

Genocide in Vietnam?

The line between legal argument and moral judgment

Hugo Adam Bedau

In 1965, shortly after the United States Government had ordered regular bombing raids over Vietnam, Bertrand Russell and his Peace Foundation organized a nongovernmental "International War Crimes Tribunal." Its aim was to determine whether the U.S. Government was committing crimes in violation of international law in its conduct of the Indochina war. Hearings began in November, 1966, in Sweden. A year later, Secretary McNamara was ordering preparation of what is now known as the Pentagon Papers, and four months after that was the massacre at Mylai. The final question put before the Tribunal was: "Do the combination of crimes imputed to the Government of the United States in its war in Vietnam constitute the crime of genocide?" The Tribunal voted unanimously that "the United States Government [is] guilty of genocide against the people in Vietnam."

In June, 1971, another nongovernmental "International Commission of Enquiry into United States Crimes in Indochina" convened in Oslo, Norway. At its first session the Commission concluded that "the nature and scope of the crimes which are being committed by the United States and its allies can be deemed to fulfill the legal prerequisites of the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide." The Commission unanimously adopted a "Concluding Statement" which read in part: "[It] is also the conviction of the Commission that the conclusion of its first session that the United States war in Indochina amounts to genocide was correct."

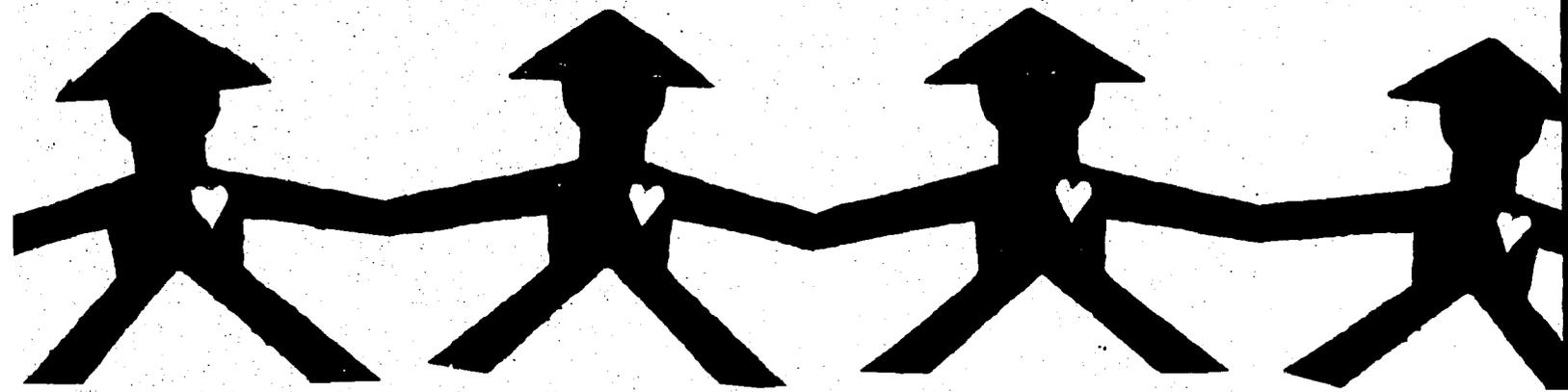
These accusations have not been without support in this country. Professor Hans Morgenthau, not one

to exaggerate for political effect, said that the Vietnam war was against "an entire people." Professor Richard Falk, in his preface to the report of the Oslo Commission, judged that our conduct in Vietnam had produced "the most grotesque crime of all . . . genocide." During 1972, at the Dellums Committee Hearings in Washington, D.C., and during the Winter Soldier Investigation at about the same time, the accusation of genocide became almost commonplace.

