

MEMORANDUM

The ICRC's privilege of non-disclosure of confidential information

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Proceedings of a judicial, quasi-judicial, public inquiry, fact-finding or similar nature, in which confidential communications of the International Committee of the Red Cross (ICRC) risk being disclosed, raise important challenges for the ICRC's capacity to carry out its internationally recognized mandate. In order to carry out that mandate and fully assume its operational role in the protection and assistance of victims of armed conflict and other situations of violence, confidentiality is an essential tool that allows the ICRC to build the necessary trust to secure access, open channels of communication, influence change and ensure the security of its staff. The purpose of this Memorandum is to, first, provide the rationale for and broad practical context of confidentiality as the ICRC's working method; second, outline the legal sources on which the ICRC bases its requests that national and other authorities protect the confidentiality of its communications from public disclosure and from being used in legal proceedings; and third, set out the scope of application of the ICRC's evidentiary privilege regarding confidential information.

The ICRC's operational identity and working method

The ICRC is a humanitarian organization established in Geneva, Switzerland, in 1863 that adheres strictly to the Fundamental Principles of neutrality, impartiality and independence in its operations. As a neutral humanitarian actor, the ICRC abstains from taking sides – or actions that might be perceived as taking sides – in armed conflicts or other situations of violence, or in any controversies of a political, racial, religious or ideological nature. Based on the principle of impartiality, the ICRC does

not engage in any form of discrimination and carries out its activities guided only by the needs of the victims it seeks to protect and assist. The ICRC's independence – from States and international organizations, but also from any other persons, groups or entities that may seek to exert pressure or influence in situations of armed conflict – means that it has the autonomy it needs to accomplish the exclusively humanitarian task with which it is entrusted. As such, independence also contributes directly to its capacity to be neutral and impartial, and to be perceived as such, when attending to needs on the ground. These three principles are among the seven Fundamental Principles of the International Red Cross and Red Crescent Movement (the Movement), initially proclaimed by the 20th International Conference of the Red Cross in 1965 and revised and reaffirmed by the 25th International Conference held in 1986. The principles of neutrality and independence are of direct relevance and to a large extent justify the ICRC's working method of confidentiality. For the ICRC to be – and be perceived as – truly independent, international or domestic tribunals should not be able to compel the ICRC to provide confidential information related to the performance of its mandate and functions. And if such confidential information were used in legal proceedings in favour of or against one of the parties to an armed conflict, this would inevitably undermine the perception of – and trust in – the ICRC as truly neutral in that conflict.

The ICRC's mandate is set out in the 1949 Geneva Conventions that have been ratified by all States in the world, and in the 1977 Additional Protocols thereto, as well as in the Statutes of the International Red Cross and Red Crescent Movement which are adopted *inter alia* by States.¹ The ICRC's mandate is to provide protection and assistance to victims of armed conflict and other situations of violence, to work for the faithful application of international humanitarian law (IHL) and to act as a neutral intermediary between parties to armed conflicts. The organization does so primarily by means of its activities in the field: the ICRC currently operates in more than 80 countries and deploys over 13,400 staff worldwide who, on a daily basis, strive to preserve and restore human dignity in often very difficult situations. It is against this backdrop that the ICRC's long-standing policy and practice of confidentiality, derived directly from the principles of neutrality and independence, was developed as the organization's standard working method. The policy and practice mean that the organization requires confidential and bilateral communications, including written submissions, with the relevant authorities, and that it expects such authorities to respect and protect the confidential nature of its communications.

Establishing effective dialogue

Confidentiality as a working method is not an aim in itself. It was developed and adopted over time as a result of the ICRC's long field experience and the

1 At the time of writing, Additional Protocol I had been ratified by 174 States and Additional Protocol II by 168 States (for up-to-date numbers, see www.icrc.org/ihl, accessed in April 2015). The Statutes of the International Red Cross and Red Crescent Movement were adopted by consensus by the International Conference of the Movement, in which all States party to the Geneva Conventions participate.

realization that it is a crucial tool enabling the organization to establish and maintain an effective dialogue with parties to armed conflicts, whether State or non-State. The dialogue is aimed at helping the parties to adhere to their obligations under IHL and to put a stop to or prevent violations of IHL when and where they occur, and at ensuring they adequately address other humanitarian concerns.² The confidential nature of the ICRC's communications with parties to armed conflicts is thus a specific way of ensuring that violations of IHL are addressed by those responsible as they are happening, rather than only in a later, *ex post facto* manner, and that other humanitarian concerns are addressed as soon as the actual needs arise. The ICRC's ability to conduct a dialogue with States or organized armed groups involved in armed conflicts is, however, necessarily predicated on a relationship of trust that must be established with the relevant actor. The confidential nature of the communication that takes place is essential to that trust and enables the ICRC to work for adherence to IHL by means of concrete recommendations aimed at changing behaviour, particularly when violations of IHL are involved. The ICRC's working method is thus distinct, but complementary to other methods that exist for ensuring that there is no impunity for violations of legal obligations, such as criminal prosecution or public advocacy.

