Testimony of ICRC delegates before the International Criminal Court

by
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In its June 2000 issue the *Review* published a commentary on the decision of the International Criminal Tribunal for the former Yugoslavia (ICTY) of 27 July 1999 recognizing the absolute right of the ICRC to nondisclosure of information relating to its own activities.[1] The Tribunal concluded that this right was based on international customary law.

This case set in motion a broader reflection within the ICRC regarding the confidentiality of information before international tribunals, and in particular the future International Criminal Court (ICC). The purpose of this article is to outline the ICRC's endeavours within the framework of the Preparatory Commission for the Establishment of an International Criminal Court (hereinafter the PrepCom) to secure a provision protecting the confidentiality of the organization's information, and the results of those steps.

The ICRC and the International Criminal Court

The ICRC has been mandated to promote respect for international humanitarian law, which includes the development of better implementation mechanisms.[2] Its active participation in the negotiations and its support for the establishment of the ICC are pur-

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suant to this mandate. The ICRC welcomed the text of the ICC Statute as being substantive and enabling the Court to engage in the battle against impunity.[3] The ICRC has been intensively involved in negotiating the Statute, and subsequently the Elements of Crime, with regard to issues directly related to its mandated role as expert on, and guardian of, international humanitarian law.[4]

At a time when the ICTY's decision was not yet known, there was much discussion within the ICRC on the best course of action to protect the confidentiality of information within the context of the ICC. A dialogue was also initiated within the International Red Cross and Red Crescent Movement, in particular with the International Federation of Red Cross and Red Crescent Societies and a number of National Societies. Since the Statute of the ICC had already been adopted in Rome in July 1998, it was obviously too late to add a clause to it. Under these circumstances it seemed that the ideal solution would be to obtain the inclusion, in the draft Rules of Procedure and Evidence, of a general clause protecting the confidentiality of certain information collected in the course of the ICRC's activities. It proved difficult, however, to define exactly which information should, or could, be privileged, how, and for whom.

1 Stéphane Jeannet, "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.

2 The tasks incumbent upon the ICRC under the Statutes of the International Red Cross and Red Crescent Movement (1986), Arts 5.2c) and g) include "to undertake the tasks incumbent upon it under the Geneva Conventions, to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law" and "to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any developments thereof". It should be noted that the Statutes have been unanimously adopted by the States party to the 1949 Geneva Conventions and the components of the International Red Cross and Red Crescent Movement.

3 Marie-Claude Roberge, "The new International Criminal Court", *IRCC*, No. 325, December 1998, pp. 671-677.

4 Knut Dörmann, "Preparatory Commission for the International Criminal Court: The Elements of War Crimes", *IRRC*, No. 839, September 2000, pp. 771-796.

Contact was therefore taken up with key government representatives. Their views were unanimous: there was indeed a need to protect information obtained in certain categories of professional relationships. While there was no objection to placing the work of the ICRC under such protection, it appeared that a provision of a general nature would be unacceptable, since it would, in their view, open a floodgate: the Court would be blocked by all kinds of requests for nondisclosure by any organization or individual. Such a clause would therefore gravely hinder the work of the Court. Consequently, the ICRC was strongly advised against pursuing such a strategy. It was told that only a very tightly drafted clause referring specifically and solely to the ICRC would have a chance of being accepted by States represented in the PrepCom; other avenues would have to be envisaged for other entities (including other components of the Movement), for example through witness protection measures.

In accordance with this advice, the ICRC requested that a specific provision be included in the Rules of Procedure and Evidence during the PrepCom's second session, which took place in New York from 26 July to 13 August 1999. Following the same line of thinking as in the case before the ICTY, the ICRC argued that there is a similar need for the work of the organization to be protected within the framework of the ICC as well. Indeed, for a Court to request (or admit) such confidential information or documents or to require (or accept) testimony from ICRC staff would seriously undermine the role of the ICRC under international humanitarian law and the manner in which it discharges its mandate under the 1949 Geneva Conventions for the protection of war victims, the two 1977 Additional Protocols, and the Statutes of the International Red Cross and Red Crescent Movement. This is because warring parties are likely to deny or restrict access of the ICRC, in particular to prison and detention facilities, if they believe that its delegates may be collecting evidence for use in future criminal proceedings.

The proposed solution was that such a clause would make it necessary for the Court to obtain the ICRC's consent before requiring or permitting any present or former ICRC official or employee to testify about, or before considering admitting as evidence, or

permitting the disclosure of, documents, information or other evidence which came into the possession of the ICRC in the course, or as a consequence, of the performance of its functions.

As indicated above, the arguments supporting the inclusion of a specific provision were essentially the same as that which the ICRC presented in its submission before the Trial Chamber of the ICTY.[5] They can be summarized as follows:

- in discharging its mandate, the ICRC obtains information on the basis of a relationship of confidence;
- the element of confidentiality is essential to the maintenance of the relationship between the ICRC and warring parties;
- it is universally accepted (in particular in the Geneva Conventions and their Additional Protocols) that it is in the international interest to foster this relationship;
- the disclosure of information, in breach of the ICRC's confidentiality rule, would cause irreparable damage to the ability of the ICRC to perform the functions allotted to it and thus to the international public interest.

The confidentiality rule is a working principle derived from the general practice of the ICRC and from international humanitarian law, and is accepted and expected by States and victims of armed conflict. It is the hallmark of the ICRC.

