter, by the time he sent his thoughts on proportionality to Pilloud in late 1955, was a member of the Harvard Law School faculty, he had only recently moved there from his position as a leading military lawyer within the Office of the Judge Advocate General of the United States Army, where he had played a key role in revising the Army's primary point of reference for the laws of war, Field Manual (FM) 27-10, "The Law of Land Warfare."

The revision of FM 27-10 was issued in July 1956, and it provides a curious footnote to Baxter's opposition to the rule of proportionality. The rule itself figures as Article 41 in the manual, as a corollary to the defended places rule: "Particularly in the circumstances referred to in the preceding paragraph, loss of life and damage to property must not be out of proportion to the military advantage to be gained."[38] This was precisely the sort of limit on belligerent freedom

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[37] See Conway-Lanz, pp. 223-227, on the proportionality principle's lack of traction within the United States in the early post-World War II decades.

[38] Department of the Army, "The Law of Land Warfare," Field Manual (FM) 27-10, July 1956, https://www.loc.gov/rr/frd/Military_Law/pdf/law_warfare-1956.pdf (accessed 25 July 2016).

of action with which Baxter had expressed his concerns to Pilloud less than a year before the manual's publication. Baxter had left the military part way through the process of revising the manual, and he was not entirely pleased with how the manual was completed after his departure.[39] Given his letter to Pilloud in October 1955, it can probably be assumed that Article 41 was one of the parts he was dissatisfied with. Whatever contingency prompted Article 41's inclusion in the manual—perhaps Baxter's replacement in the Office of the JAG was more sympathetic than his predecessor to the ICRC's Draft Rules—its inclusion would come to provide a hook upon which future efforts to portray the rule as intrinsic to the legal order of war could be hung. But at the time, in 1956, its inclusion went against the grain of state thinking about law in war; the defended places rule was certainly in flux by the time of the Vietnam War, but it was nevertheless still the applicable standard. Recognizing this might help us to better understand why that war was conducted the way it was.

The conventional mode of war that the Americans sought to impose upon the South Vietnamese physical and human landscape—the "positional war" and its attendant tactics summarized in Section I above—did not stand in opposition to the international law of war as it had developed by the 1960s. Rather, the two had evolved in tandem; each constituted the other, and they both operated within a broader paradigm that made war legible through territorial demarcations. American rules on targeting—what or who could be fired upon, when, where, and with what means—were consistent with this broader paradigm for much of the Vietnam War. Washington reconciled its adherence to the fundamental cleavage in the law of armed conflict—

[39] Detlev F. Vagts noted in 2013 that FM 27-10 "was an institutional publication and Baxter, one infers, did not agree with all of it." Vagts, "Guide to Baxter's Scholarship on Humanitarian Law," Richard Baxter, *Humanizing the Laws of War: Selected Writings of Richard Baxter*, Edited by Detlev F. Vagts, Theodor Meron, Stephen M. Schwebel, and Charles Keever (New York: Oxford University Press, 2013), p. 4.

the distinction between combatants and civilians—with practices of war that produced significant civilian casualties by dint of *where* those civilians were killed.

In the wake of the enormous harm done to civilians in World War II, and especially as the devastation of the Korean War and the destructive potential of hydrogen bombs became apparent to Americans, the principle of intentionality emerged in the public consciousness as especially important in rationalizing civilian deaths: "the culturally significant distinction was not whether U.S. weapons actually killed civilians," writes the historian Sahr Conway-Lanz, "but whether Americans *intended* to kill civilians with their weapons."[40] As it had developed in the law of armed conflict up to that time, the principle of intentionality was mostly understood in spatial terms. Firepower could legally be directed at particular places containing military objectives; as civilians were not the intended targets, any noncombatant deaths which resulted from such attacks were not considered a crime. That American officials upheld this place-based manifestation of the principle of intentionality through to the final stages of the Vietnam War helps to explain why much of the violence in that conflict was regularized—in the twin sense described above of being both normal *and* rule-based.

Place-based understandings of civilian harm informed American rules of engagement and official justifications for violence against civilians in two main ways: hamlets and villages were fired upon or destroyed on the basis of their being "defended" or "fortified";[41] and Free-Fire Zones, and other such zones of fire, were targetable because of the presence of military objectives contained therein. Any harm inflicted on civilians during attacks on both these types

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[40] Conway-Lanz, p. 21. Emphasis added.

[41] Department of the Army, "Final Report of the Research Project: Conduct of the War in Vietnam," May 1971, pp. 19, 23, 24-26, and pp. 41-42, Box 58, William C. Westmoreland Collection, U.S. Army Military History Institute, Carlisle Barracks, Pennsylvania; Lewy, p. 231 (bombardment of defended places) and pp. 232-233 (destruction of fortifications).

of places was considered unintentional, and therefore not illegal. The lack of any intention to harm civilians was highlighted by two measures taken (or supposed to be taken) prior to an attack: warnings by leaflet and loudspeaker;[42] and efforts to relocate any civilians likely to be harmed out of such harm's way.

American firepower, then, was officially targeted at particular places or areas in accordance with international law as U.S. government lawyers and other officials interpreted it in the 1960s. After having been (in theory) warned and/or relocated out of the area prior to an attack, any civilians still in that area who were killed or wounded were considered regrettable, but justifiable, casualties of war. This place-based understanding of the principle of intentionality was not inconsistent with American military strategy, which like counterinsurgency strategies elsewhere sought to separate the enemy from the people. At the level of official policy, law was not so much flagrantly violated in Vietnam as it was interpreted and applied. And given that this legal framework of armed conflict was so entwined with American methods of waging the Vietnam War, it is not surprising that as those methods of war were increasingly questioned so too did the legal framework come under ever greater pressure.

III

The burning and bombardment of villages may have had some undergirding legal logic, but for observers of the war this was incredibly difficult to see. The location of fortifications, or what were taken to be fortifications, may have been enough to justify the burning of a village, but the

[42] The shift from a defended places to a constructively defended places test was accompanied by the increased importance placed on warning the local population of imminent bombardment, as indicated in the passage from Art. 2, IX Hague Convention (1907) reproduced above; within the American military, the use of warnings became widespread only during the Korean War, mapping onto the place-based understanding of intentionality that became especially prominent at that time. See Conway-Lanz, esp. pp. 170-179 on warnings.

fortifications did not show up on a television screen. There may well have been legitimate targets (supply depots, training camps), within NLF base areas, but it was the incredible (if unintended) non-military damage that seared images into the minds of viewers. Even for some onlookers who did make an effort to come to grips with the law, the logic was unhinged. Trying to make sense of a "policy of forced population removal that has reduced the peasantry from about 85 percent to about half of the population, while laying waste to the countryside," Noam Chomsky concluded that "if international law has nothing to say about this except that civilians aiding the resistance are war criminals, then its moral bankruptcy is revealed with stark clarity."[43]

Irrespective of whether American violence in Vietnam was technically indiscriminate or not according to international law, its effects had such a widespread impact on the civilian population so as to undermine the dominant American territorial strategic-legal paradigm of war. Critics questioned whether the scale of civilian suffering was at all consonant with the American goal of creating a viable anti-Communist regime in Saigon which had the secure support of the South Vietnamese people. As expressed in programs such as Operation Phoenix, the strategic emphasis shifted somewhat from targeting areas of enemy activity with heavy U.S. firepower to identifying and neutralizing particular enemy-affiliated personnel within those areas.

