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**DEFENDING
AMERICA'S CAMBODIAN
INCURSION**

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December 1993

There is little worse than justifying a legal argument with hindsight. And yet, by defending America's Cambodian incursion twenty-three years after the fact, I certainly open myself up to such a charge. Nevertheless, that is exactly what this paper is -- a defence of the legality of the 1970 Cambodian incursion.

One might ask why put forth the effort to defend a military operation twenty-three years past. The law of neutrality, so critical to understanding the Cambodian incursion, seems much less important in today's world than it did in the 1970's. Sanctuary warfare is not currently an issue in today's conflicts. But to see the Cambodian incursion in that light is to close your eyes to the bigger issues involved. The Cambodian incursion was about respect for the rule of law. It was about whether the law would be used to vindicate or further handcuff the victim of aggressive use of force.

In a sense, the Cambodian incursion was a microcosm of the entire second war in Indochina. On the one hand, you had the aggressive communist regime of North Vietnam waging war in a manner willing to do whatever it took to win. If that meant violating the international law of neutrality, using the territory of a nation declared to be neutral (by both international treaty to which North Vietnam was a signatory and by domestic proclamation), using that territory to move

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troops and supplies, using that territory for military bases, and using that territory as a springboard for military offensive operations, so be it. North Vietnam was willing to circumvent international law because, as the myth went, they were just a group of peasants waging a guerilla war. The world was not going to hold North Vietnam to such legal niceties, and even more certainly, the United States would never actually do anything about the violations of international law.

On the other hand, you had the United States, not only abiding by the law of neutrality, but so scrupulously interpreting it as to allow the law to handcuff and further victimize American troops. For years, the United States was aware the North Vietnamese were using the territory of neutral Cambodia for military purposes, yet the United States did nothing in response. The United States' toleration of North Vietnam's illegal activities encouraged further breaches of international law.

Nevertheless, when the United States finally did react, and took recourse allowed under international law, the response was strongly against the administration decision. Not only were college student protests numerous, but more importantly, and more disappointing, scholars, purported international law experts, produced a mass of writings condemning the Cambodian incursion as illegal. So much was

written in the wake of the incursion that was wrong both legally and factually, and which was based on pure emotion.

And so it is that twenty-three years later I defend the operation. But so it is also, that hindsight becomes an issue. In answer to that charge, I can only say this defence is based upon evidence that was known at the time of the incursion. Furthermore, the evidence contained here comes from both sides of the conflict. Much of the factual proof is supported by admissions of the North Vietnamese leaders themselves.

This paper begins with a discussion of the law of neutrality and the rights and duties placed upon neutral and belligerent powers. This is followed by a review of the facts surrounding the Cambodian incursion, and how the law of neutrality applied to those facts. After concluding the law of neutrality was violated by both North Vietnam and Cambodia, I turn to the remedy, under international law, of self defence. There, I discuss the legal requirements of necessity and proportionality, and once again proceed to an analysis of the facts of the incursion, this time in light of the law of self defence. The final portion of this paper shifts the emphasis to domestic constitutional law of the United States, particularly the Commander in Chief powers of the President, and congressional authorization for the use of armed force.

I have not, in this paper, discussed evidence which has been discovered since the incursion. Classified government

documents regarding the incursion, for the most part, remain classified. However, I believe the case is even stronger for the administration's decision when it is seen that information available at the time of the incursion supports its legality. Likewise, because this paper is a defence of the incursion, related topics that arose after the incursion, such as congressional attempts to withhold appropriations for specific military purposes, are not discussed.

NEUTRALITY

CUSTOMARY LAW

Some scholars have maintained in the United Nations Charter era that the laws of neutrality are obsolete.¹ They base this theory on the premise that all members of the United Nations are bound to give the United Nations "every assistance in any action it takes"² and are further required to "refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action."³

However, this view is overly narrow and simplistic. At the very least, it fails to consider conflicts, like the second war in Indochina, fought under the auspices of Article 51 of the United Nations Charter. Article 51 allows use of force for self defence until the Security Council takes measures. If, as in the case of the second Indochina war, the Security Council never takes measures, the laws of neutrality for non-belligerent states remain alive and critical. Such "dual wars", although arguably illegal from one side or the

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Gerhard Von Glahn, Law Among Nations 843 (6th ed. 1992).

²

United Nations Charter, § 2(5).

³

Id.

other's viewpoint as a breach of Article 2(4) of the United Nations Charter, are common in the Charter era, and realpolitik often dictates that other nations, especially those bordering the belligerents, remain neutral.

The law of neutrality has its roots in customary international law.⁴ The customary rights and duties of neutral countries during land warfare were finally treated in the Hague Convention V of 1907.⁵ Two basic ideals upon which the rest of the law of neutrality is based are impartiality of the neutral toward the belligerents, and respect on the part of the belligerents toward the inviolability of the territory of the neutral.⁶

4

L. Oppenheim, International Law 624-626 (H. Lauterpacht ed., 7th ed. 1952). Since there was no international law in ancient times, there obviously was no such concept as neutrality. Although Grotius, in the seventeenth century, wrote of neutrality, the body of law was just taking shape at that point. It was in the eighteenth century that many of our modern maxims of neutrality became recognizable. Id.

5
Morris Greenspan, The Modern Law of Land Warfare 534 (1959); Georg Schwartzberger, A Manual of International Law 179 (6th ed. 1976).

6
Schwartzberger, *supra* note 5 at 180. In fact, Schwartzberger, at 177, states the rights and duties of neutral powers under international customary law can be summarized in three basic rules: 1) a neutral state must abstain from taking sides in the war and from assisting either belligerent; 2) a neutral state has the right and duty to prevent its territory from being used by either belligerent as a base for hostile operations; and 3) a neutral state must acquiesce in certain restrictions which belligerents are entitled to impose on peaceful intercourse between its citizens and their enemies, in particular, limitations of the freedom of the seas. This paper will discuss only the first two propositions.

Indeed, the very first article of the Hague Convention V of 1907 states simply and in its entirety, "The territory of neutral powers is inviolable."⁷ Other essential articles prohibit the movement of troops or convoys of war munitions or supplies across neutral territory,⁸ place the burden of such prohibition upon the neutral,⁹ and require "every measure of restriction or prohibition taken . . . must be impartially applied . . . to both belligerents."¹⁰ What traditionally was viewed as a duty to remain impartial, allowing some aid to be given to both belligerents as long as it was done equally, has evolved into a requirement of abstention. In other words, since 1907, and the stricter requirements of the Hague Convention V, a neutral state cannot assist both sides of a conflict, or allow both sides equally to use its territory.¹¹

See also Von Glahn, *supra* note 1 at 844: "The basic right, beyond any question, is the inviolability of neutral territory . . . and all other neutral rights really are mere corollaries to that fundamental principle". Cf. Greenspan, *supra* note 5 at 534: "The chief and most vital right of a neutral state is that of the inviolability of its territory."

⁷

The Hague Convention (V) of 1907 Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land [hereinafter Hague Convention V], 18 October 1907, § 1.

⁸

Id. at § 2.

⁹

Id. at § 5.

¹⁰

Id. at § 9.

¹¹

Oppenheim, *supra* note 4 at 675. In fact, at 653, in defining the term neutral, Oppenheim says, "Such states as do not take part in a war between other states are neutrals" (emphasis added). Von Glahn, *supra* note 1 at 834, says,

TREATIES

In addition to violating customary international law, a violation of neutrality also violates any applicable treaties.¹² Most obviously, when a nation uses armed force against the territory of another nation proclaimed to be neutral, the aggressor nation violates Article 2(4) of the United Nations Charter.¹³

Furthermore, specific treaties may also apply. In the particular case of Cambodia, the Geneva Accords of 1954 specified various rights and duties regarding Cambodia's neutrality:

The Royal Government of Cambodia is resolved never to take part in an aggressive policy and never to permit the territory of Cambodia to be utilized in the service of such a policy.

The Royal Government of Cambodia will not join in any agreement with other states, if this agreement carries for Cambodia, the obligation to enter into a military alliance not in conformity with the principles of the Charter of the United

"Neutrality by a state not a party to a war consists of refraining from *all participation in war*" (emphasis added).

See also Erik Castren, The Present Law of War and Neutrality 441 (1954): "In actual fact, in the law of neutrality, abstention means the same as neutrality since only those which keep wholly away from warfare are neutral, while neutrality is characterized by this very abstention." Castren even more clearly states, at 444, that assisting both sides of a conflict is not neutrality. C.f. Clive Parry, et al., Encyclopaedic Dictionary of International Law 255, 256 (1988), which defines neutrality in terms of impartiality and abstention.

¹²

Schwartzberger, *supra* note 5 at 179.

¹³

Article 2(4) of the United Nations Charter prohibits the threat or use of force against the territorial integrity or political independence of any state.

Nations, or as long as it is not threatened, the obligation to establish bases on Cambodian territory for the military forces of foreign powers.

The Royal Government of Cambodia is resolved to settle its international disputes by peaceful means, in such a manner as not to endanger peace, international security, and justice.¹⁴

By signing the Final Declaration, North Vietnam obligated itself to respect Cambodia's neutrality and to refrain from establishing military bases on Cambodian territory.¹⁵ The United States, although not a signatory to the Final Declaration, agreed to abide by its terms.¹⁶ Finally, in November 1957, Cambodia made its neutrality even clearer when its National Assembly enacted its neutrality into domestic law.¹⁷

DUTIES UNDER THE LAW OF NEUTRALITY

In 1970, Cambodia clearly purported to be a neutral power. But what did that entail? And did the nations affected by the second Indochina war (including Cambodia) comply with the law of neutrality?

Neutrality not only requires abstention from the martial

¹⁴

Final Declaration of the Geneva Conference on the Problem of Restoring Peace in Indochina [hereinafter Final Declaration], Declaration by the Royal Government of Cambodia, 21 July 1954.

¹⁵

Final Declaration, §§ 4, 5, and 12.

¹⁶

Stanley Karnow, Vietnam, A History 221 (revised ed. 1991).

¹⁷

John Norton Moore, International Law and the Indochina War 483 (1972).

affairs of other states, but also carries with it affirmative duties on the part of the neutral power.¹⁸ In fact, the ultimate expression of such requirements is the duty, if all else fails, which some commentators place on neutral powers, to use force to prevent belligerent powers from using neutral territory for war-making.¹⁹ If the neutral does not prevent the use of its territory, the result is a breach of neutrality, a delict in international law.²⁰ Note, however, that the duty of a neutral to prevent a belligerent from breaching its neutrality is not absolute, but applies only to the extent of the neutral's ability; inability, as opposed to unwillingness, is not in itself a delict.²¹

Before discussing the options of a belligerent injured by a breach of neutrality, how can that status be breached? The law of neutrality is an overlapping montage of rights and corollary duties. As we have seen, the primary right is that of the neutral's territorial integrity, and the corollary duties are recognition and respect of such integrity by all nations, and the active protection of that right by the

¹⁸

Oppenheim, *supra* note 4 at 654.

¹⁹

Castren, *supra* note 11 at 441; Oppenheim, *supra* note 4 at 698; Von Glahn, *supra* note 1 at 846.

²⁰

Castren, *supra* note 11 at 441.

²¹

Von Glahn, *supra* note 1 at 847.

neutral power.²² All other rights and duties flow from this. This primary right may not be waived by the neutral power,²³ because to do so would invariably favor one belligerent at the expense of the other, thus obviating the essence of neutrality. Concomitant with this right is the duty of the neutral power "to exercise such control of the situation as it can" and to not willingly permit infringement of its territory.²⁴

One of the duties which flows from the right of territorial integrity is that the neutral must do all in its power to prevent either belligerent from using its territory, particularly to move troops.²⁵ Like other aspects of neutrality, it does not matter whether the neutral allows one or both belligerents to use its territory. The use in and of itself constitutes the breach²⁶ (of the neutral's right by the aggressor, and of the neutral's duty to prevent such²⁷).

²²

Castren, *supra* note 11 at 441; Greenspan, *supra* note 5 at 534; Charles C. Hyde, International Law 2336 (1947).

²³

Castren, *supra* note 11 at 442.

²⁴

Id.

²⁵

Hague Convention V, § 2; Hyde, *supra* note 22 at 2337; Schwartzberger, *supra* note 5 at 180. Oppenheim, *supra* note 4 at 687, notes this is a change from the eighteenth century practice.

²⁶

Oppenheim, *supra* note 4 at 688.

²⁷

Hague Convention V, § 5.

Not only does international law forbid belligerent troops to pass through neutral territory, it is thus inherently unlawful for a belligerent to use neutral territory to form or organize hostile expeditions into belligerent territory,²⁸ or for any other military purpose.²⁹ Belligerents may not use neutral territory for military bases.³⁰ While the eighteenth century practice allowed certain use of neutral territory, today the neutral has an affirmative duty to prohibit all use of its territory by belligerents, and that duty extends as far as requiring the neutral to use whatever force is within its ability.³¹ Inherent in this prohibition is that the neutral territory may not be used by the belligerents for depots or factories of arms, munitions, or military provisions.³²

28

Greenspan, *supra* note 5 at 545.

29

Id. at 545-546. The emphasis here is on the purpose of the use, not on whether the expedition or enterprise is organized or equipped as a military force or unit.

30

Id.

31

Oppenheim, *supra* note 4 at 698.

32

Id. at 702. This well-recognized point of law is diametrically opposed to a portion of John Fried's article, *United States Military Intervention in Cambodia in the Light of International Law*. The article received widespread recognition in the wake of the Cambodian incursion, and was reprinted in Richard Falk's four volume work, The Vietnam War and International Law, at 100-137. Fried states in his paper that depots of war materials in neutral territory are not unlawful. He cites no legal authority whatsoever in support of this statement, nor does he confide how radical this position is. Yet, Fried's handling of the law is not unusual when compared with much material published by opponents of the incursion.

The prohibition on the passage of military supplies is a similar duty incumbent upon both neutrals and belligerents. Belligerent powers have a duty, in respecting the neutral's territorial integrity, not to use that territory to move war materiel,³³ and the neutral power has a duty not to allow its territory to be so used.³⁴ Belligerents are free to purchase war materiel through normal commercial channels, and neutral governments need not prohibit such.³⁵ It is the use of the neutral territory as a conduit for war materiel which is prohibited.

The mere entry onto or presence in neutral territory for military purposes does not make the neutral power liable for an international delict.³⁶ It does, however, impose further duties upon the neutral. Thus, the Hague Convention V states:

A neutral power which receives on its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theater of war.

It may keep them in camps and even confine them in fortresses or in places set apart for the purpose.³⁷

³³

Hague Convention V, § 2; Oppenheim, *supra* note 4 at 690; Schwartzenger, *supra* note 5 at 180.

³⁴

Hague Convention V, § 5.

³⁵

Schwartzenger, *supra* note 5 at 180.

³⁶

Oppenheim, *supra* note 4 at 718. In fact, neutral territory, being outside the theater of war, constitutes an asylum, which the neutral power is free to offer.

³⁷

Hague Convention V, § 11.

Arguably then, a neutral power could accept, or even invite full belligerent units across its borders without violating its duty as long as the neutral power disarmed and interned those units.³⁸ Such a determination is left to the neutral, and can neither be demanded by one belligerent nor may its refusal be demanded by the other belligerent.³⁹ The requirement of disarming and interning, whenever giving asylum, furthers the purpose of keeping the neutral territory free from use for military purposes.

REMEDIES UNDER THE LAW OF NEUTRALITY

Having considered the concept that rights and duties of neutrality are complimentary to both the neutral and the belligerent, as well as having considered the specific duties found in the law of neutrality, and having acknowledged the neutral's duties are not absolute but only extend to due diligence, the question remains what options exist if the neutral is willing to stop a belligerent but is unable to do so. The remedy available to a belligerent injured by its

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Schwartzberger, *supra* note 5 at 180. Oppenheim, *supra* note 4 at 723, relates "the most remarkable instance [of this] known in history," where Swiss General Herzog entered into a convention in 1871 with French General Clinchant to intern 82,000 French soldiers and 10,000 horses until the end of the Franco-German War. At the conclusion of the war, France paid the Swiss government eleven million francs for the maintenance of the troops and horses.

³⁹

Oppenheim, *supra* note 4 at 719.

enemy's unlawful use of neutral territory is not only logical, but is founded deeply in customary international law.

In the seventeenth century, the father of international law, Hugo Grotius, wrote:

From what has been said, we can understand how it is permissible for one who is waging a just war, to take possession of a place situated in a country free from hostilities. Such a procedure, of course, implies these conditions, that there is not an imaginary but a real danger that the enemy will seize the place and cause irreparable damage; further, that nothing be taken except what is necessary for protection such as the mere guarding of the place, the legal jurisdiction and revenues being left to the rightful owner; and finally, that possession be had with the intention of restoring the place as soon as the necessity has ceased.⁴⁰

Schwartzberger interprets this as a right of reprisal,⁴¹ while other commentators view it as a right emanating from the failure of neutral duties, a right of self defence, or a right of self preservation.⁴² The difference may only be one of semantics,⁴³ but the important point must not be overlooked:

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Hugo Grotius, *De Jure Belli Ac Pacis* [The Law of War and Peace] 195 (Book II, chapter II, part X) (Francis W. Kelsey trans. 1925).

