

Recognition of the ICRC's long-standing rule of confidentiality

An important decision by the International Criminal Tribunal for the former Yugoslavia

by

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“... the Trial Chamber came to the conclusion that customary international law provides the ICRC with an absolute right to nondisclosure of information relating to the work of the ICRC...”. This is how the press release issued by the International Tribunal for the former Yugoslavia (ICTY) on 8 October 1999 announced the important decision taken on 27 July 1999 by Trial Chamber III to the effect that the ICRC need not testify before the Tribunal. This article is a short, non-exhaustive presentation of some issues raised by this case, and of the importance of the decision for the continued work of the International Committee of the Red Cross.

The confidentiality of ICRC information questioned

The ICRC strongly supported the establishment of the ICTY as a means to combat impunity and agreed from the very beginning of the Tribunal's work to cooperate with it, provided that

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the organization's limitations were respected as a means of ensuring its full independence in carrying out the mission entrusted to it by international humanitarian law. The ICRC has indeed consistently taken the position that its officials and employees, past and present, may not testify before any court or tribunal in respect of matters which came to their attention in their capacity as officials or employees of the organization.¹

The specificity of the ICRC's mandate and methods of work was recognized by the Tribunal in several exchanges of letters between the President of the ICRC and the ICTY's President and Prosecutor. In addition, in accordance with an Agreement of 28 April 1995 between the Tribunal and the ICRC, the latter acts as an independent and impartial inspector of the remand facilities operated by the Tribunal.²

From the inception of the ICTY, and then of the International Criminal Tribunal for Rwanda (ICTR), the ICRC had relied on an informal understanding to ensure that the *ad hoc* Tribunals respected the confidentiality of ICRC information. Such protection before national tribunals is ensured both through practice and headquarters agreements or similar agreements granting the ICRC immunity from legal process.

But, to the ICRC's consternation, this understanding was questioned by the ICTY Prosecutor in her case against *Blagoje Simic, Milan Simic, Miroslav Tadic, Stevan Todorovic and Simo Zaric*. In this con-

¹ The ICRC's position regarding testimony has been spelled out in the following statement, which reflects previous positions: "Persons carrying out activities under the ICRC's responsibility cannot be compelled to provide information and/or give testimony relating to any situation covered by the Geneva Conventions, namely international or non-international armed conflicts. This would jeopardize the accomplishment of the ICRC's humanitarian mission, as defined in those Conventions, for the following reasons: 1) it would violate the ICRC's pledge of confiden-

tiality *vis-à-vis* both the victims and the parties to conflicts; 2) it would undermine the confidence of the authorities and the victims in the ICRC; 3) it might threaten the confidence of the victims and of ICRC delegates; 4) it might cause the ICRC to be denied access to the victims in present or future circumstances." — Statement of the ICRC of 25 February 1993 on its position regarding the establishment of the ICTY.

² Exchange of letters, published in *IRRC*, No. 311, March-April 1996, pp. 238 ff. See also *ICTY Basic Documents 1998*, p.381.

text, the Prosecution wished to use evidence in the possession of a former employee of the ICRC, the knowledge of which originated by virtue of his employment with the organization. Since exchanges of views on the issue of the disclosure of ICRC information did not generate a solution acceptable to both sides, on 10 February 1999 the Office of the Prosecutor filed an *ex parte* confidential motion under Rule 73 of the ICTY Rules of Procedure and Evidence, seeking a ruling by the Court.

The ICRC granted leave to appear as *amicus curiae*

The Prosecution, while acknowledging the ICRC's concerns with regard to the confidentiality of its work, did not accept that, as a matter of law, ICRC information could not be disclosed. It therefore proposed that the ICRC be granted leave to appear as *amicus curiae* under Rule 74 of the Rules of Procedure in order to present its views. The ICRC was both relieved and grateful that such an opportunity was given to it. In its Decision, the Trial Chamber supported this approach: making reference to *Prosecutor v. Simic*,³ it noted that the issue of admissibility of the testimony of a witness can indeed involve the interests of third parties, of which due account should be taken.

On 13 April 1999, the ICRC, represented by Professor Christopher Greenwood, QC, Alun Jones, QC, and Norman Farrell, Esq., filed a submission concerning the case. Annexed to it were Opinions from three leading experts in public international law: Professor James Crawford, QC, Whewell Professor of International Law, University of Cambridge, and a member of the English and New South Wales Bars; Emeritus Professor Jean Salmon, Free University of Brussels, Member of the Institute of International Law and of the Permanent Court of Arbitration; and Professor Éric David, Director of the International Law Centre, University of Brussels. Affidavits and letters in support of the ICRC's position were also attached.

³ Case No. IT-95-9-PT, 13 April 1999.

The ICRC's submission

The content of the ICRC submission was, in essence, as follows:⁴

There is a need to protect the work of the ICRC in the framework of the ICTY. Indeed, for a Court to admit ICRC confidential information or documents or to call as witness an ICRC staff member without prior authorization would seriously undermine the role of the ICRC under international humanitarian law and the manner in which it discharges its mandate under the Geneva Conventions of 12 August 1949 (188 States parties), the two Additional Protocols of 8 June 1977 (156 and 149 States parties respectively), and the Statutes of the International Red Cross and Red Crescent Movement (also adopted by the States parties to the Geneva Conventions) to work for the implementation of international humanitarian law. 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 an ICRC delegate may be collecting evidence for use in future criminal proceedings.

