www.nationalinterest.org

EDITOR: John O'Sullivan

• 1615 L Street, N.W. • Suite 1230 • Washington, D.C. 20036 •

• (202) 467-4884 • Fax (202) 467-0006 • editor@nationalinterest.org •

THE NATIONAL INTEREST

Number 79 • Spring 2005

THE NATIONAL INTEREST (ISSN 0884-9382) is published quarterly by the The National Interest, Inc., with the cooperation of The Nixon Center. Contact THE NATIONAL INTEREST for further permission regarding the use of this work.

Double-Red-Crossed

Lee A. Casey & David B. Rivkin, Jr.

THE INTERNATIONAL Committee of the Red Cross (ICRC) is an impressive edifice—both physically and morally. Its Swiss headquarters, once a Belle Epoch luxury hotel, is perched on a commanding height overlooking Lake Geneva. Just below is the Palais des Nations, formerly home to President Woodrow Wilson's ill-fated League, and now occupied by the United Nations. The whole area exudes a comfortable, faded-paint kind of civility—complete with peacocks roaming free on the UN lawns below. It is, of course, home to the world's oldest non-religious organization dedicated to humanitarian relief—an organization with a unique place in international law, identified by the four 1949 Geneva Conventions as an "impartial humanitarian body."

It is in this ostensible role that the ICRC has clashed with the Bush Administration. Early in 2002, President Bush determined that captured Al-Qaeda and Taliban members were not legally entitled to be treated as "prisoners of war" (POWs) under the Geneva Conventions, which reserve the multifarious rights and privileges of POWs for groups that meet the basic criteria of "lawful" belligerency. Those requirements were drawn from earlier international practice and agreements, and include subordination to a responsible command structure, wearing uniforms, carrying arms openly, and operating in accord with the other laws and customs of war. These are the elements that distinguish regular armies from irregular or guerrilla fighters, not to mention terrorists.

Neither Al-Qaeda nor the Taliban meets these minimum requirements and, as a result, the president concluded that those groups were "unlawful" or "unprivileged" enemy combatants. Such individuals are entitled to be treated humanely. However, they are also subject to prosecution in military courts and may simply be held, without a criminal trial, until the war is over—even if that takes years. Wars sometimes do.

The ICRC disagrees. In a series of more or less direct statements issued over the past two years, the group has decried the detention of Al-Qaeda and Taliban members at the Guantanamo Bay naval base in Cuba, suggesting that they must be treated as POWs under the Geneva Conventions, or as civilians entitled to a speedy trial in civilian courts. The ICRC also has accused the United States of intentionally using psychological and

Lee A. Casey and David B. Rivkin, Jr. are partners in the Washington, DC, office of Baker & Hostetler, LLP and frequently write on international law issues. They served in the Justice Department under Presidents Reagan and H. W. Bush, and are members of the UN Sub-Commission on the Promotion and Protection of Human Rights. The views expressed here are their own.

sometimes physical coercion "tantamount to torture" on the detainees. The basis of this claim appears to be both the "indefinite" detention of captured Al-Qaeda and Taliban members, as well as the use of "stress" interrogations, including "solitary confinement, temperature extremes, use of forced positions."

It is important to understand what the ICRC is actually saying. It is not simply arguing that the type of criminal sexual conduct that took place at Abu Ghraib was abusive, as it surely was. Nor is it claiming that detainees are being subjected to the types of actual torture—such as extensive and brutal beatings—suffered by American POWs during the Korean, Vietnam, and Gulf wars, which it effectively ignored. Rather, the ICRC is suggesting that simply holding captured Al-Qaeda and Taliban members without trial and devising an interrogation regimen designed to "break their wills"—without actually subjecting them to torture—itself violates international law and is indeed "tantamount to torture."

The United States has, of course, denied that its detention and interrogation policies constitute "torture" or equally forbidden cruel, inhuman or degrading treatment. Under the law actually applicable to American actions, the government is correct. The problem is that the ICRC fundamentally disputes the legal rules applicable to the United States, demanding—whether directly or indirectly—that the U.S. government comply with legal norms it has not approved and to which it is not bound. In this, the ICRC is acting not as an impartial interlocutor or advisor, but as an advocate—seeking to achieve recognition and implementation of a particular set of legal norms of which, as a policy matter, it approves.