Gaining access

Confidentiality is also essential if the ICRC is to persuade the parties to an armed conflict to allow it to have access to conflict areas, to the civilian population, to persons deprived of liberty and to the fighting forces themselves. If parties to a conflict were under the impression that information gathered by the ICRC in theatres of conflict or in places of detention would subsequently be used in a court case, a public inquiry or similar proceedings, this would not only jeopardize the organization's ability to gather relevant information and submit allegations of violations or present other humanitarian concerns to the parties, but would very likely prevent it from doing so entirely. Lack of guarantees of confidentiality would thus, at best, serve as a major disincentive for parties' cooperation with the ICRC, and at worst, preclude ICRC access to vulnerable persons and populations, with the effect of increasing their vulnerability and the hardship suffered.

Security

Apart from enabling ICRC access to persons and places that would otherwise be out of reach, confidentiality as a working method also serves to protect ICRC staff in the field. Many of them work in highly dangerous operational contexts. Their physical security depends on the acceptance of the organization's presence in conflict areas,

2 To address humanitarian concerns, the ICRC also invokes other fundamental rules of international law besides IHL, as applicable, in situations of armed conflict. In other situations of violence, where IHL is, by definition, not applicable, the ICRC engages with authorities exclusively on the basis of the before-mentioned fundamental rules of international law.

which is largely based on the parties' recognition of the ICRC's neutrality and independence and their understanding that the ICRC will carry out its work and present its findings in a confidential manner. ICRC personnel are unique because they move about in conflict zones without armed protection, thanks to the trust that the parties place in the organization. Without confidentiality the ICRC's personnel would not be able to have direct access to victims of armed conflict and perform the humanitarian mandate entrusted to the organization by the community of States.

The confidential nature of the ICRC's communications applies not only to ICRC observations communicated to parties to a conflict, but also to ICRC personnel. Staff are contractually bound to maintain the confidential nature of information gathered or acquired in the course of their work for the organization both during their employment with the ICRC and thereafter.

Given its field-based focus and the significant impact of confidentiality on access, effective dialogue and security as described above, the ICRC places great reliance on compliance by relevant national and other authorities to protect confidential information from disclosure. This means, in particular, that confidential ICRC information must not be used or disclosed in the framework of any type of legal proceedings, as this could undermine the organization's capacity to carry out its operations, both locally and globally.

Sources of legal protection of ICRC confidentiality

The ICRC's privilege of non-disclosure is well established in both international and domestic law. In the international order this is reflected in the jurisprudence and/or rules of procedure and evidence of international courts and tribunals investigating and prosecuting serious violations of IHL and other international crimes. In the domestic legal order, the ICRC's privilege of non-disclosure forms part of the privileges and immunities that the organization enjoys in countries around the world.

International courts, tribunals and quasi-judicial bodies

At the international level, the ICRC's privilege of non-disclosure has been recognized in the jurisprudence of the *ad hoc* International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) as well as, indirectly, by the Special Court for Sierra Leone (SCSL). The ICRC's claim to a right to non-disclosure of confidential information was first upheld in a decision of the ICTY involving a case in which the prosecutor intended to call a former ICRC employee to testify. The ICTY determined that the ICRC has an absolute privilege to decline to provide evidence in connection with judicial proceedings as a matter of both international treaty and customary law:

72. The ICRC has a pivotal role in the regime established by the Geneva Conventions and their Protocols to guarantee the observance of certain minimum humanitarian standards. This role is unique. ... The Geneva Conventions and their Protocols must be construed in the light of their fundamental objective and purpose as described above, and for that reason they must be interpreted as giving to the ICRC the powers and the means necessary to discharge its mandate effectively.

73. The analysis [of the Court, based on submissions by the parties,] has clearly indicated that the right to non-disclosure 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 non-disclosure 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 non-disclosure 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 non-disclosure of the Information.³

In reaching the above conclusions, the ICTY cited the ICRC's unique status and mandate under the doctrines and practices of IHL, including States' historical recognition of ICRC confidentiality. The Court also relied on its conviction, based on evidence presented, that the success of the ICRC's field operations depended on its continued ability to maintain its confidentiality.