Even after Mylai, however, not every critic of American conduct in Vietnam has been willing to go so far. Telford Taylor, whose book *Nuremberg and Vietnam* did so much to assault the complacency of cold war liberals, mentions genocide but neglects to make clear whether he thinks it occurred in Vietnam. The most prominent academic spokesman against the United States military adventures in Indochina, Noam Chomsky, uncompromising though he has been in condemning our government's policy of "massacre," "crimes against humanity" and "war crimes," has never argued that our crimes in Vietnam included genocide. As for former high officials of three administrations, they have almost without exception ignored the entire controversy.

Genocide is not just another crime, not even another "war crime" or "crime against humanity." Accusations of genocide in our time are colored by the paradigm case still very much within living memory, the treatment of European Jews and other "undesirables" by the Nazi government. The very term "genocide" entered our language as the result of that holocaust. Still, the concept is a general one; there is no reason why the Nazis alone should be capable of genocide. Even so, there is a strong disinclination to describe as genocide any crime that fails to measure up to the fury of the Nazi's "final solution." In addition, there is the desire to repress nightmare possibilities, to dismiss all talk of genocide in Vietnam as rhetorical exaggeration. Perhaps now,

HUGO ADAM BEDAU is Fletcher Professor of Philosophy at Tufts University. An abbreviated version of this essay will appear in Held, Morganbesser and Nagel, eds., *Philosophy and International Conflict* (Oxford), to be published this year.



with the United States substantially disengaged from combat actions in Vietnam and our policy one of retrenchment throughout Southeast Asia, we can consider more calmly the ugly charge of genocide.

Part of the uncertainty over whether genocide occurred in Vietnam arises from the meaning of the term itself. Etymology invites us to construe "genocide" on analogy with "homicide," "suicide" and other terms to mean the killing of an ethnically identifiable group. However, if genocide is criminal without exception—and that is the prevailing assumption—the concept of genocide must include a *mens rea* (a notion of criminal intention) which etymology alone fails to provide. What is wanted is an analogy between genocide and murder, not genocide and homicide. Some homicides are excusable and others are justifiable, but no murder is justifiable. Those who reject the charge of genocide in Vietnam do so because, in effect, they do not think U.S. conduct involved the *mens rea* of genocide, no matter how many Vietnamese were killed. So long as the debate over genocide in Vietnam relies on the etymology of "genocide" alone, it cannot be fairly and finally resolved.

The Convention on the Prevention and Punishment of the Crime of Genocide, or, as it is more usually called, The Genocide Convention, has been in force since 1951, after its adoption by the U.N. General Assembly in 1948. It derives from the special resolution of the General Assembly in 1946, adopted immediately on the heels of the Nuremberg Principles, in which "genocide" was declared to be "a crime under international law." The Convention declares any of the following to be genocidal acts: "killing members of a . . . national, ethnical, racial or religious group," causing members of such a group "serious bodily or mental harm," "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part," "imposing measures intended to prevent births within the group" and "forcibly transferring children of the group to another group." These acts become genocide, however, *only if* they are committed with "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." The record of the discussion makes it clear that, as one leading scholar put it, "It is not enough to kill persons belonging to a different race or religion, but these murders must be committed as part of a plan to destroy the given group. . . . Where such specific intent is lacking there is no genocide." Consequently,

if the prohibited acts occur "simply as a *result* of an otherwise intentional action," that would be insufficient to constitute genocide under the Convention. I emphasize the language of the Genocide Convention because, for better or worse, the issue of genocide in Vietnam is in the end the issue whether the crime defined by this Convention has been committed.