Broadly speaking, international humanitarian law needs to be implemented in three complementary ways: (a) promotion of the law; (b) direct supervision and assistance to victims; and (c) repression of violations. The ICRC was specifically mandated by States to work in the first two ways, i.e. to take action, in the event of armed conflict or internal violence, to persuade the parties to comply with humanitarian law, to cease committing violations of that law or to prevent such violations from occurring. This means giving information about international humanitarian law, promoting compliance with it, educating, persuading and verifying. But it does not mean playing a punitive role in response to violations or taking part in repressive mechanisms. The ICRC strongly believes that its work, in particular with regard to direct supervision and assistance to victims, would be severely damaged if it were to be implicated in the repression of violations.

⁴ At the time of writing, pending a decision by the Tribunal, it was not clear whether the submission, or for that matter, the expert

opinions attached to it, would be made public. Proper reference to these documents was therefore not possible.

Under humanitarian law applicable to international armed conflicts, the ICRC has the right of access to victims. In practice, the ICRC is dependent upon the willingness of the parties to enable it to exercise that right. Many functions performed by the ICRC, particularly in non-international armed conflicts and situations of internal strife, are based only upon its right of initiative, and the warring parties have no legal obligation to permit the involvement of the ICRC. If, in an environment characterized by tension and suspicion, the ICRC is to perform its tasks, then it has to gain the acquiescence and win the trust of the warring parties on all sides. If the ICRC cannot achieve that, it will not be able to function properly or even at all.

The ICRC makes public statements about violations of international humanitarian law only when it is confident that to do so will not prejudice its ability to discharge its mandate. Such statements are of a very general character, avoiding any allegations against named individuals. The violations must be major and repeated and must have been directly witnessed. Even then, public statements are made only if steps taken confidentially have not succeeded in putting an end to the violations, and such publicity is in the interests of those affected or threatened. The ICRC uses public statements, therefore, as a means to put a stop to an ongoing violation of humanitarian law, not in connection with the punishment of violations. Accordingly, they serve a purpose entirely different from participation in criminal proceedings.

The ICRC has developed its practice through experience gained over 137 years. Its working methods are both accepted and expected by States and the victims of conflict. Its particular method of work with warring parties and victims requires the maintenance of strict confidentiality. The ICRC is certain that if it was perceived that there was a likelihood (or even a possibility) that ICRC staff could testify, then many warring parties would simply deny the ICRC access. A number of incidents have shown that any suspicion of working with criminal tribunals hinders the work of the ICRC and can place its staff in danger. It has also become clear that protective measures such as those foreseen in the Statute and Rules of Procedure of the ICTY are not sufficient to remedy this.

The ICRC has been mandated to promote respect for international humanitarian law. It has collaborated with the two *ad hoc* criminal tribunals to the largest extent permitted by the principles governing its action. The respective mandates of the ICTY 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*.

In its submission, the ICRC put forward an alternative argument to the effect that ICRC information is protected from being disclosed in evidence by a doctrine analogous to the doctrine of privilege in common law systems or the principle of confidentiality which exists in certain civil law systems.

These are the main issues which were fully examined by the Trial Chamber. A number of other points were made in the ICRC's submission, to which we may refer insofar as they were examined by the Chamber.

The Trial Chamber is bound by customary international law with regard to admissibility of evidence

The Chamber recognized that, while it had, according to its Rules of Procedure, a wide and liberal discretionary power to admit evidence, that discretion was not unlimited. In particular, the Chamber deemed itself bound, beyond the content of the Rules, by customary international law. The Chamber referred to Article 1 of the Tribunal's Statute, which makes reference to international humanitarian law. This body of law being constituted of both conventional and customary norms (a crucial consideration, as will be found later), and the Tribunal's jurisprudence being consistent with that approach, the Chamber considered itself bound to respect both types of norms, including those pertaining to the admissibility of evidence. It therefore chose to examine the following considerations:

- whether under conventional or customary international law there is a recognition that the ICRC has a confidentiality interest that would entitle it to prevent disclosure of evidence;
- whether this interest should be balanced against the interests of justice, on a case by case basis, having regard in particular for the

importance of the evidence to the prosecution's case, if the Trial Chamber determines that the ICRC has a right under international law; and

- whether protective measures could adequately protect this interest and meet the ICRC's concerns, if the Trial Chamber finds that the ICRC has a relevant confidentiality interest in the evidence.

The Trial Chamber determines the existence in law of the ICRC's confidentiality interest

Trial Chamber III⁵ first examined the ICRC's mandate under conventional and customary international law. The organization presented arguments based on international humanitarian law and on the principles derived from it, on which it operated, in particular those of neutrality and impartiality. In short, the mandate of the ICRC derives from two sources: 1) the Statutes of the International Red Cross and Red Crescent Movement, and 2) treaties of international humanitarian law.

