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OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D. C. 20301

30 AUG 1971

INTERNATIONAL SECURITY AFFAIRS

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MEMORANDUM FOR [redacted] OFFICE OF SPECIAL ASSISTANT FOR VIETNAMESE AFFAIRS, HEADQUARTERS, CIA

SUBJECT: The Geneva Conventions and the Phoenix Program

On 19 July 1971, Ambassador William E. Colby appeared before the House Subcommittee on Foreign Operations and Government Information to testify concerning CORDS operations in South Vietnam. During the hearing the issue was raised concerning the applicability of the Geneva Conventions to the Phoenix (PHUNG HOANG) Program. As a consequence, Ambassador Colby was requested to furnish at a later time a legal opinion which would address this issue and which would be incorporated as part of his testimony. Subsequently, the Office of the Legal Advisor at State and the Office of the General Counsel at Defense developed a statement that sought to clarify the issue. A copy of this statement is being furnished (Enclosure) because of your close and continuing interest in the Phoenix (PHUNG HOANG) Program.

You will note that this statement represents the opinion of the Department of State. The reason for this is keyed to a portion of the sentence appearing at the top of page three, namely, "...and we have acknowledged a residual responsibility with respect to those captured by US forces." Essentially, the point involves the position taken by State concerning "residual responsibility." It is the Defense view that the legal rights of persons are provided for under the terms of the Geneva Conventions, and thus the protection of the legal rights of citizens of South Vietnam remains the responsibility of the Government of South Vietnam. The United States does not acquire a "residual responsibility" under the Geneva Conventions for protecting the legal rights of South Vietnamese citizens. Accordingly, it is not relevant to discuss the legal rights of Vietnamese citizens within the framework of this advisory program. Other than this point, Defense is in full agreement with the contents of this statement.

This statement may be instructive in terms of your agency's interest in the Phoenix (PHUNG HOANG) Program. No objection is interposed if you wish to make wider distribution.

GAC TAD CJS EFH
JHW JWA JFR HGB
Enclosure POO EXH MEE
DSS JKL JES

DAVID E. FARNHAM
Lieutenant Colonel, USA
Vietnam Task Force

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OSD/ISA/VNTF
Room 4C840

House Committee on Government Operations
Foreign Operations and Government
Information Subcommittee
Hearing Transcript, 19 July 1971
Page 768, following line 2

The Geneva Conventions and the Phoenix Program

Questions have been raised and considered from time to time concerning the conformity of the Phoenix Program with the Geneva Convention requirements. The following memorandum represents the opinion of the Department of State on this question.

MEMORANDUM

The Geneva Conventions and the Phoenix Program

The four Geneva Conventions of 1949 for the protection of war victims updated earlier international conventions to reflect the experiences of World War II. They filled a number of lacunae which had become evident in the earlier conventions. The fourth Convention on protection of civilian persons in time of war was a completely new treaty designed to minimize, to the greatest possible extent, the suffering of civilians caught in the turbulence of war. Bearing in mind the Nazi practices during World War II, the drafters of the fourth Convention sought to ensure humane treatment of civilians in belligerent and occupied territories, and to lay down rules to prevent their being deported, taken as hostage or interned in concentration camps. Experience since 1949 has revealed additional lacunae in the Conventions, and international discussions are now taking place with a view to the further refinement of humanitarian treatment of both combatants and non-combatants caught up in armed conflict.

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Article 4 of the third Convention of 1949 on protection of prisoners of war sets certain standards for recognition as prisoners of war. In Vietnam, the United States and the Republic of Vietnam have as a conscious policy accorded prisoner of war status to many thousands of paramilitary and other prisoners captured by United States or South Vietnamese forces who would not be entitled to it under the Convention. (See MACV Directive 381-46, dated 27 December 1967, copy attached.)