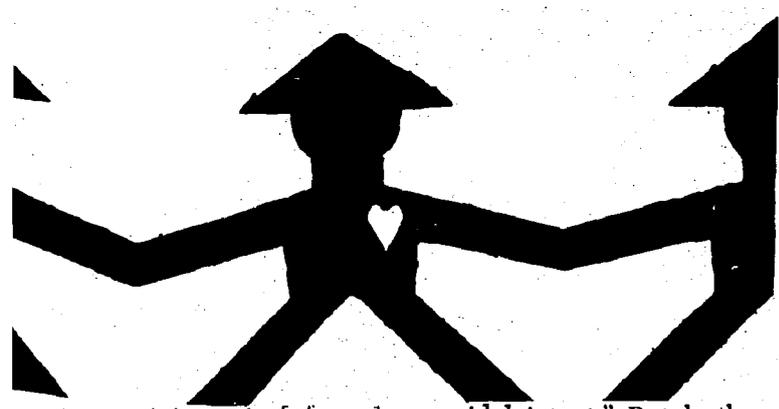
The idea that the Vietnam war might lead to genocide did not originate with Europeans, nor was it first aired at the Russell Tribunal in 1967. Early in 1966, two Americans, Edward S. Herman and Richard Du Boff, in their generally neglected book *America's Vietnam Policy*, concluded that "the ultimate logic of American military policy in Vietnam appears to be genocide. . . ." They argued:

[T]he logic of American military escalation leads to nothing less than a war of extermination against the native Vietnamese peasantry; because the guerrillas cannot be segregated from the peasantry; because the peasantry provides the necessary broad base for the guerrillas; and because the United States has the military means to eradicate this base completely, if need be, to create an "independent" South Vietnam.

On this view, a lethal dialectic was at work. The thesis of American imperialism, coupled with vast military power and the will to use it, confronted its antithesis in national self-determination and anti-colonialism in Vietnam. Unlike the dialectic of Hegel and Marx, however, no higher synthesis could emerge from that conflict. There is only retreat and defeat for the imperialist power or a Carthaginian peace, total extermination, for the peasant society.

Such arguments either ignore the fact that the crime of genocide requires *genocidal intent*, or they implicitly adopt the view that the tendency, the "logic," of an action is the intention. Ignoring the factor of intent is an unacceptable departure from the Genocide Convention. The identification of intent with "logic" is problematic on several scores. Because Herman and Du Boff are extremely unclear about what they mean by "logic," it is best to look elsewhere for a serious development of the charge of genocide in Vietnam.

The only explicit argument known to me, which is not spoiled at the outset by the above dilemma, is the one Jean-Paul Sartre presented to the Russell Tribunal in 1967. Sartre readily conceded that "the American government has avoided making clear



statements [of any] genocidal intent." But he hastened to add: "It is impossible to decide . . . [whether] its authors [government officials] are thoroughly conscious of their intentions, [for] the government of the United States, despite its hypocritical denials, has chosen genocide." "The genocidal intent is implicit in the facts. It is necessarily premeditated."

Anyone who examines "the facts" in question, Sartre argues, must reach this conclusion. These facts are to be found in the United States foreign policy objectives in the struggle over the future of Vietnam, and in the methods used to achieve these objectives. Evidently, "the conflict has two objectives": the "military" objective, "to encircle Communist China"; and the "economic" objective, to show "all of the Third World . . . that guerrilla war does not pay." The first objective "can" be achieved by genocide, though possibly less drastic measures will suffice. To achieve the second objective, "the United States *must* carry out, at least in part, . . . extermination of the Vietnamese."

Pervading the pursuit of these objectives, especially the second, is "the racism of the American soldiers." One "proof" of the racism in American society is that "the United States government [has] refused to ratify the Genocide Convention." On the battlefield in Vietnam the soldiers "often say themselves, 'The only good Vietnamese is a dead Vietnamese,' or what amounts to the same thing, 'A dead Vietnamese is a Viet-cong.'" We have here "the truth of the Vietnam war: it meets all of Hitler's specifications. Hitler killed the Jews because they were Jews. The armed forces of the United States torture and kill men, women and children in Vietnam merely *because they are Vietnamese* . . . the spirit of genocide is in the minds of the soldiers." "[T]he only possible relationship between an over-industrialized country and an underdeveloped country . . . is . . . a genocidal relationship implemented through racism—the only relationship, short of picking up and pulling out."