The essential role of the ICRC is to provide protection and assistance to the victims of armed conflict. Article 5 of the Statutes of the Movement (and not of the ICRC's own Statutes, as the Chamber erroneously mentioned) establishes the purpose of the ICRC.⁶ Furthermore, the ICRC is specifically referred to in 40 articles of the Geneva Conventions and in 8 articles of their Additional Protocols.⁷ In addition, the ICRC in practice exercises most of the

⁵ Trial Chamber III was composed of: Judge Patrick Lipton Robinson (Presiding), Judge David Hunt, and Judge Mohamed Bennouna.

⁶ These tasks are *inter alia*: "a) 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; b) to endeavour at all times — as a neutral institution whose humanitarian work is carried out particularly

in time of international and other armed conflicts or internal strife — to ensure the protection of and assistance to military and civilian victims of such events and of their direct results;" Statutes of the International Red Cross and Red Crescent Movement (1986), Art. 5.

⁷ The four Geneva Conventions for the Protection of Victims of Armed Conflict, of 12 August 1949, and their Additional Protocols, of 8 June 1977, recognize the special role of the ICRC.

functions entrusted to Protecting Powers by 51 articles of the Geneva Conventions and 6 articles of Additional Protocol I.⁸

The ICRC provided extensive evidence, based on literature⁹ and international practice,¹⁰ of its international legal personality. Both the Prosecution and the Trial Chamber acknowledged that fact.

8 The following provisions of the Geneva Conventions make specific reference to the ICRC: GC I: Arts 3, 9, 10, 11 and 23; GC II: Arts 3, 9, 10 and 11; GC III: Arts 3, 9, 10, 11, 56, 72, 73, 75, 79, 81, 123, 125 and 126; GC IV: Arts 3, 10, 11, 12, 14, 30, 59, 61, 76, 96, 102, 104, 108, 109, 111, 140, 142 and 143. — In addition, in accordance with Art. 10 of Conventions I, II and III, and Art. 11 of Convention IV, the ICRC in practice exercises the functions entrusted to the Protecting Power by the following provisions: GC I: Arts 8, 16, 23 and 48; GC II: Arts 8, 19, 44 and 49; GC III: Arts 20, 121, 122 and 128; GC IV: Arts 9, 23, 24, 35, 39, 42, 43, 45, 49, 52, 55, 60, 71, 72, 74, 75, 83, 98, 101, 105, 113, 129, 131, 137 and 145. The relevant provisions in Protocol I are Arts 5, 6, 33, 78, 81, 97 and 98. In addition, Arts 2, 11, 45, 60, 70 and 84 deal with the Protecting Power. The status of the ICRC is also recognized in Art. 24 of Protocol II.

9 G. Barile, "Caractère du Comité International de la Croix-Rouge", *Rivista di diritto internazionale*, Vol. 62, 1979, p. 112; D. Bind-schedler-Robert, "Red Cross", *Encyclopedia of Public International Law*, Vol. 5, 1983, p. 250; Beigbeder, *The Role and Status of International Humanitarian Volunteers and Organizations*, Martinus Nijhoff, Dordrecht, 1991, p. 66; C. Koenig, "Observer status for the International Committee of the Red Cross at the United Nations", *IRRC*, No. 280, January-February 1991, p. 40; A. Schlögel, "International Red Cross", in R. Wolfrum (ed.), *United Nations: Law, Policies and Practice*, Vol. 2, Martinus Nijhoff, Dordrecht, 1995, p. 815.

10 When it was created, the ICRC was a private humanitarian initiative, sanctioned by a diplomatic conference in 1864. In 1915 it was

formally established as a Swiss organization under the Swiss Civil Code. But it has increasingly been recognized as performing public international functions and as being entitled to a distinct international status in respect of the exercise of those functions. The evidence of this recognition is, *inter alia*: (a) the existence and activities of the ICRC are mentioned by various international humanitarian law treaties; (b) in addition, the ICRC has exercised international functions of various kinds under other international agreements, whether named as a "third party" or as a party to the agreement in its own right; (c) the ICRC's relationship with Switzerland is based on an Agreement concluded on 19 March 1993, in which Switzerland recognizes "the international juridical personality and the legal capacity in Switzerland" of the Committee (Article 1), see *IRRC*, No. 293, March-April 1993, pp. 152-160; (d) also, the ICRC has signed 57 headquarters agreements with States governing the status of its delegations and their staff, as well as other agreements with both States and intergovernmental organizations; according to legal doctrine, these agreements are in the nature of treaties; also, they are generally assimilated to treaties by domestic constitutional law; (e) in certain other States, international privileges and immunities are granted unilaterally, in recognition of the special role of the ICRC, e.g. in the United States, pursuant to the International Organizations Immunities Act (PL 79-291 as amended by PL 100-204); (f) finally, the ICRC became the first non-governmental body to be accorded permanent Observer Status to the UN General Assembly (UNGA Res. 45/6, of 16 October 1990, adopted by consensus).

But while the Prosecution also agreed that the ICRC's mandate was conferred upon it by the international community, it disagreed as to the effect of the ICRC's status on the question at hand — indeed, for the Prosecution, there existed no rule of international law which required the ICRC's consent before evidence could be admitted.

