

PERSPECTIVES ON THE ICRC



Observations on the 150th anniversary of the ICRC

John B. Bellinger III

John Bellinger is a Partner at the law firm Arnold & Porter in Washington, D.C. He served as Legal Adviser for the Department of State from 2005 to 2009 under Secretary of State Condoleezza Rice, and as Senior Associate Counsel to the President and Legal Adviser to the National Security Council at the White House from 2001 to 2005. He headed the United States delegation for the negotiation of the Third Additional Protocol to the Geneva Conventions.



The 150th anniversary of the International Committee of the Red Cross (ICRC) offers me an excellent opportunity to reflect on my frequent interactions with the organisation over an eight-year period while I served in the United States (US) government.

Between 2001 and 2009, I met regularly with ICRC officials both in Washington and in Geneva, including in particular President Jakob Kellenberger, Director of Operations Pierre Krähenbühl, and Washington Head of Delegation Geoffrey Loane. These three individuals deserve great credit for their hard work in maintaining a diplomatic but candid working relationship with senior US officials across multiple departments during the extremely difficult period for the US after the terrorist attacks of 11 September 2001. They enjoyed great personal respect in Washington, even when their messages were not always welcome.

Dr. Condoleezza Rice was willing to meet regularly with President Kellenberger both when she was National Security Adviser at the White House and when she was Secretary of State. In her memoirs, Dr. Rice comments: ‘Though [Dr. Kellenberger] harbored deep reservations about our policies, he was more interested in solving problems than generating headlines.’ Based on her

recommendation, President Bush met with President Kellenberger in February 2005, and the two leaders had a constructive meeting.

My frequent interactions with the ICRC fell roughly into three categories: (1) discussions regarding the application of the Geneva Conventions and other applicable law to the detention of members of Al Qaeda and the Taliban after the 9/11 attacks; (2) discussions regarding the detention of, and ICRC visits to, specific individuals under US control at Guantanamo Bay and elsewhere; and (3) the negotiation of the Third Additional Protocol to the Geneva Conventions and admission of the Israeli and Palestinian humanitarian societies to the International Red Cross/Red Crescent Movement. During my last year in office, I also worked with the ICRC to negotiate the Montreux Document on Private Military and Security Companies.

Application of the Geneva Conventions

One of the most vexing issues for the US government after 9/11 was determining which international rules and standards to apply to detained members of Al Qaeda and the Taliban. I spent hundreds of hours discussing the applicable law with President Kellenberger and many ICRC officials.

Although I had a constructive ongoing dialogue with ICRC officials, on occasions it appeared to me that the ICRC's views were based more on policy preferences than on an examination of what the Geneva Conventions actually require as a matter of law. In particular, I would have welcomed a more careful analysis of whether and precisely how the Third or Fourth Geneva Conventions apply to members of Al Qaeda and the Taliban.¹ The US government questioned some of the ICRC's recommendations because they were not supported by rigorous legal analysis.²

The Bush Administration, of course, was and continues to be criticised for not applying the privileges of the Third or Fourth Conventions to members of Al Qaeda and the Taliban as a matter of law. The Bush Administration did apply most Geneva provisions as a matter of policy. It is important to emphasize that the Obama Administration has not changed this legal position and has not treated

- 1 Editor's note: The ICRC's position in this regard is laid out in Knut Dörmann, "The legal situation of "unlawful/unprivileged combatants", in *International Review of the Red Cross*, Vol. 85, No. 849, March 2003, pp. 45–74.
- 2 During this same period, US officials expressed similar concerns about the lack of legal rigor in the ICRC's Customary International Humanitarian Law Study. On 11 November 2006, the General Counsel of the Department of Defense and I sent a lengthy letter to the ICRC criticizing the methodology of the study and the lack of evidentiary support for its conclusions that certain rules had achieved customary international law status. See 'Joint letter from John Bellinger and William Haynes to Jakob Kellenberger on Customary International Law Study', in *International Legal Materials*, Vol. 46, May 2007, p. 514. Also see the exchange in the *International Review of the Red Cross* between, on one side, myself and William Haynes ('A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law'), and, on the other, Jean-Marie Henckaerts of the ICRC ('Customary International Humanitarian Law: a response to US comments'), in *International Review of the Red Cross*, Vol. 89, No. 866, June 2007.