The decision was subsequently confirmed by the ICTY Appeals Chamber,⁴ as well as by the ICTR,⁵ and there has been no decision to the contrary by either of those tribunals since. The SCSL, established in 2002, follows the jurisprudence of the international criminal tribunals for the former Yugoslavia and Rwanda. Pursuant to Article 20(3) of the SCSL's Statute:

3 ICTY, *Prosecutor v. Simić*, Case No. IT-95-9, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999, paras 72–74 (emphasis added).

4 ICTY, *Prosecutor v. Brđjanin*, Appeals Chamber, Case No. IT-99-36, Decision on Interlocutory Appeal, 11 December 2002, para. 32.

5 ICTR, *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55, Reasons for the Chamber's Decision on the Accused's Motion to Exclude Witness TQ, 15 July 2005, paras 14–16.

The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. In the Interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone.⁶

The seminal decision handed down by the ICTY in *Simić* has since been reflected and incorporated in the Rules of Procedure and Evidence of the International Criminal Court (ICC). Rule 73 expressly provides for the ICRC's absolute privilege to decline to submit evidence to the Court. The text embodies the consensus of the more than 100 States that took part in negotiations on the Rules of Procedure and Evidence subsequent to the adoption of the ICC Statute in 1998. No other organization, whether intergovernmental or non-governmental, was granted this privilege. Rule 73 provides in relevant part as follows:

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

- (a) After consultations undertaken pursuant to sub-rule 6, ICRC does not object in writing to such disclosure, or otherwise has waived this privilege; or
- (b) Such information, documents or other evidence is contained in public statements and documents of ICRC.

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

6. If the Court determines that ICRC information, documents or other evidence are of great importance for a particular case, consultations shall be held between the Court and ICRC in order to seek to resolve the matter by cooperative means, bearing in mind the circumstances of the case, the relevance of the evidence sought, whether the evidence could be obtained from a source other than ICRC, the interests of justice and of victims, and the performance of the Court's and ICRC's functions.⁷

6 Statute of the Special Court for Sierra Leone, 16 January 2002 (entered into force 12 April 2002), Rule 20, para. 3.

7 ICC, Rules of Procedure and Evidence, reproduced from the Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, ICC-ASP/1/3 and Corr. 1, New York, 3–10 September 2002, Part II.A, Rule 73.

The ICRC's privilege has also been incorporated into the founding documents of other courts. Thus, the first paragraph of Rule 73 of the ICC Statute has been included *verbatim* in the 2009 Rules of Procedure and Evidence of the Special Tribunal for Lebanon (STL). Pursuant to Rule 164:

The Tribunal 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 the ICRC of its functions under the Statutes of the International Red Cross and Red Crescent Movement.⁸

The Mechanism for International Criminal Tribunals (MICT), which was established by the United Nations Security Council on 22 December 2010 to carry out a number of essential functions of the ICTR and ICTY after the completion of their respective mandates, provides in Rule 10 of its Rules of Procedure and Evidence that:

The International Committee of the Red Cross (ICRC) shall not be obligated to disclose any information, including documents or other evidence, concerning the performance of its mandate pursuant to the four Geneva Conventions of 12 August 1949 or their Additional Protocols or concerning its functions under the Statutes of the International Red Cross and Red Crescent movements [sic]. Nor shall such information acquired by a third party on a confidential basis from the ICRC or by anyone while in the service of the ICRC be subject to disclosure or to witness testimony without the consent of the ICRC.⁹

On a general note, it is worth pointing out that international bodies that have sought the views of the ICRC on the matter of disclosure of confidential ICRC information have generally understood the institution's concerns and have always accepted its position and fully protected its confidentiality.

Status agreements and legislation conferring privileges and immunities upon the ICRC in the domestic legal order of States

In the domestic legal order, the ICRC has been granted privileges and immunities that are necessary to fulfil its functions either through bilateral status agreements or through primary legislation. At the time of writing, the ICRC enjoys such privileges and immunities – aimed at ensuring that the necessary conditions for the performance of its mandate are met – in 103 countries and is in the process of negotiating status agreements with thirteen more countries.¹⁰

8 STL, Rules of Procedure and Evidence, STL-BD-2009-01-Rev.6-Corr.1, 20 March 2009, Rule 164.

9 MICT, Rules of Procedure and Evidence, MICT/1, 8 June 2012, Rule 10.

10 Numbers are up to date as of 1 April 2015.

These agreements generally grant the ICRC and its staff immunity from all forms of legal process as well as inviolability of documents, manuscripts, archives and data. While testimonial immunity is generally considered to be included in immunity from legal process, many of the ICRC's status agreements also explicitly provide for an exemption from obligations to provide evidence in legal proceedings.