41

Schwartzberger, *supra* note 5 at 180. "If [the neutral] fails to safeguard its territorial integrity, the other belligerent is entitled, by way of reprisal, to institute military operations against enemy forces which have established themselves in the neutral territory."

42

Ian Brownlie, *International Law and the Use of Force by States* 309 (1963).

43

International Law and Military Operations Against Insurgents in Neutral Territories, 68 *Columbia Law Review* 1127, 1140, 1147 (1968). After recognizing that some see the difference as merely semantics, the author of the note

belligerents need not stand hopelessly by, the victims of repeated attacks by the enemy, simply because of a lack of willingness or ability on the part of the neutral to enforce its territorial integrity.

The classic example of reprisal for use of neutral territory by belligerents occurred in Greece in the first world war. Greece, though still a neutral in late 1915, allowed the allies to land in Salonika in order to assist Serbia. In January 1916, Germany responded by bombarding the city of Salonika. Subsequently, a store owner sought reparation from Germany for damage to his store, based on the fact Greece was a neutral country attacked by Germany.⁴⁴ While decided on other grounds,⁴⁵ the tribunal did recognize:

describes it as more than semantics, and maintains international law should permit and encourage primary reliance on self defence as a justification because it imposes additional but acceptable restraints on the use of force against the violation.

⁴⁴
Coenca Brothers v. The State of Germany, VII Recueil des Decisions des Tribunaux Arbitraux Mixtes 683, (Greco-German mixed tribunal, 1927), reported in H. Briggs, The Law of Nations: Cases, Documents, and Notes 756 (1st ed. 1938).

⁴⁵
The tribunal found, despite Germany's rationale for the air raid, they had violated international law themselves:

- 1) That the bombardment of Salonika in January 1916 took place without previous warning by the German authorities;
- 2) That the attack took place at night;
- 3) That the dirigible dropped the bombs from a height of about 3000 meters. . . .

Whereas, it follows from what has been set forth that the bombardment in question must be considered as contrary to international law.

Whereas, the occupation of Salonika by the armed forces of the allies in the autumn of 1915, when Greece had not yet entered the war, constitutes a violation of the neutrality of that country;

Whereas, it is useless to enquire whether the Greek government protested against that occupation or whether it expressly or tacitly consented thereto;

Whereas, in either case, the occupation of Salonika was, as regards Germany, an illicit act which authorized her [Germany], to take, even on Greek territory, any acts (opérations) of war necessary for her defence.⁴⁶

From this case it is apparent international law prohibits the use of neutral territory by belligerent troops, whether with or without the consent of the neutral power. But more importantly, international law recognizes a right on behalf of the injured belligerent in such cases to protect itself when the neutral is unwilling or unable to prevent the use of its territory.

A response by the injured belligerent, though legal, is not without limits. Recall the limits Grotius placed when recognizing the right. Oppenheim acknowledges the right of self defence for the injured belligerent, but limits it to cases of extreme necessity.⁴⁷ Other scholars recognizing the

Id. at 757-758.

⁴⁶

Id. at 757.

⁴⁷

Oppenheim, *supra* note 4 at 698.

limited right include Castren,⁴⁸ Greenspan,⁴⁹ Guggenheim,⁵⁰ and Hyde.⁵¹

To summarize, the law of neutrality grants certain rights to the neutral, primary of which is territorial integrity. Concomitant with that right is the duty of the neutral to prevent breaches of its territorial integrity, and the duty of belligerents to respect that territory. When a belligerent uses neutral territory for military purposes, and the neutral allows such use, breaches have occurred on behalf of both the

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Castren, *supra* note 11 at 442: "If however, a neutral state has neither the desire nor the power to interfere and the situation is serious, other belligerents may resort to self help."

49

Greenspan, *supra* note 5 at 538: "Should a violation of neutral territory occur through the compliance of the neutral state, or because of its inability, through weakness or otherwise, to resist such violation, then a belligerent which is prejudiced by the violation is entitled to take measures to redress the situation, including, if necessary, attack on enemy forces in the neutral territory." Consider *id.* at 583-584, for a discussion of the importance of attempting peaceful means to settle such breaches prior to resorting to reprisals.

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Paul Guggenheim, Traité de Droit International Public 346 (1954): "The neutral territory is included in the spatial domain of the valid law of war if a belligerent state has been able to erect a military support base there, before or after the beginning of hostilities."

51

Hyde, *supra* note 22 at 2338: "If a neutral possesses neither the power nor the disposition to check warlike activities within its own domain, the belligerent that in consequence is injured or threatened with immediate injury would appear to be free from the normal obligation to refrain from the commission of hostile acts therein."

neutral and the belligerent, and the prejudiced belligerent has a right to self defence in certain cases.

THE FACTS

The law, however, does not exist in a vacuum. In fact, the most important part any legal analysis is how the law applies to *the facts of a given case*. Before moving on to the law of self defence then, it is necessary to determine whether there was, in fact, a breach of the law of neutrality, and if so, to what extent.

Cambodia achieved its modern status as an independent state at the culmination of the Geneva Accords in 1954. As already pointed out, the Final Declaration was the instrument used both by Cambodia to declare its neutrality, and by North Vietnam to recognize it.⁵² The United States pledged to abide by the Accords as well.⁵³

It did not take long for activities on behalf of both Cambodia and North Vietnam to bring into question Cambodia's neutrality. Frequently and aptly referred to as "the mercurial Prince",⁵⁴ Norodom Sihanouk, in shifting roles as

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Final Declaration, §§ 4, 5, and 12.

⁵³

Karnow, *supra* note 16 at 221.

⁵⁴

Two such examples of this *nom de guerre* appear in Moore, *supra* note 17 at 482, and Karnow, *supra* note 16 at 604, though many more such references certainly exist. Sihanouk's image is deserved. Consider just two of his public statements, typical of his style: "Whether I swing right or left depends on me alone"; C.L. Sulzberger, *Foreign Affairs: How the War Must End*, New York Times, 9 April 1969

King, Prince, and Chief of State, habitually tried to steer a middle course between communist and free world influences, while constantly referring to Cambodia's alleged "neutral" status. Sihanouk's idea of neutrality, however, was of the eighteenth century variety, where a neutral could maintain its status by even-handed assistance to both sides of a conflict, as opposed to the modern rule of abstention.⁵⁵ As we shall see in this section, instead of remaining neutral, Sihanouk's courting of both the communist and free world factions cost Cambodia its status as a neutral.

The Ho Chi Minh Trail

Vietnamese use of Cambodia's territory dates back to the first war in Indochina against the French, when the Vietminh ran troops and supplies down the primitive Ho Chi Minh Trail.⁵⁶ With an eye toward their expansion into South Vietnam, in 1959 the North Vietnamese activated the 559th

at 46; and "When Washington does silly things to Cambodia, we have to move a little closer to China. . . . [I]f the Communists themselves become ugly, they had better take care too. This provocation will only push us into the other camp"; Hedrick Smith, *Prince Sihanouk Believed Seeking Eventual Role for Cambodia at Enlarged Vietnam Peace Conference*, *New York Times*, 16 April 1969 at 11. To appreciate the full context of these remarks, keep in mind Cambodia was allegedly a neutral country at the time.

⁵⁵

See Oppenheim, *supra* note 4 at 675 for the modern rule.

⁵⁶

Tran Dinh Tho, *The Cambodian Incursion* 18 (1979). General Tho was the Assistant Chief of Staff of the Joint General Staff of the South Vietnamese Air Force (RVNAF).

Transportation Group to modernize the trail.⁵⁷ The trail, earlier accessible only by bicycle, ox cart, or elephant, was widened, and roads were laid into a continuous system from Laos in the north to eastern Cambodia bordering South Vietnam just west of Saigon in the south (see Appendices III and IV). An air defence system was also installed.⁵⁸ Work of this sort continued over the next decade and a half, until North Vietnamese General Tran Van Tra drove the trail in 1974,

. . . noting that the Ho Chi Minh Trail was a "far cry" from the primitive web of paths he had first descended more than a decade earlier. Now travelling by car, he cruised along a modern highway dotted with truck rest and service areas, oil tanks, machine shops, and other installations, all protected by hilltop anti-aircraft emplacements.⁵⁹

57

Id. The 559th Transportation Group included approximately 50,000 troops and 100,000 laborers from North Vietnamese engineer, transportation, air defence, signal, and medical units. These numbers, as reported by General Tho, may in fact be high, but in 1983, North Vietnamese officials (military commander General Vo Nguyen Giap and General Vo Bam) admitted 30,000 troops had been involved in building the trail. *We Lied To You*, 286 *The Economist* 56 (No. 7,278 26 February 1983).

58

Tran, *supra* note 56 at 18-20.

59

Karnow, *supra* note 16 at 676. In a 1983 French television interview, North Vietnamese officials (military commander General Vo Nguyen Giap and General Vo Bam) described the trail similarly:

Fully developed, it contained several thousand kilometers of surfaced roads which could carry artillery and tanks. There were air raid shelters every 100 yards When the trail first opened, it took six months to travel from one end to the other. In 1975, when Saigon fell, the journey lasted a week.

Veteran communist officer Bui Tin (who eventually accepted the South Vietnamese surrender in Saigon) described to author Stanley Karnow his early trek down the Ho Chi Minh Trail in 1963, to survey the situation in order to infiltrate troops into South Vietnam via the trail:

Accompanied by a dozen military specialists and civilian cadres . . . they travelled by foot, sweating as they plodded through damp forests and shivering as they forded icy mountain streams. . .

They carried sacks of rice wrapped around their torsos, and each bore a knapsack with thirty or forty pounds of food, medicine, extra clothes, a hammock, and a waterproof sheet. There were few villages in the wasteland, but they could replenish their supplies from stocks stored for that purpose at isolated outposts. They sometimes spent the night at these dismal spots, which were manned by lonely North Vietnamese or Vietcong soldiers.⁶⁰

During the war, North Vietnam continuously denied use of Cambodia as a conduit for supplies and troops, but in 1981, while still Prime Minister, Pham Van Dong admitted, "Weapons, ammunition, and other military supplies, as well as *tens of thousands* of soldiers were moved into the south for combat" along the Ho Chi Minh Trail.⁶¹

We Lied To You, *supra* note 57 at 56.

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Karnow, *supra* note 16 at 347.

⁶¹

Id. at 346. This admission by the Prime Minister supports not only news reports of the same type of data as early as 1969 (See e.g. C.L. Sulzberger, *Foreign Affairs: The Sanctuary*, *New York Times*, 6 April 1969, § IV, at 10), but also bolsters President Nixon's statistics regarding North Vietnamese presence in Cambodia, asserted as the reason for removing the sanctuaries.

One question which went unanswered by Hanoi for over two decades was just how early the North Vietnamese started using the trail. The eventual North Vietnamese answer proved General Tho's assertions above, as well as President Nixon's determination of the necessity of removal of the sanctuaries. While being interviewed on French television in 1983, North Vietnamese General Vo Bam admitted he was given the job of opening up an infiltration route in the south on 19 May 1959.⁶² According to North Vietnamese Military Commander General Vo Nguyen Giap, interviewed along with General Bam, ". . . 20,000 men, including thousands of political cadres, moved along [the Ho Chi Minh Trail] in its early years."⁶³ By 1961, the trail stretched through Cambodia to An Loc, 75 miles west of Saigon, with dozens of spurs running off of it.⁶⁴

The Sihanoukville Port Route

The Ho Chi Minh Trail was not the only conduit of military troops and supplies through Cambodia, although it was the most highly publicized. The other major logistical route was through the port of Sihanoukville, in southern Cambodia.⁶⁵ Supplies and troops were brought via the South

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We Lied To You, *supra* note 57 at 56.

⁶³

Id.

⁶⁴

Id.

⁶⁵

Tran, *supra* note 56 at 21.

China Sea, around the coast of South Vietnam, to Sihanoukville. The materiel and troops were then transported by truck to Svay Rieng and Kampong Rau in the Cambodian province of Kien Tuong. There, the North Vietnamese or Vietcong troops picked up the supplies and troops and moved them to sanctuary bases along the Cambodian-South Vietnamese border (see Appendix IV).⁶⁶ Cambodian armed forces personnel often would assist in the transportation, either actively moving the materiel and troops or allowing civilian "bootleggers" through checkpoints after accepting bribes.⁶⁷ Because the route was entirely within Cambodia, it was free from bombing and the North Vietnamese thought it much more secure.⁶⁸

Although less publicized than the Ho Chi Minh Trail, the Sihanoukville Port Route became, in time, because of its relative safety from bombing, the major route for materiel (while the Ho Chi Minh Trail remained the main conduit for troops).⁶⁹ New York Times reporter C. L. Sulzberger wrote in

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Id.

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New York Times, *supra* note 61 at 10; *see also* Tran, *supra* note 56 at 22.

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Cambodia Raids Go Unopposed, New York Times, 9 May 1969 at 7; *see also* Tran, *supra* note 56 at 21.

⁶⁹

New York Times, *supra* note 61 at 10; *see also* Tran, *supra* note 56 at 21.

1969 about the magnitude of this violation of the law of neutrality:

Between November 1966 and January 1969, 36 ships suspected of carrying arms or ammunition unloaded at Sihanoukville, a Cambodian port. There are fourteen well-documented cases of three Soviet and eleven Chinese vessels that discharged 14,367 tons of ordnance. Yet Washington estimates Cambodia's own forces require only 400 tons a year. . . . In the past year Washington has given Sihanouk six packets of evidence detailing what we know to be going on.⁷⁰

Sanctuary Bases

In addition to using the Cambodian territory as a conduit for troops and materiel, and to facilitate the entire transportation system, the 559th Transportation Group, when improving and expanding the Ho Chi Minh Trail, built a series of bases called "binh trams".⁷¹ These bases were being used as early as 1962 in the Cambodian provinces of Stung Treng, Ratanakiri, Kratie, Prey Veng, Svay Rieng, Takeo, and Kampot (see appendices V, VI, and VII), and by 1969 were housing 50,000 North Vietnamese and Vietcong troops.⁷²

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New York Times, *supra* note 61 at 10; see also Tran, *supra* note 56 at 21: "It was estimated that the tonnages moving through Sihanoukville were sufficient to meet 100% of the requirements of enemy units in the [Republic of Vietnam] III and IV Corps areas [from approximately Quanc Duc province south] and perhaps two-thirds of the requirements for enemy units in the II Corps area of South Vietnam [from approximately Quang Duc province north to the Kontum provincial border]."

⁷¹

Tran, *supra* note 56 at 20.

⁷²

Sak Sutsakhan, The Khmer Republic at War and the Final Collapse 18 (1980). Sak Sutsakhan was the Commander in

Geographically, this scattered the bases along the entire Cambodian-South Vietnamese border, and while they varied in number from five to thirty, there averaged at least twenty bases at any one time.⁷³

Each base was a self-contained logistics base and could carry out transportation, engineer, medical, maintenance, storage, and security functions.⁷⁴ Certain bases were awarded the distinction of "Ten Thousand Tons" for moving that amount of supplies during a given period of time.⁷⁵ Various bases from time to time also served as the South Vietnamese military headquarters, known as the Chief Office for South Vietnam (COSVN). In the mid sixties, COSVN was located at Tay Ninh,⁷⁶ after which it moved to Mimot from 1966 to 1970.⁷⁷

Foreign sanctuary bases have always been vital in revolutionary warfare, and the second Indochina war was no

Chief of the Cambodian Armed Forces, Ambassador, and the last Chief of State of the Khmer Republic.

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Tran, *supra* note 56 at 23. General Tho thoroughly discusses at 23-28, the precise location and function of most of these bases.

⁷⁴

Id. at 20.

⁷⁵

Id.

⁷⁶

Id, at 26. See also C.L. Sulzberger, *Foreign Affairs: Has a Strategy Collapsed?*, New York Times, 27 March 1970 at 32; Karnow, *supra* note 16 at 417.