Turning again to the ICRC's mandate under international humanitarian law, the Chamber noted that most of the provisions of the 1949 Geneva Conventions are generally accepted as declaratory of customary international law. By accepting to be bound by these instruments, States parties also agree to the special role and mandate of the ICRC. Further, the Chamber quoted the Appeals Chamber of the ICTY in the *Tadic* Decision, in which the latter noted the “unanimously recognized authority, competence and impartiality of the ICRC, as well as its statutory mission to promote and supervise respect for international humanitarian law”.¹¹ It also made reference to the letter of agreement following the request by the President of the ICTY for the ICRC to inspect the conditions of detention and the treatment of accused persons in detention at the United Nations Detention Unit, in which the ICRC is referred to as “being an independent and impartial humanitarian organization of long-standing experience in inspecting conditions of detention in all kinds of armed conflicts and internal strife throughout the world”.¹² Finally, it made reference to the discussions in the UN General Assembly which led to the granting of observer status to the ICRC.¹³

The Chamber then went on to consider the “widely acknowledged prestige” of the ICRC and its *autorité morale*, based on the ICRC's consistent adherence to the basic principles on which it operates to carry out its mandate — i.e. the seven Fundamental Principles of the International Red Cross and Red Crescent Movement: humanity, impartiality, neutrality, independence, voluntary service, unity and universality.¹⁴ The role of the ICRC is “in particular... to maintain and disseminate” these principles.¹⁵

¹¹ *Tadic* (1995) | ICTY JR 485, para. 73.

¹² *Loc. cit.* (note 2).

¹³ UNGA Resolution 45/6 of 16 October 1990.

¹⁴ Statutes of the Movement, preambular para., *loc. cit.* (note 6).

¹⁵ *Ibid.*, Art. 5, para. 2; see also Statutes of the ICRC, Art. 4, para. 1.

Two of the principles relate particularly closely to the question of the ICRC's cooperation with international criminal tribunals. These are neutrality and impartiality. To these principles should be added the confidentiality rule, which is based on the principles of neutrality and impartiality as well as on a number of provisions of the Geneva Conventions. But it is above all a working tool developed by the ICRC during its 137 years of history to ensure the effective discharge of its mandate.

Neutrality is a fundamental principle because "in order to continue to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature".¹⁶

The ICRC argued that the principle of neutrality is based on the consistent practice of the organization and the recognition by the international community of the need for that practice. Unlike the United Nations, which may find it necessary to take sides between an aggressor and its victim, the ICRC must take care even in the heat of battle to preserve its role as a neutral intermediary in order to avoid finding itself denied access to all victims of the conflict. The ICRC must therefore avoid behaving in a way that could be perceived by a warring party, past or present, as adopting a position opposed to it. Hence the impossibility for the ICRC, as a neutral institution, to have a role in any action that could be viewed as taking sides in a conflict, thereby losing the trust of any one of the parties to that conflict.

The principle of impartiality obliges the ICRC to make "no discrimination as to nationality, race, religious beliefs, class or political opinions ... to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress".¹⁷ This enables the organization to win the confidence of the victims — to whichever side they may belong — with a view to affording them the protection and assistance required by their condition.

¹⁶ *Loc. cit.* (note 14).

¹⁷ *Ibid.*

The ICRC, in its submission, agreed that the above-mentioned principles may conflict with the requirements for discovering the truth in legal proceedings. However, it pointed out that the requirements arising from providing protection and assistance to those affected by conflict must remain unaffected. This has long been recognized by the international community, and the ICRC cited historical precedents going back as far as the 1936 Italo-Ethiopian conflict.

The ICRC then went on to explain its confidentiality rule. It described it as a working principle derived from the general practice of the ICRC and international humanitarian law, accepted and expected by States and the victims alike. It can be said to be the hallmark of the ICRC. The Rule is either required for the operational benefit of the ICRC by specific provisions of international humanitarian law treaties or implied as the best means for the organization to carry out its other tasks, not covered by that law.¹⁸ In addition, the Confidentiality Rule was specifically mentioned in the explanatory note presented for the adoption by the UN General Assembly of Resolution 45/6 regarding the granting of observer status to the ICRC;¹⁹ this did not give rise to any challenge or controversy.

The ICRC's confidentiality is not limited to its visits to prisoners of war and civilian detainees. ICRC practice shows that most of its humanitarian activities are governed by and imbued with such confidentiality. Article 5 of the Movement's Statutes requires the organization "to work for the faithful application of international humanitarian law applicable in armed conflicts". As a result, the ICRC has the power and mandate to verify the application of international humanitarian law *in toto*. To that end, it enjoys a considerable right of initiative. But this is based on agreement from the warring parties, which makes ICRC action conditional upon confidentiality because

¹⁸ Articles 126 and 143 respectively of the Third and Fourth Geneva Conventions establish a system for the supervision of the internment of prisoners of war and civilian detainees. In particular, these provisions state that "[r]epresentatives or delegates of

the Protecting Powers ... shall be able to interview the prisoners/civilian detainees (...) without witnesses", and that "[t]he delegates of the ICRC shall enjoy the same prerogatives."