Finally, the respective mandates of the ICC and the ICRC are separate but complement one another in the endeavour to ensure respect for international humanitarian law. They both form part of the international *ordre public*. Differences between the work of the ICC and that of the ICRC should therefore not be regarded as contradictory.

The rule adopted by the PrepCom

After much negotiation, the PrepCom on 30 June 2000 adopted by consensus the Rules of Procedure and Evidence of the ICC. Rule 73, entitled "Privileged communications and information", deals with the issue of the confidentiality of several categories of

5 See Jeannet, *op. cit.* (note 1), pp. 406-408.

professional relationships. Sub-rule 73.1 stipulates that communications between a person and his or her lawyer are privileged and therefore not subject to disclosure. Sub-rules 73.2 and 73.3 provide that the Court may recognize communications within other professional or confidential relationships as privileged. In this context, particular regard is to be given to such relationships between patient and medical doctor, psychiatrist, psychologist or counsellor, or between a person and a member of a religious clergy. Finally, sub-rules 73.4 to 73.6 specifically deal with the case of the ICRC:

> "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:
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> (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
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> (b) Such information, documents or other evidence is contained in public statements and documents of ICRC.
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> 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 and employees.
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> 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."[6]

6 Doc. PCNICC/2000/INF/3/Add.1. p. 39.

Comments on sub-rules 73.4 to 73.6

This provision in effect bars the Court from using any confidential ICRC information (including by requesting or accepting testimony by ICRC delegates, past or present), unless the organization has specifically waived its privilege. Naturally, this does not concern all information, but only that having to do with the ICRC's official functions. Three qualifiers were nevertheless added in order to avoid blocking access by the Court to information that is essentially public. Therefore, the Court can admit evidence if:

- after consultation with the Court (see below) the ICRC does not object to disclosure (sub-rule 4(a));
- the ICRC has already made the information public (sub-rule 4(b)); or
- the same information has also been collected by another source (e.g. by another organization also present in the field), independently from the ICRC (sub-rule 5).

From the beginning of negotiations at the PrepCom, there was very little opposition to the idea that there should be a provision protecting ICRC information.[7] There were, however, some doubts about who should have the last word in deciding whether or not particular evidence could be disclosed: the Court or the ICRC. Some government representatives indeed considered that the ICRC should not be "above" the ICC; others believed that if evidence that a particular State considered to touch on its national security could be disclosed without its consent, the ICRC should not benefit from a more favourable treatment. But finally, with the support of an increasing number of delegations, the fact that it would be up to the ICRC to decide whether information could be disclosed was not challenged when the Rules of Procedure and Evidence were adopted on 30 June 2000.[8]

7 See also Knut Dörmann and Claus Kress, "Verfahrens- und Beweisregeln sowie Verbrechenselemente zum Römischen Statut des Internationalen Strafgerichtshofs: Eine Zwischenbilanz nach den ersten zwei Sitzungen der Vorbereitungskommission für den Internationalen Strafgerichtshof", *Humanitäres Völkerrecht – Informationsschriften*, Heft 4, 1999, p. 202.

8 The ICTY decision was taken on 27 July 1999. The fact that it recognized the ICRC an absolute right to nondisclosure based on cus-

To achieve this result an additional provision had to be added, namely sub-rule 6, which provides for a dialogue between the ICC and the ICRC, "if the Court determines that ICRC information, documents or other evidence are of great importance for a particular case". The clause draws its inspiration from Article 72 of the Rome Statute, which deals with the disclosure of information pertaining to national security.[9] There is, however, a significant difference between the two provisions, since Article 72 leaves the last word to the Court. Here, on the other hand, the ICRC's privilege remains untouched.

Conclusion

The ICRC insisted on obtaining a very clear and absolute rule, because anything less, i.e. any uncertainty as to whether ICRC evidence may be used by the Court without the organization's consent, would cast a shadow on the ability of the ICRC to establish or maintain a relationship of trust with the parties to armed conflicts and the victims of such situations. Such uncertainty may result in denial or restriction of ICRC access. The perception of the ICRC by its interlocutors is of crucial importance here. In certain circumstances Rule 73 will therefore be a useful operational tool to negotiate that access.

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tomary international law would undoubtedly have been extremely helpful in convincing the diplomats who had doubts about the draft rule. However, it was not until 8 October 1999 that this decision was made public, that is several weeks after the end of the second session of the PrepCom. Therefore, the ICRC did not use this information until the next session (29 November-17 December 1999), during which discussion on the draft rule was not reopened.

9 See: Donald P. Piragoff, "Protection of National Security Information", in Roy S. Lee (Editor), "The International Criminal Court, The Making of the Rome Statute", Kluwer Law International, The Hague, 1999, pp. 270-294.

Résumé

La question du témoignage des délégués du CICR devant la Cour pénale internationale

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L'auteur analyse l'adoption, en juin 2000, d'une clause dans le Règlement de procédure et de preuve de la Cour pénale internationale, qui confère au CICR le droit de ne pas divulguer des informations confidentielles (y compris par le témoignage de délégués) sans le consentement de l'institution. Cette nouvelle norme vient renforcer la décision prise en 1999 par le Tribunal pénal international pour l'ex-Yougoslavie (voir RICR, n° 838, juin 2000, pp. 403-425).