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Foe Said to Have Left Cambodian Base, New York Times, 4 April 1970 at 3.

exception.⁷⁸ In his 6 April article in the New York Times, C.L. Sulzberger described the importance of the Cambodian sanctuaries to the North Vietnamese:

Vietcong and North Vietnamese forces would have been unable to bear their losses were it not for the sanctuaries. . . . Cambodia, however [contrasting it with Laos], is a complete sanctuary. Without Cambodia as an ordnance depot, training center, and transportation route for materiel, men, medicine, and food, the Communists in South Vietnam could not possibly last out the year. . . . Growing reserves for the Communist forces have accumulated in Cambodia. . . . This is sanctuary warfare at its most effective.⁷⁹

Three days later he described North Vietnamese control of the Cambodian frontier, through sanctuaries, as a "de facto occupation" of all eastern Laos and Cambodia, from the China border south to Parrot's Beak, just west of Saigon.⁸⁰

American news reporters were not the only ones talking about sanctuaries. Sihanouk himself admitted in March 1969, a full year before the American-South Vietnamese incursion:

78

Telephone interview with Mr. Douglas Pike, Director of the Institute of East Asian Studies, Berkeley, California (17 September 1993). See also New York Times, *supra* note 61 at 10. Both Mr. Pike and New York Times reporter C.L. Sulzberger list Algerian sanctuaries in Tunisia and Morocco as successful examples of sanctuary warfare, which eventually drove France to the negotiating table despite overwhelming success of the French on the battlefield. On the other hand, both cite Tito's closing of Greek communist sanctuaries in Yugoslavia as the main reason for Athens' victory over the communists.

79

New York Times, *supra* note 61 at 10.

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New York Times, *supra* note 54 at 46.

There are Vietnamese infiltrating Cambodia. I am deeply worried. There are Vietcong and Vietminh [his reference to North Vietnamese] infiltrating. If you look at a map near Mondolkiri is San Mororom, is O Raing [sic]. After O Raing is Mount Nam Lean and there are plenty of Vietcong and Vietminh there. If you go up to Ratanakiri you will see Laban Siek. Farther north is Bo Khanh. Let us stop there -- a few meters from Bo Khanh. It is full of Vietcong and Vietminh.⁸¹

Later, Sihanouk admitted the North Vietnamese and Vietcong effectively controlled several of Cambodia's northern provinces and that he could not remove them.⁸²

The New York Times reported figures as high as 69,000 North Vietnamese troops in Cambodia at any one time.⁸³ A more conservative estimate, and one admitted by Sihanouk himself is 40,000 as an average, although this number surely fluctuated.⁸⁴

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Id. C.f. Timothy D. Allman, *Cambodians Have Their Own Guerrilla Problems*, New York Times, 30 July 1969 at 15, detailing specific locations and numbers of North Vietnamese troops.

82

New York Times, *supra* note 68 at 7. The article further detailed how North Vietnamese war supplies had been stockpiled throughout the sanctuaries.

83

New York Times, *supra* note 72 at 1, quoting Trin Hoanh, government official under the Lon Nol National Salvation Committee, on how many North Vietnamese troops had previously been in Cambodia.

84

Hanoi and Vietcong Strength In Cambodia Put at 40,000, New York Times, 17 October 1969 at 2. C.f. Staff of Senate Committee on Foreign Relations, 91st Cong., 2d Sess., Cambodia May 1970 2, (Comm. Print 1970); Jeffrey Clarke, Advice and Support: The Final Years 412 (1988); *Address by President Nixon*, 20 April 1970, 62 Dep't St. Bull. 601, 602 (1970). These sources cite other estimates at other times. All estimates vary greatly from 17,000 in 1968 to 69,000

Not only did the United States allege North Vietnamese presence in Cambodian sanctuaries, and not only did Cambodia subsequently acknowledge that presence, but just as with the supply routes, eventually the North Vietnamese themselves admitted using Cambodian territory as a sanctuary for military operations. Unfortunately, while admitting the breach of international law, the North Vietnamese further maintained they would continue to do so until the end of the war.⁸⁵ True to their promise, nearly a year later the North Vietnamese were still entrenched in their Cambodian sanctuaries. In fact, they were entrenched even deeper into Cambodia, and still not only were admitting their presence but were refusing to leave.⁸⁶

Sihanouk's Foreign Policy

From the above facts it is evident North Vietnam breached international laws of neutrality -- both customary and those established by treaty (the United Nations Charter and the

just before the incursion in March 1969.

⁸⁵ *Cambodia Gets Red Promise*, New York Times, 22 June 1969 at 3: ". . . the Commander of the Cambodian Army had received a written promise from the Vietnamese Communists that they would leave Cambodia as soon as the Vietnamese war ended" (emphasis added).

⁸⁶ *Cambodian Premier Stresses Neutrality Through Peaceful Removal of Troops*, New York Times, 24 March 1970 at 3. On 29 March 1970, the North Vietnamese and Vietcong embassies cut off all diplomatic relations with Cambodia and refused further initiation by the Cambodian government to resume discussions regarding the withdrawal of troops from Cambodia. Sak, *supra* note 72 at 16.

Final Declaration of the 1954 Geneva Accords) -- by using the territory of a declared neutral power for the movement of troops and supplies and the formation and organization of military operations. However, that breach was further compounded by Cambodia's failure to meet its obligation as a neutral country, viz, protection of its territorial integrity and prevention of its use by belligerents. Obviously, this duty upon the neutral power is not absolute, and extends only to due diligence,⁸⁷ but equally obvious is the duty of a neutral power to at least abstain from encouraging a belligerent to breach its territorial integrity.⁸⁸ Not only did Sihanouk fail to abstain from involvement, but his continual pitting of the communist and free world factions against each other for Cambodia's favor was a violation of Cambodia's neutrality and prolonged the war.

Admittedly, the Cambodian military was no match for North Vietnam's army. While some touted the North Vietnamese army as the best infantry in history, in 1970 the Cambodian army numbered only about 30,000 and were at best an ill-equipped security force.⁸⁹ But despite its weakness,

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Von Glahn, *supra* note 1 at 847.

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Oppenheim, *supra* note 4 at 675.

⁸⁹

Keith Nolan, Into Cambodia 74 (1990). The idea that the North Vietnamese army was a small group of untrained peasants, while popular with opponents of the war, is a myth. According to Professor Robert Turner, in a lecture given at the University of Virginia on 27 October 1993,

Cambodia's breach of law came not in its inability to repel the North Vietnamese army, but in its unwillingness to do so and its permissive attitude and active participation with the North Vietnamese.

While always claiming to be neutral, Sihanouk felt the future of the entire Indochina peninsula lay with the communist bloc, particularly with the People's Republic of China. His true feelings were far from neutral, and were revealed in such public statements as the following:

Quite frankly, it is not in our interests to deal with the West, which represents the present, but not the future. In ten years time, there will probably be in Thailand, which always responds to the dominant wind, a pro-Chinese neutralist government, and South Vietnam will certainly be governed by Ho Chi Minh or his successor. *Our interests are served by dealing with the camp that one day will dominate the whole of Asia -- and by coming to terms before its victory -- in order to obtain the best terms possible.* (Emphasis added).⁹⁰

This attitude went beyond mere public statement, however. Appeasing the communist bloc, particularly North Vietnam, became a cornerstone of Cambodian foreign policy under

North Vietnam had the world's third largest military force. A comparison was drawn between the Cambodian and North Vietnamese armies in the New York Times, *supra* note 54 at 46. That article showed the Ninth Vietcong Division, alone, which happened to be stationed in Cambodia at the time, was strong enough by itself to "overwhelm" the entire Cambodian army.

⁹⁰
Sak, *supra* note 72 at 10, quoting from Michael Leifer, Cambodia, The Search for Security (no page cite given) (1967).

Sihanouk.⁹¹ In March 1964, Sihanouk authorized a citizen's uprising which resulted in serious damage to the United States Embassy,⁹² in retaliation for the United States' failure to support an international conference to guarantee Cambodia's borders. When, in 1965, the United States agreed to such a conference, Sihanouk balked, and insisted the National Liberation Front be allowed to represent South Vietnam.⁹³ Sak Sutsakhan, Commander in Chief of the Cambodian military, and last Chief of State for the Khmer Republic, described Sihanouk's "slide" to the communist bloc from 1962 on:

. . . in that year Sihanouk initiated intense political contacts with the PRC. As a result the PRC agreed to aid Cambodia in all areas, economic, military, etc, without any prior conditions. The PRC asked only that in return Cambodia disassociate itself from the Free World for good, particularly from the U.S.⁹⁴

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How deeply into the communist bloc Sihanouk had drifted became evident upon Ho Chi Minh's death, when Sihanouk declared a National Day of Mourning "in homage" to Ho. *Ho Honored by Cambodia*, New York Times, 6 September 1969 at 18.
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Sak, *supra* note 72 at 10.
⁹³

Id. at 11. No state had even recognized the National Liberation Front as representative of South Vietnam.
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Id. at 12. The People's Republic of China tried this same policy with the Lon Nol government, but met with abject refusal. On 5 May 1970, representatives of the People's Republic of China met with the Lon Nol government and announced they would view the Sihanouk-Lon Nol struggle as an "internal problem" and "overlook the personalities" if Cambodia permitted China to continue using Cambodian territory to resupply the North Vietnamese Army with weapons, munitions, and supplies for war in the south, authorized the North Vietnamese to establish their bases in Cambodia as before, and continue to support the North

Formal cooperation with the communist bloc became evident in June 1967, when Sihanouk allowed the National Liberation Front to open an office in Phnom Penh.⁹⁵ On 9 May 1969, Sihanouk's Foreign Ministry announced diplomatic relations with this office would be raised to an embassy level,⁹⁶ and this was achieved in September of that year.⁹⁷ In addition, instead of taking measures to eradicate the communist sanctuaries, seeking United Nations assistance if unable to do so alone, or at least denouncing the presence of the sanctuaries, Sihanouk negotiated with North Vietnamese officials and subsequently approved the use of the Sihanoukville Port Route, stating he did so because Cambodia and North Vietnam faced the same enemy: imperialist American aggression.⁹⁸

In June 1969, the first formal agreement was entered into between Cambodia and the Provisional Revolutionary Government (PRG).⁹⁹ The agreement not only openly recognized, but formally approved Sihanouk's breach of the law of neutrality

Vietnamese with propaganda. *Id.* at 15.
⁹⁵

Tran, *supra* note 56 at 16.
⁹⁶

Agreement With Vietcong, New York Times, 10 May 1969 at 5.
⁹⁷

Tran, *supra* note 56 at 16.
⁹⁸

Id. at 21.
⁹⁹

Sak, *supra* note 72 at 20.

which had been occurring for years with his tacit approval.

C.L. Sulzberger recounted the Cambodian involvement:

Two trucking companies, Hak Ly and Mackhim Bophea, handle shipments. Colonel Oum Savouth of the Cambodian General Staff and the prominent Sisowath family, with several members in key military positions, are deeply involved. The financing is done by the Chinese Embassy in Phnompenh which turns over Hong Kong dollars to the North Vietnamese Embassy.¹⁰⁰

In July 1969, Sihanouk met with Huynh Tan Phat, chairman of the Vietcong's PRG. Sihanouk pledged his cooperation to the PRG in their "struggle" against "American aggression."¹⁰¹

One further means by which Sihanouk breached the laws of neutrality is in his treatment of prisoners of war.¹⁰² A neutral which encounters belligerent troops on its territory is bound to disarm and intern those troops for the duration of the belligerency.¹⁰³ Sihanouk's practice, to the contrary, was to release North Vietnamese or Vietcong prisoners back to the National Liberation Front's representative in Phnom Penh.¹⁰⁴ What makes this breach particularly serious,

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New York Times, *supra* note 61 at 10.

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Cambodia Releases About 30 Vietcong, New York Times, 5 July 1969 at 2.

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This data is doubly important because it not only shows Sihanouk's breach of neutrality, but is also further evidence of North Vietnam's belligerent presence in Cambodia.

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See *supra*, notes 37 and 38 and accompanying text.

¹⁰⁴

Cambodia Frees 7 Vietcong and Plans to Release More, New York Times, 11 April 1969 at 4; *Cambodia Releases About 30*

though, is that the National Liberation Front's representative who accepted the prisoners in April announced they would be sent back to the theater of operations in South Vietnam.¹⁰⁵ This shows not only Sihanouk's partiality to the communist bloc, but flies directly in the face of the purpose of the rule, avoiding troops once removed from combat from being allowed back into the war.

Opposition Arguments

In the present case, after the United States remedied the breach of neutrality, some commentators opposed to the Cambodian incursion accused the United States of having "unclean hands", that is, of being equally or more guilty of the same delict. This tactic is nothing more than bootstrapping, since, as we have seen, violations of neutrality quite possibly, and often do, lead to a situation where the injured belligerent is allowed under international law to engage in conduct which would otherwise be illegal, thus giving the impression of "unclean hands."

To prove their charge of "unclean hands", various scholars, prominent among them Richard Falk, Wolfgang Friedmann, and John Fried, used a multitude of faulty analogies which completely misstated the doctrine of neutrality, in order to allege there was nothing North Vietnam

Vietcong, New York Times, 5 July 1969 at 2; *4 Vietcong Are Returned*, New York Times, 28 December 1969 at 4.

¹⁰⁵

New York Times, 11 April 1969, *supra* note 104 at 4.

was doing that the United States wasn't doing on a far grander scale.¹⁰⁶ Most of the analogies are faulty for one of the following reasons: 1) the author compared unlike military operations; 2) the author used the comparison solely to evoke the emotions of the reader; or 3) the author misapplied the concept of a "neutral" nation.

Richard Falk cited America's record of "over and over again support[ing] of the position that when a *border crossing* armed attack occurs, it is a matter of grave concern for the entire community of nations" (emphasis added).¹⁰⁷ He then cited how the United States vociferously opposed such cross-border attacks as between North Korea and South Korea, or between India and Goa (or any of the examples cited in note 106, *supra*).¹⁰⁸ Finally, he pointed to the dissonance between condemning these operations and conducting the

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At various times, Richard Falk draws analogies, each one faulty, with India and Goa, the invasion of South Korea by North Korea, the Suez, Hungary, the Congo, Egypt, Thailand, Guam, Okinawa, the Quisling regimes, Israel, and Cuba. John Fried compares the Cambodian incursion with the second World War activities of the Axis powers, and also draws false analogies with Japan and Germany in 1970, NATO and SEATO countries, Taiwan, Hong Kong, Singapore, and Thailand. Finally, Wolfgang Friedmann compares the United States' response to the sanctuaries with the Soviet invasions of Hungary and Czechoslovakia. While this simple listing is not academically helpful, it does illustrate the obsession with this argument and the importance attached to it by opponents of the incursion.

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Richard A. Falk, *The Cambodian Operation and International Law*, 65 Amer. J. Int'l L. 1, 2 (1971).

¹⁰⁸

Id. at 2-3.

Cambodian incursion. Falk's line of criticism here is fairly typical of criticism levelled by opponents of the incursion. His logic, though, failed to recognize the incompatibility of the operations compared.

For instance, in the India-Goa example, the invasion occurred between two belligerents, India and Portugal. The Indian military's purpose was to expel the Portugese from Goa and take control of the territory itself. Both India and Portugal were belligerents in what was essentially a dispute to gain control over territory. And as for his Korean comparison, North Korea invaded the territorial integrity of South Korea with the goal of obtaining political control over that territory. Neither of these cases are comparable with America's incursion into Cambodia to protect American lives. In neither case was the border crossing based on self defence, nor was there a threat to the army crossing the border, both characteristics which distinguish the United States' actions in Cambodia. In fact, the offensive aggression shown by India and North Korea is precisely the type of use of force prohibited by Article 2(4) of the United Nations Charter, and was rightfully condemned by the United States. The Cambodian incursion, on the other hand, was not an invasion of Cambodia, but rather, a limited act of self defence in an area totally controlled by North Vietnam.¹⁰⁹

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See discussion, Self Defence, *infra*.

Another faulty use of analogy commonly used by opponents to the administration was to compare the Cambodian incursion to an emotionally charged historic event, in the hope that emotion overpowered logic, which logic would show the dissimilarities in the comparison. Examples of this include the Axis powers in the second world war,¹¹⁰ the Soviet invasions of Hungary¹¹¹ and Czechoslovakia,¹¹² and the Quisling regimes of the second world war.¹¹³

Falk, himself, pointed out the fallacy of his Quisling regime analogy:

The German reliance during the Nazi period upon Fifth Column tactics to undermine the governing process in countries which were the targets of aggression should be recalled in the Cambodian context. A "Quisling" regime is one that operates in the name of a nation, but serves as an agent of its dismemberment and destruction. Vidkun Quisling was the head of the Nationalist Party of Norway, a pro-Nazi group with no parliamentary representatives and little popular following. In April 1940, when Hitler invaded Norway, Quisling welcomed the German occupation of Norway and

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John H.E. Fried, *United States Military Intervention in Cambodia in the Light of International Law*, published in Richard A. Falk, *The Vietnam War and International Law* (Vol. III 1972) 100, 105.

111

Falk, *supra* note 107 at 3; Wolfgang Friedmann, *Comments on the Articles on the Legality of the United States Action in Cambodia*, published in Richard A. Falk, *The Vietnam War and International Law* (Vol. III 1972) 97, 98.

112

Friedmann, *supra*, note 111 at 98.