¹⁹ *Loc. cit.* (note 13).

“to denounce publicly breaches of humanitarian law by either side might interfere with its work of relieving suffering. It could alienate sympathy and lead the accused belligerent to commit further breaches, driving the opposite party to take reprisals to the detriment of the victims it is the ICRC’s duty to protect.”²⁰

Finally, the ICRC emphasized that its obligations with regard to confidentiality are so fundamental that they are set out in express provisions of all the contracts of ICRC employees. Thus, all persons carrying out activities for the ICRC or under its responsibility are contractually bound by the obligation to exercise confidentiality, and only the ICRC may release them from that obligation.

The Trial Chamber acknowledged the ICRC’s consistent practice as to the non-testimony of its staff before courts, which was also reflected in its headquarters agreements. This practice was also extended to the ICRC’s relations with the ICTY: “any participation by the ICRC in war crimes proceedings involving providing information or giving testimony would ... place the institution’s work at serious risk”, and such participation “would violate the ICRC’s pledge of discretion and confidentiality *vis-à-vis* both the victims and the parties to the conflict”.²¹

The Chamber rebutted the submission by the Prosecution that the ICRC had not been consistent in its practice because it had issued public statements concerning violations of international humanitarian law in particular conflicts. It found on the contrary that the fundamental commitment of the ICRC to neutrality was fully reflected in its practice not to make public statements about specific acts committed in violation of international humanitarian law and attributed to specific persons.

The ICRC stressed that disclosure would have a negative impact on the organization’s ability to carry out its mandate,

²⁰ F. Bugnion, *Le Comité international de la Croix-Rouge et la protection des victimes de la guerre*, ICRC, Geneva, 1994, p. 1101. ICRC translation.

²¹ “Some preliminary remarks by the ICRC on the setting up of an International Criminal Tribunal for the former Yugoslavia”, reprinted in Morris and Schar (eds), *Insider’s Guide to the ICTY*, vol. II, pp. 391-398.

especially in that it would destroy the relationship of trust both with parties to a conflict and with victims. The Chamber examined this contention, relying heavily on the affidavits and letters by practitioners. In that, the Judges recognized not only the validity of the legal arguments put forward by the ICRC, but also the reality of the operational constraints placed on the organization's work in conflict areas, most notably the necessity of gaining and keeping access to victims.

The Chamber found that the ICRC had a "unique" and "pivotal" role in the regime established by international humanitarian law. It went on to note that, for this reason, its decision on the ICRC's right to nondisclosure does not "open the floodgates" in respect of other organizations.

Consequently, the Chamber made the following findings (emphasis added):

73. The analysis... has clearly indicated that the right to nondisclosure of information relating to the ICRC's activities in the possession of its employees in judicial proceedings is necessary for the effective discharge by the ICRC of its mandate. The Trial Chamber therefore finds that the *parties to the Geneva Conventions and their Protocols have assumed a conventional obligation to ensure nondisclosure in judicial proceedings of information relating to the work of the ICRC* in the possession of an ICRC employee, and that, conversely, *the ICRC has a right to insist on such nondisclosure by parties to the Geneva Conventions and the Protocols*. In that regard, the parties must be taken as having accepted the fundamental principles on which the ICRC operates, that is impartiality, neutrality and confidentiality, and in particular as having accepted that *confidentiality is necessary for the effective performance by the ICRC of its functions*.

74. The ratification of the Geneva Conventions by 188 States can be considered as reflecting the *opinio juris* of these State Parties, which, in addition to the general practice of States in relation to the ICRC as described above, leads the Trial Chamber to conclude that *the ICRC has a right under customary international law to nondisclosure of the information*.

The Chamber determines that the ICRC's interest need not be balanced against the interests of justice on a case by case basis

The ICRC put forward an alternative argument to the effect that ICRC information is protected from being disclosed in evidence by a doctrine analogous to the doctrine of privilege in common law systems or the principle of confidentiality which exists in certain civil law systems. It was submitted that such a privilege extends to all information obtained by ICRC officials or employees in their capacity as such and relating directly to the discharge of the ICRC's mandate and that it may not be waived by the individual official or employee.

In the further alternative the ICRC submitted that even if the Tribunal may receive evidence of the kind described above, it should not do so without balancing the importance of the evidence for the Prosecutor's case against the importance of confidentiality for the effective operation of the ICRC. Because of the importance of confidentiality for the effective performance of the ICRC's mandate, the Tribunal should admit such evidence only where the Prosecutor demonstrates that the evidence is of overwhelming importance to the case before the Tribunal — a test, the ICRC argued, that was not satisfied in the instant case.

The Chamber, however, accepted the ICRC's submission that it had, under international law, a confidentiality interest and a claim to nondisclosure. As was noted earlier, the Tribunal considered itself bound by customary international law. In this case, there existed a rule which, "properly understood, is, in its content, unambiguous and unequivocal, and does not call for any qualification. Its effect is quite simple: as a matter of law it serves to bar the Trial Chamber from admitting the information." Therefore, no question of the balancing of interest arose.

