

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION,
CENTER FOR CONSTITUTIONAL RIGHTS,
PHYSICIANS FOR HUMAN RIGHTS,
VETERANS FOR COMMON SENSE AND
VETERANS FOR PEACE,

Plaintiffs,

v.

DEPARTMENT OF DEFENSE, AND ITS
COMPONENTS DEPARTMENT OF ARMY,
DEPARTMENT OF NAVY, DEPARTMENT OF
AIR FORCE, DEFENSE INTELLIGENCE
AGENCY; DEPARTMENT OF HOMELAND
SECURITY; DEPARTMENT OF JUSTICE,
AND ITS COMPONENTS CIVIL RIGHTS
DIVISION, CRIMINAL DIVISION, OFFICE OF
INFORMATION AND PRIVACY, OFFICE OF
INTELLIGENCE POLICY AND REVIEW,
FEDERAL BUREAU OF INVESTIGATION;
DEPARTMENT OF STATE; AND CENTRAL
INTELLIGENCE AGENCY,

Defendants.

ECF CASE

04 Civ. 4151 (AKH)

DECLARATION OF
CHARLES A. ALLEN

CHARLES A. ALLEN, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am the Deputy General Counsel (International Affairs) in the Office of the General Counsel of the Department of Defense (“DoD”). I have served in this capacity since May 22, 2000. In this capacity, I advise the General Counsel and other senior officials of the Department, including the Under Secretary of Defense (Policy) and his staff. The attorneys in my office are responsible for advising on legal matters related to the stationing and activities of U.S. Armed Forces. My duties as Deputy General Counsel have included advising senior DoD officials concerning matters related to the International Committee of the Red Cross (the

“ICRC”). I have participated in meetings and other interactions with various ICRC officials, as have members of my staff. During the relevant time period, my office was involved with ICRC matters in the Office of the Secretary of Defense (“OSD”).

2. The statements in this declaration are based upon my personal knowledge and upon my review of information available to me in my official capacity.

The International Committee of the Red Cross

3. I am familiar with the operations, activities and responsibilities of the ICRC under the law of war, including the 1949 Geneva Conventions. The Armed Forces of the United States and DoD have a long-standing relationship with the ICRC because of its role in regard to prisoners of war and other detainees held during armed conflict. The 1949 Geneva Conventions prescribe and recognize express roles for the ICRC, *i.e.*, Articles 9 and 126 of the Third Geneva Convention (Prisoners of War), and Articles 10 and 143 of the Fourth Geneva Convention (Civilians). These roles include accounting for persons protected by the Geneva Conventions through collecting information reported to the ICRC by detaining powers, visiting places where such persons are interned, imprisoned or held pending transfer, privately interviewing such persons, and advising and reporting to governments engaged in hostilities on the condition of prisoners of war and detainees held by the various nations involved. Information about those detained, access to them, and confidentiality during the visits form the cornerstone of the ICRC’s role under the Geneva Conventions. The Geneva Conventions also provide for the ICRC to fulfill the humanitarian role of facilitating communications between persons detained and their families. In 2003, ICRC representatives visited more than 460,000 detainees held in more than 1,900 places of detention in some 73 nations. A copy of the ICRC’s summary of its role is

provided at Exhibit A. No other entity has the role as recognized by the Geneva Conventions and the degree of access to detention operations of a government as that enjoyed by the ICRC.

4. When ICRC representatives visit a detention facility operated by the United States or the government of another country, ICRC representatives meet directly with government officials at that facility and communicate to them ICRC observations and findings with respect to the detainees and their conditions of detention. ICRC representatives also communicate ICRC views and observations related to armed conflict with DoD officials through written reports, letters, telephone calls, and meetings.

5. Under long-standing practice, communications between the ICRC and governments regarding the ICRC's observations and findings as to detainees are conducted on a confidential basis in order to enable the ICRC to ensure its continued access and thereby conduct its missions effectively.

6. Congress has recognized the ICRC's unique status as an impartial humanitarian body named in the Geneva Conventions of 1949 that assists in their implementation. Because of the ICRC's special status, Congress has specifically authorized and the President has designated the ICRC under the International Organizations Immunities Act, 22 U.S.C. § 288f-3, to ensure that the privileges and immunities afforded under that Act are extended to the ICRC and its employees in the same manner, to the same extent, and subject to the same conditions, that they are extended to any public international organization in which the United States participates. See Executive Order No. 12643 of June 23, 1988.

7. Preserving the confidentiality of ICRC communications is critical to the ability of the ICRC to fulfill its humanitarian role. If the ICRC publicly disclosed the details of detention

operations, particularly during the course of an armed conflict, governments likely would restrict or deny altogether ICRC's access to those facilities. Without access, ICRC's humanitarian role could not be discharged effectively.

8. In The Prosecutor v. Simic (Case No. It-95-9-PT) (July 27, 1999), a trial court of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") recognized the unique status of the ICRC under international law and found that the ICRC's effectiveness could be jeopardized if ICRC officials testified before courts, since the ICRC could lose the confidence of governments of warring parties. ICRC confidentiality was found to be a necessary attribute of the ICRC, and the ICTY trial court found that all states are bound to ensure non-disclosure of information related to ICRC's conventional roles.