The conclusion is inescapable. The United States in Vietnam is engaged in "neo-colonialism," and in this enterprise, "total genocide"—that is, both physical and cultural—"emerges as the absolute basis of an anti-guerrilla strategy" and even "emerges as the explicit objective." "[T]he major *purpose* of 'escalation' was, and still is, to prepare international opinion for genocide." "[T]he true goal of imperialism . . . is to reach, step by step, the highest stage of escalation—total genocide." "[G]enocide presents itself as the only possible reaction to the rising of a whole

group of people against its oppressors." The United States Government is "guilty—according to its own admissions—of unconsciously carrying out this admonitorary war in order to use genocide as a challenge and threat to all peoples of the world."

There is much that is controversial or worse in this argument of Sartre's, but it has the merit of highlighting the issue of genocidal intent. The problem before us is easily illustrated. There is little doubt that the vast majority of American military acts in Vietnam were intentional. This is only to concede that relatively few were unintentional, involuntary, accidental or done for no reason at all. This by itself, however, does not mean that *the intention with which* any of these military actions were done was the intention relevant to genocide. How are we to determine intention? Our usual source of help in understanding criminal intention—an extensive history of case law and learned commentary—is simply nonexistent where genocide is concerned.

Our best strategy, therefore, is to exploit the law of malicious intent in criminal homicide. In this way we can arrive at four models. If genocidal intent cannot be understood in terms of these models, then it is doubtful whether it can be understood at all. Similarly, if an argument for genocide in Vietnam cannot be sustained on the evidence appropriate to at least one of these models, then the accusation is probably false.

The least plausible model is suggested, oddly enough, by the most natural reading of the verdict of the Russell Tribunal. Its verdict was in response to this question: "Do the combination of crimes imputed to the Government of the United States in its war in Vietnam constitute the crime of genocide?" Others have subsequently used similar language in explaining the idea of genocidal guilt. Most recently, the Oslo Commission relied on evidence which "establishes that [in Vietnam] the battlefield tactics of high-technology counterinsurgency warfare plus the aggressive war character of the enterprise [by the United States] add up to . . . genocide."

These ways of construing the issue of genocide in Vietnam are analogous to asking, in a case of criminal homicide, "Do the combination of crimes imputed to the accused constitute the crime of murder?" The occasion for asking such a curiously worded question would arise naturally only in the following kind of case. Suppose that you do *not* believe that Smith killed Brown with malice aforethought (the traditional *mens rea* of murder as distinct from manslaughter), nor that he killed Brown willfully, deliberately and with premeditation (the traditional *mens rea* of first-degree murder). You do believe, however, that Smith did kill Brown and that he did commit some "combination of crimes" against Brown. Centuries ago Blackstone declared, "If one intends

to do another felony, and undesigned kills a man, this is murder." This is the theory of *constructive malice* which underlies the familiar concept of felony-murder. It is the natural way to construe how the Russell Tribunal understood its verdict of genocide, given its wording of the question.

The crime of genocide, however, is a crime of *specific intent*, while the felony-murder model of constructive malice requires no such intent. Indeed, it was invented just for cases in which such intent is believed to be absent or unprovable, so that prosecutors can obtain first-degree murder convictions of robbers and burglars who accidentally, unintentionally, unwillingly and even unknowingly kill. Is this what Sartre meant by "genocidal intent implicit in the facts"? If it is, and if this is how the Russell Tribunal understood his argument or their own verdict, then it represents a complete departure from the Genocide Convention.

In a second model, Smith, after an evening's drinking in the tent with Brown, becomes rowdy and suddenly throws a heavy ashtray at Brown. He misses, but does hit and break the oil lamp burning overhead, causing it to drench Brown in flames, thereby burning him to death. In every ordinary sense of "intention," we are entitled to say that Smith did *not intentionally* kill Brown. In the circumstances supposed, we may even add that Smith had no desire to kill Brown and did not believe that Brown would die as a result of the ashtray being thrown at him. Nevertheless, the courts have generally held that in this kind of case Smith did murder Brown with *implied malice*. "When no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart," when the agent acts as Smith did, "recklessly indifferent as to the results of his act," thereby manifesting "a heart void of social duty, and fatally bent on mischief," the law will permit an implication of malice that transforms homicide into murder. After all, Smith's throwing the ashtray, however impulsive it may have been, was intentional, and anyone not an idiot or infant could be reasonably sure that, if the ashtray hit Brown or the lamp overhead, it could do serious bodily injury to him.