Nevertheless, the Chamber very briefly examined two questions raised in the submissions of the Prosecutor and the ICRC. First, the Prosecutor had relied on the Decision rendered by the Appeals Chamber on the subpoena issue in the *Blaskic* case.²² The

²² *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-AR 108 bis, A.C., 29 Oct. 1997.

Chamber found that this reference was not appropriate, because it dealt with the relationship between the ICTY and States under Article 29 of the Statute, which does not apply to international organizations. This is important to note in the light of the argument sometimes heard that the ICRC could not claim more protection against disclosure of information than that accorded to States.

Second, the Chamber deemed it important to deal with the issue of the relationship between the Tribunal and the ICRC:

79. They are two independent international institutions each with a unique mandate conferred upon them by the international community. Both mandates are based on international humanitarian law and ultimately geared towards the better implementation thereof. Although both share common goals, their functions and tasks are different. The ICRC's activities have been described as "preventive", while the International Tribunal is empowered to prosecute breaches of international humanitarian law once they have occurred.

The Chamber thereby recognized the validity of the ICRC's argument that both the Tribunal and the ICRC have been given by the international community mandates that are complementary to one another, and that the two mechanisms of implementation of international humanitarian law must not be seen as contradicting one another but rather as working in tandem.

The question of protective measures left unanswered

It was argued by the Prosecution that some of the concerns of the ICRC could be met by the adoption of protective measures to conceal the identity of a witness and to prevent the disclosure of evidence outside the Court. The ICRC believed that such measures would not, in practice, meet its particular concerns.

In light of its finding as to the customary nature of the non-admissibility of ICRC information, the Chamber logically found it unnecessary to examine the question of the adoption of protective measures. This of course leaves unanswered a number of very delicate questions, at a time when protective measures are being discussed in contexts such as the negotiation of the draft Rules of Procedure and

Evidence of the International Criminal Court. It must be pointed out that the contention by the ICRC that protective measures would not satisfy its particularly stringent need for confidentiality cannot be inferred to apply across the board to all cases, for all institutions and individuals. Indeed, the majority of the arguments put forward by the ICRC were, in fact, ICRC-specific. For instance, in the case of the ICRC, it is the institution which must be protected, as the very nature of disclosed information would make its origin obvious.

Judge Hunt, in his separate concurring opinion, nevertheless briefly touched upon the question of the protection of the confidential nature of information. In essence, he was of the opinion that such measures cannot fully be relied upon to guarantee the ICRC's protection.

The separate concurring opinion of Judge Hunt

Judge Hunt, in a separate concurring opinion attached to the Decision, recognized that the ICRC's obligation of confidentiality (which has permitted it to carry out its mandate) gives rise to a "powerful public interest" to protect the ICRC against disclosure. He insisted that the disclosure he was referring to did not concern the evidence itself, but rather the fact that ICRC staff will have disclosed ICRC information in any proceedings. Indeed, once such evidence is given, "there is but little which can be done to avoid that fact being known". He acknowledged that the Tribunal's protective measures "*may* [original emphasis] in some cases substantially reduce that risk of disclosure, although too much emphasis should not be placed on this factor". He further noted that "the more important the evidence of the witness for the resolution of the proceedings, the more difficult for any judgment to be written that deals properly with the facts which have been found against the accused but which would not also necessarily reveal the source of the evidence in question — although this would not be impossible."

Therefore, Judge Hunt recognized several of the arguments put forward in the ICRC's submission, to the effect that, in practice, if ICRC information is used by the Tribunal, this fact would find its way into the public domain. He further acknowledged that this

would impair the discharge by the ICRC of its mandate. However, he pointed out that there exists another powerful public interest: namely that, in the interest of justice, all relevant evidence be made available to the courts.

Judge Hunt recognized that there may be a customary rule that the protection of the ICRC before *national* courts is an absolute one. On the other hand, he was not persuaded that such a rule includes *international* criminal courts. To his mind "it is an enormous step to assume that States had contemplated at the time of the Geneva Conventions the existence of a similar immunity in international criminal courts (created for the first time almost a half a century later), or that they have contemplated the existence of such an immunity since in such courts". On the basis of this finding, he declares himself not persuaded that there exists a rule of customary international law.

This argument is, in the author's view, not convincing. Firstly, because a custom could have come into being since 1949; and secondly, the case at hand is the first to be examined by an international court. In any event, Judge Hunt fails to take into account the historical sequence in which the issue arose, which clearly demonstrates that the issue of protection of the confidentiality of ICRC information has, in fact, been in the minds of international lawmakers for a long, long time.