113

Falk, *supra* note 107 at 10.

eventually obtained dictatorial powers in Norway from the Germans. (Emphasis added).¹¹⁴

Such a comparison is riddled with errors. There is absolutely no evidence of American complicity in the fall of the Sihanouk regime, as there was with the Nazis in Norway. Nor is there any evidence of American complicity in the rise of the Lon Nol government, as there was with the Nazis and Vidkur Quisling. Professor Falk does not even attempt to support these critical elements of Quisling regimes in his Cambodian analogy. In addition, I have already shown Cambodia was not a "target of aggression" of the United States, as was Norway of Nazi Germany. Also, it belies all logic to say the Lon Nol government was an agent of Cambodia's dismemberment and destruction. On the contrary, it was the Lon Nol government which attempted to remove the invading North Vietnamese Army which had taken control of large portions of Cambodian territory. Unlike Vidkun Quisling, Lon Nol enjoyed the support of a *unanimous* parliament, as well as a public which had begun to question the integrity of Sihanouk. Finally, there was never an American occupation of Cambodia, as there was of Norway by the Nazis. The comparison of the Cambodian incursion to Quisling regimes lacks any merit whatsoever, and was the basest play for emotions used by opponents to the incursion.

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Id.

Finally, many faulty analogies cited by opponents to the incursion simply involved a blatant disregard for the legal definition of neutrality.¹¹⁵ Since neutrality is a term of art critical to the issue of the legality of the Cambodian incursion, it is unconscionable that international law scholars would have so little regard for its proper use and so mislead the public.¹¹⁶

One such careless use of the concept of neutrality occurred after President Nixon said one reason for the incursion was his concern for American lives. Professor Falk responded by stating:

Such an assertion of responsibility -- presumably a responsibility shared in common with all Heads of State -- is hardly relevant to a discussion of the status of the invasion in international law. Surely the lives of the North Vietnamese armed forces are deeply endangered by

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See Falk, *supra* note 107 at 14: "Consideration of a hypothetical reciprocal claim helps to express the unreasonableness of the United States position and the utter absurdity of the Administration contention." Unfortunately, Professor Falk's "hypothetical reciprocal claims" bear little or no resemblance to the facts of the Cambodian situation, in which case their utility is greatly diminished.

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Neutrality is defined by Parry and Grant in terms of impartiality and abstention, just as it has been defined in this paper. Parry, *supra* note 11 at 255, 256. Parry and Grant also utilize most of the same scholars cited here, such as Oppenheim, Schwartzenger, and the Hague Convention V. Such a definition simply would not work with most of the comparisons drawn by opponents to the incursion.

the use of airfields in Thailand, Guam, and Okinawa.¹¹⁷

John Fried not only cites the Thailand¹¹⁸ comparison, but also West Germany and Japan;¹¹⁹ NATO and SEATO countries;¹²⁰ and Taiwan, Hong Kong, and Singapore.¹²¹ One example of Fried's hyperbole follows:

Can it be objected that the U.S. in storing war materiel, for example, in *West German* or *Japanese "sanctuaries"* acts legally because *those neutrals* agreed to such storage -- but that the Provisional Revolutionary Government of South Vietnam or the Democratic Republic of Vietnam forces acted illegally by storing such goods in Cambodian caches because Cambodia had not agreed to this? (Emphasis added).¹²²

That is precisely the distinction that *is* critical. There is a vast and important distinction between, on the one hand, storing materiel openly, with an allied government's consent, pursuant to defence agreements (as the United States did in

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Falk, *supra* note 107 at 6. In addition to disagreeing with his comparison of Cambodia to Thailand, Guam, and Okinawa, I disagree with the substance of Professor Falk's point here. President Nixon's concern for American lives is exactly relevant, despite being common to all heads of state. It is the essence of the assertion of self defence as justification for the incursion, and is precisely what set Cambodia's frontiers apart from American air fields in Thailand, Guam, and Okinawa.

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Fried, *supra* note 110 at 112.

119

Id. at 108, 109, 110, 112.

120

Id. at 109.

121

Id. at 110.

122

Id. at 108.

Fried's examples) and, on the other hand, covertly and aggressively using the territory of a neutral government, against that government's will (as North Vietnam did in Cambodia). Fried also discussed the United States' "own vast use of neutral depots."¹²³ He mentioned, "Huge quantities of war materiel for use in Vietnam . . . loaded and unloaded in neutral ports in different parts of the world."¹²⁴ He accused the United States of ". . . a settled policy to use numerous neutral countries not only for obtaining, storing, transporting, etc. war materiel . . . but also for its armed forces."¹²⁵ He said, "[T]he U.S. has trained its forces undisturbed on its far flung bases within various neutral territories."¹²⁶ He maintained "*hundreds of thousands* of U.S. military personnel have been sent to neutral territories."¹²⁷ Finally, he concluded by stating:

. . . the other side is accused of something that the U.S. has been doing ever since 1965 on a vastly larger scale. Neither by military nor by legal logic can it be said that if PRG or DRNV forces move by primitive means from inside the Cambodian border into South Vietnam, this *is* infiltration from a neutral sanctuary; whereas if U.S. ground troops move into South Vietnam by modern transport from [West Germany or Japan] this

123

Id.

124

Id. at 109.

125

Id.

126

Id.

127

Id. at 110.

is not infiltration from a neutral country. Both cases are identical, insofar as belligerent forces departed from neutral territory for war purposes.¹²⁸

Every single one of these examples cited fails for the same reason. Fried paid no heed to the legal definition of neutrality. While Cambodia purported to be a neutral power, that cannot be said of any of Fried's other examples of nations allied with the United States. They simply were not neutral powers. Fried is comparing dissimilar examples. Unlike West Germany and Japan, as well as the other nations used for comparison by both Falk and Fried, Cambodia was neutralized by both treaty, the Geneva Accords of 1954, and domestic legislation. Furthermore, Cambodia repeatedly and publicly pronounced its neutrality, especially as specifically related to the war in Vietnam. Cambodia appealed to the United Nations as well as the individual nations around the world for assistance in ridding its frontiers of the North Vietnamese occupation. North Vietnam militarily occupied the sanctuaries against Cambodia's will and had expelled most, if not all, of the Cambodian presence.

The United States presence in West Germany, Japan, Thailand, Guam, Okinawa, Taiwan, Hong Kong, Singapore, and NATO and SEATO countries was in no way comparable to the forced military occupation of Cambodia by the North

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Id. at 112.

Vietnamese. The United States did not militarily occupy or overtake these countries or any part thereof. United States presence was permissive or even requested, and resulted from treaty. The absurdity of these comparisons reaches its zenith with Guam. Being a United States territory, Guam could hardly qualify as a neutral country in a war involving the United States.

SUMMARY OF NEUTRALITY

The law of neutrality is deeply embedded in customary international law and survives to this day. This body of law applied to Cambodia in the 1960's and 1970's by virtue of the Geneva Accords of 1954 and Cambodia's own proclamation of neutrality. As a neutral, Cambodia had a duty to abstain from assisting the belligerents, but failed to do this due to a foreign policy favoring the communist bloc. The belligerents had a duty to respect Cambodia's territorial integrity. North Vietnam breached this duty by using Cambodia as a conduit for troops and war materiel, by building bases inside Cambodia, and by launching military operations from those bases. Under the law of neutrality, a belligerent injured by an enemy's breach has recourse to self defence.

SELF DEFENCE

Having fully discussed the law of neutrality, I maintain North Vietnam breached its duty to respect the territorial integrity of a declared neutral power by using Cambodian territory to transport troops and supplies; by building bases for logistics, transportation, training, and command functions on neutral territory; and by launching offensive military operations from neutral territory. In addition, Cambodia also failed in its obligations as a neutral to abstain from participating in the belligerency and failing to take measures to protect its territory from being used for belligerent purposes. This latter failure was due not to an inability to defend its territorial integrity (although that may have been the case), but by an active campaign of partial treatment of and assistance for North Vietnam.

THE LAW OF SELF DEFENCE

Any modern day discussion of the legality of self defence as an international doctrine must include both customary and "hard" law.¹²⁹ No modern state questions the existence of

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"Hard" law, as used in this sense, includes the United Nations Charter and any treaties in effect. For purposes of this paper I will discuss only the 1954 Geneva Accords as far as treaties are concerned. Although the Southeast Asia Collective Defense Treaty entered into force on 19 February 1955, and designated Cambodia as being under its protection, Cambodia, under Sihanouk, denounced the treaty. Furthermore, the United States did not rely on the SEATO treaty as justification for the incursion. Therefore, I will not discuss the effects of that treaty. See generally, Southeast Asia Collective Defense Treaty, 8 September 1954,

the right of self defence as a component of sovereignty.¹³⁰ Hyde describes it as "the mere exercise of the right of political independence."¹³¹ However much nations agree as to its existence, there is great disagreement regarding the doctrine's application in real events. Most of the dispute centers on the conditions under which self defence becomes an internationally recognized use of force.

Because the United Nations Charter provision regarding self defence (Article 51) incorporates customary law,¹³² that is where the discussion must begin. Scholars, beginning with Grotius in the sixteenth century, wrote of the difference between just and unjust wars. Out of these discussions evolved Vattel's concept (in 1758) that justification for war extended only so far as to what was necessary for defence and the maintenance of a state's rights.¹³³

The doctrine of self preservation is an ancient one in international law, and was always broad enough to include what

6 UST 81, TIAS No. 3170, 209 UNTS 23.
¹³⁰

Von Glahn, *supra* note 1 at 129.
¹³¹

Hyde, *supra* note 22 at 237. See also Schwartzberger, *supra* note 5 at 36. Waldock refers to self defence as a "primordial element" in any legal system, and as the most important of all state's rights. C.H.M. Waldock, *The Regulation of Use of Force by Individual States in International Law*, 81 *Recueil Des Cours* 455, 461 (1952).
¹³²

Article 51 of the United Nations Charter refers to "the inherent right" of self defence.
¹³³

Waldock, *supra* note 131 at 456.

is commonly referred to today as self defence.¹³⁴ But after the first world war, the international trend was toward a definite limiting of the rights of self help and self preservation as a means of foreign policy. As these rights drifted into obsolescence, however, the more specific right of self defence began for the first time to take shape as a separate and distinct legal doctrine.¹³⁵

The seminal case setting forth the limits of the customary law of self defence is The Caroline. During the Canadian civil uprising of 1837, a number of Canadians were supported by sympathetic Americans across the Niagara River. The United States government, for its part, was not able to control the actions of these Americans.¹³⁶ Late in 1837, the Canadian government discovered Americans were using the Caroline, a United States registered ship, to supply the insurgents with both men and arms.¹³⁷ On 29 December, while

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Brownlie, *supra* note 42 at 252. See also Waldock, *supra* note 131 at 451.

¹³⁵

See generally Brownlie, *supra* note 42 at 255-257.

¹³⁶

Under international law there is no duty upon the neutral power to prohibit its citizens from aiding one belligerent or the other, as long as such is done independently of the government by individuals. Oppenheim, *supra* note 4 at 687. Great Britain, the United States, and other nations often require neutrality of their citizens, but such a duty flows from domestic, not international, law. Thus, American citizens in the Caroline case, or for that matter, Cambodian citizens aiding North Vietnam independently of the Sihanouk government, caused no breach of the law of neutrality.

¹³⁷

Waldock, *supra* note 131 at 462.

the *Caroline* was docked in American territory, a group of Canadian soldiers boarded her, set her on fire, and put her adrift over the Niagara Falls. There were 33 Americans on board at the time, and subsequently only 21 were accounted for, one known to have been killed and the others presumed drowned.¹³⁸

The United States made a claim against the British government, who answered that the act had been a necessary act of self defence. Three years later, Alexander McLeod, a British citizen present in the United States, was overheard boasting about his part in the destruction of the *Caroline*.¹³⁹ He was arrested and was tried for murder in the incident, but was acquitted after pleading the act of state doctrine.¹⁴⁰ The United States acquiesced in this defence, but, as it had since the incident, rejected Great Britain's further claim of self defence.

In subsequent, and now famous, correspondence between Secretary of State Daniel Webster and British Special Minister Lord Ashburton, Webster set out what has become the standard by which international claims of self defence are measured.

Undoubtedly it is just, that, while it is admitted that exceptions growing out of the great

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Hyde, *supra* note 22 at 239.

¹³⁹

R.Y. Jennings, *The Caroline and McLeod Cases*, XXXII Amer. J. Intern'l L. 82, 93.

¹⁴⁰

Waldock, *supra* note 131 at 462-463.

law of self defence do exist, those exceptions should be confined to cases in which the necessity of that self defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.¹⁴¹

Thus the United States set forth and defined (although in vague terms¹⁴²) the doctrine of necessity. Webster's letter proceeded to set forth necessity's twin requirement, proportionality:

It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive since the act, justified by the necessity of self defence, must be limited by that necessity and kept clearly within it.¹⁴³

Thus, the customary requirements of self defence according to international law are that the use of force must be both necessary and proportional.

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Hyde, *supra* note 22 at 239. Also, see generally, *Id.* at 240-245 for an excellent discussion of other cases utilizing the doctrine of self defence in American history, including those involving General Andrew Jackson, Francisco Villa, and *The Virginius*.

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In a modern analysis of the Caroline language, Professor McDougal says, "The standard of required necessity has been habitually cast in language so abstractly restrictive as almost, if read literally, to impose paralysis." His sage advice is that the standard "can ultimately be subjected only to that most comprehensive and fundamental test of all law, reasonableness in particular context." Myres S. McDougal and Florentino P. Feliciano, Law and Minimum World Public Order 217-218 (1961).

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Jennings, *supra* note 139 at 89.

More than 100 years later, the United Nations Charter was yet another attempt to inhibit the use of force by nations, or at least to prohibit the use of force as a means of foreign policy. But it did not prohibit, nor did it to any significant degree inhibit, the right of self defence. The prohibition of the use of force as a means of foreign policy is found in Article 2(4) of the Charter:

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.

However, that restriction on the use of force was not without limits itself. Many of the Charter framers thought it obvious that Article 2(4) was not doing away with the customary right of self defence, but smaller states, especially those from Latin America, were not convinced, and wanted assurances they would not lose the right they had secured for themselves in the Inter-American Treaty of Reciprocal Assistance and the Bogota Charter.¹⁴⁴ Thus, Article 51 was added, not to create, but to recognize, the already existing right of self defence:

Nothing in the present Charter shall impair the *inherent right of individual or collective self defence* if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken

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Brownlie, *supra* note 42 at 253, 267.

by Members in the exercise of this right of self defence shall be immediately reported to the Security Council and shall not in any way effect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security. (Emphasis added).¹⁴⁵

In summary, international law has customarily recognized a right of self defence as part of a nation's sovereignty. This custom was incorporated into the United Nations Charter and can be asserted individually or collectively. The standard for whether or not the use of self defence is legal is two-pronged: the use of force must be both necessary and proportional.

THE FACTS

Considering the magnitude of opposition to the Cambodian incursion, there was surprisingly little dispute about the neutrality issue discussed above -- either legally or factually. Moreover, the law of self defence was not really a source of debate either. Instead, most of the debate centered around the Nixon administration's justification for sending American troops into Cambodia. In particular, the arguments fell into one of three categories: 1) the incursion "widened" the war in Vietnam; 2) the administration had no

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United Nations Charter, § 51. While the English language version of the Charter refers to "an armed attack", the French and Russian language versions, each as equally authoritative as the English language version, speak in terms of "armed aggression."

legal basis for the incursion, or in the alternative, what legal basis they had was ambiguous; or 3) the United States' use of force was disproportionate to the threat, and therefore was unlawful. This portion of the paper will set forth the facts of the incursion as they were known in 1970, show the necessity for the incursion, as well as its proportionality, and will rebut many of the arguments made in the wake of the incursion.

Necessity

The Situation in Cambodia

By the end of April 1970, there was no doubt it had become necessary to send American troops into Cambodia in order to save American lives of troops stationed in South Vietnam. Much of the factual support for this premise was cited in the first section of this paper to show the breach in the law of neutrality, and is incorporated here. To briefly review, the North Vietnamese had, for years, used Cambodia as a supply route, sanctuary, and base of operations against American troops. Over the years, countless tens of thousands of North Vietnamese or Vietcong troops had either passed through or been stationed in Cambodia. In April 1970, there were 40,000 to 60,000 troops stationed there. For years the United States continued to respect Cambodia's neutrality, but beginning in March 1970, two forces combined to dramatically alter the threat faced by American troops: a rapid

deterioration of Cambodian domestic affairs, and an equally rapid buildup of North Vietnamese troops in Cambodia.