By the end of the American ground war, a similar shift had taken place in the legal (or regulatory) framework applied to the use of American firepower within South Vietnam. Art. 6(c) of the final version (dated 30 December 1971) of the "Rules of Engagement for the Employment of Firepower in the Republic of Vietnam" states (in part):

> The enemy is known to take advantage of areas normally considered as non-military targets. Typical examples of non-military targets are places of religious or historical

[43] Noam Chomsky, *For Reasons of State* (New York: The New Press, 2003 [1970]), p. 222.

> value and public or private buildings or dwellings. When an enemy has sheltered himself or installed defensive positions in such places, the responsible brigade or higher commander must positively identify the preparation for, or execution of, hostile enemy acts before ordering an attack.[44]

Previous iterations of the rules never required an attack from a hamlet to be underway or imminent before American fire could be initiated; the simple location of enemy personnel, fortifications or other military objectives in the *area* was justification enough to trigger bombardment. With this iteration of the rules of engagement, the defended places rule, together with the constructively defended places rule, essentially became a dead letter. Population relocations and the generation of refugees also diminished after 1968,[45] further drawing the curtain on a territorially-based conception of acceptable civilian harm.

At the same time as the old paradigm was being discredited and gradually retired, a new paradigm was rising to take its place. The United States took on board criticism of its seemingly indiscriminate attacks by doing away with the idea that an area could be targeted because it contained military objectives; Washington now recognized that only military objectives themselves could be targeted. But where did this leave the status of civilian casualties killed during attacks on purely military objectives? As a legal fiction, military objectives might now be more precisely defined, but in counterinsurgency wars like Vietnam, they were still situated in areas in which civilians lived and worked.

Some opponents of the United States wanted to criminalize any harm done to civilians, which would put an end to the principle of intentionality. This argument was common among eastern bloc and newly independent states during debate on the "Human Rights in Armed

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[44] Reproduced in the *Congressional Record*, S3513, March 26, 1985.

[45] Lewy, pp. 113-114.

Conflict" agenda item at the United Nations General Assembly in the late 1960s and early 1970s. It was recognized in Washington that such an outcome would be detrimental to the future use of American firepower, the very thing that gave the United States such an advantage on any battlefield. And so there appeared a growing emphasis on a new understanding of intentionality. Rather than justify civilian deaths on the territorial basis of *where* military objectives were located, they began to be justified on the utilitarian basis of the *value* of the military objective attacked.

As we have seen, the rule of proportionality was not entirely new, but the incredible emphasis the United States came to place on it was. It assumed the status of the most basic rule of conduct, the clearest expression of a new conceptual paradigm for legitimating violence against civilians in times of war. By 1972, the General Counsel of the Department of Defense had made it the legal heart of American military conduct while attempting to play down its novelty:

> I would like to reiterate that it is recognized by all states that they may not lawfully use their weapons against civilian population or civilians as such, but there is no rule of international law that restrains them from using weapons against enemy armed forces or military targets. The correct rule of international law which has applied in the past and continued to apply to the conduct of our military operations in Southeast Asia is that "the loss of life and damage to property must not be out of proportion to the military advantage to be gained." A review of the operating authorities and rules of engagement for all of our forces in Southeast Asia, in air as well as ground and sea operations, by my office reveals that … such operations [are] in conformity with this basic rule.[46]

[46] J. Fred Buzhardt, General Counsel of the Department of Defense, to Senator Edward Kennedy, Chairman of the Subcommittee on Refugees of the Committee on the Judiciary, Letter (excerpts), 22 September 1972, in *American Journal of International Law*, Vol. 67 (1973), pp. 122-125 at pp. 124-125.

While the idea of proportionality is often invoked in a general sense, as a legal principle it manifests itself in particular ways within various parts of the international law of war (among other bodies of law), including rules regulating reprisals, requisitions, and the resort to force. As a rule governing the conduct of hostilities—the subject of this chapter—it is a test for evaluating the level of acceptable harm to civilians and civilian objects in the course of military operations. While intentionally targeting civilians is always illegal, civilian death and damage that occurs unintentionally as the byproduct of an attack on a legitimate military target is not. But the legal bounds of unintentional killing are not limitless. The rule of proportionality measures how much unintentional harm can accrue before those bounds are reached.

In many respects, the rapid rise of the proportionality principle is really a story of shifting paradigms of the legal geography of war. In the older paradigm both the civilian population and target area (usually the country's industrial base) were merged together. To strike the latter was also to hit the former. The failure of that paradigm—to adequately signal strategic restraint in the air war against North Vietnam, and to draw a comprehensible line around legitimate killing in the war within South Vietnam—necessitated divorcing targets from their surrounding territory. That became increasingly feasible physically with the rise of precision-guided munitions; it became possible conceptually with the rise of the rule of proportionality. The grammar of war then shifted from a territorially-bound vocabulary filled with rear zones, front zones, hinterlands, defended places, and open cities to a simple, deterritorialized binary: estimated civilian casualties and military objectives. Unconnected from any geographical marker and related to military value by means of a sliding scale, targets could now move freely through space.

The rise of this paradigm has had a knock-on professional effect, contributing to the phenomenal growth in the number of lawyers in the U.S. military. When this growth is

connected to Vietnam, it is often held to stem from the Pentagon's Law-of-War Program that emerged from the inquiry into the My Lai massacre and sought to give better training in the laws of war to Americans serving in uniform. The Law-of-War Program certainly accounts for some, but not all or even most, of the growth, which can only be understood in light of the rise of a proportionality paradigm of targeting. As one perceptive lawyer (and Air Force officer) noted, in observing and selling the rise of the new targeting paradigm during the Vietnam War, "targets that are capable of being used for military purposes are generally conceded to be legitimate military targets. The line between possible and probable military use is one for the operations analyst in terms of cost effectiveness and for the lawyers in terms of proportionality."[47]

[47] Adler, pp. 24-25. See also p. 27: "A functional legal approach to targeting probably can be spelled out only in terms of military necessity and proportionality. Lawyers and triers of fact who have long dealt with such terms as 'reasonable,' who have long balanced conflicting concepts, should not be bothered by judgments based on rules, the applicability of which can only be determined in a given factual setting."

6. WIDER WAR

I

American interpretations of international law that were developed during the Vietnam War, often novel at the time, were normalized in the years after the end of the war. This includes the interpretation developed by State Department Legal Adviser John Stevenson to justify Nixon's 1970 Cambodian incursion. Stevenson had used a "cannot or will not" formulation to describe the right of an injured party to take action against an aggressor on a third party's territory when that third party could not or would not take action to stop the aggression itself. Kissinger changed the wording of the doctrine to the now-standard standard "unwilling or unable," and while internationally it is a controversial extension of the Article 51 right of self-defense, it is indeed now a standard U.S. doctrine used to justify the use of force against non-state or third-country groups sheltering in another state's sovereign territory.