Importantly, especially in light of the fact that the ICRC needs to share confidential information regarding alleged violations of IHL or other humanitarian concerns with the authorities capable of addressing these concerns, States recognize the need also to protect the confidentiality of ICRC information in their own hands. Therefore, recent status agreements include a provision to the effect that:

The State ... undertakes to respect the confidentiality of ICRC reports, letters and other communications to the government, which respect includes neither divulging their content to anyone other than the intended recipient, nor permitting their use in legal proceedings, without prior written consent of the ICRC.

Scope of the evidentiary privilege

In order to enable the ICRC to carry out its humanitarian mandate and to do so in full conformity with its Fundamental Principles as well as with the standard working modality of confidentiality derived therefrom,¹¹ the ICRC's evidentiary privilege necessarily has a broad material and temporal scope of application. At the same time, as it is granted for the sole purpose of enabling the ICRC to carry out its mandate, the privilege's personal scope of application is necessarily limited in nature.

Material scope of application

In order to achieve its objective, the ICRC's evidentiary privilege necessarily covers all confidential information related to or necessary for the performance by the ICRC of its mandate and activities, wherever and by whomever it is held. Such information may be contained in paper, electronic, audio-visual or any other format. Confidentiality is required in respect of both ICRC-generated documents and those produced by the relevant national authority (recipient) or any other third party and including or referring to confidential information originating within or from the ICRC.

11 See also the finding of the ICTY in the *Simić* case, above note 3, paras 72–73, reaffirming the ICRC's capacity to carry out its mandate as the rationale for its privilege of non-disclosure under international law. The same rationale underpins the privilege provided for in bilateral status agreements and primary domestic legislation.

Likewise, the privilege necessarily applies in all types of legal proceedings, be they judicial, administrative, executive or quasi-judicial in nature and regardless of the substantive nature of the jurisdiction of the bodies concerned. Indeed, the use of confidential information in any such proceedings is likely to have a negative impact on the ICRC's reputation as a neutral and independent humanitarian organization and on its operational access, dialogue and security. The privilege therefore generally applies in civil and criminal proceedings, access to/freedom of information proceedings, public inquiries, coronial and arbitral proceedings, traditional and transitional justice mechanisms, fact-finding and truth and reconciliation mechanisms, or any other form of proceedings before a national or international entity charged to look into abuses and violations of domestic or international law that may have occurred in situations of armed conflict or other situations of violence. The privilege moreover applies throughout the different stages of proceedings, including the fact-finding and investigation, discovery and trial stages.

Furthermore, the privilege is absolute in nature. The ICTY, in its landmark decision in the *Simić* case, explicitly rejected any balancing exercise as far as the ICRC's confidentiality interest is concerned:

76. It follows from the Trial Chamber's finding that the ICRC has, under international law, a confidentiality interest and a claim to non-disclosure of the Information, that *no question of the balancing of interests arises*. The Trial Chamber is bound by this rule of customary international law which, in its content, does not admit of, or call for, any balancing of interest. The rule, properly understood, is, in its content, unambiguous and unequivocal, and does not call for any qualifications. Its effect is quite simple: as a matter of law it serves to bar the Trial Chamber from admitting the Information.

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79. [T]he Trial Chamber deems it important to touch on the issue of the relationship between the International Tribunal and the ICRC. 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.¹²

Finally, the fact that information covered by the privilege has been disclosed in public or transmitted to the court by a third party without the ICRC's consent does not alter the fact that the privilege effectively bars courts or quasi-judicial mechanisms from admitting such information as evidence in proceedings. As the

12 ICTY, *Simić*, above note 3, paras 76, 79 (emphasis added).

ICC's Rules of Procedure and Evidence point out, the privilege retained in Rule 73 does "not affect the admissibility of the same evidence obtained from a source other than ICRC and its officials or employees", but only "when such evidence has also been acquired by this source independently of ICRC and its officials or employees".¹³

Personal and temporal scope of application of testimonial immunity

The rationale and legal justification for the ICRC's privilege of non-disclosure directly derives from the crucial importance of confidentiality as a necessary working method for the effective discharge of the ICRC's mandate under the Geneva Conventions, the Additional Protocols and the Statutes of the International Red Cross and Red Crescent Movement. The testimonial immunity, which is an inherent part of that privilege, therefore applies to those individuals through whom the ICRC carries out its mandate and activities. These typically include ICRC representatives and staff members. The privilege may, however, also extend to persons who are not members of or employed by the ICRC, but to whom the ICRC has assigned specific functions as part of specific ICRC operations. These may include consultants hired by the ICRC as well as volunteers or staff of National Red Cross or Red Crescent Societies when they are seconded to the ICRC or are deployed as part of ICRC teams on the ground.¹⁴ Testimonial immunity concerns information that these persons may have obtained, or become aware of, in the exercise of their functions for the ICRC and thus continues to apply even after these persons have left the service of the ICRC.