There is nothing inherently wrong with such advocacy. It is the bread and butter of NGOs such as Human Rights Watch and Amnesty International. The ICRC, however, is supposed to be different. Human Rights Watch and Amnesty International make no pretense of impartiality and do not receive millions of American tax dollars each year, as does the ICRC. By claiming that American policy "violates" international law, knowing full well that the United States disputes this interpretation, the ICRC has gone far beyond its mandate and has abused its unique international position. As a result, the United States can, and should, reassess its relationship with the ICRC. Indeed, that reassessment is long overdue.

Amici Humani Generis?

THERE IS much mythology surrounding the ICRC, especially in the United States. First, the ICRC is often confused with the American Red Cross and wrongly credited with that organization's blood drives, disaster-relief activities and life-saving training courses. The American Red Cross is only loosely associated with the ICRC, as part of the "Red Cross Movement." It is in fact an independent charity organized, operated and controlled by Americans in the United States.

By contrast, the ICRC is organized under the Swiss Associations Law. It began as the inspiration of Henri Dunant, a businessman from Geneva who witnessed the terrible aftermath of the 1859 Battle of Solferino. Dunant was horrified by the primitive medical services for the wounded and published his thoughts in 1862 in *A Memory of Solferino*. A year later, the book prompted a five-man committee in Geneva, including Dunant, to establish the organization that became the ICRC. In 1864 the Swiss government convened a diplomatic conference that produced the first "Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field"—a document in which the red cross emblem was first recognized as a mark of neutrality.

Over the next eighty years, the ICRC

worked to alleviate the suffering of the wounded on the battlefield. It extended its activities to POWs during World War I, when it began to visit and report on conditions in detention camps and to keep track of individual prisoners. In the 1920s the ICRC was instrumental in bringing together a diplomatic conference that produced the 1929 Geneva Convention detailing the treatment to be accorded to POWs. It was largely on the basis of this treaty that the ICRC conducted its relief operations during the Second World War.

Most of this took place with little relation to a United States determined to avoid entanglements in Europe. However, although the ICRC continues to claim pride of place for the 1864 Geneva Convention in the establishment of humanitarian rules in war, Abraham Lincoln actually commissioned the first written code governing the conduct of armed hostilities in 1863. That document, "General Order No. 100, Instructions for the Government of Armies of the United States in the Field", informally known as the "Lieber Code", was adopted as the basis of the laws of war at the 1907 Hague Convention, which remain in effect today.

The United States' first long-term experience with the ICRC as an interlocutor came during the Second World War. Between 1941 and 1945, the ICRC provided invaluable services to the United States by transmitting supply packages to POWs held in Germany. Unfortunately, the ICRC has been living on that capital now for three generations.

American forces have been engaged in five major armed conflicts since 1945: Korea, Vietnam, the Gulf War and the current conflicts in Afghanistan and Iraq. At no time in any of these wars have our adversaries accorded captured Americans the legal rights of POWs under the 1929 Geneva Convention, the 1949 Geneva Convention or customary international law. Moreover, during this entire period, the ICRC's contribution to the welfare of captured Americans was negligible.

Of the 7,245 Americans taken prisoner in Korea, 2,847—more than a third—died in captivity. Nearly 400 known to be alive at the war's end were never repatriated to the United States. In Vietnam, some 766 Americans were taken prisoner, and 114 died in captivity. At the war's end, nearly 1,300 Americans were listed as missing in action. Throughout the conflict, American POWs were treated with unspeakable brutality—even though the United States determined in 1966 to accord POW status to captured Viet Cong, regardless of whether they legally merited that treatment. In response to this decision, the ICRC delegate in South Vietnam waxed poetic, noting that for the first time: "A government goes far beyond the requirements of the Geneva Convention in an official instruction to its armed forces. The dreams of today are the realities of tomorrow." Unfortunately for American soldiers, that reality never materialized. Despite the adherence of the United States to the Geneva Conventions and its extension of Geneva benefits to unlawful Viet Cong combatants, there was no reciprocity. Moreover, the ICRC itself made no discernable effort on behalf of American POWs. The ICRC's Central Tracing Agency contains numerous U.S. government requests for information relative to individual POWs in North Vietnam that were not acted upon.