In order to support his invocation of an "unwilling or unable" doctrine, Stevenson cited both eminent authorities—Vattel, Castrén, FM 27-10, the post-World War I Greco-German Mixed Arbitral Tribunal, Waldock, Greenspan, Hyde[1]—and past American instances where

[1] Stevenson's examples seem to be taken from pre-Charter era cases, or from post-1945 legal texts which continued to give credence to those cases.

similar actions had been pursued: "General Jackson's incursion into Spanish West Florida in 1818 in order to check attacks by Seminole Indians on United States positions in Georgia; the action taken against adventurers occupying Amelia Island in 1817, when Spain was unable to exercise control over it; and the expedition against Francisco Villa in 1916, after his attacks on American territory which Mexico had been unable to prevent."[2]

These cases from the nineteenth century and the World Wars, as well as legal texts from the eighteenth century through the late 1950s, were "surely authority," thought Stevenson, "for the proposition that, assuming the Charter's standards are met, a belligerent may take action on a neutral's territory to prevent violation by another belligerent of the neutral's neutrality which the neutral cannot or will not prevent, providing such action is required in self-defense."[3] Seeking the authority of precedent, Stevenson couched his history in terms of the duties of neutrals—with the 1945 UN Charter not replacing the rights of victims of aggression to take action against neutral territory if the neutral state did not fulfil those duties. Cambodia was, of course, a neutral country, although the UN Charter would have applied irrespective of that designation.[4]

Stevenson's reliance on the history of neutrality to make his case for "unwilling and unable" has been replicated by the most prominent proponent of the doctrine today, Ashley Deeks, who "identifies the test's deep roots in neutrality law." Deeks "excavates the historical lineage of the 'unwilling or unable' test, a story that has not previously been told in the academic literature," and finds, after "plumb[ing] two centuries of state practice," that the law of neutrality

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[2] Stevenson in Fox (ed.), *The Cambodian Incursion: Legal Issues*, pp. 29-31. Stevenson also cited those much more wary of the right to violate neutrality—Oppenheim, Stone—but who nonetheless agreed that such a right existed if required for self-defense.

[3] Stevenson in Fox (ed.), *The Cambodian Incursion: Legal Issues*, p. 31.

[4] The extent to which the concept of neutrality retains its force in the era of the UN Charter has been hotly contested by publicists and legal scholars.

is "the original source of the test." The "equities and concerns of the neutral state and an offended belligerent state in the neutrality law context are," she argues, "analogous to those of the territorial state and the state seeking to use force in self-defense against a non-state actor in that territory."[5]

Deeks' aim is "to bolster the legitimacy and efficiency of the 'unwilling or unable' test by explaining the test's pedigree and proposing a way to clarify the norm's content."[6] Her repeated invocation of the two centuries of practice, comprising 39 cases, from which she discerns the existence and parameters of the unable or unwilling doctrine underscores her attempt to establish pedigree. Just as Stevenson's memo sought to add legal gravitas to his formulation of unwilling and unable by the invocation of a long history, so too does Deeks.[7]

But Stevenson, and by implication Deeks, is as much involved in a process of forgetting history as of finding it. The effort to blend "unwilling or unable" seamlessly into a centuries-long doctrinal history actually obscures perhaps the most pertinent historical period in Stevenson's account: the five years prior to the 1970 Cambodian Incursion. Writing in 1970, Stevenson had suggested that the right to intervene in Cambodia "was available" to the United States "long ago," and perhaps as early as 1965, but that "we refrained from exercising it." Stevenson's predecessor, however, had steadily and strenuously advanced a different opinion, denying to the

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[5] Ashley S. Deeks, "'Unwilling or Unable': Toward a Normative Framework for Extraterritorial Self-Defense," *Virginia Journal of International Law*, Vol. 52, No. 3 (2012), pp. 483-550 at pp. 483, 496, 497.

[6] Deeks, p. 488.

[7] Detractors of the unwilling and unable doctrine also trace a longer history of the doctrine back to nineteenth-century ideas of civilisation and colonialism. See, e.g., Ntina Tzouvala, "TWAIL and the 'Unwilling or Unable' Doctrine: Continuities and Ruptures," Symposium on TWAIL Perspectives on ICL, IHL, and Intervention, 109 *AJIL Unbound* 266 (2016). Tzouvala is also quick to note, however, that any historical narrative that traces unwilling or unable back to the nineteenth century—whether the purpose is to legitimize or stigmatize the doctrine—is neglecting the "profound reconfiguration" of international law in the post-1945 Charter era.

United States the right to intervene on a large scale (i.e., other than in operational self-defense of a military unit engaged in combat) in Cambodia. The Cambodian government's inability or unwillingness to confront the Vietnamese Communist forces on its territory was insufficient grounds for intervention; only Cambodian complicity in attacks launched from its territory upon South Vietnam, argued Meeker, was sufficient grounds.[8]

Stevenson did not cite the most relevant and up-to-date understandings, i.e., those articulated by his predecessor as Legal Adviser, or actions, i.e., the Johnson Administration's refusal to launch operations into Cambodia other than those required by immediate reference to the operational self-defense of allied military units. For Stevenson, writing in 1970, it is as if the previous decade of American experience in, and legal argument around, Vietnam never happened. (Which, for him personally, was true—he was not a government official during the Johnson years, but no doubt many of his attorneys in "L" were.) Stevenson's argument—and the development of the unwilling/unable doctrine—rest on the erasure of the legal history of much of the Vietnam War, and in particular the Johnson-era history of the American legal argument over the Cambodian sanctuaries.

In this light, the Cambodian incursion and, especially Stevenson's justification of it, appears less as one case of the doctrine's use among dozens, and across centuries, than it does as a contingent moment in the very rise of the "Unwilling or Unable" Doctrine in contemporary U.S. foreign policy, providing as it does the pivot from the old law of neutrality to the new law of self-defense. And although Deeks does not single out Stevenson's memo as particularly influential, the structure and reasoning of her article follows, in places, quite closely to

[8] See Chapter 2 above; Leonard Meeker to Benjamin Read, Memorandum, "'Hot Pursuit' in Viet-Nam," 24 March 1965, Doc. 176, Folder 3 (Vol. XXXI, 3/12-31/65, Memos (A) [1 of 3]), Box 15 [1 of 2], Vietnam Country File, National Security File, Lyndon Baines Johnson Library, Austin, Texas.

