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Statement before Hammarskjold Forum of the Association of the Bar of the City of New York on the Issues of International Law Involved in United States Military Actions in Cambodia
New York, May 28, 1970
By John R. Stevenson, Legal Adviser, Department of State

I welcome the opportunity to present the Administration's views on the questions of international law arising out of the current South Vietnamese and United States operations in Cambodia.1/

I do not intend to review in any detail the legal justification of earlier actions by the United States in Viet-Nam. In 1966 the previous Administration set forth at some length the legal justifications for our involvement in South Viet-Nam and our bombing of North Viet-Nam.2/

1/ The views of the Administration on the military and political issues have been expressed clearly by the President and other officials. See, in particular, President Nixon's address of April 30, 1970, reprinted in State Dept. Bulletin of May 18, and his press conference of May 8, reprinted in the New York Times on May 9. See also, Deputy Secretary of Defense Packard's address of May 15, 1970 in Fort Worth, Texas.

2/ Meeker, "The Legality of United States Participation in the Defense of Viet-Nam", March 4, 1966, submitted to the Senate Committee on Foreign Relations on March 8, and published in the State Department Bulletin of March 28, 1966.

In general, reliance was placed squarely upon the inherent right of individual and collective self-defense, recognized by Article 51 of the U.N. Charter. This legal case involved the showing that North Viet-Nam had raised the level of its subversion and infiltration into South Viet-Nam to that of an "armed attack" in late 1964 when it first sent regular units of its armed forces into South Viet-Nam. The build-up of American forces in South Viet-Nam and the bombing of North Viet-Nam were justified as appropriate measures of collective self-defense against that armed attack.3/

The legal case presented by the previous Administration was vigorously attacked and defended by various scholars of the international legal community.4/ Many of the differences rested on disputed questions of fact which could not be proved conclusively. This Administration,

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3/ They were also justified on that basis in U.S. reports to the United Nations, pursuant to Article 51. See the texts of the letters from Ambassador Stevenson to the Security Council, dated February 7 and February 27, 1965, reprinted in the Department of State Bulletin, Feb. 22, 1965, p. 240, and March 22, 1965, p. 419.

4/ See the collection, in two volumes, The Viet-Nam War and International Law, edited by Richard A. Falk, and published in 1968 and 1969 by the American Society of International Law.

however, has no desire to reargue those issues or the legality of those actions which are now history. In January 1969, President Nixon inherited a situation in which one-half million American troops were engaged in combat in South Viet-Nam, helping the Republic of Viet-Nam to defend itself against a continuing armed attack by North Viet-Nam. Our efforts have been to extricate ourselves from this situation by negotiated settlement if possible, or, if a settlement providing the South Vietnamese people the right of self-determination cannot be negotiated, then through the process of Vietnamization.[5/] The current actions in Cambodia should be viewed as part of the President's effort to withdraw United States forces from combat in Southeast Asia.[6/]

5/ The President reviewed our efforts at negotiation and the progress of Vietnamization in his statement of April 20, 1970, published in State Dept. Bulletin, May 11, 1970 and stated: "...our overriding objective is a political solution that reflects the will of the South Vietnamese people and allows them to determine their future without outside interference."

6/ In his address of April 30, announcing the use of force in Cambodia, President Nixon said: "We take this action not for the purpose of expanding the war into Cambodia but for the purpose of ending the war in Viet-Nam, and winning the just peace we all desire. We have made and will continue to make every possible effort to end this war through negotiation at the Conference table rather than through more fighting in the battlefield."

I appreciate this opportunity to discuss the questions of international law arising out of our actions in Cambodia. It is important for the Government of the United States to explain the legal basis for its actions, not merely to pay proper respect to the law, but also because the precedent created by the use of armed forces in Cambodia by the United States can be affected significantly by our legal rationale. I am sure you recall the choice that was made during the Cuban missile crisis in 1962 to base our "quarantine" of Cuba not on self-defense since no "armed attack" had occurred, but on the special powers of the Organization of American States as a regional organization under Chapter 8 of the U.N. Charter.7/ Within a narrower scope the arguments we make can affect the applicability of the Cambodian precedent to other situations in the future. I believe the United States has a strong interest in developing rules of international law that limit claimed rights to use armed force and encourage the peaceful resolution of disputes.