Of the major alternative models for the doctrine of genocidal intention of Vietnam, this one has a certain initial persuasiveness. Whatever else is true of the conduct of the United States in the Vietnam war, it tended toward genocidal results, as many commentators have noted. It was marked by reckless disregard of the foreseeable consequences of military policy, tactics and weaponry. American anti-Vietnamese racist sentiments made it simply that much easier to be indifferent to the welfare of the Vietnamese, indifferent to the distinction between a Viet Cong and a non-Communist Vietnamese peasant. The resulting state of mind of Americans in the field, like their civilian and military leaders in Washington,

is consistent with "an abandoned and malignant heart," "a heart void of social duty, and fatally bent on mischief." Could not genocidal intent be truly implicit in such conduct?

The answer is No. It is usually conceded that the doctrine of implied malice in murder does not establish that the homicide was committed with a malicious intention. Even though the law presumes that a person intends the natural and probable consequences of his acts, this presumption only establishes something which *for legal purposes is equivalent* to a malicious intention. The doctrine of implied malice in murder plainly departs from the ordinary concept of intention. In ordinary language and morality it is not true that a person intends all the consequences of his actions which he foresees, yet the law does not balk at this. So, even in the crime of murder, these objections imply that *no* combination of action involving culpable foresight, culpable recklessness and homicidal results is *identical* with action done with the specific intention to kill. It follows that the specific intention for genocide cannot be obtained on this model either.

The two models examined so far contrast with two more drawn from the study of how homicide is transformed into murder by the evidence of *express malice*. In murder, the *mens rea* of the crime appears most conspicuously in either of two forms. One is in the case where Smith kills Brown as a means to some end or with a further intention (Smith wants Brown out of the way so that his heirs will put up for sale the land Smith covets). Let us call this the model of *express malice with further intention*. The other is in the case where Smith kills Brown for no further reason or with no further intention at all (he hates Brown and wants him out of the way). Let us call this the model of *express malice with bare intention*. Similarly, genocide will involve express malice when it is chosen as the way to achieve some further end, or when it is chosen as the end itself. We can take up the latter alternative first.

Sartre admitted that there is no evidence of a self-conscious United States policy in Vietnam to kill Vietnamese "merely because they are Vietnamese." He did not dwell on the possibility that such evidence might eventually appear. Instead, he made a somewhat half-hearted claim that despite the silence of the government and the absence of unambiguous evidence, genocide was the settled, even if unavowed, intention with which the government acted in Vietnam.

The idea that the United States Government transported a half million men into Indochina in order to commit genocide is appalling. It is also implausible, there being little or no evidence for it and considerable evidence against it. Sartre's explicit parallel to the Nazis, therefore, is a groundless exaggeration

that invites critical readers to dismiss everything he says, which is unfortunate. This is not to deny that many Vietnamese were killed by U.S. military forces, sometimes under superior orders, "merely because they are Vietnamese." As in other wars, massacres such as those at Mylai have happened. But no inference to government policy or official intentions follows, not even in view of subsequent efforts by higher echelons to conceal these crimes and to resist bringing the responsible officers to trial. The issue before us is not whether a Lieutenant Calley committed a genocidal massacre, nor whether the Pentagon's attempt at concealment is misprision of a genocidal felony, but whether during the 1960's the United States Government conducted a genocidal war in Vietnam.

The final alternative is whether genocide may have been committed in Vietnam as a *means* to a further end. More than any other possibility, this one appears closest to the structure of Sartre's argument and is also the model best fitting the evidence. It is not so easy to refute.

