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February 10, 1972

Mr. Daniel Ellsberg
10 Hilliard Street
Cambridge, Massachusetts

Dear Dan:

It was good talking to you last Sunday at the Biltmore. I have had a chance to check out the application of the Geneva Convention of 1949 to your case and I believe a very plausible defense can be raised. It would go something like this:

1. The Geneva Convention relative to the protection of civilian persons in time of war (TIAS 3365, 6 UST 3516) contains two articles relating to war crimes (copies attached). Article 146 requires each state to bring persons committing certain war crimes before its own courts. Article 147 specifies the type of war crimes involved. Thus the United States is under an obligation as a matter of domestic law to bring such people to justice.

2. It has been the law at least since the United States v. Schooner Peggy, 1 Cranch 103 (1801) that a treaty is equivalent to a legislative enactment and that a subsequent treaty repeals earlier inconsistent domestic legislation. Thus, the 1949 Geneva Convention ratified in 1955 would repeal inconsistent sections of the Espionage Act which would make it a crime to make public evidence of war crimes. Thus, to the extent that the Pentagon Papers contain such material and you were motivated to fulfill the national obligations imposed by the Convention you cannot be punished under the Espionage Act.

3. It is clear that you revealed information concerning individuals who might be accused of war crimes for their actions in planning and waging the war in Vietnam. The relevant Nuremberg cases are:

Opinion and Judgment of United States Military Tribunal at Nuremberg in United States v. Josef Altstoetter, et al (Justice case) (1947)

Opinion and Judgment of United States Military Tribunal at Nuremberg in United States v. Ernest von Weizsaecker, et al (Ministries case) (1947)

Although Article 146 does not encompass all war crimes, it should cover the bombing of North Vietnam, the deportation of South Vietnamese civilians and other acts of wanton destruction by the American military.

If any of this makes any sense to you or to Leonard Boudin or Charles Nessen, I will be happy to talk further about it. Dick Falk likes the idea.

Sincerely,

A handwritten signature in cursive script, appearing to read "Leon".

Leon Friedman

Encl.

MULTILATERAL

PROTECTION OF WAR VICTIMS

Civilian Persons

TIAS 3365
Aug. 12, 1949

*Convention, with annexes, dated at Geneva August 12, 1949.
Ratification advised by the Senate of the United States of America,
subject to a reservation and statement, July 6, 1955;
Ratified by the President of the United States of America, subject to said
reservation and statement, July 14, 1955;
Ratification of the United States of America deposited with the Swiss
Federal Council August 2, 1955;
Proclaimed by the President of the United States of America August 30,
1955;
Date of entry into force with respect to the United States of America:
February 2, 1956.*

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS the Geneva Convention relative to the Protection of Civilian Persons in Time of War was open for signature from August 12, 1949 until February 12, 1950, and during that period was signed on behalf of the United States of America and sixty other States;

WHEREAS the text of the said Convention, in the English and French languages, as certified by the Swiss Federal Council, is word for word as follows:

CONVENTION
RELATIVE A
DES PERSONS
EN TEMPS
DE GUERRE

GENEVA
RELATIVE TO
OF CIVILIAN
IN TIME
OF WAR

the above prerogatives. The appointment of such delegates shall be submitted to the approval of the Power governing the territories where they will carry out their duties.

ARTICLE 144

The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population.

Any civilian, military, police or other authorities, who in time of war assume responsibilities in respect of protected persons, must possess the text of the Convention and be specially instructed as to its provisions.

ARTICLE 145

The High Contracting Parties shall communicate to one another through the Swiss Federal Council and, during hostilities, through the Protecting Powers, the official translations of the present Convention, as well as the laws and regulations which they may adopt to ensure the application thereof.

ARTICLE 146

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.

TIAS 3364
Ante, p. 3396.

TIAS 3365

Les délégués du Comité international de la Croix-Rouge. La désignation de ces délégués sera soumise à l'approbation du pouvoir qui gouverne les territoires où ils exerceront leurs fonctions.