7/ See Chayes, "Law and the Quarantine of Cuba", 41 Foreign Affairs (1963) 550.

One way to have limited the effects of the Cambodian action would have been to obtain the advance, express request of the Government of Cambodia for our military actions on Cambodian territory. This might well have been possible.[8/] However, had we done so, we would have compromised the neutrality of the Cambodian Government and moved much closer to a situation in which the United States was committing its armed forces to help Cambodia defend itself against the North Vietnamese attack. We did not wish to see Cambodia become a co-belligerent along with South Viet-Nam and the United States. We are convinced that the interests of the United States, the Republic of Viet-Nam, and Cambodia, and indeed the interests of all Asian countries, will best be served by the maintenance of Cambodian neutrality, even though that neutrality may be only partially respected by North Viet-Nam.

8/ On May 1 a Cambodian spokesman said that "the Cambodian Government as a neutral government cannot approve foreign intervention." However, on May 5, Lon Nol issued the following statement: "In his message to the American people of April 30, 1970, President Nixon made known the important measures which he had taken to counter the military aggression of North Vietnam in Laos, Cambodia and South Vietnam. One of these measures concerns the aid of the U.S. in the defense of the neutrality of Cambodia violated by the North Vietnamese. (cont'd)

(footnote continued)

"The Government of Salvation notes with satisfaction the President of the United States took into consideration in his decision, the legitimate expressions of the Cambodian people who only desire to live in peace within their territory, independent, and in strict neutrality. For this reason, the Government of Cambodia (GOC) wishes to announce that it appreciates the views of President Nixon in his message of April 30 and expresses to him its gratitude.

"It is time now that the other friendly nations understand the extremely serious situation in which Cambodia finds itself and come to the assistance of the Cambodian people who are victims of armed aggression. The Government of Salvation renews on this occasion its appeal for assistance made April 14, noting that it will accept from friendly countries all unconditional and diplomatic, military and economic assistance."

Later statements have indicated even more clearly the Cambodian Government's approval of our actions.

As the President has made clear, the purpose of our armed forces in Cambodia is not to help defend the Government of Cambodia, but rather to help defend South Viet-Nam and United States troops in South Viet-Nam from the continuing North Vietnamese armed attack.[9/] This limited purpose is consistent with the Nixon Doctrine, first set forth by the President at Guam on July 25, 1969,[10/] that the nations of the region have the primary responsibility of providing the manpower for their defense.

The North Vietnamese have continued to press their attack against South Viet-Nam since 1964 and have made increasing use of Cambodian territory in the furtherance of that attack. They have used Cambodia as a sanctuary for moving and storing supplies, for training, regroupment

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9/ This is to be distinguished from the furnishing of weapons and ammunition to Cambodia pursuant to the Foreign Assistance Act, 75 Stat. 424, 22 U.S.C. §2161-2410, which is done to improve the ability of Cambodia to defend itself.

10/ The President's statements were not for direct quotation, but the New York Times of July 26, 1969 contains a fair summary of his remarks. The President later clarified the Doctrine in his address to the nation on Viet-Nam of November 3, 1969 and in his Report to the Congress dated February 18, 1970 on U.S. Foreign Policy for the 1970's.

and rest of their troops and as a center of their command and communications network. I assume that these facts are generally accepted, but it might be useful to give a few examples.

In the past five years, 150,000 enemy troops have been infiltrated into South Viet-Nam through Cambodia. In 1969 alone, 60,000 of their military forces moved in from Cambodia. The trails inside Cambodia are used not only for the infiltration of troops but also for the movement of supplies. A significant quantity of the military supplies that support these forces came through Cambodian ports.

Since 1968 the enemy has been moving supplies through southern Cambodia to its forces in the Mekong Delta. Further, in the spring and summer of 1969, three to four regiments of regular North Vietnamese troops used Cambodian territory to infiltrate into the Mekong Delta. Up to that time, there had been no regular North Vietnamese combat units operating in this area.