The situation was little better in 1990–91 during the Gulf War. Although Iraq was clearly bound both by the Geneva Conventions and customary international law, American prisoners were beaten, and at least one was murdered, in Saddam's prisons. Today, our enemies in Afghanistan, Iraq and elsewhere in the War on Terror do not take prisoners. Most of those Americans, whether military or civilian, unfortunate enough to fall into their hands have been

butchered, and their murders have been broadcast on television throughout the Middle East and made available around the world on the Internet.

Admittedly, neither North Korea nor North Vietnam granted the ICRC access to their prisons. However, the ICRC did not, as a result, undertake anything like the persistent public campaign against those governments that it has launched against the United States with respect to Guantanamo Bay. Similarly, during the Gulf War, ICRC officials in Baghdad failed to protect coalition POWs held by Saddam, merely assisting in their repatriation once he was defeated—even though there were a dozen ICRC delegates in Baghdad during the war.

Thus, when the American Red Cross sought to defend the ICRC, its claims that "[t]he ICRC visits detainees of every nationality, including American service members" referred far more to an increasingly distant past than to the present. The ICRC's assertions that it has treated the United States like other countries and has "gone public" with its complaints only because no action was taken should also be taken with a grain of salt. The ICRC's record of publicly criticizing governments for failing, in its view, to meet applicable international humanitarian standards is mixed at best, suggesting a marked tendency to attack democracies rather than dictatorial regimes.

Take the ICRC's 2001 Annual Report's section on Saddam Hussein's Iraq. It is impossible to determine whether the ICRC considered his regime to be in violation of any international legal norms at all. The closest the group came to criticizing Saddam is a statement that Iraq was refusing to participate in the Tripartite Commission, established after the Gulf War principally to track missing persons. At the same time, the report noted prominently that the ICRC was "deeply concerned about the adverse consequences of the [UN] embargo in humanitarian terms", that the United States and Britain continued to enforce their self-imposed no-fly zones, and that "persistent reports of possible military action against Iraq were yet another source of psychological stress for the population."

So the ICRC's claims that it is treating the United States impartially, no better or worse than other countries, should be severely discounted. In fact, the ICRC's continuing public attacks on the administration's detainee policy have much more to do with the group's advocacy agenda than with any actual violations by the United States. The ICRC recognizes, and has promoted for thirty years, a different set of norms that are far more favorable to irregular or guerrilla warfare than those traditional norms recognized and applied by the United States.

An "Impartial" Advocate?

CLAIMS THAT captured Al-Qaeda and Taliban members, or "foreign fighters" in Iraq, must be treated as well as Geneva POWs are based largely upon the 1977 "Protocol I Additional" to the Geneva Conventions or, more precisely, upon the ICRC's interpretation of Protocol I. Protocol I is, in fact, a pastiche. Some of its provisions clearly reaffirm longstanding rules of international law, such as the injunctions against direct attacks on civilians and civilian objects, the abuse of flags of truce, and the prohibition of a declaration of "no quarter." Each of these can be traced not merely to the aspirations of human rights activists, but to centuries of practice by states actually engaged in armed conflict. At the same time, and as the ICRC has occasionally conceded, many aspects of Protocol I represent innovations.

In particular, for those countries who have ratified Protocol I, the treaty fundamentally alters the status of irregular or guerrilla fighters under the laws of war. It gives them a lawful status and the right to

POW treatment. In addition, because a successful guerrilla campaign involves hit-and-run tactics and the ability to "disappear" into the surrounding civilian population, Protocol I created a substantial advantage for irregulars by relaxing the requirements of uniforms and openly carried weapons. The regular armed forces of states, of course, must continue to distinguish themselves from the civilian population by wearing a uniform and carrying their arms openly.

