

**Croix-Rouge
et Croissant-Rouge**

**Red Cross
and Red Crescent**

The ICRC's privilege not to testify: Confidentiality in action

An explanatory memorandum¹

Delegates often have the opportunity to explain the unique status of the International Committee of the Red Cross in international law. No element of that status provides a better focal point for explanation of what the ICRC is, what it does and by what authority, than the privilege to decline cooperation with investigative and judicial authorities.² An even more compelling reason for consideration of this subject is the very real possibility that at some point a delegate will be confronted with an official demand for information — a demand that will require him or her to walk the fine line between respect for the legitimate expectations of authorities (and, for that matter, of mankind) and the legitimate rights and interests of the ICRC. Therefore the twofold purpose of this document is to provide

- a foundation for discussing the ICRC's international legal status in general and its testimony policy in particular, and
- a context for dealing with demands for cooperation with authorities who seek information about ICRC activities.

Section I of this note describes the unique nature of the ICRC's international legal status, from which its testimonial immunities derive. Section II summarizes the three specific sources in international law for the ICRC's testimonial protection: the *Rules of Procedure and Evidence of the International Criminal Court (ICC)*; a *decision of the International Criminal Tribunal for the former Yugoslavia (ICTY)*; and the *headquarters agreements between the ICRC and its host States*. Section III describes the reasons behind the ICRC's policy on testimony. Section IV shows that the policy is well within the context of commonly accepted principles of judicial procedure. Section V focuses on the implementation of the ICRC's testimony policy in the field.

The international legal status of the ICRC

The ability of individuals, States and organizations to assert legal rights and to shoulder legal responsibilities depends on how, if at all, these entities are recognized under the law. Such recognition is known as “legal personality”. The State has been *the* historically recognized entity in international law.

The recognition of organizations in international law generally stems from their association with State structures. Thus the United Nations and its agencies, and other intergovernmental organizations such as the Organization of American States, are deemed to possess international legal personality. On the other hand, organizations that are not composed of States or that have no constituent State participation, i.e., non-governmental organizations (NGOs) such as Amnesty International, do not possess international legal personality despite their international scope of operations. But unlike other organizations with no State component, the ICRC does have international legal personality. The following chart summarizes the status of individuals, States and organizations in both domestic (national) and international law:

Who has legal personality?

	Domestic Law	International Law
Individual	yes	limited
State	yes	yes
Organization	varies depending on laws of the State and nature of organization	yes for ICRC and for inter-governmental organizations; no for non-governmental organizations

1 This memorandum has been prepared for ICRC delegates.

2 The terms “cooperation with investigative or judicial authorities”, “providing testi-

mony”, “providing evidence” and the like are used interchangeably, although they each may have different implications in specific situations.

Perhaps the ICRC's acknowledged *sui generis* status can best be described as analogous to that of intergovernmental organizations. The following factors contribute to this status:

- The ICRC is the subject of international mandates conferred upon it by the treaties of international humanitarian law.
- The ICRC's international legal status is recognized in its relations with the United Nations, where it enjoys observer status, pursuant to General Assembly Resolution 45/6 adopted on 16 October 1990 by consensus. Moreover, the ICRC delegation in New York meets monthly with the chair of the Security Council and the President of the ICRC meets annually with the whole Security Council.
- While it is independent of affiliation with any State, the ICRC is a component of the International Red Cross and Red Crescent Movement, in whose International Conference — its supreme deliberative body — States participate to determine the ICRC's statutory authority to offer services or otherwise intervene in armed conflict.
- The ICRC's international legal status is implicitly acknowledged in the ICC Rules of Procedure and Evidence, which base recognition of the ICRC's testimonial exemption on respect for the international mandates conferred upon it by international humanitarian law.
- The international legal status of the ICRC is explicitly acknowledged in the decision of 27 July 1999 of the ICTY Trial Chamber, in the case *Prosecutor v. Simić et al.*, recognizing the customary international law-based right of the ICRC to decline to provide evidence.
- Many States treat the ICRC as they do intergovernmental organizations such as UNHCR. The ICRC maintains diplomatic relations with States and international organizations, treating with them on a level of coordination rather than subordination. For example, in 1993 the ICRC and Switzerland signed a Status Agreement in which the Swiss Federal Council "recognizes the international juridical personality and the legal capacity" of the ICRC. As of October 2001, the ICRC has such headquarters

agreements acknowledging its diplomatic privileges and immunities in more than 60 States.³