As many as 40,000 North Vietnamese and Viet Cong troops were operating out of the Cambodian base areas against South Viet-Nam prior to April 30. As the war in

South Viet-Nam intensified, Viet Cong and North Vietnamese troops have resorted more frequently to these sanctuaries and to attacking from them to avoid detection by or combat with United States and South Vietnamese forces.

During 1968 and 1969 the Cambodian bases adjacent to the South Vietnamese provinces of Tay Ninh, Pleiku, and Kontum have served as staging areas for regimental-size Communist forces for at least three series of major engagements -- the 1968 Tet offensive, the May 1968 offensive and the post-Tet 1969 offensive.

Many of these North Vietnamese actions violate Cambodian neutrality. Flowing from the Fifth Hague Convention of 1907[11/] are the generally accepted principles that a neutral may not allow belligerents to move troops or supplies across its territory, to maintain military installations on its territory, or to regroup forces on its territory. A neutral is obligated to take positive action to prevent such abuse of its neutrality either by attempting to expel the belligerent forces or to intern them.

11/ 1 Bevans, Treaties and Other International Agreements of the United States of America (1968) 654.

Both the previous Cambodian Government under Prince Sihanouk and the present Government headed by Lon Nol have made efforts to limit, if not prevent, these violations of Cambodia's rights as a neutral. While the Sihanouk Government did not, in our judgment, do all that, under international law, it should have done, it unquestionably made some efforts. As a legal matter it is clear that a neutral must take active measures commensurate with its power to protect its territory from abuse by a belligerent. It is likewise clear that a neutral's "duty of prevention is not absolute, but according to his power." 12/ In any event, however, the control and restraint exercised by the previous Cambodian Government was progressively erroded by constant North Vietnamese pressure. Prior to the ouster of Prince Sihanouk, regular supply of arms and munitions through the Port of Sihanoukville had become an established fact.

12/ As the Harvard Research in International Law pointed out in its 1939 Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, "A neutral State is not an insurer of the fulfillment of its neutral duties. It is obligated merely to 'use the means at its disposal' to secure the fulfillment of its duties." 33 American Journal of International Law (1939), Suppl., p. 247.

After the change of government on March 18, in which the United States was not involved in any respect, Cambodian police and other officials were driven out of many localities in the border area. When it became apparent to North Viet-Nam that the new Cambodian Government was not willing to permit the same wide scope of unneutral use of its territory by North Vietnamese forces as the previous government, the decision was evidently taken to expel all Cambodian Government presence from the border areas and move militarily against the Cambodian army, with a view to linking up all the sanctuaries and the Port of Sihanoukville. This would have produced a unified and protected sanctuary from the Gulf of Siam along the entire border of South Viet-Nam to Laos, with virtually unrestricted movement and unlimited supply access. The threat posed by such a situation of renewed and increased attacks against United States and Vietnamese troops in South Viet-Nam is obvious. We also knew that enemy forces were instructed to emphasize attacks on U.S. forces and increase U.S. casualties.

That is the rapidly developing situation the President faced at the time of his April 30 decision to

make limited military incursions into the sanctuaries in Cambodia, which had been militarily occupied by North Viet-Nam. It was impossible for the Cambodian Government to take action itself to prevent these violations of its neutral rights. Its efforts to do so had led to the expulsion of its forces. In these circumstances, the question arises of what are the rights of those who suffer from these violations of Cambodian neutrality.

It is the view of some scholars that when the traditional diplomatic remedy of a claim for compensation would not adequately compensate a belligerent injured by a neutral's failure to prevent illegal use of its territory by another belligerent, the injured belligerent has the right of self-help to prevent the hostile use of the neutral's territory to its prejudice.13/ Professor Castrén, the distinguished Finnish member of the

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13/ According to Greenspan, The Modern Law of Land Warfare (1959) 538: "Should a violation of neutral territory occur through the complaisance 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."

International Law Commission has stated that "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." 13a/

The more conservative view is that a belligerent may take reasonable action against another belligerent violating the neutral's territory only when required to do so in self-defense. 14/

13a/ Castrén, The Present Law of War and Neutrality (Helsinki, 1954) 442. See also II Guggenheim, Traité de Droit International Public (Geneva, 1954) p. 346.