Sartre's major theme is that genocide has been unavowedly adopted as the policy of the U.S. in order to fight a successful antiguerrilla war under conditions prevailing in Vietnam. The truth is not quite so simple. Today, more than in 1967, we can assess our national history and foreign policy during the past two decades as they affected the Vietnam war. The Vietnam war beginning in 1965 was, by and large, not conducted on any recognizable theory of counterinsurgency at all. The war—understood as the events of possibly genocidal significance—consisted of responses to considerations progressively incompatible with the patience and persistence required by antiguerrilla warfare. Central to this interpretation are the constraints on the methods and tactics of warfare available to the Johnson Administration under the exigencies of domestic politics and the military knowledge and technology in hand, and the transformation of the pacification program of the early 1960's from the goal of "winning the hearts and minds of the people" in South Vietnam to the goal in the later 1960's of bringing as much of the population as quickly as possible under the control of the Saigon government, and to use almost any means to do so.

As to the first point, little needs to be said here. The availability of a large Strategic Air Force capable of delivering massive if somewhat indiscriminate destruction on short notice to any target area, with relatively little loss of American lives, has been a fixture of American military capability since the end of World War II. The need to keep American casualties to the lowest possible levels for domestic political reasons needs no documentation. The resulting deployment of military equipment and manpower in order to use the maximum amount of firepower,

on the ground and from the air, inevitably follows—whether or not there were suitable military targets for that weaponry and whether or not these tactics were in line with the professed political aims of the war. The result, too, is well known: the intentional destruction of people and property throughout much of South Vietnam.

Why was it believed that these constraints on tactics and manpower might nevertheless win the war, or at least not lose it? The answer lies in four interlocking convictions which came to dominate the thought of civilian and military leadership during the early years of the Johnson Administration: First, the chief task of U.S. policy in Vietnam is to prop up the Saigon government; second, this cannot be done unless the Viet Cong are prevented from taking over rule of the people; third, the only way to prevent Viet Cong takeover is to destroy the Viet Cong's political power by separating the people from them, with persuasion if possible but with force if necessary; fourth and finally, domestic constraints on United States tactics and technology will still permit the force necessary to accomplish these goals.

The Pentagon Papers provide ample evidence of the first two of the above propositions. The evidence for the third proposition is the most important for the present argument. Even before the massive build-up of American forces in Vietnam during 1965, the idea that only force would suffice to "separate the people from the Viet Cong" was conceded in knowledgeable quarters. Within a few months after the bombing campaign against the North began, General Westmoreland was reported to have said that peasant farmers in South Vietnam would no longer be able to choose among three alternatives—staying put, moving into a Strategic Hamlet, or joining the Viet Cong—because the first had been eliminated by "B-52 bombings." The General concluded: "I expect to see a tremendous increase in the number of refugees." Pacification by persuasion, by piecemeal efforts of small teams among the rural villagers, had not ceased. Another policy, with appropriately different tactics, had been superimposed upon it. In an interview with another journalist, Robert Komer, then General Westmoreland's Deputy for Pacification, is reported to have said: "If we can attrit the population base of the Viet Cong, it'll accelerate the process of degrading the VC." Perhaps the most graphic statement of this new pacification policy came from an unnamed "high U.S. field commander" during the spring of 1966, who said: "If the people are to the guerrillas as the oceans are to the fish, then . . . we are going to dry up that ocean."

The U.S. Government had opted for what John Lewallen, in *The Ecology of Devastation*, called "a Devastation Model" of pacification. On such a model, pacification is indistinguishable from limited annihilation. Theoretically, of course, the intention to dry up the water where the Viet Cong fish swim was not

genocidal. Methods other than force, and perhaps forceful methods other than obliteration bombing, free-fire zones, search-and-destroy missions, defoliation and other essentially "scorched earth" policies could have separated the guerrilla movement in Vietnam from its base in a dispersed, rural, peasant culture. But since these brutal methods were used almost from the beginning and with the intention of destroying the population base of the Viet Cong, what more could be required to establish the facts of genocidal intent on the model of "express malice with further intention"? When General Westmoreland said, in April, 1967, that the Vietnam war had become "in the final analysis . . . a war of attrition in Southeast Asia," he was referring to the need to kill more Vietnamese soldiers and Viet Cong cadres than they could afford to lose.