Stevenson's. It is difficult to imagine her argument being as strong today if Stevenson had not argued as he did back in 1970.[9]

Stevenson's juridical erasure of the Cambodian border in 1970—his reimaginging of the spatial stakes in use of force law—has helped to pave the way for the legal justifications for America's borderless wars of the twenty-first century. In May 1970, Stevenson emphasized the importance of laying out the legal basis for actions in Cambodia: "the arguments we make," he said, "can affect the applicability of the Cambodian precedent to other situations in the future."[10] And forty-odd years later, Stevenson's argument was indeed picked up as a precedent—by the Department of Justice for U.S. use of force (in this case, targeted killing) outside an area of active hostilities.[11]

Stevenson was by no means alone in drawing a long legal bow. Meeker and others in the Johnson years did pull and tug at the lines of Cambodian sovereignty in order to allow some

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[9] Of Deeks' 39 cases of supposed use of something like the doctrine of Unwilling or Unable, only three occur after 1945 (a bright red line of use of force law) and before the Cambodian Incursion—the French attacks upon Algerian rebels in Tunisia (1957-1960), and the Portuguese attacks upon anti-Portuguese rebels in Senegal (1969-1971) and Zambia (1969). Deeks notes that in none of those three cases did the "victim state specifically invoke the 'unwilling or unable test' or a closely related concept." (As a side note, there is a broader relationship—including the mingling and migration of legal ideas—among these cases, other wars of decolonization, the Arab-Israeli and Israeli-Palestinian conflicts, and the Vietnam War that warrants a broader study.) Interestingly, Deeks also thinks that the Cambodian Incursion was a case in which the victim state (i.e., the United States) did not specifically invoke the unwilling or unable test, despite Stevenson's "cannot or will not" formulation.

[10] Cited in Fox (ed.), *The Cambodian Incursion: Legal Issues*, p. 25. He continued: "I believe the United states has a strong interest in developing rules of international law that limit claimed rights to use armed force and encourage the peaceful resolution of disputes."

[11] "Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force," Department of Justice White Paper, no date, http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf (accessed 21 May 2014), pp. 4-5. Mary Dudziak has also noted the connection between U.S. operations in Cambodia during the Vietnam War and this drone memo, although she focuses on a different aspect (secrecy) of its significance. Mary Dudziak, "Obama's Nixonian Precedent," Opinion Editorial, *The New York Times*, 21 March 2013, http://www.nytimes.com/2013/03/22/opinion/obamas-nixonian-precedent.html (accessed 21 May 2014).

scope for the use of force on Cambodian territory. This was formally allowed through the concept of operational self-defense, although much of the on-the-ground rhetoric and argument was made in terms of "hot pursuit," which persisted despite several attempts by "L" to kill it off. Officials on the ground in South Vietnam probably used it to give cross-border actions an air of legitimacy. Lauren Benton notes that colonial officials from the early modern period engaged in what she terms "legal posturing," which included "the inventive referencing of various sources of law in support of often ad hoc local policies." Such "active legal imagination" was not merely the result of a failure to apply law correctly but was also "a familiar kind of strategic cultural practice" for those embedded within the litigious societies of early modern Europe.[12]

In a similar way, the referencing of hot pursuit (or of "immediate pursuit," the alternative term devised by the U.S. military to escape the legal technicalities of hot pursuit) probably drew on cultural reservoirs of American legal practice in armed conflict.[13] Not only did the United States have a self-perception as the most law-abiding power in the world, something even military men who scoffed at the restraints of international law did not publicly disavow, it also had long experience with justifying crossing borders with force of arms. U.S. officials sometimes advocated a unilateral right of hot pursuit with regard to Mexican territory in the late nineteenth and early twentieth centuries.[14] And the language of hot pursuit was still deployed a generation

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[12] Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (New York: Cambridge University Press, 2010), pp. 24-25.

[13] American officials probably also drew on experiences of domestic law enforcement within the complex federal jurisdictional arrangement of the United States.

[14] See, e.g., the proclamation of a unilateral right of hot pursuit, on the grounds of necessity, made by U.S. officials during negotiations between the U.S. and Mexico in 1916. Poulantzas, *The Right of Hot Pursuit in International Law*, p. 15. In late-nineteenth-century North America, there is evidence to suggest that a customary law right to hot pursuit on land was beginning to develop with regard to bands of Indians which crossed the U.S.-Mexican border. A treaty of 1882 and a subsequent series of protocols, however, nipped the development of this potential customary right in the bud by conforming to the established practice of states of

later during the Korean War.[15] Given this history, it is not surprising that U.S. officials, especially military officers, had rhetorical recourse to an imagined right of hot pursuit during the Vietnam War. Given the national and international sensitivities around Cambodian neutrality, it may have been hoped such a postured legal right would deflect some of the criticism of cross-border transgressions.[16]

Legal posturing might also have been at play in the temporal and territorial limits placed on the Cambodian incursion, which at one point in his memoirs Kissinger describes as being arbitrarily determined and announced by Nixon in the face of media and public pressure for invading Cambodia. However arbitrary they were, Stevenson nonetheless stressed the 60-day time limit on U.S. troop presence in Cambodia as a sign of the Administration's restraint. Not without some legal connection—in particular, to the principle of proportionality that applies to the use of force—this time limit, along with other self-imposed limits, was nonetheless perceived more as a political obligation.[17] In any case, its quasi-legal formulation seemed to have some influence on the subsequent course of congressional action to limit the executive, and the War Powers Resolution of 1973 entrenched within U.S. law the 60-day limit to congressionally-unauthorized presidential use of force. The 60-day limit of the War Powers Resolution does not,

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negotiating bilateral treaties to allow for a reciprocal right of hot pursuit. Poulantzas, *The Right of Hot Pursuit in International Law*, pp. 13-16. See also Daniel S. Margolies, *Spaces of Law in American Foreign Relations: Extradition and Extraterritoriality in the Borderlands and Beyond, 1877 – 1898* (Athens, GA: University of Georgia Press, 2011), p. 103.

[15] Poulantzas, *The Right of Hot Pursuit in International Law*, pp. 17-20, esp. pp. 18-19 and n. 40 on the Korea-Manchuria frontier.

[16] Poulantzas does not directly suggest this as the reason why some US officials advanced hot pursuit as a justification for actions in Cambodia, but he does suggest it lay behind Israeli calculations in justifying late 1960s raids into Jordan as cases of hot pursuit. Poulantzas, *The Right of Hot Pursuit in International Law*, p. 26.

[17] See Chapter 2 above.

of course, affect the relevant international law on the use of force, but it might well be indicative of changing Congressional attitudes to international law, and it is certainly sobering that some of Nixon's "legal posturing" around Cambodia became embedded within U.S. law only a few years after the incursion.[18]

II

Only a dozen years after the ICRC's failure to get traction among governments with its 1956 Draft Rules (see Chapter 5 above), a changed global context saw the item of revision of the laws of war back on the international diplomatic agenda, pushed by a network of newly independent states, national liberation movements, and human rights organizations (most notably the International Commission of Jurists) in the wake (or midst) of the brutal and controversial wars of decolonization. The ICRC took the lead in organizing two "Experts" conferences in 1971 and 1972 to develop draft protocols additional to the 1949 Geneva Conventions. In 1974, the Swiss government took over leadership of the process, convening the formal Diplomatic Conference that considered, debated, and amended the ICRC drafts. Four annual sessions of the Diplomatic Conference would be held, ending with agreement in 1977 on the texts of two Additional Protocols, the first on international armed conflicts and the second on non-international armed conflicts.