Article 4 of the fourth Convention on protection of civilian persons in time of war provides that persons protected by that Convention are those who find themselves in the hands of a party to the conflict or occupying power of which they are not nationals. This means that South Vietnamese civilians detained by South Vietnamese authorities are not protected persons within the meaning of Article 4 of the fourth Geneva Convention. Article 4 also provides that nationals of a co-belligerent state are not protected persons while the state of which they are nationals has normal diplomatic representation in the state in whose hands they are. This provision would seem to cast considerable doubt on the entitlement of South Vietnamese civilians captured by United States forces to protection as protected persons even while they are in the custody of the United States forces. Nevertheless, the United States and South Vietnamese Governments have agreed that humanitarian treatment must be accorded to all persons, irrespective of whether an individual

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is considered a protected person within the meaning of the Convention, and we have acknowledged a residual responsibility with respect to those captured by US forces.

Article 3, which is common to all four of the Geneva Conventions, prescribes the minimum standards of humanitarian treatment to be accorded to all persons, even though they may not be "protected persons" within the strict meaning of the Conventions. Paragraph 1(d) of this Article 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." This provision applies only to sentencing for crimes and does not prohibit a state from interning civilians or subjecting them to emergency detention when such measures are necessary for the security or safety of the state.1/

The Phung Hoang, or Phoenix Program, is a Vietnamese program aimed at the Viet Cong Infrastructure (VCI), the political subversive apparatus which directs and supports the military threat to South Vietnam's security. The United States support of this program has been principally advisory in nature directed at improving the intelligence methods, the apprehension techniques, the legal procedures and the detention arrangements involved in the struggle of the Vietnamese against the VCI. Persons suspected of involvement in the VCI may be arrested by the Vietnamese authorities and placed in administrative detention or brought to trial.

1/ The ICRC commentary on the Fourth Geneva Convention states in this connection: "No sort of immunity is given to anyone under this provision. There is nothing in it to prevent a person presumed to be guilty from being arrested and so placed in a position where he can do no further harm; and it leaves intact the right of the State to prosecute, sentence and punish accordingly [illegible]

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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.[2/] 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.

Not a part of the Phoenix Program, but sometimes discussed as in possible conflict with the Geneva Conventions, is the subject of forced relocations of communities. Vietnamese Government policy is currently to bring security to the people rather than the people to security whenever possible, but such relocations have occured in the past and, if deemed essential, might occur in the future. Article 49 of the Fourth Convention, intended to deal with the transfer of protected persons from occupied territory, clearly contemplates the possibility of transfer inside the national territory for security reasons. Article 49, like

2/ Articles 42, 43 and 78 of the Fourth Geneva Convention clearly contemplate wartime internment and assigned residence for civilians as accepted procedure under certain safeguards. Since these Articles apply only to protected persons, their specific requirements would not apply to South Vietnamese civilians.

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Articles 42 and 43, concerns only protected persons. Of course, the general obligation of humanitarian treatment would apply in the case of any relocation of communities in South Vietnam, even though the individuals involved are not protected persons under the fourth Convention.

In conclusion, although there have been some individual failures in execution, the general obligation of humanitarian treatment underlying the Geneva Conventions has been accepted by the Governments of Vietnam and the United States in the context of the Vietnam conflict, despite the anomalies created by attempting to apply rules essentially designed for a World War II situation to one involving a political, subversive infrastructure.

Department of State (Legal Adviser): Concurrence

Department of Defense (General Counsel): Informed (not concurrence)

Ambassador William E. Colby: Concurrence

Office or Origin: OASD/ISA/VNTF
Action Officer: LTC David E. Farnham
Date Prepared: 27 August 1971

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HEADQUARTERS
UNITED STATES MILITARY ASSISTANCE COMMAND, VIETNAM
APO San Francisco 96222

DIRECTIVE
NUMBER 381-46

27 December 1967
(MACJ26)

MILITARY INTELLIGENCE
COMBINED SCREENING OF DETAINEES

1. PURPOSE. This directive provides policy guidance for the combined screening of detainees, and for the activation, as required, of Combined Tactical Screening Centers (CTSC).

2. GENERAL.

a. The forces that capture or detain suspect personnel are responsible for the prompt screening and classification of detainees.

b. Criteria for determination of status and classification of detainees is contained in paragraphs 3 and 4 of Annex A.

c. Disposition of detained personnel who have been classified will be made in accordance with paragraph 5 of Annex A.

d. Close coordination between the capturing forces, civil authorities, and military police units is essential to accomplish the screening, classification, and disposition of the detained personnel.