Not surprisingly, Protocol I was immediately embraced by "national liberation movements", many "developing" states (at the height of its export of terrorism, Libya rushed to become the second nation to ratify Protocol I), Europe's guilt-ridden former colonial powers, and the ICRC. The United States, however, opted out—a decision that was praised at the time by the editorial boards of both the *New York Times* and the *Washington Post*. President Reagan explained the reasons in a 1987 message to the Senate:

> It contains provisions that would undermine humanitarian law and endanger civilians in war. . . . It would give special status to "wars of national liberation", an ill-defined concept expressed in vague, subjective, politicized terminology. Another provision would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves.

As a result, the United States has not ratified Protocol I and is not bound by its provisions except to the extent that they restate otherwise applicable customary international law.

This did not, and does not, sit well with the ICRC. The group had in fact conceived, carried and ultimately birthed Protocol I. It was through the ICRC's efforts that the Swiss government convened the 1974–77 diplomatic conference that produced the treaty. The ICRC prepared the original "discussion" drafts. And it was the ICRC's representatives who largely managed the conference, presenting each draft article in turn for discussion. The final document, according to the ICRC's own official commentaries, "very largely [met] the concerns and wishes of the Red Cross." Thus, in refusing to ratify Protocol I, the United States did not merely refuse the ICRC's advice and counsel—it rejected one of the group's children. Like many other disappointed parents, the ICRC has refused to take "no" for an answer.

When the ICRC criticizes the United States for holding War on Terror detainees "indefinitely" and without trial, or when it claims that any and all "coercive" interrogation of these men is forbidden, it is acting out what amounts to a twenty-year tantrum. Perhaps more to the point, it is deliberately using its role as an "impartial" advisor on the Geneva Conventions to advance its own policy agenda. The legal pretext, of course, is not that the United States must comply with Protocol I per se, but that Protocol I now represents customary international law that does bind the United States. Indeed, in March the ICRC is expected to release a "customary law study"—a document funded in part by U.S. contributions and that, in derogation of the ICRC's own past practice, was not shared with the U.S. government for comment. In it, the ICRC will likely claim customary law status for all of Protocol I. This, of course, is preposterous.

Protocol I has rarely been implemented in practice, and it is simply not the case that merely because the ICRC claims that a particular requirement is customary international law it therefore must be accepted as such. Although the ICRC is often described as the "guardian" of the

Geneva Conventions and its published commentaries on these documents are sometimes called "authoritative" (although "argumentative" is often a more accurate description), it has no legally recognizable role in interpreting or applying those treaties. States alone make international law, and each state is entitled to interpret that law itself—this is the essence of sovereignty and self-government. To the extent that the ICRC commentaries are respected, it is because they generally follow the relevant negotiating records, not because of any inherent wisdom. When the commentaries depart from those records, they are nothing but rhetoric.

Indeed, the ICRC's interpretation of Protocol I's norms as benefiting the men now held at Guantanamo Bay is far more than the treaty's actual language will bear. Protocol I does privilege irregulars, but only to the extent that they are excused from the traditional requirements of uniforms and carrying their arms openly. The other critical requirements—that such men be subordinated to a responsible command structure and be part of a military organization that acknowledges and complies with the laws and customs of war in its operations at least as a matter of policy—were left fully intact. Thus, neither Al-Qaeda, the Taliban, nor the foreign fighters in Iraq would qualify as lawful combatants or POWs, even under Protocol I.

Ironically, the distinction between guerrillas and outright terrorists has been acknowledged even by guerrillas and terrorists. Che Guevara, for example, once wrote, "It is necessary to distinguish clearly between sabotage, a revolutionary and highly effective method of warfare, and terrorism, a measure that is generally ineffective and indiscriminate in its results, since it often makes victims of innocent people." Unfortunately, this distinction appears to have been lost on the ICRC.

THE ICRC has also taken the position that any form of coercive interrogation is prohibited. But that is the standard applicable to POWs under the Geneva Conventions. Absent Protocol I, it does not apply to unlawful combatants. Such individuals have no legal right to keep their "military secrets", particularly with respect to the capabilities and future plans of their associates. They can lawfully be interrogated on these subjects, and coercive interrogation methods can be employed so long as they do not involve the severe pain and suffering forbidden as torture, or otherwise constitute cruel, inhuman or degrading punishment. Obviously, defining these terms is no easy task. The Justice Department's Office of Legal Counsel (OLC) already has prepared two differing opinions on the subject.