This summary of the foundations of the ICRC's international legal personality provides the context in which to view the more specific sources of the ICRC's testimonial privilege.

The legal sources of the ICRC's privileged exemption from providing evidence

There are three sources in international law in which the ICRC's right to refrain from providing evidence is recognized:

1. The *International Criminal Court (ICC) Rules of Procedure and Evidence* were negotiated and adopted by the ICC Preparatory Commission at its June 2000 session. Rule 73 covers privileged communications and information. The portion of the rule that deals with the ICRC is the result of a compromise: the ICRC had advocated a rule giving absolute protection. Several States, however, insisted on a rule whereby the Court would play a part in determining on a case-by-case basis what ICRC information, if any, should be released. Thus the rule requires the ICRC to consult with the Court where information is deemed by the latter to be "of great importance for a particular case". The ICRC nonetheless retains the final say on release of its information.⁴

No other organizations, whether non-governmental, like *Médecins sans Frontières (MSF)*, or intergovernmental, like UNHCR, were granted this privilege. The extraordinary treatment accorded to the ICRC reflects the appreciation of States for its unique status and role in the world. Rule 73 of the ICC Rules of Procedure and Evidence is a cornerstone of the ICRC's testimonial immunity for the future.

2. A Trial Chamber of the *International Criminal Tribunal for the former Yugoslavia (ICTY)*, in its Decision of 27 July 1999 in the case

³ The terms "status agreement" and "headquarters agreement" are used interchangeably.

⁴ Rule 73, paras 4-6. See *Annex 1*. — For more on the negotiating history of Rule 73,

see Stéphane Jeannot, "Testimony of ICRC delegates before the International Criminal Court", *IRRC*, No. 840, December 2000, pp. 993-1000.

Prosecutor v. Simić et al.,⁵ ruled that as a matter of customary international law, the ICRC enjoys an absolute privilege to withhold its confidential information.

The ICTY Decision concludes that:

- the ICRC is a unique entity and institution, possessing an international legal personality and a special status in international law;
- the ICRC's mandate to protect victims of armed conflict under the Geneva Conventions, the Additional Protocols and the Statutes of the Movement represents a "powerful public interest";
- the ICRC's ability to fulfil that mandate depends on the willingness of warring parties to grant the ICRC access to the victims of such conflict; and that such willingness, in turn, depends upon the ICRC's adherence to its principles of impartiality and neutrality, and rule of confidentiality; and
- the ratification of the Geneva Conventions by 189 States,⁶ the recognition by the United Nations General Assembly of the ICRC's special role in international relations, and the historic practice of and official opinions expressed by States in respect of ICRC confidentiality give rise to a rule of customary international law, providing the ICRC with an absolute right to non-disclosure of information relating to its work.⁷

3. *Headquarters agreements* are international treaties. Because they contain a government's explicit consent to respect the ICRC's confidentiality, they are the most directly enforceable means of providing testimonial privileges in domestic proceedings. The ICRC currently has headquarters agreements with more than 60 States.⁸ Among other privileges and immunities, these agreements provide varying

⁵ IT-95-P.

⁶ As of October 2001.

⁷ For more on the ICTY Decision, see Stéphane Jeannot, "Recognition of the ICRC's long-standing rule of confidentiality: An important decision by the International Criminal Tribunal for the former Yugoslavia", *IRRC*, No. 838, June 2000, pp. 403-425.