Al Qaeda and Taliban detainees as prisoners of war or protected civilians. Nor has the Obama Administration concluded that Article 75 of Additional Protocol I applies to Al Qaeda and Taliban detainees.

Since the US Supreme Court determined in its 2006 *Hamdan* decision that Common Article 3 of the Geneva Conventions applies to Al Qaeda and Taliban detainees on the basis that the United States is in a non-international armed conflict with Al Qaeda and the Taliban, the United States has applied Common Article 3 as a matter of law.

Nonetheless, Common Article 3 does not provide guidance on many important questions applicable to the detention by a state of members of a non-state group in a non-international armed conflict, including:

- Which individuals are subject to detention?
- What legal process must the state provide to those detained?
- When does the state's right to detain terminate?
- What legal obligations do states have in connection with repatriating detainees at the end of detention?

I gave a comprehensive address on these issues at Oxford University in December 2007,³ which I later discussed at great length with President Kellenberger in Geneva. At the time, ICRC lawyers resisted the idea that there are any 'gaps' or lack of clarity in the Geneva Conventions as applied to a conflict between a state and non-state actors. One can understand a desire that there be no 'law-free' zones, but allegedly applicable rules (especially purported rules of 'customary' international law) should not be invented simply in order to have rules.

Based in part on our discussions, I expanded these remarks into a lengthy article (written with my former State Department colleague Vijay Padmanabhan) for the *American Journal of International Law* in 2011.⁴ In that article, we said that:

the continued relevance of international law in governing contemporary conflicts will require that states address, rather than ignore or avoid, the stress that conflicts with non-state actors exert on existing legal rules. Because of the pressing need to fill the gaps in the existing law of detention, we hope that the relevant actors will acknowledge the limitations of existing law and take effective steps to address them.⁵

Accordingly, I was pleased that at the 31st International Conference of the Red Cross and Red Crescent in November 2011, the States parties to the Geneva Conventions, together with the other components of the Movement, adopted a

3 See US Department of State Archive, *Oxford Leverhulme Programme on the Changing Character of War*, John B. Bellinger III, Legal Adviser Lecture at the University of Oxford, 10 December 2007, available at: <http://2001-2009.state.gov/s/l/rls/96687.htm> (last visited May 2013).

4 See John B. Bellinger III and Vijay M. Padmanabhan, 'Detention operations in contemporary conflicts: four challenges for the Geneva Conventions and other existing law', in *American Journal of International Law*, Vol. 105, No. 2, April 2011, p. 201.

5 *Ibid.*, p. 243.

resolution inviting the ICRC to study whether existing international humanitarian law is adequate, or needs to be strengthened and clarified, as applied to persons detained in armed conflicts.⁶ In preparation for the Conference, the ICRC had drafted a report entitled ‘Strengthening legal protection for victims of armed conflicts’.⁷ The report concluded that, although the Geneva Conventions remain important, they do not address, or do not sufficiently address, many questions relating to detention, especially in non-international armed conflicts between states and non-state groups. The report identified particular ‘gaps and weaknesses’ in the law and a ‘dearth of legal norms’ regarding conditions of detention, procedures governing security internment, and transfers of detainees.

Although the ICRC appropriately tries to stay out of public legal debates, I think it would have been valuable for the organisation to have contributed more to the public dialogue (as opposed to engaging only in private discussions with US officials) on whether detention of members of Al Qaeda and the Taliban should be governed by international humanitarian law or human rights law. Eleven years later, many international law ‘experts’ assert that there is not and never has been an armed conflict between the United States and Al Qaeda or the Taliban, and therefore that international humanitarian law (including the Geneva Conventions) is not the applicable legal framework of reference. It would still be useful for the ICRC to state its views publicly, in a neutral and non-critical way, on whether an international armed conflict can exist between a state and non-state actors. If the applicable ‘law’ is as clear as many observers believe, one would hope that there would be agreement between the ICRC and other legal experts on whether international humanitarian law or human rights law applies.

