

REPORTS AND DOCUMENTS

The International Committee of the Red Cross's (ICRC's) confidential approach

Specific means employed by the ICRC to ensure respect for the law by State and non-State authorities
Policy document. December 2012.

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Introduction

The ICRC defines its mission in the following terms:

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance.

The ICRC also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles.

Established in 1863, the ICRC is at the origin of the Geneva Conventions and the International Red Cross and Red Crescent Movement. It directs and coordinates the international activities conducted by the Movement in armed conflicts and other situations of violence.¹

To conduct its mission, the ICRC's preferred mode of action is persuasion,² whereby it engages in confidential dialogue with the State and non-State authorities (hereafter 'the authorities') directly responsible³ for matters relating to respect for

1 See the policy document entitled *The ICRC: Its mission and work*, 2008, p. 4, available at: <http://www.icrc.org/eng/resources/documents/publication/p0963.htm>.

international humanitarian law and other fundamental rules protecting persons in situations of violence.⁴ The confidential approach has been part of the ICRC's identity for decades. In some cases, it is a key argument for obtaining access to the people the organization assists and protects. Bilateral and confidential dialogue has proven its effectiveness from the humanitarian point of view, in particular in contexts in which a neutral and independent player is needed.

The ICRC's confidential approach, which is at the core of its identity, is nevertheless subject to growing doubt in an international environment demanding greater transparency. The aim of this policy document is to clarify what the approach means, and to define its features and its limits. The document formalizes existing ICRC practice.

The expectations and general perception of the role of organizations when they are confronted by violations of the law have changed considerably in recent years. The appearance on the international scene of new sociopolitical, media and legal realities has increasingly laid open to question the relevance and effectiveness of the ICRC's traditional confidential approach in particular. These new realities include the following:

- **The crucial struggle against impunity** has been reinforced by the establishment of bodies competent to prosecute crimes that are not subject to a statute of limitations and of which the ICRC may have direct knowledge as a result of its field work. In this context, the ICRC's position may be perceived as contradictory: on the one hand, it supports and promotes such legal mechanisms as means not only of implementing international humanitarian law, but also of preventing future violations;⁵ on the other, in asserting its confidential approach, it refuses to participate in the establishment of indictments/defence briefs by testifying or divulging information relating to its activities.
- **The victims' demand that justice be done:** the ICRC's confidential approach and consequent refusal to testify can be perceived by the victims of violations as bolstering the perpetrators' impunity.
- **The demand for transparency and rapid results:** the ICRC, like other players, is increasingly subject to demands for transparency and rapid and measurable results. Its strategy, which is predicated on the gradual establishment over time of a confidential dialogue with the authorities, may appear not to meet expectations in this regard.

2 *Ibid.*, p. 11: 'Persuasion aims to convince someone to do something which falls within his area of responsibility or competence, through bilateral confidential dialogue. This is traditionally the ICRC's preferred mode of action'. The ICRC's modes of action are raising awareness of responsibility (persuasion, mobilization, denunciation), support, and substitution (direct provision of services).

3 The ICRC *protection policy* defines what is meant by 'authorities and other actors': 'all authorities and bearers of arms (...) who are able to launch hostile action against persons or a population and who are responsible for protecting those who fall under their control'; available in *International Review of the Red Cross* (hereafter *IRRC*), Vol. 90, No. 871, 2008, pp. 751–775, <http://www.icrc.org/eng/resources/documents/article/review/review-871-p751.htm>.

4 For the reader's sake, the term 'authorities' is used here to designate both State and non-State authorities.

5 *The roots of behaviour in war: understanding and preventing IHL violations*, ICRC, Geneva, October 2004, available at: <http://www.icrc.org/eng/resources/documents/publication/p0853.htm>.

- **The rapid spread and diversification of increasingly sophisticated and hard-to-control information technologies:** it is becoming more and more difficult to guarantee that the confidential information handled by the ICRC in the context of bilateral dialogue with the authorities is not the subject of deliberate or accidental internal or third-party leaks, despite the technical and human measures taken to prevent such leaks.

1. Content of the ICRC's confidential approach

The confidential approach, which consists in persuading an authority to meet its obligations without resorting to public pressure, is a means to an end for the ICRC; it is never an end in itself or an inalienable principle. It is based on a tested method, but it has a point only if the ICRC is convinced that the authorities are willing to cooperate with it and that confidential bilateral dialogue can result in an objective benefit for the victims of violence. The approach is to be understood as a dynamic process implying that progress is made in terms of results and the commitment of the authorities concerned to put a stop to violations. It can never serve to justify, by silence, an unsatisfactory and static situation that is unlikely to change for the better in any significant way. This is why the ICRC must be in a position deliberately to breach its undertaking of confidentiality in exceptional cases in which the approach runs counter to the interests of the victims, in accordance with the Policy on ICRC action in the event of violations.⁶

1.1 Guaranteed results

The confidential approach allows the ICRC to create a space for dialogue between it and the authorities in which the two cooperate with a view to enhancing respect for humanitarian rules and to taking the required corrective action in the event those rules are violated. At the same time, the ICRC takes account of the efforts made and results accomplished, and of the constraints inherent in each situation, as it develops its dialogue with the authorities.