There is only one line of defense which might be adequate. This defense must concede that many of the acts in question were acts of the sort enumerated in and prohibited under Article II of the Genocide Convention, and so in that sense they were genocidal acts. The defense would also concede that these acts were done as the means to a certain end, as instruments of policy, and thus were done intentionally. But they were not truly genocidal acts, it might be contended, because they were not done in order to "destroy, in whole or in part, a national . . . [or] racial group, as such." That they were not done to destroy the group *as a whole* is shown by many facts, not least of which were the efforts to house and feed the refugees once they were under the nominal control of the Saigon government. That the policy was not aimed at destroying the group *in part* is more difficult to prove. The acts *did* destroy the group in part; but that does not prove the point in contention, for almost any methods of counterinsurgency warfare used by the U.S. on behalf of the Saigon government would have had that result. The methods used were undertaken as a last resort, and would not have been used had the people of South Vietnam shown both a nominal loyalty to Saigon and some sustained resistance to the Viet Cong. In any case, the genocide-like acts were not genocidal, because they were *not done with the intention of killing any part of the people of South Vietnam "as such."* These acts were done with the intention of killing people who, in the judgment of field officers, might at a later point prove to be Viet Cong or who were in an area of South Vietnam where one could not be sure that any of the natives were loyal to the Saigon government. In many cases the people were killed simply because they were in the way. These things were not done in order to destroy the people "as such." All the people residing in South Vietnam were to be ruled by the Saigon government,

hopefully a government of their own choosing, but in any case not a government of an anti-Western, pro-Communist minority. This was the intention of the United States throughout the 1950's and 1960's.

The above defense is not offered as a parody. It is meant as a genuine rebuttal of the genocide charge as strictly drawn under the Genocide Convention. Whether such a defense is persuasive is quite another matter.

If the issue of genocide in Vietnam were simply a question of whether U.S. military forces killed thousands of innocent Indochinese peasants, there would be nothing to discuss. If the issue were simply whether this killing, in its mode and circumstances, evidenced a reckless and dangerous disregard for the life and limb of the innocent, in the pursuit of objectives which would do no honor to those in the government who sought them, there would be, again, nothing to discuss. What is chiefly at issue, however, is the intention with which these things were done and whether that intention coincides with the requirements of genocidal intention under the Genocide Convention.

Of the four models canvassed, two of them—the model of implied malice and the model of express malice with further intention—will continue to have special aptness for interpreting the idea of genocidal intent in the Vietnam war and, *horribile dictu*, in any future warfare by an industrial power such as the United States in a Third World nation such as Vietnam. The merits of these two models differ, however, in complementary ways. The model of implied malice has the edge so far as the evidence presently available is concerned. But this model places the greatest *conceptual* strain on the imputation of genocidal intent. The model of express malice with further intention provides a perfectly intelligible notion of genocidal intent, but it puts the argument under *evidential* strain. Thus, if my analysis is correct, the accusation of genocide in Vietnam against the United States can be sustained only by further conceptual argument or by the discovery of new evidence. The gap between my argument here and a verdict of genocide in Vietnam is not very wide. It may in the future be closed altogether.

Whether or not this question is ever resolved, the charge of genocide in Vietnam will continue to have an undeniable rhetorical appropriateness. No other single word so well captures the magnitude of the offensiveness of the war in light of the methods used to fight it, the purposes advanced as its justification, the political and social realities in Southeast Asia and the complex but not entirely elusive intentions of the Johnson and Nixon administrations in fighting it as they did. History gives us no better term than "genocide" with which to express our horror at what our government has done in Vietnam.