Operational discussions in relation to detention

In addition to our robust dialogue on the law applicable to detained persons, I had regular meetings with ICRC officials on practical and operational details relating to the detention of members of Al Qaeda and the Taliban at Guantanamo Bay and elsewhere. These discussions were always ‘full and frank’ (in diplomatic parlance), and we made significant operational progress on many issues, including providing the ICRC with rapid access to all persons in Guantanamo Bay. ICRC officials were always professional and constructive in these meetings.

6 See John B. Bellinger III, ‘Red Cross Conference acknowledges “gaps” in international humanitarian law governing detention’, *Lawfare* blog, 3 December 2011, available at: www.lawfareblog.com/2011/12/red-cross-conference-acknowledges-gaps-in-international-humanitarian-law-governing-detention/ (last visited May 2013).

7 See ICRC, ‘Strengthening legal protection for victims of armed conflicts’, Draft resolution and Report, 31st International Conference of the Red Cross and Red Crescent, 28 November–1 December 2011, available at: www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-strengthening-legal-protection-11-5-1-1-en.pdf.

Negotiation of the Third Additional Protocol to the Geneva Conventions

One of the highlights of my tenure as Legal Adviser of the State Department was working together with ICRC officials to negotiate the Third Additional Protocol to the Geneva Conventions ('Third Protocol'), which created the Red Crystal as an alternative symbol to the Red Cross and Red Crescent and paved the way for both Israel's Magen David Adom and the Palestinian Red Crescent Society to join the International Red Cross/Red Crescent Movement.

As is well-known, the Organisation of the Islamic Conference (OIC) opposed the Third Protocol because it wanted to exclude the Magen David Adom from the Movement, at least until it could wrest certain political concessions from Israel regarding its treatment of Palestinians in the West Bank and Gaza. The OIC's effort to use the negotiation of the Third Protocol as leverage was perhaps understandable, but it was unfortunate that the OIC attempted to block a humanitarian convention for political purposes. The United States supported a balanced approach that would allow for adoption of the Third Protocol and for the admission of both the Magen David Adom and the Palestinian Red Crescent Society (even though Palestine was not itself a State party to the Geneva Conventions).

President Kellenberger showed great personal courage in announcing that if consensus could not be reached, he would support putting the Third Protocol to a vote, rather than delaying the matter further. As head of the US delegation at the time, I called for a vote, and the parties to the Diplomatic Conference overwhelmingly voted in favour of the Third Protocol (and later in favour of admitting both the Magen David Adom and the Palestinian Red Crescent Society to the Movement). I am convinced that, without President Kellenberger's personal leadership on this issue, the Third Protocol would not have been brought to a vote, and both the Magen David Adom and the Palestinian Red Crescent Society would still be excluded from the Movement.

The Montreux Document

During my last year as Legal Adviser, I also supported the efforts of the ICRC and the Swiss government to negotiate the Montreux Document, which sets forth good practices for private security companies in armed conflicts. I was pleased to represent the United States at the meeting in Montreux in October 2008, at which the Document was adopted. The ICRC and the Swiss government adopted a pragmatic approach to the Montreux Document, opting to lay out the existing law and to state best practices rather than to try to develop controversial new legal principles that the US government might have resisted. The Document laid the foundation for the adoption of the International Code of Conduct for Private Security Service Providers in November 2010.

To conclude, I was honoured to work closely with the ICRC during my tenure in the US government on some of the most difficult international legal issues facing the United States. While we did not always agree, I enjoyed excellent professional and personal relationships with the ICRC's leadership and its Washington Delegation. I commend them on their work on behalf of humanity and congratulate the ICRC on its 150th anniversary.