1.2 Protection of the victims of situations of violence

The confidential information collected, obtained or received by the ICRC in the course of its humanitarian mission is only ever communicated in order to alleviate the plight of the victims of situations of violence.

6 'Action by the International Committee of the Red Cross in the event of violations of international humanitarian law or of other fundamental rules protecting persons in situations of violence' (hereafter Policy on ICRC action in the event of violations), in *IRRC*, Vol. 87, No. 858, 2005, available at: <http://www.cicr.org/eng/resources/documents/article/review/review-858-p393.htm>.

The ICRC's work is broadly guided by an ethic of responsibility⁷ that subordinates the organization's decisions to consideration of the anticipated results for the persons it is its mission to protect in a given operational context. It is therefore prohibited to divulge information that could undermine the security of people (who are its source), including in the context of a confidential bilateral dialogue with the authorities concerned.

1.3 Transparency about the conditional nature of the confidential approach

In its dialogue with the authorities, the ICRC ensures that its confidential approach is not understood to be unconditional and definitive. It stipulates that the approach is contingent on progress being made and on the quality of the dialogue engaged. The agreements concluded between the authorities and the ICRC do not contain a clause binding the ICRC to absolute confidentiality. The Policy on ICRC action in the event of violations is a public document⁸, and the decision to derogate from bilateral confidential dialogue is subject to the specific conditions set out therein.

1.4 Concentric and creative representations

In the event of established or known violations of international humanitarian law and other fundamental rules protecting persons in situations of violence, the confidential approach must be broad, systemic and creative. The ICRC looks for any point of support within the power apparatus or structure able to correct the situation, using a variety of channels. It seeks as a priority to act on the direct perpetrators of the violations, but it also talks with those in a position to influence them. Its strategy can include other measures,⁹ which do not entail the ICRC departing from its policy of discretion in respect of the confidential information it holds.

2. The *raison d'être* of the ICRC's confidential approach

2.1 Access to the victims

In order to discharge its mission, the ICRC considers that it must have direct and sustained access to the people who are victims of situations of violence. The

7 In this regard, see Max Weber, *Politics as a vocation* (available at: <http://anthropos-lab.net/wp/wp-content/uploads/2011/12/Weber-Politics-as-a-Vocation.pdf>), for a discussion of the 'ethic of responsibility' (*verantwortungsethisch*) versus the 'ethic of ultimate ends' (*gesinnungsethisch*). The 'ethic of responsibility' presupposes that an organization must be held to account for the foreseeable consequences of its actions. The 'ethic of ultimate ends' posits, on the contrary, that the affirmation of a fundamental moral principle, even if the consequences are unfortunate, outweighs all other considerations.

8 See also section 4.1.1 below.

9 Such as suspending or stopping activities.

confidential approach is intended to make it easier to obtain access to those people from the authorities exercising control over them or over access to them. This proximity to the affected persons allows the ICRC to have on tap the most objective possible knowledge of the problems affecting them, to propose appropriate humanitarian action and to make representations based on established facts.

This approach also helps strengthen security conditions for ICRC staff in the field whose mission is to collect the facts needed to make credible representations.

The general requirement of access to people and security for ICRC staff, together with the individual protection of victims of violence, weighs in any decision to break with the confidential approach.

2.2 A corollary to the principle of neutrality

By refusing to favour one party over the other or, more generally, to be involved in any way that is not purely humanitarian, the ICRC seeks at all times to project an image fostering its acceptance and paving the way to concerted dialogue. This is why it is paramount to respect the Fundamental Principle of neutrality,¹⁰ which is key to ensuring that the ICRC can conduct its activities. The confidential approach helps reinforce the credibility of its commitment to political neutrality.

2.3 Recognition and legal protection of the ICRC's confidentiality by the international community

The international community has widely recognized that the confidential approach is a means enabling the ICRC to discharge its mandate. In its 1999 decision in the case of *Simic et al.*,¹¹ the International Criminal Tribunal for the former Yugoslavia (ICTY) recognized that international customary law gave the ICRC the absolute right not to divulge information relating to its activities. In reaching that conclusion, the ICTY took account of three of the Movement's seven Fundamental Principles – impartiality, neutrality and independence – and of the almost universal ratification of the 1949 Geneva Conventions. It considered that, in the context of legal proceedings, the ICRC retained the right not to divulge information if it considered that doing so would be detrimental to the discharge of its mandate. That decision has been confirmed by other international criminal tribunals.¹²

10 For a definition of the principle of neutrality, see *The Fundamental Principles of the Red Cross: commentary*, Jean Pictet, 1979, available at: <http://www.icrc.org/eng/resources/documents/misc/fundamental-principles-commentary-010179.htm>.