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[18] The War Powers Resolution is generally championed as a constraint on the exercise of U.S. force abroad. Sam Moyn has recently noted that it, along with other congressional actions to end the Vietnam War, embody "the most significant constraints on executive power ever put on paper in American history." Samuel Moyn, "From Antiwar Politics to Antitorture Politics" (November 29, 2011). Available at SSRN: http://ssrn.com/abstract=1966231 or http://dx.doi.org/10.2139/ssrn.1966231 (accessed 11 March 2014), p. 42. But in acknowledging the legitimacy of the 60-day rule—and, its corollary, in subverting older conceptions of legal time in use of force law—the War Powers Resolution may well have also enabled the legal justifications for the violation of Cambodian sovereignty and neutrality as they culminated in May 1970 to have a fruitful afterlife.

To the extent that the negotiations for the Additional Protocols are remembered in international history, the issues that have garnered most attention relate to the incorporation of guerrilla wars of national liberation into Protocol I. With the acceptance of Article 1(4) of that protocol, "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in exercise of their right of self-determination," became classified as international armed conflicts. And with the acceptance of Article 44, lawful combatants had to distinguish themselves from the civilian population only during and immediately prior to an attack. Both were controversial at the time (and remain so today: the United States has not ratified the protocol), and the U.S. and its allies initially opposed both provisions before eventually resigning themselves to their inclusion in the protocol.[19] Given the number of votes from newly-decolonized states and their friends that could be mustered in support of the measures, the choice for western states became stark: let the measures through or walk away from the process.

The first session of the conference (1974) was taken up almost entirely with the political issue of wars of national liberation, and it was clear that the Western allies would need to accept Article 1(4) at some level if the conference was going to progress, which they did. Article 44 (discussed at the conference as draft Article 42) was not addressed until the third session (1976), but it was deemed just as important to non-European states. The relevant committee at the Geneva conference spent "most of its time and emotional energy" on the "contentious and politically charged topic" of draft Article 42, according to the British report of the conference.

[19] Article 1(4) was seen as importing value judgments about the justness of particular wars into a system of law that was supposedly neutral with regard to that question; and Article 44 was seen by some as fudging the clear line between combatants and civilians and giving unnecessary advantages to the western powers' likely adversaries.

The divide "ran along predictable lines—classic guerrilla theory on one side (DRV, PLO, most Africans and Arabs) and, on the other, Western/Latin insistence that failure to distinguish put every civilian at risk." The West wanted combatants to distinguish themselves as much as possible and loss of prisoner-of-war status for those combatants who failed to so distinguish themselves.[20]

The British delegation's report reads as a declension narrative of the committee's work: "The [initial] draft as a whole represented in many eyes far too substantial a concession on our part to the opposition. Each successive draft went further down the roads the West had vigorously refused to travel in earlier years. The circumstances in which the last draft emerged, after private consultations by the Rapporteur with a group including the DRV, PLO, Algeria and for the West only FRG and Norway (unrepresentative on this issue) were regarded with some justifiable suspicion."[21]

The Rapporteur who led the way towards Western capitulation was George Aldrich, head of the American delegation. As the leading Western representative at the conference, Aldrich might have been expected to hold a stronger line against North Vietnam, the PLO, Algeria and the other non-Western countries pushing for formal status for guerrilla fighters. On the contrary, Aldrich seemed (to British eyes at least) to go out of his way to accommodate those on the other side of this issue to the West. Aldrich treated the North Vietnamese representative "with studied courtesy," noted the British, "and indeed almost exaggerated consideration, which was

[20] "Draft Report: Committee III," July 1976, folio 65, FCO 58/996, The National Archives, Kew, United Kingdom.

[21] "Draft Report: Committee III," July 1976, folio 65, FCO 58/996, The National Archives, Kew, United Kingdom.

reciprocated. This mutual admiration society was regarded by most Western delegates with distaste and some disquiet."[22]

A vote was never taken on the draft Article in 1976, and in between sessions Aldrich further compromised the Western position, gaining Russian agreement to the draft as it had ended up in 1976. "On [draft] Article 42," wrote one British official, "identity of view between the US and USSR does not of course accord with our own position, though it must affect it."[23] Upon hearing of rumblings in the Pentagon over Aldrich's leniency ("To end on what might be regarded as a more cheerful note," concluded one British Ministry of Defence official's report of a conversation with a key American law-of-war expert, "Mr [Waldemar] Solf told me that he thought George Aldrich would have apoplexy when he saw the Pentagon brief on [draft] Article 42"),[24] the British attempted to circumvent Aldrich in order to influence the American position.[25] But Aldrich won out over his military counterparts, arguing two main points. First, that "his draft represented the best compromise the West could achieve that would still be acceptable to the Conference as a whole."[26] Second, that the West could get some satisfaction out of making an interpretive statement (either as part of the official negotiating history or as a signing statement)

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[22] "Draft Report: Committee III," July 1976, folio 65, FCO 58/996, The National Archives, Kew, United Kingdom.

[23] M. R. Eaton (Legal Advisers) to Freeland (Second Legal Adviser), Memorandum, 28 February 1977, folio E32, DEFE 24/1746, The National Archives, Kew, United Kingdom.

[24] J. E. Makin, "Report on the Meeting on Civil Defence in Bonn, 14-16 February 1977," 18 February 1977, folio E18, DEFE 24/1746, The National Archives, Kew, United Kingdom.

[25] MODUK to BDS Washington, Cable, DTG 251717Z MAR 77, "Diplomatic Conference on Humanitarian Law – Article 42 Guerrillas," 25 March 1977, folio E46, DEFE 24/1747, The National Archives, Kew, United Kingdom.

[26] MODUK to BDS Washington, Cable, DTG 251717Z MAR 77, "Diplomatic Conference on Humanitarian Law – Article 42 Guerrillas," 25 March 1977, folio E46, DEFE 24/1747, The National Archives, Kew, United Kingdom.

specifying a broad reading of the word "deployment" in the Article.[27] (The Article requires arms to be carried openly while fighting or deploying to fight.)