9. As stated above, detaining powers require such confidentiality to protect the security of their military and detention operations and to protect the lives and safety of their military and security personnel. U.S. Armed Forces personnel and other U.S. persons captured in the course of an armed conflict are direct beneficiaries of the unique access that the ICRC is provided under the law of armed conflict. When U.S. personnel are captured by hostile forces, they know that ICRC representatives will insist on gaining access to them to ensure that they are being treated properly under international law. For example, ICRC representatives gained access to three United States Army personnel who were captured and held as prisoners of war by the former government of Yugoslavia during NATO operations in 1999.

10. Commencing in early 2002, the United States transferred enemy combatants captured abroad to detention facilities at Guantanamo Bay, Cuba ("Guantanamo"). The United States also has detention facilities in Iraq, including a facility at Abu Ghraib, at which persons

captured in Iraq are detained. The ICRC has requested opportunities to visit detainees at Guantanamo and in Iraq, and the United States has granted those requests. I have been informed that during and after such visits, ICRC employees have communicated, orally and in writing, with U.S. officials at Guantanamo and in Iraq regarding ICRC observations and findings.

11. ICRC representatives have met with DoD officials concerning detention operations at Guantanamo and in Iraq. I have attended such meetings with ICRC representatives. DoD does not publicly disclose confidential communications by and with the ICRC, such as communications during meetings that I have attended.

12. Consistent with the ICRC's policy of confidentiality, the ICRC has indicated that it treats as confidential its communications with DoD regarding ICRC observations and findings with respect to detainees and detention facilities, and the ICRC has provided such information to DoD on the condition that the information be treated as confidential. The following statement appears prominently on ICRC reports: "This report is strictly confidential and intended only for the authorities to whom it is presented. It must not be published, in full or in part, without the consent of the International Committee of the Red Cross." Pursuant to ICRC policy, the ICRC has adhered to this policy of confidentiality in connection with its observations and findings regarding detainees at Guantanamo and in Iraq. The ICRC does not comment publicly on the treatment of detainees or on conditions of detention.

13. ICRC communications to DoD have included information pertaining to military operations and have identified by name U.S. military units and personnel, detention facilities, and detainees. The Secretary of Defense has directed that written ICRC communications received by DoD are to be marked as confidential, restricted-use documents, handled as if they were

classified SECRET, and disseminated only to DoD officials who need access to them in the course of their duties and have been authorized to have that access. This directive-type memorandum provided explicit guidance, but it did not change DoD's previous practice of confidential handling of ICRC communications and limiting access to and dissemination of ICRC documents. A copy of the memorandum is provided at Exhibit B.

Plaintiffs' FOIA Requests

14. I am familiar with the requests submitted by plaintiffs under the Freedom of Information Act ("FOIA") seeking records relating to communications between the ICRC and DoD with respect to detainees held at Guantanamo and in Iraq. During the relevant time period, my office retained DoD correspondence with the ICRC and other records of communications with the ICRC. This was the case both as to documents concerning detainees held at Guantanamo and in Iraq, and as to documents concerning detainees held by DoD at facilities located in other areas of the world. The files of the Office of the General Counsel have been searched for documents responsive to plaintiffs' requests, and I understand that my colleague, Associate Deputy General Counsel (Legal Counsel) Stewart Aly, in his capacity as Initial Denial Authority, has denied the request with regard to all responsive documents pursuant to FOIA Exemption 3(B), except as to certain minutes of ICRC meetings from which material subject to FOIA Exemption 3(B) has been redacted. An index of these documents is attached to Mr. Aly's declaration.

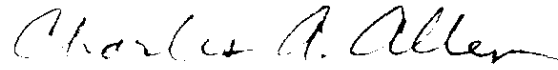
15. FOIA Exemption 3(B) permits the withholding of records that are "specifically exempted from disclosure by statute . . . provided that such statute . . . establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C.

§ 552b(3)(B). Documents constituting communications from the ICRC or containing information derived from such communications are exempt from release by statute, specifically 10 U.S.C. § 130c (“Nondisclosure of information: certain sensitive information of foreign governments and international organizations”). The communications and information contained in the responsive documents listed in the index attached to Mr. Aly’s declaration meet each of the requirements of 10 U.S.C. § 130c. Such documents contain information provided or produced by or in cooperation with an international organization; that organization is withholding the information from public disclosure; and that information was provided to the United States on the condition that it not be released to the public. ICRC qualifies as an international organization under this statute pursuant to Executive Order 12643, codified in 22 U.S.C. § 288f-3.

16. In order to maintain its neutrality and its continued access to government installations, the ICRC does not release its reports to the public. Release of confidential ICRC reports would impair the ICRC’s mission to protect and aid victims of conflict. The United States recognizes and respects the ICRC’s need for confidentiality of its communications with all governments because of the unique role of the ICRC under international law, including the Geneva Conventions, and the beneficial contributions that the ICRC has been able to make following these principles. The United States has an interest in protecting ICRC confidentiality to ensure that other governments will allow the ICRC access to Americans held in future conflicts.

I declare under penalty of perjury that the foregoing is true and correct.

Date: Washington, DC
March 25, 2005



CHARLES A. ALLEN