The unique role and mandate of the ICRC, which forms the basis of the organization's privilege of non-disclosure of confidential information, also limits the scope of application of the privilege to the ICRC. This is illustrated in the *Muvunyi* case, where the ICTR ruled that:

The privilege [of non-disclosure] derives from the ICRC's pivotal and unique role in the regime established by the Geneva Conventions and the first Protocol. As stated by an ICTY Chamber in the *Simic* case, such finding "does not open the floodgates in respect of other organizations." The Chamber notes that the ICC's Rules of Procedure and Evidence similarly grant such privilege only to the ICRC, and not to any other organization.¹⁵

Waiver of the privilege of non-disclosure of confidential information

The privilege of non-disclosure of confidential information related to, or necessary for, the performance of the ICRC's mandate and activities *can* be waived by the

13 ICC, above note 7, Rule 73.

14 See, for example, ICTR, *Muvunyi*, above note 5, paras 17–18.

15 *Ibid.*, para. 16.

ICRC in exceptional circumstances where, in its sole opinion, the immunity would impede the course of justice, and it can be waived without prejudice to the interests of the ICRC, i.e. its capacity to carry out its mandate around the world, in full conformity with its Fundamental Principles and its standard working modalities. Any waiver of immunity that could result in a reduced operational capacity for the ICRC in the field – because of restrictions on access, security concerns (such as retaliatory acts against the ICRC, its staff or the beneficiaries of its activities) or the lack or insufficiency of an effective dialogue with those able to address humanitarian concerns and alleged violations of IHL – is considered prejudicial to the interests of the ICRC. Likewise, any testimony that could reflect negatively on the ICRC's reputation as a neutral and independent humanitarian actor is considered prejudicial to the interests of the ICRC.

The decision to waive the privilege of non-disclosure and/or the inherent testimonial immunity for persons carrying out official functions for the ICRC therefore needs to take into account a variety of factors related to the ICRC's access, security and operations around the world and to its perception of neutrality and independence. Only the ICRC has access to all this information and is therefore able to assess whether the criteria for a waiver are met.

Such a waiver is only valid when given explicitly, in writing, by the competent authority within the ICRC. Decisions on waivers are taken at the highest level in the ICRC.

Obligation of national and other authorities to protect ICRC confidentiality

The decisions of the international tribunals mentioned above, Rule 73 of the ICC's Rules of Procedure and Evidence and the provisions of the ICRC's status and other agreements all reflect the respect of the international community for the confidentiality of the ICRC's communications with the parties to an armed conflict. As outlined above, such respect is essential to the ICRC's ability to fulfil its humanitarian mandate. For this reason, and based on the legal authority stated above, the ICRC places the following standard confidentiality clause in confidential reports that it regularly submits to parties to a conflict:

[The relevant authority] ... undertakes to respect the confidentiality of ICRC reports, letters and all other forms of confidential communication with its representatives. This includes not divulging their content to anyone other than the intended recipients, making no public statements concerning their content, and not permitting the use of ICRC confidential documents in legal proceedings, unless the prior written consent of the ICRC has been obtained.

When a party receives such a communication from the ICRC, it does so subject to the conditions of confidentiality stated therein. This is entirely consistent with the limited purpose served by ICRC reports on visits to places of detention or reports on the protection of the civilian population. These reports are to be seen only by

the authorities to whom they are addressed and they serve the sole purpose of generating independent investigation by those authorities, with the aim of improving the conditions and treatment of persons subject to detention/internment or the protection of the civilian population in the case of hostilities. Thus, the authorities who receive such reports may not publish or otherwise transmit ICRC material beyond the scope of their authority, and especially may neither use nor permit the use of such communications in proceedings of a judicial, public inquiry, fact-finding or similar character because of the harm that would result to the ICRC's ability to fulfil its mandate. It is for these reasons that the ICRC declines to make these confidential communications available to parties other than the authorities to whom they are addressed.

International Committee of the Red Cross
Geneva, April 2015