Aside from these tactical negotiating points, however, there was another reason that Aldrich was able to give so much ground to the classic-guerrilla-theory camp and retain some level of support for this position among the US military: the American experience in Vietnam. As one British official described a conversation with a senior US military officer:

> I put to him our misgivings on the encouragement paragraphs 3 and 4 give to guerrillas not to distinguish themselves from civilians; the consequent disadvantage to the regular soldier; and the consequent risk to civilians. He understood our concerns but felt that the likely practical effect of these paragraphs could be exaggerated. More important in US eyes was the protection which the Article achieved for the captured soldiers, even where they could be accused individually or as units of having broken the rules of war. In other words, they were mainly concerned to protect their own personnel when captured, remembering Vietnam experience, rather than either to make life harder for guerrillas or to protect the civilian population."[28]

The American position only left the British more exasperated, with one Army lawyer writing: "It does seem clear that the US position has been conditioned by their Vietnam experience. The North Vietnamese did not comply with the Third Geneva Convention, they alleged that captured aircrew were war criminals and not POW. This was a clear violation of the law, even taking into account their reservation to Article 85 of that Convention. It is the US hope that the present draft of Article 42 will prevent similar occurrences in future but this attitude

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[27] M. R. Eaton (Legal Advisers) to Freeland (Second Legal Adviser), Memorandum, 28 February 1977, folio E32, DEFE 24/1746, The National Archives, Kew, United Kingdom.

[28] M. R. Eaton (Legal Advisers) to Freeland (Second Legal Adviser), Memorandum, 28 February 1977, folio E32, DEFE 24/1746, The National Archives, Kew, United Kingdom. After the word personnel, somebody has handwritten "particularly bomber pilots."

seems to be incredibly naïve. No matter how an article of this sort is drafted, it is always open to a State to twist the law, taking advantage of the drafting to reach a conclusion which is totally contrary to the intention behind the Treaty."[29]

The Army lawyer could simply not understand the US position: "The whole framework appears to be designed to encourage guerrillas and this would seem to be against our national interest."[30] But the threat to try US airmen in Hanoi had been an incredibly powerful one during the Vietnam War,[31] and some element of reciprocity did eventually emerge to prevent those trials. Moreover, although the Americans presented their case in terms of protecting their soldiers, their Vietnam experience with giving guerrilla fighters formal combatant status gave them little reason to think it was a terrible idea in practice—and Vietnam experience may have been subtly informing comments such as the one cited above that "the likely practical effect" of Article 44 "could be exaggerated."

The British became resigned to their fate, with one official on the eve of the final (1977) session noting that it "seems very unlikely that the Americans will consider reopening or even supporting amendments to the text. Western countries (which are divided on the issue) almost certainly cannot muster the necessary votes either for specific amendment or to block the text as a whole; and, without the Americans, it is extremely doubtful whether we and other Western delegations which share our doubts would be able to negotiate such amendments. We have to

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[29] Sir David Hughes-Morgan, Memorandum, BLS/6 Vol. I, "Humanitarian Law Article 42 of Protocol I – Guerrillas," 4 March 1977, folio E11/1, DEFE 24/1747, The National Archives, Kew, United Kingdom.

[30] Sir David Hughes-Morgan, Memorandum, BLS/6 Vol. I, "Humanitarian Law Article 42 of Protocol I – Guerrillas," 4 March 1977.

[31] Indeed, the POW issue more generally was a major political issue in the United States, even after the war. See Michael Allen, *Until the Last Man Comes Home: POWs, MIAs, and the Unending Vietnam War* (Chapel Hill: University of North Carolina Press, 2009).

decide, therefore, whether we should continue to press for modifications to the text, given that the chances of success are virtually excluded."[32]

The British eventually decided to relent, agreed to Aldrich's draft, and went on to sign Additional Protocol I later that year along with the United States. Somewhat ironically, the United States never ratified the protocol, in part because of Article 44. But that decision probably has as much to do with forgetting the experience in Vietnam as it does of remembering it.

III

American conciliation on both Article 1(4) and Article 44 at the Diplomatic Conference was probably vital to ensuring the success of a measure that appears to have been even closer to Washington's heart (and western hearts more generally): the rule of proportionality. The U.S. position on proportionality had evolved considerably since the mid-1950s, when Yingling and Baxter had declaimed its essential uselessness to the ICRC (see Chapter 5 above). As outlined above, the fraught experiences of both waging and justifying the Vietnam War had led to the decline of a territorially-grounded paradigm of intentionality. In its place was emerging a new paradigm that paired standalone military objectives (i.e., disconnected from any place, defended or undefended) with a proportionality calculus. Much of the American effort at the negotiations in Geneva was geared towards entrenching this new paradigm within the codified law of armed conflict, both as a means for smoothing the path for the use of American firepower in the future, and as a means of rationalizing past uses of force in Southeast Asia. As George Aldrich, the head of the U.S. delegation, has noted: "Among the military lawyers who worked with me during the

[32] M K O Simpson-Orlebar (United Nations Department), "Brief for the UK Delegation to the Fourth Session of the Diplomatic Conference on Humanitarian Law in Armed Conflict," 11 March 1977, folio E51/1, DEFE 24/1747, The National Archives, Kew, United Kingdom.

negotiation of the *Geneva Protocols* I detected a desire to prove that the armed forces of the United States had acted in Vietnam in accordance with international law—not merely the law of the old *Hague Conventions*, but the law as nations wanted it in the 1970s."[33]

The first session of the Diplomatic Conference, in 1974, ended in a stand-off between two positions. "It was clear," the British delegation reported at the end of that session, "that the general climate of opinion was in favour of absolute prohibitions against attacks on civilian population, doing away with any element of intent on the part of the attacker and with the principle of proportionality."[34] The U.S. delegation's report to Secretary of State Henry Kissinger was in line with the British assessment, noting "East European delegations and those from less developed countries attacked the concept of proportionality on the ground that all incidental losses among the civilian population should be prohibited."[35] Against this tide of opinion, the British, the Americans and their NATO allies, "put considerable emphasis on the concept of proportionality—that incidental losses among the civilian population must not be out of proportion to the military advantage anticipated."[36]

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[33] George H. Aldrich, "Some Reflections on the Origins of the 1977 Geneva Protocols," in Christophe Swinarski (ed.), *Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet* (Geneva/The Hague: International Committee of the Red Cross/Martinus Nijhoff Publishers, 1984), p. 136.

[34] Delegation Report, IOC(74)112; Diplomatic Conference on Humanitarian Law in Armed Conflict, Geneva, 20 February – 29 March 1974: First Session; Annex A: Report on Debates in Plenary and Committees, para. 30; folio 165, FCO 61/1233, The National Archives, Kew, United Kingdom.

[35] R. R. Baxter and George H. Aldrich to the Secretary of State, "Report of the United States Delegation to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, Switzerland, February 20 – March 29, 1974," 10 June 1974, p. 22; folio 191, FCO 61/1234, The National Archives, Kew, United Kingdom.

[36] *ibid*., p. 22.