3. APPLICABILITY.

a. This directive applies to all US forces and FWMAF assigned, attached, or under operational control of MACV.

b. CTSC are to be activated on an "as needed" basis in conjunction with combined operations, to optimize the screening of detained persons. Deactivation will occur as soon as the tactical situation dictates and the requirement for the center no longer exists.

4. DISCUSSION. Classification of persons detained is the sole responsibility of the detaining US or FWMAF. All detainees must be classified into one of the following categories:

a. Prisoners of War.

b. Non-Prisoners of War.

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(1) Civil Defendants.

(2) Returnees.

(3) Innocent Civilians.

5. CONCEPT.

a. The success of the combined screening is dependent upon close coordination and integrated planning among all participating and interested organizations. Maximum cooperation and the availability of essential data will aid in the immediate release of innocent civilians and proper treatment of returnees.

b. Combined screening of detainees will be conducted at the lowest echelon of command practical; normally, at the brigade or division Prisoner of War (PW) collecting points. Screening centers should be located near sector/sub-sector headquarters for ease of access to both military and civilian files.

c. The mission of the CTSC is to optimize the screening and classification of a large number of detained personnel to permit effective exploitation of knowledgeable sources for immediate tactical information and to expedite the proper disposition of PW's and Non-Prisoners of War.

6. RESPONSIBILITIES.

a. ACofS, J-2, will develop joint policy and guidance for the classification of detainees.

b. ACofS for CORDS will insure that its field activities coordinate with the operation of the CTSC.

c. CG, I FFORCEV, II FFORCEV, and III MAF will insure that units under their operational control have made adequate provisions for combined tactical screening of detainees prior to the start of operations.

d. Province and district chiefs will usually have the funds to provide for feeding of Non-Prisoners of War detainees. If local funds are not available, foodstuffs can be obtained through the local CORDS representative on an emergency basis.

7. ORGANIZATION OF THE COMBINED TACTICAL SCREENING

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a. The CTSC will have joint representation from participating military units and civil authorities. Ideally, the deputy province chief and a representative from the operational unit should function as co-chairmen. As established in paragraphs 2a and 8b, final responsibility for determining the status of persons detained by US forces, rests with a representative of the US Armed Forces. In addition to participation by various staff elements of the operational unit, representatives at the CTSC should include the following: The National Police, Provincial/District Police, including the Special Branch, National Police Branch, Military Security Service (MSS) and Sector/Sub-Sector S2. Each element functioning in the CTSC will provide its own transportation, equipment, and supplies.

b. Exploitation of human sources, documents, materiel, and other intelligence requirements incident to the effective screening and classification of detainees will normally be accomplished by intelligence personnel of the participating elements.

c. Liaison with the Province/District office is necessary to gain advice on territorial matters which may be affected as a result of activation of a screening center.

8. SCREENING PROCEDURES.

a. The detaining unit will insure that the proper documentation is initiated and maintained on every individual detained. It is imperative that data reflect circumstances of capture and whether documents of weapons were found on the detainee.

b. Maximum use must be made of interrogators and interpreters to conduct initial screening and segregation at the lowest possible level. Participation in the initial screening by all agencies represented in the CTSC is encouraged. However, the sole responsibility for determining the status of persons detained by US forces rests with the representatives of the United States Armed Forces.

c. Detainees will be classified in accordance with the criteria established in Annex A. Every possible arrangement will be made to insure that it is a joint effort by the participants of the CTSC, that all possible information and facts have been gained from interrogation, and that all pertinent files and records have been checked.

d. To preclude rejection by the PW camp commanders of PW's of questionable status, evidence gathered to substantiate the determination that the detainee is entitled to PW status must be forwarded with the prisoner. Improperly documented PW's will not be evacuated to PW camps.

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CRITERIA FOR CLASSIFICATION AND DISPOSITION OF DETAINEES

1. PURPOSE. To establish criteria for the classification of detainees which will facilitate rapid, precise screening, and proper disposition of detainees.