For instance, the ICRC, in its submission, had made reference to the precedent set in 1936 in connection with the Italo-Ethiopian conflict, when Ethiopia complained to the League of Nations that the Italian army had used poison gas. The League's Secretary-General and the Committee of Thirteen asked the ICRC to forward to it any information gathered on this subject by its delegates present in the field. Citing the principle of neutrality, the ICRC turned down the League of Nation's request. There were astonished reactions to the ICRC's refusal, and President Max Huber judged it necessary to make a public statement explaining the three principles underlying the ICRC's position: firstly, the ICRC sought to maintain the trust of the parties to a conflict; secondly, the ICRC sought to avoid any suspicion of partiality; and thirdly, the role of the ICRC was

not to act as trial judge or examining magistrate.²³ The ICRC's position in this respect was never again called into question.²⁴

Following World War II, the ICRC took a position consistent with the one adopted earlier: that it was for itself to decide whether, and if so, what information would be communicated to the powers making a request. Delegates would remain bound by their contractual obligation, and the information would remain that of the ICRC. In the Proceedings of the International Military Tribunal at Nuremberg in 1946, the ICRC permitted evidence from three delegates to be filed. The delegates did not appear in person, but provided a written response to questions submitted at the initiative of the defence, which did not contain any specific information about the alleged violations committed by the accused; the decision of whether to provide evidence was that of the ICRC.

These two examples tend to show that States were aware of the ICRC's rule of confidentiality when they drafted the four 1949 Geneva Conventions, especially the articles specifically dealing with this question. Judge Hunt's contention that States may not have had in mind an immunity for the ICRC before international criminal courts when they drafted the Geneva Conventions is an interesting one which would warrant further research. What can be said at this stage, however, is that: (1) States were indeed aware of the issue, as it had been raised in the context of the Nuremberg Trials; and (2) the establishment of a permanent international criminal court had already been discussed prior to 1949, most notably by the UN General Assembly in 1948.²⁵ The idea of an international criminal tribunal predates the 1949 Geneva Conventions.

It is also clear that the ICRC's policy regarding confidentiality not only remained consistent thereafter; it was in fact firmly endorsed, for the confidentiality rule was reaffirmed and strengthened

²³ Bugnion, *op. cit.* (note 20), pp. 172-176.

²⁴ R. Perruchoud, *Les résolutions des Conférences internationales de la Croix-Rouge*, Institut Henry Dunant, Geneva, 1979, p. 46.

²⁵ See resolution A/Res. 260 (III) B, which asked the International Law Commission to look into the question; see also the debate on the 1948 Genocide Convention.

by the 1977 Protocols additional to the Geneva Conventions. If States (in particular the newly independent States which had not participated in the drafting of the 1949 Conventions) had deemed, in the light of the ICRC's continued policy of not disclosing information to international investigations, that the ICRC should be forced to do so, the 1977 Protocols would undoubtedly read differently.

But perhaps the most compelling argument against drawing a distinction between international and domestic tribunals is simply that the interests of the ICRC and of States in maintaining ICRC confidentiality — to safeguard the ICRC's ability to fulfil its protective mandate — do not vary with the nature of the tribunal. If anything, the damage caused by a breach of the organization's confidentiality at the international level would be greater than that at the national level.

Judge Hunt also pointed out that, because the rules of international law are still sketchy with regard to some aspects of the Tribunal's work, in particular the rules of procedure and evidence, the Chamber must rely on the more developed rules of domestic legal systems. In most national courts, he continued, statutory provisions contain only one absolute protection, that relating to confidential communications between attorney and client. In this context, it must be pointed out that Judge Hunt had earlier conceded that there was strong evidence of a customary rule relating to the protection of the ICRC before national courts. In the alleged absence of a rule at the international level, the Judges could therefore rely on this.

The separate opinion concludes that there should be a balance between two compelling public interests — those of justice and of the protection of the ICRC's work. Since Judge Hunt considered this to be dictated neither by statute nor by custom, the Tribunal must carry out its own balancing exercise. He considered that there could be two situations which would suffice to demonstrate why it may well be necessary in the rare case that the courts (or at least the international criminal courts) should have the final say: when nondisclosure may be to the detriment of an innocent defendant (i.e., where the information sought is exculpatory), or when, in the conviction of an accused, the information is of "transcendental importance". Again,

Judge Hunt recognized the validity of the ICRC's arguments against such obligatory disclosure — i.e., damage to its impartiality, neutrality and obligation of confidentiality. What concerned him really was the fact that the decision on whether or not information may be disclosed or not belongs to the ICRC — something that may indeed be difficult to accept for a magistrate.

Basically, Judge Hunt, who had come a very long way to agree with the ICRC's arguments, was unable to take the last step of accepting that the final say could rest outside the Court, with the originator of the information. That this discretion lay with the ICRC, an impartial and independent humanitarian organization, did not suffice to reassure him. Admittedly, this is indeed a heavy responsibility; but it is one of the kind that the ICRC is called upon to take on as part of its work.

The whole logic of the ICRC's argument, which was largely accepted by Judge Hunt when he examined the question of protective measures, was that the mere eventuality that the ICRC may be requested to disclose information in the context of criminal proceedings would suffice to undermine the discharge of its mandate — even if, as he himself pointed out, “it would necessarily be rare that the evidence would be of such importance as to outweigh the ICRC's protection against disclosure”. That, in his opinion, was not verified in the case at hand.

Requesting disclosure of confidential ICRC information in just one case could prove a short-lived victory — or, as some have put it, a “one-shot gun”. Indeed, the result would be to endanger (or, in extreme cases, to sacrifice) the lives of those persons to whom the ICRC would consequently be denied access. But even the suggestion of a possible balancing act would undermine the whole construction enabling parties to a conflict to trust the ICRC. Surely it would be deemed too dangerous by certain individuals to accept that ICRC delegates may come across potentially incriminating evidence, if they know that there is no guarantee that the ICRC will not have to hand it later to a court.