⁸ It should also be noted that where the ICRC does not have a headquarters agree-

ment, it may nevertheless claim a customary international law-based right to decline to provide evidence. The ICTY Decision may be cited as explicit support for this proposition. The ICC Rule may also be cited as evidence of the legal opinion of the 139 Signatory States which, either through the work of the ICC Preparatory Commission or by their subsequent ratification of the Rome Statute, recognize testimonial protection for the ICRC.

degrees of protection against the requirement to give evidence. Variations result from two circumstances. First, there is no single uniform headquarters agreement; the terms of each one must be negotiated independently with the authorities of the respective State. Secondly, the “state of the art” proposal of the ICRC has changed over time. The standard provisions relating to its status and the giving of evidence, proposed by the ICRC for its headquarters agreements, are contained in *Annex 2*.

The reasons for the ICRC’s testimony policy

The reasons behind the ICRC’s testimony policy are well understood in the field. The ICTY Decision aptly summarizes the issue. Prior to the Court’s ruling that the ICRC’s right to absolute confidentiality must be respected in all cases, the Prosecutor sought to introduce testimony from a former ICRC employee. The Prosecutor argued that the decision to either uphold or reject ICRC confidentiality should be made by the Court, on a case-by-case basis. It was claimed that because disclosure would be required only in “the rare case”, the ICRC’s interest would be adequately protected by a balancing test in which the Court would weigh the importance of the evidence in question against the confidentiality interest of the ICRC.

The Court itself rejected this reasoning. It recognized that the concern was not whether the Court would protect ICRC information in the proper case. Instead, the concern is: would the ICRC be in a position to assure combatants of confidentiality if ultimate authority over its information is placed beyond its control? Clearly, the answer is no. The mere existence of judicial power to overrule ICRC confidentiality, or at the very least the first time that such power was used, would mean the end of the ICRC’s long-standing ability to give warring parties the assurances upon which ICRC access to the victims of armed conflict depends. Rather than asking it to “trust the Court,” the ICRC should be allowed the discretion to release evidence in exceptional cases in which it determines that any resulting risk to its operations is tolerable. This is the effect of the ICTY Decision, of ICC Rule 73 and of the ICRC’s headquarters agreements.

In discussing the ICRC's confidentiality interests with the outside world, it is important to point out that the ICRC's lack of cooperation with criminal tribunals should not be viewed as hostility or indifference to their task. Insofar as the ICRC and the tribunals both have a common goal, namely to ensure respect for international humanitarian law, the ICRC enthusiastically supports the existence of mechanisms for the repression of criminal violations of humanitarian law. However, because the ICRC also has a mandate to assist and protect victims and therefore cannot forego/risk losing its access to them, its role should be seen as complementary, but not identical, to that of the tribunals.

Consistency of the right of non-disclosure with commonly accepted principles of justice

Evidentiary privileges (the right to refuse to give evidence) are generally disfavoured in the law. They run counter to the premise that justice is best served when all relevant evidence is made available. This is particularly true in criminal justice proceedings, and even more compelling in the case of international crimes which are likely to be particularly horrendous and, not coincidentally, to be the context in which ICRC evidence is most often sought. To make matters even more difficult, there may be cases in which ICRC evidence is the only evidence available to convict the guilty or, worse still, is alone able to exonerate the innocent. Nonetheless, evidentiary privileges do exist, in recognition of the fact that the protection of certain interests through respect for confidentiality can, in certain cases, outweigh the interest of full disclosure in a court case. So, for example, many States' laws discourage or even prohibit attorneys, doctors and religious personnel from testifying about confidential communications with clients, patients and penitents, in order to encourage the free and full exchange of such information among them. In these cases, the validity or necessity of the evidence excluded is not a relevant factor.

