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August 21, 1971

MEMORANDUM FOR AMBASSADOR ELLSWORTH BUNKER

SUBJECT: The Geneva Conventions and
the Phoenix Program

Phong hang

Ambassador Colby was questioned closely on the conformity of the Phoenix Program with the Geneva Convention requirements when he testified on July 19 before the Foreign Operations and Government Information (Moorehead) Subcommittee of the House Committee on Government Operations.

Congressmen Moorehead, Reid and McCloskey were particularly penetrating in their questions. It was noted, for example, that the An Tri procedure authorizes the "sentencing" of VCI suspects by province security committees to detention in prison for up to two years, and that the suspects have no right to appear in their own defense, to counsel, to confront their accusers, or to a hearing.

McCloskey cited Article 3, paragraph 1(d) of the fourth Geneva Convention, on the protection of civilian persons, which prohibits:

"the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

We have approved the enclosed memorandum for inclusion in the Subcommittee's record, in accordance with its request. The memorandum points out that the provision of the fourth Geneva Convention cited by McCloskey

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applies to only sentencing for crimes and does not prohibit a state from incarcerating civilians or subjecting them to emergency detention when such measures are necessary for the security or safety of the state. The memorandum also notes:

"The Vietnamese 'An Tri', or administrative detention procedure, is similar in some respects to the emergency detention procedures utilized by a number of other nations in time of emergency to intern persons on grounds of national security. Such procedures involve no criminal sentence and are not violative of Article 3. On the other hand, aspects of the 'An Tri' procedure raise some problems which give us concern in this regard.

We have been working with the Government of the Republic of Vietnam with a view to improving the procedure to ensure the humanitarian treatment of detainees. We are striving to make the 'An Tri' procedure accord with fundamental concepts of due process, and to improve the conditions of internment."

Unavoidably, this may be read to imply a degree of present non-conformity with Article 3. However, a response to the Board's Subcommittee which sought to avoid the implications of Article 3, paragraph 1(d) of the Fourth Convention -- e.g., by basing our defense solely on the argument that the An Tri procedure is simply one for administrative detention which does not involve trial or conviction of a crime -- might only invite further criticism and seem untenable in the light of the facts revealed in Bill Colby's testimony.

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In any case, it seems important that we make new efforts with the GVN to deal with this serious problem. We are preparing a preliminary request to the Embassy in Saigon for a report on the steps which have been taken in the past and those under current discussion with the GVN to correct failings in the "An Tri" procedure and the Phoenix Program, particularly in light of the deficiencies noted in the Moorehead Subcommittee hearing. We will then be in a better position to decide where to go from there. We are, of course, aware that the prospects for GVN legislation and/or executive branch action to deal with the problem may also change substantially following the forthcoming Vietnamese elections.

In any case, we will continue to keep you fully informed of developments in Washington, particularly congressional interest in the matter.

Robert I. Starr
Acting Assistant Legal Adviser
for East Asian and Pacific Affairs

Attachment:
As stated

cc: EA - Mr. William Sullivan
Saigon - Ambassador Samuel D. Berger

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