14/ II Oppenheim, International Law (7th ed. 1952) 698. This is true whether or not the neutral has met its obligations to use the means at its disposal to oppose belligerent use of its territory. Stone, Legal Controls of International Conflict (1954) says (p. 401): "One clear principle is that, the right of self-preservation apart, an aggrieved State is clearly not entitled to violate the neutral's territorial integrity, simply because his enemy has done so. Diplomatic representations and claim are the proper course." A Columbia Law Review Note concludes: "Military action within neutral territory may be justified as a measure of self-defense or as an appropriate response to the failure of a neutral state to prevent the use of its territory by belligerent forces... It is suggested ... that international law should permit and encourage primary reliance on self-defense as a justification". Note, "International Law and Military Operations against Insurgents on Neutral Territory", 68 Col. L. Rev. 1127 (1948). See also Corfu Channel Case, ICJ Reports 1949, 34-35 and 77.

The United States Department of the Army Field Manual relating to the Law of Land Warfare states the following rule: "Should the neutral State be unable, or fail for any reason, to prevent violations of its neutrality by the troops of one belligerent entering or passing through its territory, the other belligerent may be justified in attacking the enemy forces on this territory." 15/ This rule can be traced to, among others, the decision of the Greco-German Mixed Arbitral Tribunal after the First World War which had to deal with the German bombardment of Salonika in Greece. During the war the Allied forces had occupied Salonika despite Greece's neutrality and the Germans responded with a bombardment. The Tribunal stated that Allied occupation constituted a violation of the neutrality of Greece, and that it was immaterial whether the Greek Government protested against that occupation or whether it expressly or tacitly consented to it. The Tribunal then concluded that "in

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15/ FM 27-10 (July 1956) para. 520, p. 185. Similar provisions were contained in the U.S. Rules of Land Warfare of 1940 (para. 366) and in the British Manual of Military Law (para. 655). See Greenspan, The Modern Law of Land Warfare (1959) p. 538, n. 23.

other case the occupation of Salonika was, as regards Germany, an illicit act which authorized her to take, even on Greek territory, any acts of war necessary for her defense." 16/

When the British navy entered then neutral Norway's territorial waters in 1940 to liberate British prisoners on the Altmark, a German auxiliary vessel, a thorough analysis of that case by Professor Waldock led him to the conclusion that in some circumstances a breach of neutrality by one belligerent threatens the security of the other belligerent in such a way that nothing but the immediate cessation of the breach will suffice. "Accordingly" -- he continues -- "where material prejudice to a belligerent's interests will result from its continuance, the principle of self-preservation would appear fully to justify intervention in neutral waters." 17/

16/ Coenca Brothers v. The German State, 1927, translated in Briggs, The Law of Nations: Cases, Documents and Notes (1938) pp. 756-58.

17/ Waldock, "The Release of the Altmark's Prisoners," 24 British Year Book of International Law (1947) p. 216, at 235-36. See also Tucker, The Law of War and Neutrality at Sea (Naval War College, International Law Studies, Vol. XLX, 1955, p. 262).

As far back as the 18th Century, Vattel had this to say:

> On the other hand, it is certain that, if my neighbour offers a retreat to my enemies, when they have been defeated and are too weak to escape me, and allows them time to recover and to watch for an opportunity of making a fresh attack upon my territory...[this is] inconsistent with neutrality...[H]e should...not allow them to lie in wait to make a fresh attack upon me; otherwise he warrants me in pursuing them into his territory. This is what happens when Nations are not in a position to make their territory respected. It soon becomes the seat of the war; armies march, camp, and fight in it, as in a country open to all comers.[18]

The United States itself has sometimes in the past found it necessary to take action on neutral territory in order to protect itself against hostile operations. Professor Hyde cites many such instances of which I would note General Jackson's incursion into Spanish West Florida in 1818 in order to check attacks by Seminole Indians on United States positions in Georgia; the action taken against adventurers occupying Amelia Island in 1817, when Spain was unable to exercise control over it; and the expedition against Francisco Villa in 1916, after