Evidentiary privileges reflect acceptance of a small risk of imperfect justice, in deference to other important interests. One such interest is the confidentiality that is critical to the ICRC's ability to fulfil its obligations under international humanitarian law to protect

victims of current and future armed conflict. On balance, this concern is greater than the possibility that ICRC information might be relevant, or even crucial, to a prosecution for *past* crimes.

The ICRC's testimony policy in action

Among its personnel, it is commonly understood that “the ICRC *does not* testify”. This is often the result of application of the ICRC's policy, but it is not the policy itself. The legal authorities cited in this note are unanimous in their conclusion that “the ICRC *need not* testify”. In other words, the rule is that the ICRC may not be *forced* to testify, but the decision to do so (or not) is to be made by the ICRC itself, on a case-by-case basis.

Thus, all demands or requests for cooperation with external investigations or judicial proceedings should be brought to the attention of the head of delegation, who should then consult with headquarters in Geneva. Only in this manner can there be developed a consistent practice focused on the ultimate question: how will our decision enhance or detract from our ability to provide protection and assistance to the victims of conflict?

A word about testimony in relation to the other components of the Movement is also in order. The evidentiary protection accorded to the ICRC does not extend to the International Federation of Red Cross and Red Crescent Societies or to National Societies. Neither the ICC Rules nor any international tribunal have recognized such protection. While the Federation may enjoy such protection by virtue of its headquarters agreements with individual States, National Societies can claim no such benefit. This does not mean, however, that the Federation (where it has no testimonial privilege based on a headquarters agreement) and National Societies have no protection. Insofar as members of their staff are seconded to the ICRC, they too might successfully claim a testimonial privilege. In any case, they can develop practical protective strategies, such as instituting procedures for responding to official requests for cooperation. Such measures, and others, are currently under discussion.

And a *caveat*: Upon reading this memorandum one might be tempted to think that the ICRC's testimonial protection is well

settled and not subject to challenge. In fact, the gains made are not carved in stone. The ICTY decision could be reversed on appeal. The relevant ICC Rule is subject to rejection or revision once the Tribunal comes into being. Headquarters agreements may be terminated by States. Cooperation with judicial mechanisms by other components of the Movement, or even by outside organizations such as UNHCR and MSF, could affect the ICRC's ability to maintain its protected status. Bearing in mind that evidentiary privileges are not easily acquired or maintained, and that their virtue is not readily recognized, we should be cautious in acclaiming and using this benefit.

Conclusion

Justice cannot be administered without the cooperation of those with relevant information. Yet testimonial immunities have long been recognized in support of other values, despite the potential conflict with interests of justice. One of these other values is the work performed by the ICRC — work that could not be accomplished in the absence of guarantees of confidentiality. Without testimonial immunity, there can be no such guarantees.

States have granted the ICRC the mandate to assist and protect the victims of armed conflict. Its status as a subject of international law is acknowledged. From that status, the ICRC derives the ability to claim the need for testimonial immunity. The success of that claim reflects the agreement of States and international tribunals that the international community could not have meant to give the ICRC its mandate without also conceding to it the tools essential for the task.

There is no solution by which the performance of the ICRC's mandate and the interests of justice can both be guaranteed. We must simply acknowledge the conflict between them. To understand the legal basis and practical rationale for the ICRC's testimonial immunity will help us not only to apply it, but also to explain it to others.

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Annex 1

International Criminal Court: Rules of Procedure and Evidence¹**Rule 73 — *Privileged communications and information***

1. Without prejudice to article 67, paragraph 1 (b), communications made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privileged, and consequently not subject to disclosure, unless:

- (a) The person consents in writing to such disclosure; or
- (b) The person voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

2. Having regard to rule 63, sub-rule 5, communications made in the context of a class of professional or other confidential relationships shall be regarded as privileged, and consequently not subject to disclosure, under the same terms as in sub-rules 1 (a) and 1 (b) if a Chamber decides in respect of that class that:

- (a) Communications occurring within that class of relationship are made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure;
- (b) Confidentiality is essential to the nature and type of relationship between the person and the confidant; and
- (c) Recognition of the privilege would further the objectives of the Statute and the Rules.