Jean Lacouture traced the beginning of the downfall of the Sihanouk regime back to 1966.¹⁴⁶ By 1966, Sihanouk --the master at playing communism and the free world off each other -- had allowed his relations with both the United States and the People's Republic of China to wane. In an effort to placate the United States, Sihanouk held free general elections. The majority elected to Parliament were primarily influential landowners.¹⁴⁷ This resulted in antagonism between Parliament and Prince over the next four years as Parliament opposed Sihanouk's attempts to establish state control of the economy.¹⁴⁸

As the economy continued to slide, the people of Cambodia became more aware of the extensive presence of the North Vietnamese in their country.¹⁴⁹ While Sihanouk's ability to juggle world powers earned him some measure of international respect, the Cambodian people reacted to the contrary:

What was impardonable in Khmer religious and intellectual circles was Sihanouk's practice of abruptly changing loyalties or a policy of

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Jean Lacouture, *From the Vietnam War to an Indochina War*, 48 *Foreign Affairs* 617, 623 (No. 4 July 1970).

147

Id. at 624.

148

Id.

149

Sak, *supra* note 72 at 13.

"consistent inconsistency" (politique de constance dans l'inconstance).¹⁵⁰

Discontent with Sihanouk spun out of control, and while he was abroad for his annual obesity cure and trips to Moscow and Peking,¹⁵¹ demonstrations broke out all over the country, particularly in the Cambodian-South Vietnamese border areas where the North Vietnamese had dug in and displaced local Khmers.¹⁵² Prime Minister Lon Nol tried to contact Sihanouk in Paris, but Sihanouk refused to accept the delegation sent.¹⁵³ On 18 March 1970, the National Assembly removed Sihanouk as Chief of State by unanimous vote, and replaced him with Assembly President Cheng Heng.¹⁵⁴ The real power in the

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Id., quoting an open letter to Sihanouk from his cousin, Sirik Matak.

¹⁵¹

His stops in Moscow and Peking were actually attempts to gain the influence of those governments to remove the North Vietnamese from the sanctuaries, which Sihanouk now felt had gotten out of control. In fact, various authors suppose Sihanouk, though abroad, orchestrated the demonstrations, and planned to return home, fault Lon Nol, remove him from office, and suppress the demonstrations. This is yet another example of Sihanouk, having swung too far to one side, swinging back to the other side.

¹⁵²

Cambodia: May 1970, supra note 84 at 1. See also Sak, supra note 72 at 13; Talks on Troops Set in Cambodia, New York Times, 16 March 1970 at 1; Talks With Reds on Their Troops, New York Times, 17 March 1970 at 1.

¹⁵³

Sak, *supra* note 72 at 14.

¹⁵⁴

Id. Sihanouk subsequently was tried *in absentia* and convicted of, among other things, high treason for allowing North Vietnamese troops to establish sanctuaries and bases in violation of Cambodian neutrality. He was sentenced to death, but the sentence was not carried out as he did not return until Pol Pot had come to power.

new government, however, lay with Prime Minister Lon Nol and Deputy Premier Sisowath Sirik Matak, Sihanouk's cousin.

The North Vietnamese saw the new government as a threat to their presence in and use of Cambodian territory, and reacted quickly and violently against the Cambodian government. During the last two weeks of March and the first week of April, Vietcong troops killed thirty-seven and wounded seventy-eight Cambodians.¹⁵⁵ On 7 April, the North Vietnamese increased pressure in Svay Rieng, and heavy fighting throughout the night resulted in Cambodian casualties of twenty dead, thirty wounded, and thirty missing.¹⁵⁶ By 9 April, Cambodian troops had withdrawn from the area, abandoning the entire Parrot's Beak (see Appendix VII) area to the North Vietnamese.¹⁵⁷ This gave the North Vietnamese free reign over a thirty mile wide band of territory.¹⁵⁸ On 19 April, the North Vietnamese troops captured the town of Saang unopposed, just twenty miles south of Phnom Penh. Takeo, fifty miles south of Phnom Penh, was already captured, and a district chief and eight Cambodian militia were kidnapped in

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Id.

156

Henry Kamm, *Fighting Expands in Cambodia Area*, New York Times, 8 April 1970 at 1.

157

Henry Kamm, *Cambodian Troops Leave Embattled Border Region*, New York Times, 10 April 1970 at 1.

158

Id.

Mareng.¹⁵⁹ The North Vietnamese controlled one-fourth of all Cambodia, all areas south and east, and were within fifteen miles of Phnom Penh by 20 April.¹⁶⁰

Opposition Arguments

These facts directly contradict statements made by opponents of the incursion. For instance, both Richard Falk (in his article, *see supra* note 107) and George McT. Kahin, Cornell Professor of Government and Director of the Southeast Asian Program (in his Senate testimony), insisted the North Vietnamese presence in Cambodia was "not aggressive," but was merely reacting to *Cambodian* provocation.¹⁶¹ It belies logic to describe as provocation a nation's attempts to defend its own territory.

This evidence of North Vietnamese aggression deeper and deeper into Cambodia is contrary to perhaps the most popular rally of opponents to the incursion, that the United States "widened the war" by entering Cambodia.¹⁶² While this turn

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Henry Kamm, *Cambodian Town Near the Capital Reported Seized*, *New York Times*, 20 April 1970 at 1.

160

Henry Kamm, *Cambodians Battle Reds 15 Miles From Phnompenh*, *New York Times*, 21 April 1970 at 1. See also Richard Nixon, *The Memoirs of Richard Nixon* [hereinafter *Memoirs*] 448 (1978).

161

116 Cong. Rec. 16,071 16,073 (1970). See also Falk, *supra* note 107 at 15; Fried, *supra* note 110 at 103-105.

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Fried, *supra* note 110 at 100:

"The invasion of Cambodia, then, not only widened the Vietnam war into an All-Indochina War,

of phrase may have had an alluring effect, its allure lay totally in semantics, for it did not accord with the facts at all. In order to support the proposition that the United States' actions widened the war, one must not only turn from the evidence set forth above -- evidence of immense and long term North Vietnamese involvement in Cambodia first -- but then one must also rewrite history to say the United States was the first to enter Cambodia. Thus it is that, in spite of the evidence presented here, which was known in 1970, people like George Kahin could testify that Cambodia was a

with unforeseeable ultimate consequences; it was designed as an aspect of or condition for an indefinite continuation (in 'Vietnamized' strategy) of a U.S. military intervention that has been illegal from the beginning".

See also Kahin's Senate testimony, 116 Cong. Rec. 16,071 (1970) ". . . the invasion provides no significant military benefits; widens the war, and undermines Vietnamization"; id. at 16,072: "By enlarging the area of conflict and the scope of American commitments and by increasing the number of disputing parties, it adds enormously to the length and complexity of any agenda for negotiations"; id. at 16,073: "These operations increase the threat to our forces because the invasion of Cambodia extends the area of conflict and prolongs the war."

See also Friedmann, *supra* note 111 at 97: "Second, the Cambodian intervention, extending the Vietnamese intervention which was a major exercise in the world-wide 'containment' policy . . ."; id. at 98: "Yet it is the United States which has taken the major steps that have involved an ever-widening part of the Southeast Asian Continent in war"; id. at 99: "The Cambodian invasion marks a further escalation not only in the scale of the war but in the United States' disregard for the processes of international law."

Finally, the title of Jean Lacouture's widely publicized article, *From the Vietnam War to an Indochina War*, *supra* note 146, is additional evidence of these arguments.

"neutralist flank"¹⁶³ and that Sihanouk had "for so long managed to remain unaligned and genuinely neutral."¹⁶⁴

The Situation in Cambodia Worsens

As the North Vietnamese moved deeper into Cambodia and widened the war, Lon Nol appealed to the rest of the world for help through the United Nations.¹⁶⁵

General Tran Dinh Tho described the situation in March-April 1970:

In the Mekong Delta enemy activities increased in March in the That Son (Seven Mountains) area of Chou Doc Province and in the U Minh Forests area of An Xuyen Province. . . . This upsurge of enemy activity resulted from military action by Cambodian troops in border areas after the political event on 10 March 1970. Faced with increased difficulties in these areas, the enemy was moving his supplies and materiel into the That Son area where rugged terrains afforded him good concealment and protection.¹⁶⁶

As the domestic situation worsened in Cambodia, both economically and due to the North Vietnamese invasion, the North Vietnamese also increased their activities inside the

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116 Cong. Rec. 16,071 (1970).

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Id. at 16,072. See also Fried, *supra* note 107 at 101, 102: "[T]he Sihanouk regime was not Communist or pro-Communist, [and] . . . did not show any anti-U.S. bias."

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For just a sample of these pleas, see U.N. S.C.O.R., 25th session, Documents S/9730, S/9748, S/9760, S/9773, and S/9847 (1970). When the United Nations failed to respond, in a desperate act, military spokesman Major Amrong appealed to the media to "awaken world public opinion." Henry Kamm, *Crisis in Cambodia Grows as Army Appears to Falter*, New York Times, 23 April 1970 at 5.

¹⁶⁶

Tran, *supra* note 56 at 11.

border areas.¹⁶⁷ American troops knew the border areas had been used specifically for operations against them dating back to 1965, and included numerous attacks on Pleiku as well as the Tet offensive of 1968, the offensive of May 1968, and the post-Tet offensive of 1969.¹⁶⁸ Therefore, the fear felt in 1970 was based in past experiences suffered and was itself real.

The biggest buildup of North Vietnamese forces was in Parrot's Beak and the Fishhook. That the threat was real can be seen from the fact that both areas jut right up against South Vietnamese territory where American troops were stationed. Parrot's Beak was only 33 miles from Saigon and the Fishhook was only 50 miles away and contained the North Vietnamese military headquarters.¹⁶⁹ Captured North

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Cambodia: May 1970, supra note 84 at 2: "Around April 1, the North Vietnamese and Vietcong began a move against the Cambodian border posts, a move subsequently interpreted in Washington and by United States Military Assistance Command, Vietnam (MACV) as designed to secure control of a corridor from the 'Fishhook' area to the Gulf of Siam."

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See generally Karnow, supra note 16 at 427, 477-478, 551. See also Moore, supra note 17 at 517. President Nixon's decision to enter Cambodia should be viewed in context as well. Not only had the sanctuaries been used since the mid sixties, but within his first month in office, President Nixon was tested by the North Vietnamese with an offensive launched into South Vietnam from Cambodia. While his immediate instinct was to retaliate, his advisors persuaded him not to. He acted in accordance with those advisors, yet still feared the message sent to North Vietnam by his inaction. Memoirs, supra note 160 at 380.

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Memoirs, supra note 160 at 449.

Vietnamese documents showed the areas were used by the following units:

1. 1st and 2d Battalion, 271st Regiment, NVA 9th Division;
2. Local Force Unit of the Trang Bang District;
3. Training and Communication Platoon, 2d Sub-Military Region;
4. Training Platoon, Duc Hue District;
5. Military Hospital, 2d Sub-MR and COSVN;
6. Medical Unit, 2d Sub-MR;
7. Depot and Receiving Platoon, 6th Sub-MR;
- and 8. N-10 Sapper Unit, 6th Sub-MR.¹⁷⁰

There was no doubt both the Fishhook and Parrot's Beak, as well as other areas, were being used to launch offensives against Americans. On 9 April 1969, a full year before the incursion, the New York Times reported the Ninth Vietcong Division was stationed in Parrot's Beak, and strategists opined it would be married up with two other divisions in Cambodia to be used in an offensive against Saigon, or in the alternative, Tayninh.¹⁷¹ A month later, three divisions were reported operating back and forth across the border into South Vietnam, with a fourth division operating south and southeast of Saigon out of Cambodia.¹⁷² Events continued to unravel, and in early 1970, North Vietnamese prisoners disclosed COSVN

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Tran, *supra* note 56 at 48.

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New York Times, *supra* note 54 at 46.

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New York Times, *supra* note 68 at 7.

was planning two offensive campaigns for 1970, in May and July.¹⁷³

President Nixon's Decision

On 20 April 1970, President Nixon announced plans to withdraw 150,000 troops from South Vietnam, but made it clear withdrawal depended upon the "level of enemy activity," which he said was substantially increasing.¹⁷⁴ He took that opportunity to remind Hanoi this was a gesture for peace, and they would be "taking grave risks" should they continue to increase their activity in Cambodia.¹⁷⁵ Hanoi's reaction is described by author Keith Nolan:

On 20 April, the important plantation town of Snoul, north of the Fishhook, fell to the NVA after the battle with the Royal Cambodian Army. . . .

On 23 April, Mimot fell to the NVA.

On 24 April, the NVA attacked the seaside resort at Kep, killed several civilians, and set fire to the municipal buildings.

On 26 April, the NVA captured Ang Tassom, began attacking Chlong City . . . and opened fire on shipping in the Mekong River.¹⁷⁶

When President Nixon determined it was necessary to send troops into Cambodia, he did so because American troops for years had been the victims of aggression from neutral

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Tran, *supra* note 56 at 12.

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Address by President Nixon, supra note 84 at 601.

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Id. at 602.

¹⁷⁶

Nolan, *supra* note 89 at 76-77. This directly contradicts countless statements by opponents to the incursion who supported their position by maintaining there was no increase of activity along the borders in late April.

territory which the United States respected, and into which, therefore, they could not return fire. The unreliable Sihanouk government, which had maintained some small amount of presence, if not control, over the area, had been overthrown and replaced by a government more willing to carry out its neutral duties, but less able to do so because of a full-fledged offensive assault launched against the country by North Vietnam. In addition, North Vietnamese presence in the sanctuaries had increased and two offensives were planned for the immediate future. Finally, the United Nations sat mute, doing nothing to stabilize the situation.

President Nixon was faced with three options. First, he could ignore Lon Nol's pleas for help, and let the situation run its course without any United States intervention.¹⁷⁷ This option was unacceptable. It shifted the focus away from the safety of American troops, the true reason for the incursion. To suggest this option was to suggest the main interest of the United States was to assist the Lon Nol government, in essence, to assert self defence on behalf of Cambodia. The United States never justified the incursion by defence of Cambodia. While Cambodia did face a threat from North Vietnam, a threat also existed for South Vietnamese and

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Address by President Nixon, 30 April 1970, 62 Dep't St. Bull. 617, 618 (1970).

American troops. Doing nothing, allowing the situation to run its course, would not have decreased that threat.

Second, President Nixon could have provided arms and financial assistance to Cambodia, but not ordered the incursion.¹⁷⁸ This option was equally unacceptable. As shown above, the threat was immediate. In addition, the Cambodian Army was not only ill-equipped, but poorly trained and disorganized.¹⁷⁹ To simply provide arms to the Cambodian Army would not have provided any assurance the North Vietnamese threat would decrease, and would have risked escalation if Moscow or Peking had decided to match our assistance with their own to the North Vietnamese.

The only option which would have eradicated the threat was a limited incursion into Cambodia.¹⁸⁰ On 30 April 1970, President Nixon announced to the nation that he was sending American troops into Cambodia to clear out the North Vietnamese sanctuaries. He explained the threat and made clear his purposes:

. . . North Vietnam has increased its military aggression in all areas, and particularly in Cambodia. . . . The actions of the enemy in the last ten days clearly endanger the lives of Americans who are in Vietnam now and would constitute an unacceptable risk to those who will

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Id.
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Nolan, *supra* note 89 at 74.
180

Address by President Nixon, 30 April 1970, supra note 177 at 618.

be there after withdrawal of another 150,000. To protect our men who are in Vietnam and to guarantee the continued success of our withdrawal and vietnamization programs, I have concluded the time has come for action. (Emphasis added).¹⁸¹

President Nixon clearly stated a critical distinction that went misunderstood by many Americans in 1970 and ever since:

This is not an invasion of Cambodia. The areas in which these attacks will be launched are completely occupied and controlled by North Vietnamese forces. (Emphasis added).¹⁸²

Since the United Nations Charter prohibits use of force only against the territorial integrity or political independence of a state,¹⁸³ the incursion was not unlawful under the Charter, because the United States' only concern was protecting American and South Vietnamese troops, and the United States had no designs whatsoever on Cambodian territory or independence.¹⁸⁴

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Id. at 617.

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Id. at 619. It has always been a common mistake to view the Cambodian incursion as an invasion of Cambodia. This is clearly not supported by any of the facts, and if true, would certainly change the bulk of the discussion. For two examples of how an international law expert mistook this fundamental point, see Falk, *supra* note 107 at 16, where he discussed the lack of merit of "a claim of self-defense against Cambodia" (emphasis added), and at 17, where he referred to the Cambodian incursion as "a unilateral decision to attack the territory of a foreign country" (emphasis added).

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United Nations Charter, § 2(4).

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In fact, the United States continued to announce its respect for Cambodia's independence and neutrality in public addresses and to the United Nations. See U.N. S.C.O.R., 25th session, Document S/9781 (1970); *Interview of Secretary*

More Opposition Arguments

In the wake of the incursion, some opponents to the incursion maintained the administration had no legal basis for the incursion¹⁸⁵ or that the administration's rationale was ambiguous.¹⁸⁶ John Bender wrote:

The President indicated that his decision would "guarantee the continued success of our withdrawal and Vietnamization program," that it was taken "for the purpose of ending the war in Vietnam," and that if resort were had only to diplomatic protest in this situation, the "credibility of the United States would be destroyed in every area of the world where only the power of the United States deters aggression." However laudable those considerations might be in other contexts, they are not appropriate motives for the exercise of the right of collective self defense with respect to South Vietnam.¹⁸⁷

Bender took these statements of President Nixon completely out of context. While the President did say these things, they were part of a much larger message.