11 ICTY, *Prosecutor v. Blagoje Simic, Milan Simic, Miroslav Tadic, Stevan Todorovic and Simo Saric*, IT 95-9-PT, Trial Chamber III, Decision, 27 July 1999.

12 Specifically, the International Criminal Tribunal for Rwanda and, indirectly, the Special Tribunal for Sierra Leone. Rule 73 of the Rules of Procedure and Evidence of the International Criminal Court expressly recognizes that the information held by the ICRC is not subject to disclosure. The Rules of Procedure and Evidence of the Special Tribunal for Lebanon and those of the Mechanism for International Criminal Tribunals both contain a similar provision.

In addition, many of the headquarters agreements the ICRC has signed with States in which it conducts operations also contain a specific clause guaranteeing such immunity for ICRC staff in respect of the courts of the country concerned.

3. The ICRC's independence with regard to the use of confidential information

Subject to the applicable law, the ICRC reserves the right at any time to decide what type of information it wishes to share with the parties (State or non-State authorities, or third parties).¹³ Decisions to transmit confidential information are taken by the ICRC alone on the basis of agreed internal procedures. Such decisions must conform to the Fundamental Principles of independence, neutrality and impartiality, and take account of the interests of the beneficiaries of the ICRC's work. This holds true for bilateral confidential representations, public representations and acts of mobilization.¹⁴

The ICRC never transmits to the authorities concerned or to third parties information mentioning the names of those who have suffered abuse or violations unless it has their prior explicit consent to do so. Such information is only made available to duly authorized persons, after the periods of time set out in the Rules governing access to the archives.¹⁵

4. Breaking with the confidential approach

4.1 Deliberate breach of the confidential approach by the ICRC

4.1.1 Mobilization and public denunciation

The Policy on ICRC action in the event of violations¹⁶ governs the conditions in which the ICRC breaks with the confidential approach. Despite repeated representations made in a confidential and bilateral context, the authorities concerned may not follow up on the ICRC's recommendations and commit major and repeated violations of international humanitarian law and other fundamental rules protecting persons in situations of violence, or allow such violations to be committed. In that case, the ICRC may take other steps in the interests of the persons affected or threatened; these steps may take two forms:

- **mobilization** of third parties;
- **public denunciation** of the violations committed and/or the quality of the dialogue with the authorities concerned.

13 'Third parties' refers to any entity that is not already targeted by the confidential approach (other States, interest groups, civil society players, local and international media).

14 See point 4.1.1 below.

15 See point 4.1.2.a below.

16 See note 6 above.

The ICRC thus decides, in view of the gravity of the situation, unilaterally and deliberately to divulge information hitherto part of the confidential dialogue with the authorities. The decision is made by the ICRC's highest decision-making bodies, for strictly humanitarian purposes and as a last resort, when all other means have failed.

The information must contain only the elements strictly required and sufficing to demonstrate that a situation is unacceptable from the humanitarian point of view. The only purpose of divulging it is to support the ICRC's efforts to attain the desired outcome.¹⁷ It generally deals with:

- established observations that the law has been violated;
- the quality of the dialogue and the nature or results of the cooperation between the ICRC and the authorities concerned.

Confidential information transmitted to third parties never mentions by name the people presumed to have committed the violations.

It is prohibited to divulge confidential information unless under the provisions of the Policy on ICRC action in the event of violations.¹⁸

Mobilization. **Representations aimed at mobilization** represent a breach of confidentiality but do not go so far as to constitute a public denunciation. The ICRC may decide to share confidential information in a targeted fashion and on an exceptional basis with a limited number of authorities in a position to have a positive influence on a humanitarian situation. Should the ICRC decide to have recourse to a strategy of mobilization, it ensures that a number of parameters are met:

- the targets for the representations are chosen in the light of the context and chiefly for their ability to influence the authorities concerned;
- the capacity or willingness of the targets to respect the confidential nature of the information transmitted to them must be considered during the ICRC decision-making process. To the extent possible, an undertaking of confidentiality should be obtained from the third parties "mobilized", but not, of course, in respect of the authority "concerned" (since the mobilization is intended to influence its actions).

Public denunciation. The authorities concerned must in all cases be informed beforehand when the ICRC decides to breach its undertaking of confidentiality through a **public denunciation** that is part of a strategy of representations. Recourse

17 In exceptional cases, the ICRC can be prompted to denounce major violations even if there is no hope of a tangible outcome.