Conclusion: The importance of the Decision for the continued work of the ICRC

The following points, which had until then been taken by the ICRC as established, were recognized formally in the Decision,

which constitutes the acknowledgement, by an international judicial body:

- that the ICRC has international legal personality;
- that the ICRC has a unique role in guaranteeing observance of the standards of international humanitarian law;
- that the ICRC has a right under customary international law to nondisclosure of its information.

In essence, the Decision confirms that the confidentiality rule is the hallmark of the ICRC, and that it is in the best interest of the international community to preserve it, first and foremost for the sake of the populations affected by armed conflict, to whom access must be ensured.

The ICTY decision is not important in abstract, for theoretical legal reasons. The ICRC does not operate in a vacuum. The Decision will be useful as formal evidence, when needed, to demonstrate the neutrality, impartiality and independence of the ICRC. At the same time, it is the recognition by an international court of the ICRC's entitlement to have its confidentiality rule respected by all.

In view of the crucial nature of this question, the Chamber's Decision was received with great relief within the ICRC. Of course, the lawyers were happy with the outcome of the case; but it is the operational staff of the ICRC who breathed the biggest sigh of relief. Indeed, they are the ones who, day in and day out, put their lives on the line and have to convince their interlocutors (governments, armed groups and victims) that they can be trusted with confidential information that is potentially damaging to the interlocutors. A negative decision by the Trial Chamber would have done great harm in terms of access. The whole exercise also gave the ICRC, and the individuals who work for it, an opportunity to reassess the long-standing institutional policy of confidentiality: given the recent developments as regards repression of international crimes, and the shift in moral attitudes that came with this new phenomenon, was this policy still ethically and legally defensible? The answer was yes. The added-value of the ICRC's work and the organization's specific role still justify today the confidentiality rule, and the legal grounds for it are as valid as ever — if not even stronger.

Seen in this context, the Decision is interesting to analyse with regard to the ICRC's commitment to seeing the emergence of a truly universal mechanism to punish war crimes. Indeed, the ICRC has been mandated to promote respect for international humanitarian law, which includes the development of better mechanisms of implementation. This explains its support for the creation of both *ad hoc* Tribunals, and its active participation in the negotiations and its support for the establishment of an International Criminal Court (ICC). At Rome, the ICRC welcomed the text of the Statute as being a substantial and effective tool in the battle against impunity.²⁶

The ICRC has been intensively involved, on issues directly related to its mandate, in the negotiations of the ICC Statute and subsequently of the Elements of Crimes. It intervened in its role of expert and guardian of international humanitarian law. In this connection, it submitted to the Preparatory Commission a number of legal background papers greatly appreciated by delegations.

The point of the foregoing arguments is that the respective mandates of the international criminal tribunals 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 these courts and that of the ICRC should therefore not be regarded in terms of a contradiction. This complementarity argument is equally valid with regard to the mandate and working methods (in particular public denunciation) of human rights organizations — a fact increasingly recognized by such organizations.

This point cannot be stressed enough, particularly in view of the object of this article: the ICRC should not be perceived as obstructing justice — this was fully recognized by the Trial Chamber. All the ICRC is doing is to claim protection for the confidentiality of its information in an attempt to protect the way in which it has, is and

²⁶ Marie-Claude Roberge, "The new International Criminal Court", *IRRC*, No. 325, December 1998, pp. 671-677.

hopes to be able, in the future, to discharge its mandate: to bring protection and assistance on the field to all the persons affected by armed conflict.

This is why the Trial Chamber formulated its Decision in such absolute terms, so that there can be no doubt in the minds of all concerned that the ICRC will be able to remain consistent in its policy around the world, in all situations, at all times and with all parties, and that its policy and working principles will therefore not be questioned on an *ad hoc*, case by case basis.

Résumé

Reconnaissance de la règle traditionnelle de confidentialité du CICR — Une décision importante du Tribunal pénal international pour l'ex-Yougoslavie par STÉPHANE JEANNET

L'auteur analyse la question de la confidentialité du CICR à la lumière d'une décision du Tribunal pénal international pour l'ex-Yougoslavie (TPIY). Le procureur avait en effet proposé d'introduire le témoignage d'un ancien employé du CICR dans une procédure contre plusieurs accusés. Ce cas posait le problème de savoir si le CICR était en droit de refuser de témoigner devant une instance pénale internationale. La Cour a décidé que le CICR pouvait se prévaloir de ce droit, sur la base d'une règle internationale de caractère coutumier. Elle admet également que le CICR peut demander que le témoignage d'un collaborateur (ou d'un ancien collaborateur) de l'institution ne soit pas autorisé, ceci afin de préserver la confidentialité des informations récoltées dans le cadre des activités découlant des Conventions de Genève. L'aspect de la discrétion est d'ailleurs autant dans l'intérêt des États parties aux traités humanitaires que de la justice.

REVUE INTERNATIONALE DE LA CROIX-ROUGE

INTERNATIONAL REVIEW OF THE RED CROSS