The western powers were disillusioned with the course of the first session of the conference. The Americans were "very disappointed with the way things went,"[37] with the U.S. Delegation writing forlornly to Kissinger that "there can be little hope that there will be a convergence of agreed texts" at the next session, including on proportionality.[38] The British were more direct, reporting the following to Whitehall:

> On the evidence of the debates ... and taking into account the amendments which have already have tabled, particularly those sponsored by African States, the view of the MOD [Ministry of Defence] members of the delegation who attended this Committee was that the texts likely to be adopted would be militarily unworkable. Quite apart from the issue of the status of National Liberation Movements and the conflicts in which they are engaged this [i.e. abandoning intentionality and proportionality] would make it virtually impossible for the MOD to favour the United Kingdom becoming a party to the Protocol.[39]

At the end of the first session of the Diplomatic Conference, then, there was a decent chance that rule of proportionality would be rejected by the international community, and that, as a result, most western powers would not sign on to the additional protocols, decidedly limiting the legitimacy of any treaties that came out of a rump conference. No single endeavor "saved" the rule of proportionality, but western acquiescence on both the belligerent status of national

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[37] E. C. Glover (British Embassy, Washington, DC) to R. A. Facey (United Nations Department, FCO), Memo, "Humanitarian Law in Armed Conflict," 26 June 1974; folio 191, FCO 61/1234, The National Archives, Kew, United Kingdom.

[38] R. R. Baxter and George H. Aldrich to the Secretary of State, "Report of the United States Delegation to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, Switzerland, February 20 – March 29, 1974," 10 June 1974, p. 22; folio 191, FCO 61/1234, The National Archives, Kew, United Kingdom.

[39] Delegation Report, IOC(74)112; "Diplomatic Conference on Humanitarian Law in Armed Conflict, Geneva, 20 February – 29 March 1974: First Session," 17 June 1974; "Annex A: Report on Debates in Plenary and Committees," para. 31; folio 165, FCO 61/1233, The National Archives, Kew, United Kingdom. The more circumspect language of the Americans was not due to a difference of opinion with the British on this score, but to the differing audience and nature of their delegation reports: the British reports were strictly internal government documents and hence read much more stridently; the American reports were often distributed widely, including to academics and other interested parties outside the government, and were more muted as a result.

liberation movements and the combatant status of guerrilla fighters was probably a key factor. While there is no evidence of direct *quid pro quo* bargaining over the issue of national liberation movements and the rule of proportionality, the pragmatic decision taken by western powers to cease their opposition to including wars of national liberation and guerrilla fighters into the remit of Protocol I certainly helped to advance their case on other issues, including proportionality.[40]

The survival of the principle of proportionality was ensured during the second session of the Diplomatic Conference in 1975. A compromise of semantics allowed the Vietnamese to save face, while rescuing the rule of proportionality, even if by another name. As the British delegation reported on the second session:

> The rule of proportionality has its defects (comparing the incomparable) but is obvious commonsense. It aroused deep hostility from many delegations who saw it as a loophole for the uncaring military rather than the curb on them it actually is. The breakthrough came when it became clear (largely from a North Vietnamese intervention) that the word "proportionality" (used by US spokesmen during the Vietnam war) was the sticking point: the same principle restated in other words was acceptable.[41]

The rule of proportionality was therefore incorporated within international treaty law for the first time, albeit under an assumed identity, in 1977 with the adoption of Additional Protocol I to the 1949 Geneva Conventions.[42] Article 51(5)(b) of Additional Protocol I prohibits

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[40] Aldrich certainly saw western flexibility on wars of national liberation and guerrilla combatant status as vital to the success of the conference, writing that "the newly independent States that saw those provisions as a political victory thereby acquired an interest in seeing the draft treaty in which they were embodied adopted and accepted as broadly as possible. That acquired interest may help further explain some of the efforts to bring the conference to a successful conclusion." Aldrich, "Some Reflections on the Origins of the 1977 Geneva Protocols," p. 136.

[41] Delegation Report, IOC(75)145; "Diplomatic Conference on Humanitarian Law in Armed Conflict, Geneva 3 February – 18 April: Second Session," 5 August 1975, p. 21; folio 134, FCO 61/1374, The National Archives, Kew, United Kingdom.

[42] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, https://www.icrc.org/ihl/INTRO/470 (accessed 5 November 2015).

> an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

Article 57(2)(a)(iii) requires those who plan or decide upon an attack to

> refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

and Article 57(2)(b) further mandates that an attack must be cancelled or suspended if it becomes apparent that expected incidental civilian loss would be excessive in relation to the anticipated military advantage. Complementing the rise of proportionality was the prohibition on area attacks in Article 51(5)(a)—the nail in the coffin of the old "constructively defended places" test—and a nebulous definition of military objectives in Article 52(2):

> Military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in circumstances ruling at the time, offers a definite military advantage.[43]

In addition to being codified within international treaty law, the rule of proportionality is also now widely accepted as a rule of customary international law.[44] It applies, therefore, not solely to those states party to Additional Protocol I. It is, in short, a keystone within the contemporary legal architecture of war.

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[43] Cf. the very specific list of acceptable targets in Art. 2, IX Hague Convention (1907), reproduced in Chapter 5.

[44] Rule 14: "Proportionality in Attack," International Committee of the Red Cross, Customary International Humanitarian Law database, https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule14 (accessed 5 November 2015). While the ICRC's Customary IHL project has come in for considerable criticism, the status of the rule of proportionality as customary law is rarely questioned today.

Where the recent historiography of law and war has touched specifically on the Additional Protocols, it has tended to see them as, in the words of historian Fabian Klose, a closing of the "loopholes in international humanitarian law that had become so sorely evident in the wars of decolonization."[45] But the Additional Protocols, and especially the provisions of Protocol I noted above, are less a coda than a transition to something new. The negotiations at Geneva were a contingent moment in the rise to prominence of a new paradigm of legitimate violence against civilians in time of armed conflict—a paradigm that is crucial to how war is imagined and waged today.

IV

While the formal incorporation of the rule of proportionality into the international law of war took place relatively recently, the history of the principle is often cast as a long one stretching back to medieval Christian just war theory. Legal scholars also tend to see the principle as ever-present in the history of the laws of war, and often trace its lineage from Augustine and Aquinas, through Grotius and Vattel, to the nineteenth-century efforts at codification—the Lieber Code (1863) and the Declaration of St. Petersburg (1868)—and their twentieth-century counterparts, the Hague and Geneva conventions.[46] Historians have tended to validate this long history, with Geoffrey Best, author of two now-standard texts on the history of the laws of war, following the lawyers' lead on the advent of proportionality. "Nothing like this had ever appeared before in the

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[45] Fabian Klose, *Human Rights in the Shadow of Colonial Violence: The Wars of Independence in Kenya and Algeria* Trans. Donna Geyer (Philadelphia: University of Pennsylvania Press, 2013 [2009]), p. 239.