2. DEFINITIONS.

a. Detainees. Persons who have been detained but whose final status has not yet been determined. Such persons are entitled to humane treatment in accordance with the provisions of the Geneva Conventions.

b. Classification. The systematic assignment of a detainee in either the PW or Non-Prisoner of War category.

c. Prisoners of War. All detainees who qualify in accordance with paragraph 4a, below.

d. Non-Prisoners of War. All detainees who qualify in accordance with paragraph 4b, below.

3. CATEGORIES OF FORCES.

a. Viet Cong (VC) Main Force (MF). Those VC military units which are directly subordinate to Central Office for South Vietnam (COSVN), a Front, Viet Cong military region, or sub-region. Many of the VC units contain NVA personnel.

b. Viet Cong (VC) Local Force (LF). Those VC military units which are directly subordinate to a provincial or district party committee and which normally operate only within a specified VC province or district.

c. North Vietnamese Army (NVA) Unit. A unit formed, trained and designated by North Vietnam as an NVA unit, and composed completely or primarily of North Vietnamese.

d. Irregulars. Organized forces composed of guerrilla, self-defense, and secret self-defense elements subordinate to village and hamlet level VC organizations. These forces perform a wide variety of missions in support of VC activities, and provide a training and mobilization base for maneuver and combat support forces.

(1) Guerrillas. Full-time forces organized into squads and platoons which do not necessarily remain in their home village or hamlet. Typical missions for guerrillas include propaganda, protection of village party committees, terrorist, and sabotage activities.

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(2) Self-Defense Force. A VC paramilitary structure responsible for the defense of hamlet and village in VC controlled areas. These [illegible] time basis. Duties consist of constructing fortifications, serving as hamlet guards, and defending home areas.

(3) Secret Self-Defense Force. A clandestine VC organization which performs the same general function in Government of Vietnam (GVN) controlled areas. Their operations involve intelligence collection, as well as sabotage and propaganda activities.

4. CLASSIFICATION OF DETAINEES.

a. Detainees will be classified PW's when determined to be qualified under one of the following categories:

(1) A member of one of the units listed in paragraph 3a, b, or c, above.

(2) A member of one of the units listed in paragraph 3d, above, who is captured while actually engaging in combat or a belligerent act under arms, other than an act of terrorism, sabotage, or spying.

(3) A member of one of the units listed in paragraph 3d, above who admits or for whom there is proof of his having participated or engaged in combat or a belligerent act under arms other than an act of terrorism, sabotage, or spying.

b. Detainees will be classified as Non-Prisoners of War when determined to be one of the following categories:

(1) Civil Defendants.

(a) A detainee who is not entitled to PW status but is subject to trial by GVN for offenses against GVN law.

(b) A detainee who is a member of one of the units listed in paragraph 3d, above, and who was detained while not engaged in actual combat or a belligerent act under arms, and there is no proof that the detainee ever participated in actual combat or belligerent act under arms.

(c) A detainee who is suspected of being a spy, saboteur, or terrorist.

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(2) Returnees (Hoi Chanh). All persons regardless of past membership in any of the units listed in paragraph 3, above, who voluntarily submit to GVN control.

(3) Innocent Civilians. Persons not members of any units listed in paragraph 3, above, and not suspected of being civil defendants.

5. DISPOSITION OF CLASSIFIED DETAINEES.

a. Detainees who have been classified will be processed as follows:

(1) US captured PW's and those PW's turned over to the US by FWMAF will be retained in US Military channels until transferred to the ARVN PW Camp.

(2) Non-Prisoners of War who are suspected as civil defendants will be released to the appropriate GVN civil authorities.

(3) Non-Prisoners of War who qualify as returnees will be transferred to the appropriate Chieu Hoi Center.

(4) Non-Prisoners of War determined to be innocent civilians will be released and returned to the place of capture.

b. Responsibilities and procedures for evacuation and accounting for PW's are prescribed in MACV Directive 190-3 and USARV Regulation 190-2.

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