In the first, the OLC concluded that torture required the intentional infliction of severe pain or suffering of the sort commonly associated with "serious physical injury, such as organ failure, impairment of bodily function, or even death." That is a high bar, and it can certainly be debated, but it was based on the only definition of "severe" physical pain that Congress has actually enacted—in the laws applicable to medical reimbursements. In the second memorandum, the OLC adopted an arguably broader definition of torture, relying more heavily on judicial decisions that have discussed the sort of treatment considered to be torture, including severe beatings, cutting off fingers, electric shocks, threats of imminent death, or extreme limitations of food and water. In both instances, however, the Justice Department confirmed that pain or suffering must be of a severe nature in order to constitute torture, and most importantly, its analysis in both memoranda suggests that whether any particular treatment constitutes torture is very often a matter of degree.

Neither memorandum addressed the metes and bounds of "cruel, inhuman or degrading" treatment, which also are forbidden by international law, because they were designed to address potential criminal liabilities and not U.S. legal obligations overall. The European Court of Human Rights, however, considered whether certain "stress" methods of interrogation, as utilized by Britain against Irish Republican Army terrorists in the 1970s, violated the European Convention on Human Rights as being "inhuman and degrading" treatment. This case involved five techniques: hooding, wall standing, exposure to noise, sleep deprivation and reduced diet, used together. Although the court ruled that these methods did not constitute torture, it did conclude that, when used in tandem, they were forbidden. Obviously, this indicates that these methods, when not used in tandem, are not cruel, inhuman or degrading.

All of this suggests that coercive, "stress" methods of interrogation are not inherently illegal—unless taken to a sufficient extreme as to constitute either torture or cruel, inhuman or degrading treatment. Where that line is should be debated. It may be that, to ensure it is not crossed, stress interrogation techniques should never be more intense than military basic training. What is certain, however, is that the ICRC's position that all "coercive" interrogations are prohibited is a statement of its own aspirations and not the current state of the law. That, like its position on Protocol I in general, is a matter of advocacy, not a neutral or impartial view.

That said, it might well be asked whom the ICRC has hurt through this advocacy. The group's complaints do not appear to have altered U.S. policy in a manner dangerous to the national interest. The 2004 electorate was evidently unmoved by the ICRC's claims, and George W. Bush has a thick skin. There is, however, one group that undeniably has suffered: the detainees held at Guantanamo Bay and elsewhere.

As in all previous wars, and likely in all future wars, there have been cases of prisoner abuse in the War on Terror. The ICRC's job is to bring such instances to the attention of the relevant American authorities, so that appropriate action, whether in the form of administrative or criminal investigations or prosecutions, can be taken and reforms considered. Like the boy who cried wolf, however, the ICRC's insistence that the United States has "violated" standards to which it is not bound has surely depleted, if not exhausted, its credit with the very authorities who may now not be listening when they should be.

In addition, there is another group that the ICRC's actions have hurt—the American taxpayer. The United States, through the State Department, is the ICRC's largest donor. In 2003 alone, the U.S. contribution was almost $200 million, or 34 percent of the ICRC's government contributions. In return, the ICRC has consistently opposed American policy during a war in which individual American civilians are the enemy's preferred target. Its role as "guardian" of the Geneva Conventions did not benefit U.S. forces during the Korean War, the Vietnam War, the Gulf War or any conflict since. The group has avoided serious scrutiny by Congress, largely because of its humanitarian reputation. But this should no longer be permitted to obscure its failures.

At the climactic moment in Peter Shaffer's 1964 play about Spain's conquest of Peru, *The Royal Hunt of the Sun*, a disillusioned Francisco Pizarro demands of his attendant friars, "Look: I am a peasant, I want value for money. If I go marketing for Gods, who do I buy?" Whether the American people have been getting value for their money from Geneva's peculiar deity is a question that Congress and the president should consider—sooner rather than later. □