Likewise, Professor Falk accused President Nixon's administration of being ambiguous in its rationale for the incursion. He maintained President Nixon, in his 30 April address, cited his objectives as destroying the North Vietnamese sanctuaries and protecting lives.¹⁸⁸ While this

¹⁸⁵ of State Rogers, 62 Dep't St. Bull. 646, 652 (1970).

¹⁸⁶ See generally John C. Bender, *Self Defense and Cambodia: A Critical Appraisal*, 50 B.U. L. Rev. 130, 133 (1970).

¹⁸⁷ See generally Falk, *supra* note 107 at 4-5.

¹⁸⁸ Bender, *supra* note 185 at 133.

Falk, *supra* note 107 at 4.

is accurate, like Bender, Professor Falk used the President's words out of context. President Nixon pointed out there had been increases in both guerilla actions in the sanctuaries and in North Vietnamese action deeper into Cambodian territory, while describing the deteriorating Cambodian domestic situation. Falk interpreted this description thus:

In essence then, alleged North Vietnamese actions within Cambodia were given as *the sole basis* for initiating a military attack across the boundary. Mr. Nixon seemed to emphasize future danger rather than immediate threat to the safety of American lives. (Italics added, underline original emphasis).¹⁸⁹

President Nixon did allude to the future effect of North Vietnamese domination of Cambodia, but that was not his rationale, let alone his *sole* rationale, for the incursion. It was merely a probable result if the United States did not act.

Read in context, contrary to what Falk and Bender assert, the administration's purpose was clear and unambiguous. On 30 April, President Nixon said he had decided to enter Cambodia "to protect our men who are in Vietnam."¹⁹⁰ On 3 May, Secretary of State Rogers said, "The reason [for the incursion] was to protect the lives and safety of American men

¹⁸⁹

Id. at 5.

¹⁹⁰

Address by President Nixon, 30 April 1970, *supra* note 177 at 617.

fighting in Vietnam."¹⁹¹ Later in the same interview, when pressed again, he said the decision was "best calculated to protect American lives."¹⁹² In his 8 May news conference, President Nixon again put forth the rationale for the incursion as being to reduce American casualties.¹⁹³ In his address to the New York Bar Association on 28 May, Legal Advisor John R. Stevenson stated the reason for the incursion was "to help defend South Vietnam and American troops in South Vietnam from continued North Vietnamese armed attack."¹⁹⁴ Finally, on 3 June, President Nixon reviewed with the nation his rationale as meeting the unacceptable threat to our remaining forces in South Vietnam.¹⁹⁵ This bears no resemblance to Falk's unfounded accusation of an "ambiguous" and "shifting line of official explanation."¹⁹⁶

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Interview of Secretary of State Rogers, supra note 184 at 646.

¹⁹²

Id. at 647.

¹⁹³

President Nixon's News Conference, 8 May 1970, 62 Dep't St. Bull. 641 (1970).

¹⁹⁴

Address of John R. Stevenson, 62 Dep't St. Bull. 765, 766-767 (1970).

¹⁹⁵

Address by President Nixon, 3 June 1970, 62 Dep't St. Bull. 761 (1970).

¹⁹⁶

Falk, *supra note 107 at 4.*

Proportionality: Limits and Still More Opposition Arguments

The Nixon administration gave further evidence the incursion was a lawful act of self defence by placing limits on it, proportional to the threat faced. Administration officials repeatedly announced the incursion's limits:

. . . [I]t's limited in three ways. It's limited in the extent, purpose, and duration. Now, it's limited in extent by those parameters. It is limited to the border area that has been occupied by North Vietnamese forces for many years and used as sanctuaries to attack American troops, so it's limited in extent. . . .

Second, it's limited in purpose. . . . The purpose is to destroy the sanctuaries themselves -- to find the military supplies, the military equipment that's there, and to destroy the base areas from which they've been operating. . . .

Third, it's limited in duration. The President made it clear that it's not going to last more than six to eight weeks at the most.¹⁹⁷

The limit of the "border area" subsequently was further defined as a 21 mile wide strip along the border, inside which were most of the sanctuaries.¹⁹⁸

Many opponents of the incursion argued the United States' response was not proportional and therefore was illegal. This proposition was supported in two ways: 1) there was no armed

¹⁹⁷

Interview of Secretary of State Rogers, supra note 184 at 646. See also U.N. S.C.O.R., 25th session, Document S/9781 (1970); Address of John R. Stevenson, supra note 194 at 770; Address by President Nixon, 30 June 1970, 63 Dep't St. Bull. 65, 70 (1970).

¹⁹⁸

Address of John R. Stevenson, supra note 194 at 770.

attack by the North Vietnamese,¹⁹⁹ therefore any response by the United States would be disproportionate; or 2) while an armed attack may have occurred, the manner in which the United States and South Vietnam responded was disproportionate.²⁰⁰

To maintain no armed attack occurred is both factually mistaken and legally irrelevant. While the English language version of the United Nations Charter allows "individual or collective self defence if an *armed attack* occurs" (emphasis added),²⁰¹ the French and Russian language versions, all three versions equally authoritative, speak merely of "armed aggression."²⁰² By pointing this out I do not mean to lessen the threat necessary to satisfy the Charter requirement for self defence. Whether responding to armed attack or aggression, the use of force by the defender must be necessary. In the present case that requirement was met because the American and South Vietnamese troops had been the victims of numerous armed attacks.

Falk and Bender, and many other opponents of the incursion, simply ignored the facts as known in 1970 when they maintained there were no attacks. Richard Falk wrote,

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See generally 116 Cong. Rec. 16,204, 16,205 (1970); Falk, *supra* note 107 at 14, 15.

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See generally Bender *supra* note 185 at 137, 138; Falk, *supra* note 107 at 15.

²⁰¹

United Nations Charter, § 51.

²⁰²

See *supra* note 145.

The Cambodian operation was obviously not a response to an armed attack.²⁰³

Later, he wrote,

[T]here was no report of increased fighting along the border and there were no indications of increased South Vietnamese or American casualties as a result of harassment from across the Cambodian border.²⁰⁴

Law students from New York University School of Law submitted a brief to the House of Representatives which stated,

[N]o credible claim of actual, physical armed attacks on allied forces in Vietnam was asserted. . . . [T]he military movements of North Vietnamese troops in Cambodia merely raised the possibility of an attack, a possibility so remote in time and so contingent on fortune as to fall outside the meaning of a "threat of armed attack".²⁰⁵

To accept these assertions as truth, in light of the facts reported here, is revisionist history at its worst.

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Falk, *supra* note 107 at 2. See also *id.* at 14: "There was nothing about the events in Cambodia that could qualify as establishing a 'realistic expectation' of 'instant, imminent military attack' such as would justify a claim of individual self defense under these circumstances."

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Id. at 14. See also Fried, *supra* note 110 at 103-105. He maintained the North Vietnamese were not even present in Cambodia, but that there was much evidence of the United States being present in Cambodian territory.

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116 Cong. Rec. 16,204 (1970). The brief fails totally to acknowledge the difference between the English and the French and Russian language versions of the Charter. In fact, at 16,205, the brief stated, "[S]ome have argued for an expanded concept to include a military process rather than a single, hostile, offensive event. . . . It strains both language and credulity to consider the enlargement of a base of operations an 'armed attack'."

The second argument against proportionality at least acknowledges an armed attack took place. John Bender began his article by acknowledging the limits on the Cambodian incursion set forth by President Nixon, and by accepting those limits as proportional to the threat faced. However, he proceeded to write:

So stated, the scope and magnitude of the Cambodian operations seem reasonably proportional to the claimed threat of increased guerilla activities from the sanctuaries along the Cambodian-South Vietnamese border. Actual operations in Cambodia have not, however, adhered to the standards originally established for them. *South Vietnamese* forces have expanded the scope of their operations beyond the parameters of the areas initially deemed relevant to defensive operations. (Emphasis added).²⁰⁶

Similarly, Richard Falk wrote:

It doesn't seem legally acceptable to confine the United States responsibility to the actions of its troops. The undertaking is a joint one, and the American claim is derivative from the alleged South Vietnamese right of self defense. . . . *In my judgment*, the United States, from a legal perspective, is a coventurer, responsible for the full extent of the claim being made by the Saigon regime. (Emphasis added).²⁰⁷

Note carefully that Professor Falk cites no authority, but rather, *it doesn't seem in his judgment* to be legal. This is a novel theory, and one with serious ramifications. There is no precedent for making one sovereign nation legally responsible for the actions of a second sovereign nation.

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Bender, *supra* note 185 at 138.

²⁰⁷

Falk, *supra* note 107 at 7.

This is especially so when the actions of the second nation are part of a legally binding agreement with a third nation. What Professor Falk failed to report was that on 27 May 1970, the Cambodian and South Vietnamese governments signed an agreement giving South Vietnam a "broad and open-ended mandate to carry out military operations in Cambodia."²⁰⁸ Three days of talks resulted in a Cambodian statement that South Vietnam was militarily present in Cambodia with the consent of the Cambodian government, and would withdraw when their objective of "driving the North Vietnamese and Vietcong troops from Cambodia" was realized.²⁰⁹

While collective defence was a rationale for the incursion, that does not preclude the conclusion each nation still had some separate interests and faced some separate threats. President Nixon did assert a specific threat to American lives from North Vietnamese troops based in the sanctuaries. When the sanctuaries were cleared, that threat no longer existed, and America's self-imposed limits rightfully required American troops to withdraw. However, with the North Vietnamese moving deeper into Cambodia, even after the sanctuaries were cleared, Cambodia and South Vietnam faced a new, different, but jointly-felt threat, and were free

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Takashi Oka, *Saigon Gets Wide Mandate for Cambodian Operations*, New York Times, 28 May 1970 at 1.

²⁰⁹

Id.

to react to that threat together, though *sans* United States assistance.

The self-imposed limits set by the United States government were evidence that the United States was acting in true self defence. The limits also were the clearest evidence possible that the United States was abiding with the requirement of proportionality. The United States struck only in the area where the threat existed, for only so long as it took to eradicate the threat, and only to rid the area of the threat. The United States not only announced these limits, but scrupulously abided by them. The American troops stayed within the 21 mile area, operations were designed to clear out the sanctuaries as opposed to any other military or political purpose, and all American troops were withdrawn from Cambodia by the 30 June deadline.²¹⁰

SUMMARY OF SELF DEFENCE

America's remedy under international law for North Vietnam's breach of neutrality in Cambodia was use of force under the doctrine of self defence. The requirements for legal self defence are that the use of force be necessary and proportional. The North Vietnamese had launched attacks from Cambodia against American troops in South Vietnam for years. Two more offensives were planned in the immediate future, and

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Address by President Nixon, 30 June 1970, supra note 197 at 70. In fact, well over half of the American troops had been withdrawn by 3 June.

there was a significant increase of activity by North Vietnam in the sanctuaries. In addition, Cambodia was showing itself less and less able to handle the situation. When the United States finally used force, it was a response to North Vietnamese aggression, limited in purpose, extent, and duration. The American use of force was both necessary and proportional to the threat faced.

CONSTITUTIONALITY

A third and final issue regarding the Cambodian incursion shifts the focus from international to domestic constitutional law. Here, the main argument voiced by opponents to the incursion was that President Nixon exceeded his authority and usurped Congress' exclusive authority to declare war.²¹¹ On the other hand, proponents of the operation argued President Nixon acted within his powers as Commander in Chief of the armed forces, and, in the alternative, Congress authorized the incursion by way of the Southeast Asia Resolution.²¹² This portion of the paper will deal solely with these issues.

In the wake of the incursion, numerous scholars also addressed the issue of Congress' ability to restrain the President's authority as Commander in Chief.²¹³ This debate was spawned by congressional attempts to repeal the Southeast

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See generally, John Finney, *President Assailed by Fulbright Panel*, New York Times, 5 May 1970 at 1; Robert B. McKay, *The Constitutional Issues -- Opposition Position*, Hammarskjold Forum, 45 N.Y.U. L. Rev. 625 (June 1970); William D. Rogers, *The Constitutionality of the Cambodian Incursion*, 65 Amer. J. Int'l L. 26 (1971); *Talk of The Town*, 46 New Yorker 31-33, (No. 3 16 May 1970).

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See generally, Robert H. Bork, *Comments on Legality of U.S. Action in Cambodia*, 65 Amer. J. Int'l L. 79 (1971); *A Conversation With The President*, 63 Dep't St. Bull. 101, 111 (1970); William H. Rehnquist, *The Constitutional Issues -- The Administration Position*, Hammarskjold Forum, 45 N.Y.U. L. Rev. 628 (June 1970).

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See generally Bork, *supra* note 212 at 79; Moore, *supra* note 17 at 519; Rehnquist, *supra* note 212 at 636. C.f McKay, *supra* note 211 at 643; Rogers, *supra* note 211 at 31.

Asia Resolution and to cut off appropriations for military operations in Cambodia. Eventually, Congress achieved both of these objectives, but not until after the Cambodian incursion was successfully concluded and all American troops had withdrawn. Because these attempts had no direct effect upon the legality of the incursion, the issue of congressional restraints is not addressed here.

THE WAR POWERS

As with any legal debate, the starting point must be the law, in this case, the Constitution.

The Congress shall have the power to . . .
declare War. . . .

To raise and support Armies, but no
appropriation of Money to that Use shall be for a
longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and
Regulation of the land and naval Forces.²¹⁴

These congressional powers must be viewed, however, *vis a vis* the vesting of the executive authority of the nation in the President²¹⁵ and in view of Article II, Section 2:

The President shall be Commander in Chief of
the Army and Navy of the United States.

While some editors maintained the division of war powers is "clear", and required congressional authorization for the

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U. S. Const., § I(8).

²¹⁵

Id. at § II(1).

Cambodian incursion,²¹⁶ most scholars from all sides of the debate admit the separation of war powers is a complex and murky area.²¹⁷

Chief Justice William Rehnquist, writing in 1970, recognized that the division of powers set out in the Constitution was general, with no precise boundaries, and thus, to clarify the issue one had to look to nearly 200 years

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Talk of the Town, supra note 211 at 31-33. This article is emotional at the expense of facts and logic. It opens by calling the incursion "the most serious attack" upon the American system in modern times, and makes the startling claim that "President Nixon became the first President in the history of the United States to deliberately order American forces to invade another nation on his own, without seeking congressional approval or support." Both of these statements are highly debatable.

I also find totally without merit the article's comparison of the Cambodian incursion and a president unilaterally changing the tax laws or cancelling elections. Even the staunchest opponent of the incursion must admit the executive has *some* war powers as Commander in Chief, whereas nothing in the Constitution gives him authority to change federal law by fiat. Such hyperbole, unfortunately, was common in the wake of the Cambodian incursion, and indeed throughout the war in Indochina, and often won the day by pure emotional impact over facts, logic, and law.

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Rowland Egger and Joseph P. Harris, The President and Congress 34 (1963). Comparing it with the area of foreign affairs, they state, ". . . the dilemma created by the war-powers provisions is equally profound." Also, see generally John Norton Moore, *The National Executive and the Use of Armed Forces Abroad*, 21 Naval War C. Rev. 28, 29 (No. 5 January 1969).

The level of debate surrounding this issue every time American troops are deployed abroad underscores the complexity of the issue, and to say Cambodia was no exception is an understatement of enormous magnitude.

of historical interpretation.²¹⁸ Originally, the Committee of Detail for the Constitutional Convention gave Congress the power to "make" war, but this subsequently was amended to the power to "declare" war, leaving the President the power to repel sudden attacks.²¹⁹ It has been said of this power that the primary authority to initiate or declare wars lies with Congress, yet the President does have some limited authority to initiate the use of troops.²²⁰ Watson wrote the congressional power to declare war "means the manner of announcing that war exists."²²¹

This distinction, however, is not of much help in the case of the Cambodian incursion, although opponents to the incursion made it the cornerstone of their argument that President Nixon exceeded his authority. Their argument rests on the faulty premise that sending American troops into

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Rehnquist, *supra* note 212 at 629. At 630, he notes further, "This type of question is one that for obvious reasons has not been the subject of a lot of judicial precedents, so one has to pick his way among historical actions and among occasional observations by Supreme Court Justices in order to get some idea of what was intended."

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James Madison, Notes of Debates in the Federal Convention of 1787 475-477 (Ohio University Press Edition 1966). See also David K. Watson, Watson on the Constitution 676-679 (1910).

220

Moore, *supra* note 17 at 514. See also Moore, *supra* note 217 at 29.

221

Watson, *supra* note 219 at 676.