[46] See, for example, Michael Newton and Larry May, *Proportionality in International Law* (New York: Oxford University Press, 2014), esp. pp. 61-119; Judith Gail Gardam, "Proportionality and Force in International Law," *American Journal of International Law*, Vol. 87 (1993), pp. 391-413; and Laurie R. Blank, "A New Twist on an Old Story: Lawfare and the Mixing of Proportionalities," *Case Western Reserve Journal of International Law*, Vol. 43 (2011), pp. 707-738.

treaty texts," he correctly writes of the articles incorporating the idea of proportionality into Additional Protocol I, before swiftly discounting the possibility that those articles represented a legal innovation: "and yet the idea is as old as the idea of restraint itself" and "as fundamental as the idea of distinction."[47]

This narrative of the long history of proportionality is merited in some respects. The rule of proportionality as it applies to the conduct of hostilities does owe something to the slow evolution of the broader concept of proportionality; indeed, without that broader and longer history, the particular rule of proportionality under consideration here would probably not have emerged. But that long history is, on its own, insufficient. It cannot explain how the rule became so salient when it did. Indeed, narratives of the long history of proportionality do much to obscure that historical contingency. On the one hand, evidence for earlier uses of the idea is too often stretched: Lieber's description of military necessity and the protection of civilians, for example, seems to owe little, if anything, to proportionality; and the St. Petersburg declaration sought to reduce the human suffering of individual combatants by setting an absolute limit rather than by establishing a sliding scale. On the other hand, evidence for proportionality's contingent, sudden, and short history is too easily dismissed: Best himself casts some doubt on the long history of proportionality—"I recall a senior army legal officer, not long retired, telling me in the early 1980s that he had never heard the word until ten years or so earlier"—before reasoning away this evidence in favor of the rule's novelty by suggesting that the officer in question "may have been exaggerating for the sake of effect, as professionals sometimes do when discussing

[47] Geoffrey Best, *War and Law Since 1945* (Oxford, UK: Clarendon Press, 1994), p. 323.

their work with laymen," and that while the word *proportionality* may have been new (as well as "lumbering, unattractive and inexpressive" to boot), the idea it expressed was well established.[48]

A key function of reciting the long history of proportionality seems to be to set the principle in place at the core of the international law of war. The claim that proportionality is "as old as the idea of restraint itself" and "as fundamental as the idea of distinction" merges into an implicit assumption in which proportionality becomes more-or-less synonymous with restraint. Laurie Blank, for example, notes the *jus in bello* proportionality principle, with its balancing of military necessity and humanity, "is at the foundation of two critical aspects of IHL": that the means and methods of attacking the enemy are not unlimited, the primary limit being that the only legitimate object of war is to weaken the military forces of the enemy; and that civilian casualties that result from legitimate actions are not necessarily illegal.[49] But such claims reverse the more likely order in which those principles actually took root within the international law of war. Proportionality is surely not so much the foundation upon which the principles of restraint and intentionality were built than it is a particular manifestation of those principles.

A utilitarian calculation of advantages gained over bystanders killed is not the only available legal method for restraining the conduct of war and justifying civilian casualties; those things can also be achieved by setting more tangible limits to the time, place, and weapons of combat. Indeed, for much of the history of the international law of war, it was just such limits that prevailed. In particular, the rules of bombardment suggested that the principle of intentionality inhered in a particular place; civilians killed or injured within the geographic bounds of a legitimately-bombarded place were considered unintentional casualties of war, and

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[48] Best, *War and Law Since 1945*, pp. 324, n. 81.

[49] Blank, p. 714

hence not illegal. And yet that earlier history has been obscured with long narratives of proportionality.

Less than a year into his presidency, Barack Obama took the opportunity of his Nobel Lecture to dwell on some "difficult questions about the relationship between war and peace." The American president noted that while the morality of war was not questioned "at the dawn of history," over time, "as codes of law sought to control violence within groups, so did philosophers and clerics and statesmen seek to regulate the destructive power of war." This led to the establishment of certain criteria for a just war: "if it is waged as a last resort or in self-defense; if the force used is proportional; and if, whenever possible, civilians are spared from violence."[50]

This was by no means the only time Obama has used the language of the just war in general, nor pinpointed the importance of the principle of proportionality in particular. Indeed, both have become something of mainstays for Obama in deciding upon and justifying the use of American armed force abroad. A 2012 *New York Times* story noted that as "a student of writings on war by Augustine and Thomas Aquinas, he believes that he should take moral responsibility" for his actions, including the selection of targets for drone strikes.[51] And in his 2014 West Point Commencement speech, the president stated that the use of American military power would need

[50] Barack H. Obama, "Nobel Lecture: A Just and Lasting Peace," Oslo, Norway, 10 December 2009. Available at: http://www.nobelprize.org/nobel_prizes/peace/laureates/2009/obama-lecture_en.html (accessed 13 October 2014).

[51] Cited in David Luban, "What Would Augustine Do? The President, Drones, and Just War Theory," *Boston Review*, June 6, 2012, http://bostonreview.net/david-luban-the-president-drones-augustine-just-war-theory (accessed 13 October 2014).

to be continually accompanied by "tough questions about whether our actions are proportional and effective and just."[52]

To tell the story of this targeting rule as the product of a lengthy lineage stretching back to Augustine and Aquinas, however, could well be a misleading narrative—one whose purpose might be to legitimize, rather than analyze, the concept. More recent, critical, and fruitful histories are possible and this work attempts to recover just such a history. The rule of proportionality is one manifestation of the principle of limiting intentional harm, not its sole natural arbiter, and the legal paradigm for assessing legitimate civilian harm that dominated for much of the twentieth century was not proportionality-based but place-based: civilians killed within the geographic bounds of a legitimately-attacked place were considered unintentional casualties of war, and such killing was therefore not illegal. While ever-more destructive technologies of war prompted jurists and humanitarians to propose a proportionality-based calculus to contest or complement this place-based paradigm, states, including the United States, were generally unresponsive through the 1950s to incorporating the rule within the international law of war. That changed over the following two decades.

The current conversation on state violence and civilian casualties in war is now saturated in the language of proportionality. The principle is deployed both as justification for, and critique of, state actions. It is a *leitmotif* of legitimate wartime violence in the world today. And yet its recent origins have been obscured by narratives of just war theory that elide history in general, but especially a particular history—that of the Vietnam War. The denial of that war's

[52] Barack H. Obama, "Remarks by the President at the United States Military Academy Commencement Ceremony," West Point, New York, 28 May 2014. Available at: http://www.whitehouse.gov/the-press-office/2014/05/28/remarks-president-united-states-military-academy-commencement-ceremony (accessed 19 October 2014).

significance in policy-making circles[53] has been mirrored in the historiography of the laws of war: a standard account notes that the Vietnam War "raised few new questions of principle."[54] An alternative reading, however, suggests the Vietnam War was the crucible of a major conceptual shift in how the world understands the most basic principle of the law of armed conflict—the distinction between combatant and civilian—and, in turn, how we justify civilian suffering in war.

[53] James Mann, *The Obamians: The Struggle Inside the White House to Redefine American Power* (New York: Viking, 2012).

[54] Geoffrey Best, *Humanity in Warfare* (New York: Columbia University Press, 1983 [1980]), p. 371. See also Sahr Conway-Lanz, *Collateral Damage: Americans, Noncombatant Immunity, and Atrocity after World War II* (New York: Routledge, 2006), p. 214: "The Vietnam War appears not to have marked a dramatic departure from the way in which Americans had struggled with the dilemma over noncombatant immunity since World War II."

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