ARTICLE 144

Les Hautes Parties contractantes s'engagent à diffuser le texte de la présente Convention, en temps de paix et en temps de guerre, le texte de la Convention dans les pays respectifs, et notamment à en incorporer l'étude dans les programmes d'instruction militaire et, si possible, civile, de telle manière que les principes de la Convention deviennent connus de l'ensemble de la population.

Les autorités civiles, militaires, de police ou autres, qui, en temps de guerre, assument des responsabilités à l'égard des personnes protégées, doivent posséder le texte de la Convention et être instruites spécialement de ses dispositions.

ARTICLE 145

Les Hautes Parties contractantes se communiquent, par l'intermédiaire du Conseil fédéral suisse et, pendant les hostilités, par l'intermédiaire des Puissances Protectrices, les traductions officielles de la présente Convention, ainsi que les lois et règlements qu'elles adoptent pour assurer son application.

ARTICLE 146

Les Hautes Parties contractantes s'engagent à prendre les mesures nécessaires pour fixer les sanctions pénales adéquates pour les personnes qui commettent, ou donnent l'ordre de commettre, l'une ou l'autre des violations graves définies à l'article suivant.

Chaque Partie contractante aura l'obligation de rechercher les personnes soupçonnées d'avoir commis, ou d'avoir ordonné de commettre, de telles violations graves, et elle devra les déférer à ses propres tribunaux. Elle pourra aussi, si elle le préfère, et selon les dispositions de sa législation, les remettre pour jugement à une autre Partie contractante, pour autant que cette Partie contractante ait fait ressortir un cas *prima facie* et ait assumé des charges suffisantes.

Chaque Partie contractante prendra les mesures nécessaires pour assurer la suppression de tous les actes contraires aux dispositions de la présente Convention autres que les violations graves définies à l'article suivant.

En toutes circonstances, les inculpés bénéficieront de toutes les garanties de procédure et de défense qui ne seront pas inférieures à celles prévues par l'article 105 et les articles suivants de la Convention de Genève relative aux Prisonniers de Guerre du 12 août 1949.

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ARTICLE 147

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

ARTICLE 148

No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.

ARTICLE 149

At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed.

Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.

SECTION II

FINAL PROVISIONS

ARTICLE 150

The present Convention is established in English and in French. Both texts are equally authentic.

The Swiss Federal Council shall arrange for official translations of the Convention to be made in the Russian and Spanish languages.

TIAS 3365

ARTICLE 147

Les infractions graves visées à l'article précédent ou l'autre des actes suivants, s'ils sont commis en violation de la Convention: l'homicide intentionnel, les expériences biologiques, les grandes souffrances ou de porter des atteintes à la santé, la déportation ou le transfert illégaux, la contrainte d'une personne protégée à servir dans les forces armées, la privation de son droit d'être jugée régulièrement en vertu des dispositions de la présente Convention, la prise de otages, la destruction extensive de biens non justifiées par des nécessités militaires et effectuée de façon illicite et arbitraire.

ARTICLE 148

Aucune Haute Partie contractante ne pourra s'exonérer, elle-même ou toute autre Partie contractante, des responsabilités encourues en raison des infractions mentionnées à l'article précédent.

ARTICLE 149

A la demande d'une Partie au conflit, une enquête sera instituée, d'une manière à être décidée entre les Parties intéressées, au sujet de toute violation présumée de la Convention.

Si un accord sur la procédure d'enquête n'est pas atteint, les Parties doivent convenir de choisir un arbitre, qui décidera de la procédure à suivre.

Une fois la violation constatée, les Parties en cause doivent y mettre fin et la réprimer le plus rapidement possible.

SECTION II

DISPOSITIONS FINALES

ARTICLE 150

La présente Convention est établie en français et en anglais. Les deux textes sont également authentiques.

Le Conseil fédéral suisse fera établir des traductions officielles de la Convention en langue russe et en langue espagnole.