Cambodia was an initiation of hostilities.²²² Were that true, their position *might* be stronger. Congress should, if possible, authorize the *initiation* of American troops in sustained hostilities abroad, either prior to or immediately after the operation begins.

THE COMMANDER IN CHIEF POWERS

The opposition's premise fails, though, because the Cambodian incursion was in no way an initiation of hostilities. As we have seen, the North Vietnamese and Vietcong used the sanctuaries to launch numerous attacks against American troops, including the 1968 Tet offensive, the offensive of May 1968, and the post-Tet offensive of 1969.²²³ In addition, our intelligence reported two more offensives were due to be launched in May and July 1970.²²⁴ The Cambodian incursion was a reaction to these past attacks as well as to the present threat.

Alexander Hamilton foresaw this exact situation when he wrote to President Washington:

Our Constitution . . . has only provided affirmatively, that, "The Congress shall have the power to declare war;" the plain meaning of which

²²²

See generally McKay, *supra* note 211 at 644-646; Talk of the Town, *supra* note 211 at 31. In addition, see Rogers, *supra* note 211 at 30, where he advises we ignore all historical precedents of the use of forces to repel attacks on American forces abroad because Cambodia was somehow different.

²²³

Moore, *supra* note 17 at 517.

²²⁴

Tran, *supra* note 56 at 12.

is, that it is the peculiar and exclusive province of Congress, when the nation is at peace, to change that state into a state of war. . . . [I]n other words, it belongs to Congress only to go to war. But when a foreign national declares or openly and avowedly makes war upon the United States, they are then by the very fact already at war and any declaration on the part of Congress is nugatory; it is at least unnecessary. (Emphasis original).²²⁵

Egger agrees with Hamilton's interpretation, stating, "The President should be recognized to have the power to meet limited warfare with limited warfare, or massive attack with massive attack."²²⁶

To determine whether the Cambodian incursion was the initiation of hostilities or something less than that, it must be viewed in its entire factual context. When President Nixon took office in January 1969, he inherited a situation in which American troops were stationed in South Vietnam carrying out a congressionally authorized war. North Vietnam had already extended the theater of war to include the Cambodian frontier, had expelled the Cambodians from the area and militarily occupied it themselves, and had repeatedly attacked American troops from the area. President Nixon's response was to enter a geographically limited area for a limited time, with a particular purpose of eradicating the sanctuaries being used against the American troops, and then to return to South

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Egger, *supra* note 217 at 37, citing Henry Cabot Lodge (ed.), The Works of Alexander Hamilton 246 et seq. (Vol. III) (1903).

²²⁶

Id. at 38.

Vietnam. The operation was not aimed against the Cambodian government, generally did not involve Cambodian troops,²²⁷ and was inextricably related to the war in Vietnam. It was purely a response to activities in Vietnam, as opposed to the initiation of new hostilities.

Consequently, when viewed in context, the decision was a tactical decision, regarding how the war in Vietnam was to be conducted, and as such, fell within the Commander in Chief powers of the President. There is ample precedent to support President Nixon's decision as well. The precedents include President Roosevelt's decisions in the second world war to emphasize the war in the Atlantic over the Pacific; his decision to land troops in French North Africa (which happened to be, like Cambodia, neutral territory at the time), Italy, and the Pacific Islands; and President Truman's decision to drop the atomic bomb over Hiroshima and Nagasaki.²²⁸

In addition to past presidential decisions, United States Supreme Court opinions also support President Nixon's decision as being within the Commander in Chief powers. In The Prize Cases, Justice Grier wrote about the separation of war powers between Congress and the President, favoring deference to executive determinations:

²²⁷

The incursion itself did not involve any Cambodian troops, although some American assistance was provided to the Cambodian military in separate operations.

²²⁸

Moore, *supra* note 17 at 515.

Whether the President in fulfilling his duties as Commander in Chief . . . has met with such armed hostile resistance . . . as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. *He must determine what degree of force the crisis demands.* (Emphasis added).²²⁹

Not long after that, Chief Justice Chase wrote likewise in Ex Parte Milligan:

Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, *except such as interferes with the command of the forces and the conduct of campaigns.* That power and duty belong to the President as commander-in-chief . . . Congress cannot direct the conduct of campaigns. (Emphasis added).²³⁰

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The Prize Cases, 67 U.S. (2 Black) 635, 670 (1862).

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Ex Parte Milligan, 71 U.S. (4 Wallace) 2, 139 (1866). See also Watson, *supra* note 219 at 915-916, citing Fleming v. Page, 50 U.S. (9 Howard) 603-615 (1850); Cross v. Harrison, 57 U.S. (16 Howard) 164, 190 (1853); Leitensdorfer v. Webb, 61 U.S. (20 Howard) 176 (1857); and The Grapeshot, 76 U.S. (9 Wall.) 129 (1869).

Watson writes, "[The President] can direct the movements of the Army and Navy so as to injure the enemy in the most effective way, and to do this may order an invasion of the enemy's country, and if possible, establish the authority of the United States over it" (emphasis added).
Id.

While the Cambodian incursion was not "an invasion of the enemy's country", there is some comparison with Watson's point, considering North Vietnam's complete occupation, the exodus of the Cambodian people, and the Cambodian government's inability to deal with the problem and its pleas for help. Notice, Watson would have allowed President Nixon to go even farther than he did, and occupy the sanctuary areas. This is questionable, if not inaccurate,

Nearly one hundred years after The Prize Cases, and only eighteen years before the Cambodian incursion, Justice Jackson wrote in a similar vein in his concurring opinion in Youngstown Sheet and Tube Co. v. Sawyer:

We should not use this occasion to circumscribe, much less to contract, the lawful role of the President as Commander in Chief. I should indulge the widest latitude of interpretation to sustain *his exclusive function to command the instruments of national force*, at least when they are turned against the outside world for the security of our society. (Emphasis added).²³¹

From the above facts, legal precedents, and scholarly opinions, the following conclusions are evident. The Cambodian incursion was not an initiation of hostilities or the start of a new war. Had it been, congressional authorization may have been required under the Constitution. Rather, the incursion was a campaign within the broader conduct of the war in Vietnam, a pre-existing and congressionally authorized war. It was a tactical decision regarding a military operation in direct response to enemy activity. Such decisions do not require congressional authorization, but are within the exclusive domain of the President as Commander in Chief.

today, since the U.N. Charter has superseded Watson's analysis here. Watson states further, at 917, "[A]s Commander-in-Chief of the Army and Navy the President has the constitutional power to employ the means recognized by the laws of war as necessary to conquer the enemy."

²³¹

Youngstown Sheet and Tube Co. et al. v. Sawyer, 343 U.S. 579, 645 (1952).

CONGRESSIONAL AUTHORIZATION

Even assuming, for the sake of argument only, that the Cambodian incursion was an exercise of force which did require congressional authorization, it would nevertheless still have been constitutional because Congress did authorize the President to carry out such operations. On 10 August 1964, Congress passed H.J. Res. 1145, "to promote the maintenance of international peace and security in southeast Asia", entitled the Southeast Asia Resolution.²³² Other than providing for its expiration as the President or Congress saw fit, the resolution had two purposes:

. . . [T]he Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.

Sec. 2. . . . Consonant with the Constitution of the United States . . . the United States is, therefore, prepared as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom. (Emphasis added).²³³

The preceding section of this paper regarding the constitutional separation of war powers showed that custom, precedent, scholarly opinion, and indeed the Constitution,

²³²

Public Law 88-408, 78 Stat. 384 (1964), repealed by Public Law 91-672, § 12 (1971). Even the title of the resolution, the *Southeast Asia Resolution*, shows Congress was contemplating use of force not only in Vietnam, but in all of southeast Asia.

²³³

Id.

merely set forth general contours as to the separation of those powers. It is in cases like this, though, once Congress speaks, that those contours harden into definable boundaries. In resolutions like the Southeast Asia Resolution, Congress specifically sets forth the limits, if any, they intend to apply. Simply because Congress, in drafting the boundaries, saw fit to accord the President broad powers in this instance does not make these boundaries any less valid.

In the case of the Southeast Asia Resolution, Congress ceded to the President, without further authorization from them, the power to take *all measures necessary* to repel armed attacks against American troops. Certainly there can be no question at this point, nor should there ever have been, that North Vietnamese forces were engaged in armed attacks against American forces from inside Cambodia. President Nixon's response, as we have seen, was limited to what was necessary to repel those attacks, and thus was clearly authorized by the Southeast Asia Resolution. In fact, in direct response to a question regarding consultation with Congress, President Nixon told reporters he had to think of "what was necessary, what would save American men. . . ." ²³⁴

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A *Conversation With The President*, *supra* note 212 at 111. President Nixon also explained the need for secrecy and for speed. He then compared it with congressional debate of the Cooper-Church Amendment, which lasted seven weeks. The substance of these two topics are so similar that the debate no doubt would have taken comparable amounts of time. The President's point completely destroys the assertion in *Talk*

While many opponents of the incursion argued Congress did not *intend* such a broad reading of the resolution, or for American troops ever to be deployed inside Cambodia (in essence that Congress did not mean what it said) there is no evidence to support such a position. To the contrary, an oft-quoted portion of the Senate debate over the Southeast Asia Resolution proves just the opposite, that Congress did intend a broad reading of the resolution:

Mr. Cooper: . . . Does [Senator Fulbright] consider that in enacting this resolution we are satisfying that requirement of Article IV of the Southeast Asia Collective Defense Treaty? In other words, are we now giving the President advance authority to take whatever action he may deem necessary respecting South Vietnam and its defense, or with respect to the defense of any other country included in the treaty?

Mr. Fulbright: I think that is correct.

Mr. Cooper: Then, looking ahead, if the President decided that it was necessary to use such force as could lead into war, we will give that authority by this resolution?

Mr. Fulbright: That is the way I interpret it.²³⁵

OPPOSITION ARGUMENTS

Two other arguments of the opposition should be addressed at this point. First, the *New Yorker* castigated President Nixon for having made "necessity" the standard for the legal use of force.²³⁶ It was, in fact, Congress who, seven years

of the Town, supra note 211 at 32, that the situation in Cambodia could have been presented to Congress for a "swift decision".

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²³⁶ 110 Congressional Record 18,409-18,410 (1964).

²³⁶

Talk of the Town, supra note 211 at 31.

earlier, set out the standard of "necessity" for presidential determination of use of force in southeast Asia.²³⁷

Second, While President Nixon has been accused of not consulting with members of Congress, it should be noted those accusations have come generally from outside of Congress.²³⁸ On the other hand, President Nixon, himself, maintains he did consult with a great number of people from both the House of Representatives and the Senate, both Republicans and Democrats, on a formal²³⁹ and informal basis.²⁴⁰

CAMBODIA AS A PROTOCOL STATE

Finally, brief mention should also be made of section 2 of the Southeast Asia Resolution, which authorized the President to take all necessary steps, *including the use of armed force*, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance. Cambodia had originally been named as a protocol state under the SEATO treaty.²⁴¹ While Sihanouk purported to renounce this, the effect of that renunciation is unclear in

²³⁷

Public Law 88-408, 78 Stat. 384 (1964), repealed by Public Law 91-672, § 12 (1971).

²³⁸

E.g., *Talk of the Town*, *supra* note 211 at 31-33.

²³⁹

Memoirs, *supra* note 160 at 451. In particular, President Nixon described a meeting in the White House with a bipartisan delegation from Congress.

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A Conversation With the President, *supra* note 212 at 111.

²⁴¹

Southeast Asia Collective Defense Treaty, *supra* note 129.

light of the immense reversals of foreign policy by the Lon Nol government, and when viewed along with the many requests for assistance by the Lon Nol government, as well as its response after the incursion, certainly it appears as though the Cambodian incursion was a textbook example of a section 2 invocation of the Southeast Asia Resolution.

SUMMARY OF CONSTITUTIONALITY

To summarize, the Cambodian incursion was constitutional on two bases. First, it was a tactical decision regarding a military campaign as part of a pre-existing and previously authorized (by Congress) conflict. As such, it was within the President's exclusive power as Commander in Chief, and required no authorization by or consultation with Congress. Despite this, not only did President Nixon consult with Congress, but Congress, as a body, authorized the President to carry out this type of operation via the Southeast Asia Resolution, either to repel armed attacks against American forces, or to assist protocol states of the SEATO treaty, both of which circumstances existed in the case of the Cambodian incursion.

The evidence clearly shows the Cambodian incursion was legal under international law. For years, North Vietnam violated the law of neutrality by using Cambodian territory to move troops and war supplies, to base tens of thousands of troops, and to launch offensive operations. In addition, despite purportedly being neutral, Cambodia tolerated, and even at times encouraged, these violations. Under international law, the United States therefore had a remedy of self defence necessary and proportionate to the threat faced. That self defence was necessary is borne out by the facts surrounding the incursion, and the self-imposed limits are clear evidence of the proportionality of the United States' response.

There has been no discussion of the results of the incursion. That was a conscious decision on my part. While statistics are readily available which show the results of the incursion, they do not support the premise of this paper. Success of the incursion does not prove its legality. There is also the further problem of how to measure success. Would the success of the incursion be measured solely on the amount of materiel seized from the sanctuaries? On the number of sanctuaries cleared out? Or would you also have to consider the political response at home? Or how long the sanctuaries remained unused? Or how much longer the war in Indochina lasted? Or perhaps success could be measured by how many

American lives were saved. And if that is the case, how could such a number be computed?

This paper is a defence of the *legality* of the Cambodian incursion. Above all else, the reader must remember that. That it is a legal defence is important, because that is precisely where so much that was written during the Vietnam era went wrong. Policy and legality were often confused. That is not to say the two are not related, or that even the two should not be discussed together. In fact, I would say that in decision-making, the two should be given equal attention.

In decision-making, it is not sufficient for the international lawyer to conclude the law allows certain action. Surely, the effects of that action must be taken into account. Perhaps that was not done as well as it could have been done regarding the Cambodian incursion. Perhaps more attention could have been given to what the domestic reaction was going to be. Perhaps more thought could have gone into consultation with the United Nations and the Lon Nol government, so that it did not appear the United States was the gunslinging cowboy riding in to clean up the town.

But those are policy considerations, and do not affect the legality of the incursion. Today, twenty-three years after the fact, I have the luxury of separating legality and policy, which I have chosen to do. But I was motivated to that choice by the maneuverings of those opposed to the

administration's decision. Their rally cry was that the incursion was *illegal*, but they supported that cry with arguments that actually attacked the *wisdom* of the incursion. In so doing, they did a disservice to the American people.

Decision-making must include considerations of both law and policy, but the two must be kept distinct.

