

Kaye, David A

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From: Cummings, Edward R (Main State)
 Sent: Monday, March 11, 2002 8:34 AM
 To: Legal-All-Deputies-dl; Bowker, David W; Kaye, David A; Bloom, Evan T; Dolan, JoAnn; Taft IV, William H.; Taft IV, William H.
 Subject: FW: President Kellenberger's Discussion at the Swiss Forum

I am forwarding an e-mail from Geneva regarding comments made by ICRC President Kellenberger at a Geneva UN meeting. Please note the final sentence regarding GTMO (i.e., the ICRC as a rule does not discuss conditions of detention in public but the detainees are treated correctly at GTMO in the context of very tight security measures.)

-----Original Message-----

From: Lippman, Betsy A
 Sent: Friday, March 08, 2002 5:33 AM
 To: Cummings, Edward R (Main State)(Main State Room 5635); Alan Kreczko; Betsy Lippman; Douglas Hunter; Eugene Dewey; James Foley; Kevin Moley; Linda Thomas-Greenfield; Nicholas Miscione; T Peay
 Subject: President Kellenberger's Discussion at the Swiss Forum

President Kellenberger spoke before a medium size audience at the UN on Wednesday. The discussion on "How Can ICRC Fulfill its Mandate in Conflicts Today" was sponsored by the Swiss Forum (a think tank), the Model UN (a students organization) and the graduate institute. The translation was not great - so i apologize for this readout which may not be completely clear. I've called for a copy of his statement but there is none.

Kellenberger opened by saying that ICRC is the most active humanitarian organizations in conflicts. There has been a lot of exposure of ICRC in the media lately because of its role in relation to the detainees in GTMO because of the new type of conflict presented by the war on terrorism.

Kellenberger went on to describe at length the good work of ICRC's delegates in helping the victims of armed conflict. He underscored that ICRC's interventions are based on IHL which is a "live form of law". He noted that ICRC visits detainees in over 70 countries.

He urged that a new look be taken today at how victims can be respected and protected in armed conflict. In cases that are not specifically part of the Geneva Convention humanitarian action should be determined by the needs and not by its legal basis or a phase that a country or region is going through.

What does it mean to visit detainees, he asked. It takes negotiation with authorities that can take months or years. It is rare that a country opens its prison doors. ICRC's main objective in visiting is to look at the situation of the detainees and see if abuse is taking place. ICRC needs access to all detainees without witness. Everyone must be visited so that ICRC can follow-up on each prisoner.

He discussed the difficulties of defining the type of conflicts - an internal conflict that becomes international is difficult in legal/operational terms.

Among the 25 current conflicts in which ICRC is involved one is combatting terrorism and that is in Afghanistan. He termed this the biggest change to future wars. Terrorist action can be the cause/basis of conflict. He noted that the USG and the alliance reacted to terrorism with a war against Afghanistan.

In order to fulfill its mandate, he went on, ICRC must have access to all victims of armed conflict. It needs a certain level of safety and regional context with all the armed parties. ICRC often must maintain its presence in very complex situations such as Colombia and DRC. The principle behind the action is neutrality. ICRC ensures its access by being impartial. It can better fulfill its mandate when it is respected by the parties to the conflict. It is important to speak out when IHL is not respected. He argued that the problem in general is not that the rules are not adopted to the reality but that the rules are not respected. If they were - there would be many less refugees and IDPs.

He argued that to do more ICRC needs more people and resources. He noted that the USG is one of the big donors both in terms of quantity and quality of contributions. The UK, Switzerland, EU, Netherlands and Sweden are also large donors.

How can ICRC fulfill its role faced with the USG coalition, the Taliban and the Al Qaeda? Remarking that one cannot say that Afghanistan was discovered a few months ago but has been a disaster for years, he said that ICRC has qualified as

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- an international armed conflict the Coalition's war on Afghanistan which is happening simultaneously with an internal conflict. He described ICRC's assistance activities in Afghanistan.

The important point, he said, is that ICRC can carry out its mandate in Afghanistan. **ICRC is pleased the USG will apply the 3rd GC. He noted that ICRC and the USG have diverging opinions as to which have the right to POW status.** Kellenberger noted that respect of IHL is extremely important to combat international crime. IHL allows for those alleged to have committed war crimes to be prosecuted.

The USG has respected ICRC's role. ICRC's role as an independent, neutral party is not contested by the USG. Kellenberger noted that he could not say that IHL was eroded just that there were diverging opinions. ICRC can carry out its work vis-a-vis the detainees. The USG is supportive of ICRC's work throughout the world.

He went back again to the issue of the need to respect IHL generally and that the problem is not whether the GC is adequate or appropriate to new conflicts but the often lack of respect for the GC.

However, ICRC does realize that there is a need to develop IHL to keep pace with new developments. ICRC has been looking at the new situation created by terrorism. Can a terrorist caught in a war on terrorism be considered a POW? POW status is only for acts during not prior to a conflict.

Several questions were taken by Kellenberger but only two pertained to the war on terrorism. The first noted that terrorism is not mentioned in the GC or protocols. Kellenberger replied that in the additional protocols there are references to terrorism. It is clear in IHL that terrorism is an violation of IHL. As for the definition of terrorism he noted that this has been discussed for many years in the UN and it is difficult to get all to agree to one definition. The second question was "what kind of protection do taliban and al qaeda gain from USG supporting GC3 when they are not POWs and can you characterize how the Americans are treating the prisoners at GTMO?" Response: the USG recognizes applicability of Third Convention but there is divergent views on articles four and five. The USG says that the GC does not apply to Al Qaeda and that the Taliban do not qualify for criteria of POW status. In terms of what protections they have outside this they have human rights and american law protections. The USG says they will treat them humanely.

In terms of treatment, Kellenberger noted that as a rule ICRC does not discuss the conditions of detention in public but they are treated correctly in GTMO - correctly in the framework of very tight security measures.