3. In making a decision under sub-rule 2, the Court shall give particular regard to recognizing as privileged those communications made in the context of the professional relationship between a person and his or her medical doctor, psychiatrist, psychologist or counsellor, in particular those related to or involving victims, or between a person and a member of a religious clergy; and in the latter case, the Court shall

¹ Draft text: UN Doc. PCNICC/2000/Add.1.

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recognize as privileged those communications made in the context of a sacred confession where it is an integral part of the practice of that religion.

4. The Court shall regard as privileged, and consequently not subject to disclosure, including by way of testimony of any present or past official or employee of the International Committee of the Red Cross (ICRC), any information, documents or other evidence which it came into the possession of in the course, or as a consequence of, the performance by ICRC of its functions under the Statutes of the International Red Cross and Red Crescent Movement, unless:

(a) After consultations undertaken pursuant to sub-rule 6, ICRC does not object in writing to such disclosure, or otherwise has waived this privilege; or

(b) Such information, documents or other evidence is contained in public statements and documents of ICRC.

5. Nothing in sub-rule 4 shall affect the admissibility of the same evidence obtained from a source other than ICRC and its officials or employees when such evidence has also been acquired by this source independently of ICRC and its officials or employees.

6. If the Court determines that ICRC information, documents or other evidence are of great importance for a particular case, consultations shall be held between the Court and ICRC in order to seek to resolve the matter by cooperative means, bearing in mind the circumstances of the case, the relevance of the evidence sought, whether the evidence could be obtained from a source other than ICRC, the interests of justice and of victims, and the performance of the Court's and ICRC's functions.

Annex 2

**Selected Articles from the Standard Proposed
ICRC Headquarters Agreement****Article 1 — *Status of the ICRC***

The status of the ICRC shall be, and its treatment shall in any case be not less favourable than, that of an intergovernmental organization.

Article 2 — *Legal personality*

[Name of the State] recognizes the legal personality of the ICRC, including but not limited to its capacity to contract obligations, institute legal proceedings and acquire rights, and to acquire and dispose of movable and immovable property.

Article 3 — *Immunity of the ICRC, its property and assets*

The ICRC, its property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal and administrative process, except insofar as in any particular case the ICRC has expressly waived its immunity.

Article 4 — *Inviolability of ICRC premises, property and assets*

The premises of the ICRC shall be inviolable. The property and assets of the ICRC, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, judicial, administrative or legislative action.

Article 5 — *Inviolability of ICRC archives*

The ICRC's archives and, in general, all documents belonging to it or held by it, shall be inviolable, wherever located.

(...)

Article 10 — *Status of members of the delegation*

1. Expatriate members of the ICRC delegation, their spouses, other relatives and dependants shall have the same status as that accorded to the members of diplomatic missions.

2. They shall enjoy immunity, even after they have left the service of the delegation, from any form of legal or administrative process, including personal arrest or detention, seizure of their personal baggage, and from being called as a witness or being required to give evidence.

3. Their private residences, vehicles, documents, manuscripts and all other personal effects shall be inviolable.

(...)

10. In addition to the above-mentioned privileges and immunities, the Head of the ICRC delegation, his/her Deputy and their spouses, other relatives and dependants shall benefit from the same status that is accorded under the Vienna Convention on Diplomatic Relations of 16 April 1961 to diplomatic agents.

11. Members of the delegation who are citizens of [Name of the State] or are permanent residents in that country shall not benefit from the immunities, privileges and facilities listed in Article 10, paragraphs 1 to 9 above, except, in respect to acts and/or omissions relating to the exercise of their function, immunity, even after they have left the service of the delegation, from any form of legal or administrative process, including personal arrest or detention, and from being called as a witness or being required to give evidence.