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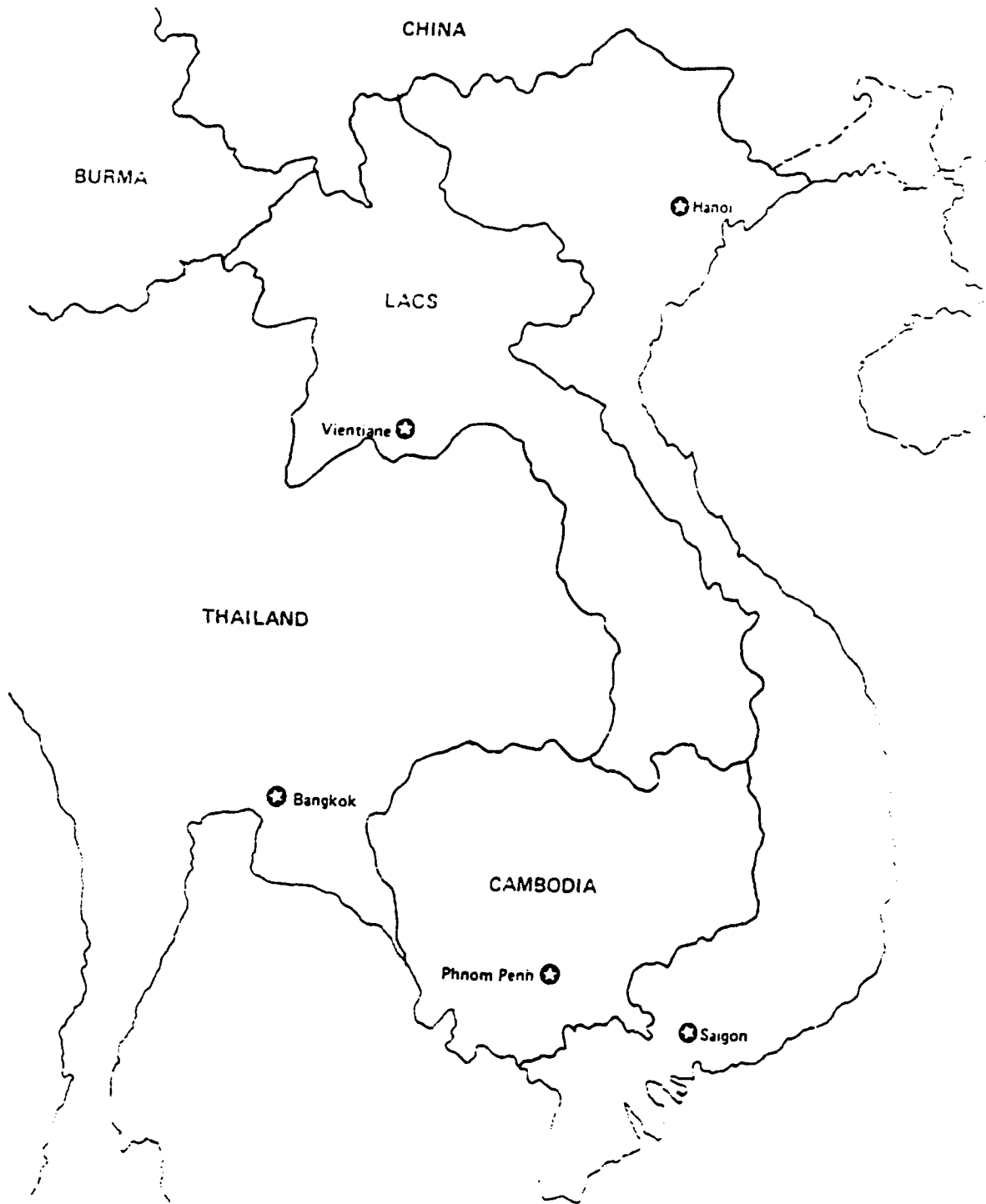
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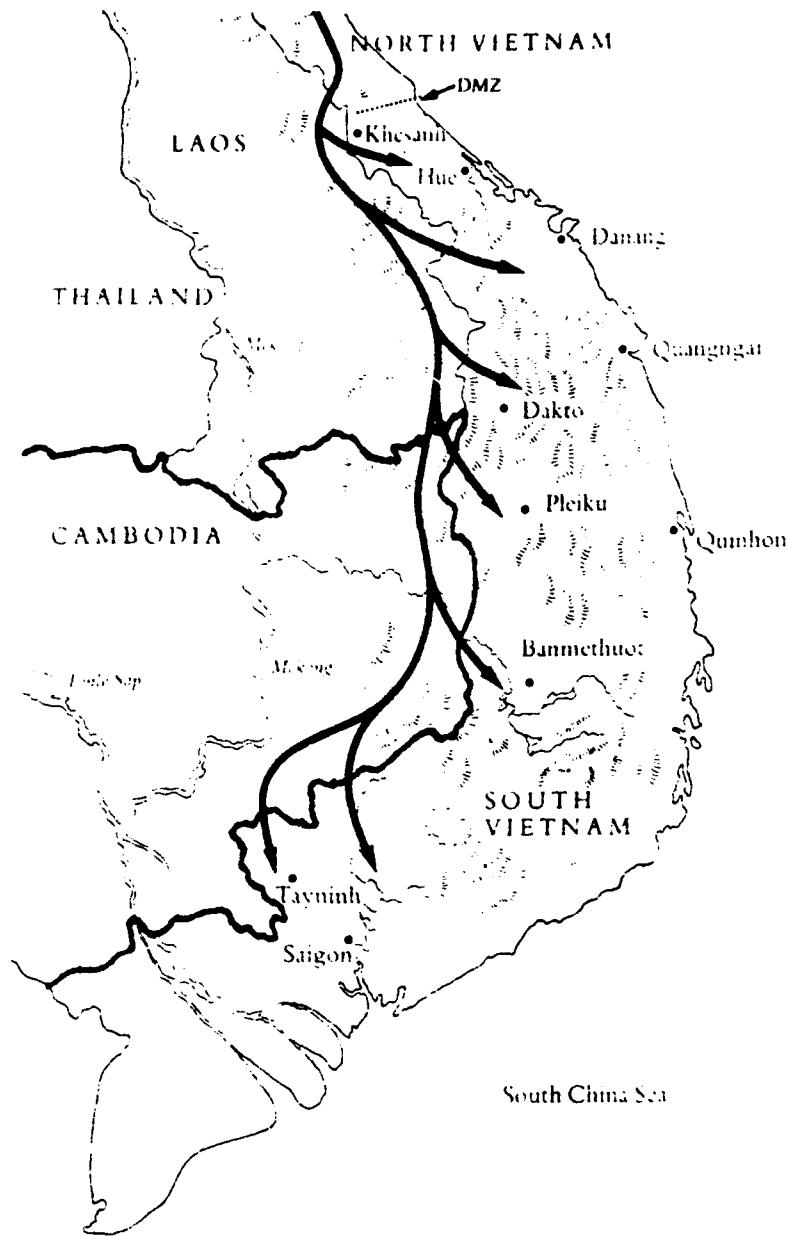
Douglas Pike, Director of the Institute of East Asian Studies (Berkeley, California), telephone interview (17 September 1993).

APPENDIX II
CAMBODIA AND SOUTHEAST ASIA



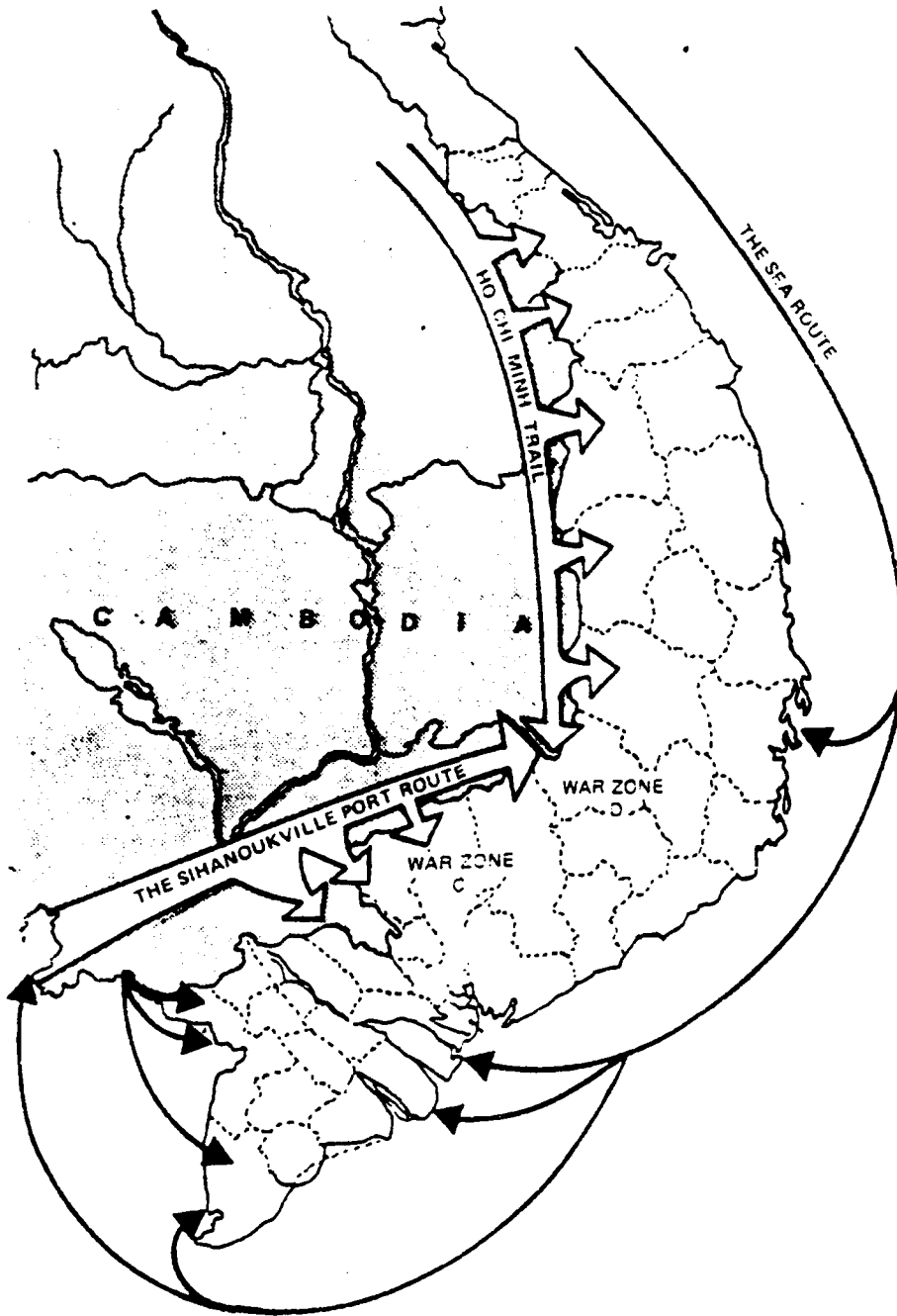
Sak, supra note 72 at 4.

APPENDIX III

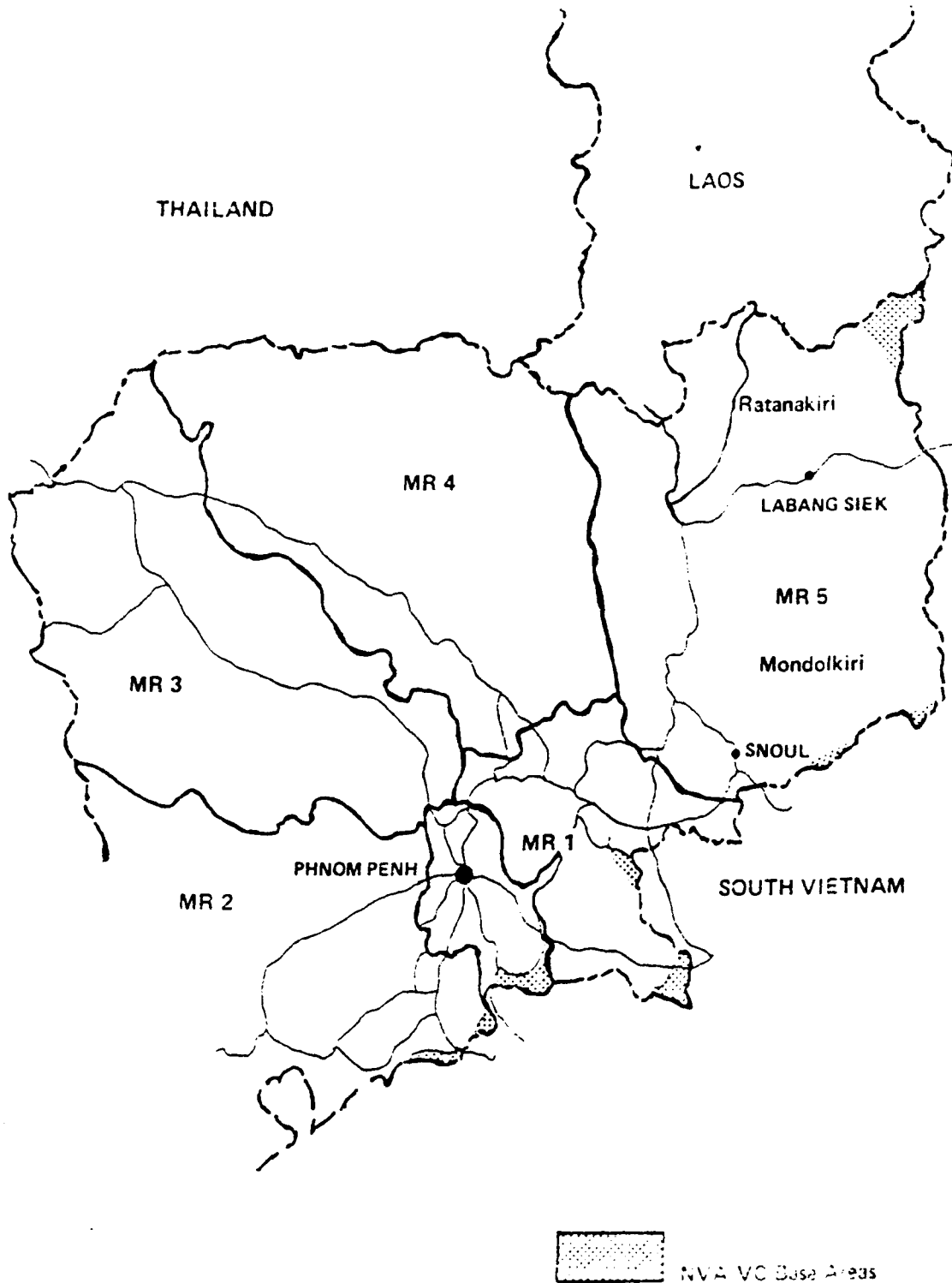


Ho Chi Minh Trail

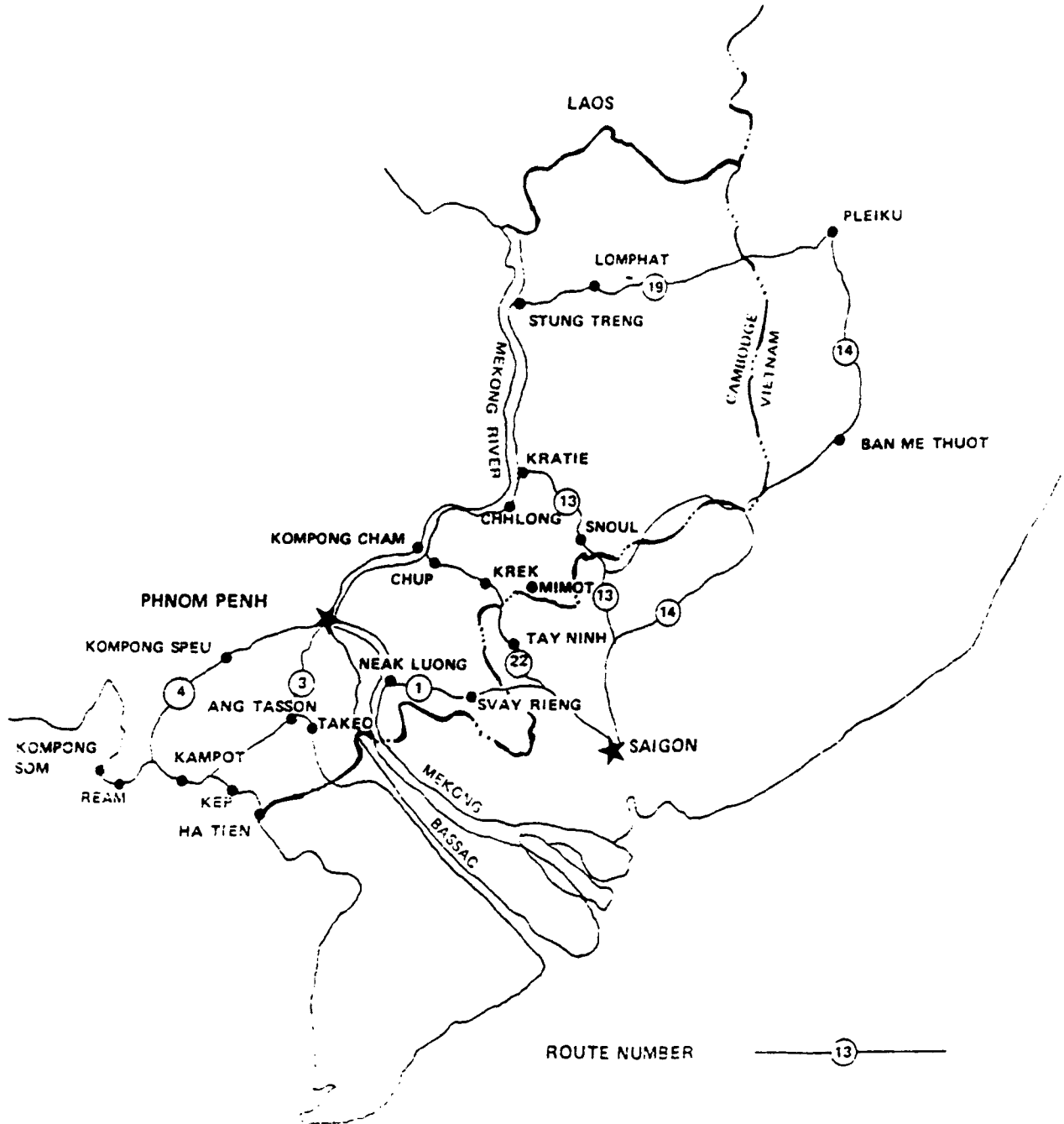
APPENDIX IV
MAIN NORTH VIETNAMESE ARMY INFILTRATION ROUTES



APPENDIX V
CAMBODIAN GOVERNMENT INFORMATION ON LOCATIONS OF PRINCIPLE
NORTH VIETNAMESE ARMY AND VIETCONG BASE AREAS IN CAMBODIA IN
1969



APPENDIX VI
CAMBODIA AND REPUBLIC OF VIETNAM BORDER REGION



**APPENDIX VII
INFORMAL DESIGNATIONS FOR AREAS OF OPERATIONS**