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18/ 3 E. DeVattel, Le Droit des Gens (Ienwick transl. 1916) §133, at 277 (emphasis added).

his attacks on American territory which Mexico had been unable to prevent.19/

I have summarized these precedents and the views of scholars and governments principally to show general recognition of the need to provide a lawful and effective remedy to a belligerent harmed by its enemy's violations of a neutral's rights. I would not suggest that those incidents and statements by themselves provide an adequate basis for analysis of the present state of the law. We all recognize that, whatever the merits of these views prior to 1945, the adoption of the United Nations Charter changed the situation by imposing new and important limitations on the use of armed force.20/ However, they are surely authority for the proposition that, assuming the Charter's standards are met, a belligerent may take action on a neutral's territory to prevent violation by another belligerent of the neutral's neutrality which the neutral cannot or will not prevent, providing such action is required in self-defense.

19/ I Hyde, International Law (2d ed., 1945), pp. 240-44.

20/ In particular, Article 2, para. 4 of the Charter.

In general, under the Charter the use of armed force is prohibited except as authorized by the United Nations or by a regional organization within the scope of its competence under Chapter 8 of the Charter, or, where the Security Council has not acted, in individual or collective self-defense against an armed attack. It is this latter basis on which we rely for our actions against North Vietnamese armed forces and bases in Cambodia.

Since 1965 we and the Republic of Viet-Nam have been engaged in collective measures of self-defense against an armed attack from North Viet-Nam. Increasingly since that time the territory of Cambodia has been used by North Viet-Nam as a base of military operations to carry out that attack, and it long ago reached a level that would have justified us in taking appropriate measures of self-defense on the territory of Cambodia. However, except for scattered instances of returning fire across the border, we refrained until April from taking such action in Cambodia. The right was available to us, but we refrained from exercising it in the hope that Cambodia would be able to impose greater restraints on enemy use of its territory. However, in late April a new and more

dangerous situation developed. It became apparent that North Viet-Nam was proceeding rapidly to remove all remaining restraints on its use of Cambodian territory to continue the armed attacks on South Viet-Nam and our armed forces there.

Prior to undertaking military action the United States explored to the fullest other means of peaceful settlement. We awaited the outcome of the Cambodian Government's efforts to negotiate with the North Vietnamese and the Viet Cong agreed limitations on the use by the latter of Cambodian territory -- without success. We have continually tried in the Paris Talks to bring about serious negotiation of the issues involved in the war. Soundings in the Security Council indicated very little interest in taking up the North Vietnamese violations of Cambodian territorial integrity and neutrality. We welcomed the French proposal looking to the possibility of an international conference although not publicly for fear of discouraging Hanoi's participation. The Soviet Union, after initially indicating interest, backed away.

We were particularly pleased with the calling of the Djakarta Conference of interested Asian states to deal with the Cambodian problem on a regional basis. The best long-run approach to East Asian security problems lies through cooperative actions such as this. In the short run, however, they cannot be expected to provide an adequate defense to the North Vietnamese military threat.

The United States has imposed severe limits on the activities of U.S. forces. They will remain in Cambodia only a limited time -- not beyond July 1 -- in a limited area -- not beyond 21 miles from the border -- and with a limited purpose -- to capture or destroy North Vietnamese supplies, to destroy base installations, and to disrupt communications. To the maximum extent possible, we have directed our forces at enemy base areas and have tried to avoid civilian population centers. We have limited our area of operations to that part of Cambodia from which Cambodian authority had been eliminated and which was occupied by the North Vietnamese.

The Cambodian Government and the Cambodian people are not the targets of our operations. During the period from 1967 to 1970 the Cambodian Government became increasingly outspoken in its opposition to the North Vietnamese occupation. In fact, Sihanouk's purpose in going to the Soviet Union and China when he was deposed was to solicit their help in persuading the North Vietnamese to get out of Cambodia. The Lon Nol Government has expressed its understanding of our actions.21/

Our actions in Cambodia are appropriate measures of legitimate collective self-defense, and we have so reported to the United Nations, as required by Article 51 of the United Nations Charter.22/

21/ See note 8/ above.

22/ S/9781 (May 5, 1970).