18 The ICRC is regularly confronted with violations of lesser severity that do not fall within the scope of the Policy on ICRC action in the event of violations. They are the subject of bilateral confidential representations until such time as they attain the degree of severity described in the Policy.

to public denunciation does not release the ICRC from its commitment to engage in dialogue with the authorities concerned.

Other forms of action not involving a breach of confidentiality. In cases in which the ICRC becomes convinced that a breach of confidentiality could seriously harm the people whose protection it is its mission to improve, or endanger its staff, it may use other forms of action, such as **suspending its activities** or **withdrawing**. It reserves the right to make its decision public in the light of its assessment of the pros and cons of doing so.

4.1.2 Other instances in which the ICRC deliberately breaks with the confidential approach

a) Access to the ICRC's archives. The ICRC's confidential approach, in addition to being conditional, is not unlimited in time. The policy governing access to the archives authorizes access to all documents produced or obtained by the ICRC after periods of time set out in the existing rules.¹⁹

b) Instances in which the ICRC waives its right not to divulge information. The ICRC benefits in international law²⁰ from the right not to divulge information relating to its activities. This right takes the form of testimonial immunity.

While it cannot be obliged to testify, the final decision whether or not to transmit items of information in its possession to a court or any other competent body remains with the ICRC.

The exceptional decision to assist a judicial body, inquiry, fact-finding commission or other similar body is taken on the basis of a detailed analysis of the situation and its potential consequences for the ICRC, its activities in the field and the people concerned by the judicial or other proceedings at hand.

4.2 Unintended breach of confidentiality by the ICRC

ICRC staff undertake contractually²¹ not to divulge confidential information except as authorized to do so by the competent ICRC bodies. Information may nevertheless

19 At present, after 40 years for general files and after 60 years for files containing personal information. See Article 7 of the Rules governing access to the archives of the International Committee of the Red Cross, in Jean-François Pitteloud, 'The International Committee of the Red Cross reduces the protective embargo on access to its archives', *IRRC*, Vol. 86, No. 856, 2004, p. 961, available at: http://www.icrc.org/eng/assets/files/other/irrc_856_pitteloup_eng.pdf.

20 See point 2.3 above.

21 The pledge of discretion signed by all ICRC staff stipulates that they must 'maintain the utmost discretion (...) with regard to matters that (they) are called upon to deal with or that come to (their) knowledge in the course of (their) activity at the ICRC, and consider (themselves) bound by an obligation analogous to that of professional secrecy'. Any information they obtain in the performance of their duties belongs to the ICRC. Persons under contract to the organization are therefore not free to use such information as they see fit. The ICTY decision in the *Simic* case (see above, note 11) implicitly recognizes that the information belongs to the ICRC and not to the individual working for it.

be divulged without authorization, as a result of a mistake, negligence or a deliberate, unilateral act. The ICRC has put in place measures to ensure that this does not happen and to take corrective action in the event that it does.

4.3 Breach of confidentiality by authorities engaged in confidential dialogue with the ICRC

An authority or its agents may unilaterally decide to make the confidential information transmitted to it by the ICRC public. The ICRC is not responsible for the breach and re-establishes the truth if the information is incomplete or tendentious. It may, for example, publish an entire document if excerpts have been divulged without its agreement, or explain why and in what context it came into possession of the information and for whom the information was intended.

The ICRC may also take such action if the breach of confidentiality is unintended or committed by a third party.

4.3.1 Divulgence for legal or political reasons

The transmission to the authorities of confidential information heightens the risk that the information will be divulged in certain circumstances.

The risk may be legal in origin: the timeframe for access to national archives, an order obliging the target of a representation to transmit the information to a judicial body, etc.

The risk may also stem from the political context: whenever the authorities in a given State change, the new authorities may decide unilaterally to publish or disseminate confidential information that the ICRC had transmitted to the previous authorities.

To the extent possible, the ICRC alerts the authorities to the potentially harmful effects that the divulgence of confidential information could have on the people concerned. On the basis of its right not to divulge information on its activities, recognized in international law, the ICRC also asserts that the judicial authorities should not consider the information concerned legally admissible.

4.3.2 Expanded dissemination of confidential information within the same State structure

On the basis of the nature of the humanitarian problems encountered, the ICRC draws up the list of authorities with whom it wishes to engage in confidential dialogue. It asks that the confidential information it transmits to them be used in accordance with the humanitarian goals established. The authorities are nevertheless free to disseminate internally the confidential information received from the ICRC.

Concluding remarks

This policy document governs the use of confidential information pertaining to the very essence of the ICRC's mission, i.e. to ensure respect for international humanitarian law and other fundamental rules. The confidential approach is never to be construed as a line of conduct allowing violations to be committed with impunity; rather, it serves to create a space for dialogue with the authorities about observations independently established by the ICRC, within which the ICRC endeavours to persuade them to fulfil their obligations.