

A. ICTY, The Prosecutor v. Simic et al.

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[Source: ICTY, The Prosecutor v. Blagoje Simic, Milan Simic, Miroslav Tadic, Stevan Todorovic, Simo Zaric, IT 95-9. PT, in the Trial Chamber, Decision of 27 July 1999; footnotes omitted]

[N.B.: This decision was made public by the Tribunal on 1st October 1999.]

IN THE TRIAL CHAMBER Decision of: 27 July 1999

PROSECUTOR v. BLAGOJE SIMIC [and Others] *EX PARTE CONFIDENTIAL*

DECISION ON THE PROSECUTION MOTION UNDER RULE 73 FOR A RULING CONCERNING THE TESTIMONY OF A WITNESS [...]

II. Submissions

A. The Prosecution [...]

3. [...] In the Prosecution's view, the issue is whether a third party to the proceedings such as the ICRC is entitled to intervene to prevent a willing witness from testifying. The Prosecution asserts that the issues in contention between the ICRC and the Prosecution are: (1) whether the ICRC has a right to determine unilaterally that ICRC employees or former employees may not give evidence before the International Tribunal despite their willingness to do so, the Prosecution position being that it does not; (2) alternatively, whether it is for the Trial Chamber to determine whether protective measures could adequately protect a relevant confidentiality interest of the ICRC; and (3) if so, then it is for the Trial Chamber to determine whether, in this particular case the circumstances are so extreme that the ICRC has a relevant confidentiality

interest which can only be protected by not allowing the witness to be called at all. Again the Prosecution argues that they are not. The Prosecution presents arguments on various issues which it anticipates the ICRC will raise, in particular as to immunity and privilege.

4. With respect to the ICRC's general position, the Prosecution states that it understands the ICRC's concern to be that national authorities might deny ICRC personnel access to places where persons protected by the Geneva Conventions are located if they think that these ICRC personnel might subsequently testify in criminal proceedings about what they have seen and heard in those places. Although sympathetic to the ICRC concerns, the Prosecution reiterates its view that the ICRC does not enjoy, as a matter of law, any immunity or privilege that would enable it, unilaterally, to prevent any of its former employees from testifying.

5. The Prosecution contends that the Trial Chamber should make a determination on a case by case basis and should decide that a witness be precluded from testifying only in exceptional circumstances. It is the Prosecution's contention that protective measures could afford appropriate protection to the ICRC interests.

[...]

B. The ICRC [...]

12. The ICRC relies, *inter alia*, on the following arguments in support of its opposition: the ICRC's international mandate, its operational principles and their application, its status of immunity, the privileged nature of its communications and the impact of such testimony on its operations, and the privilege or confidentiality doctrine in national law.

13. It is the ICRC's general position that the testimony of a former ICRC employee would involve a violation of principles of international humanitarian law concerning the role of the ICRC and its mandate under the Geneva Conventions, the Additional Protocols and the Statute of the ICRC. The ICRC submits that the testimony would jeopardise its ability to discharge its mandate in the future, as concerned parties (national authorities or warring parties) are likely to deny or restrict access to prison and detention facilities if they believe that ICRC officials or employees might subsequently give evidence in relation to persons they met or events they witnessed. [...]

14. The ICRC relies on the mandate entrusted to it under the Geneva Conventions, the Additional Protocols and its Statute, together with its special status and role, to support its arguments. It places particular emphasis on the importance of respecting the principles of, *inter alia*, impartiality and neutrality, as well as the need for confidentiality in the performance of its functions. The ICRC notes that, by adhering to these principles, it has been able to win the trust of warring parties to armed conflicts and bodies engaged in hostilities, in the absence of which it would not be able to perform the tasks assigned to it under international humanitarian law. Further, the ICRC asserts that in carrying out its mandate it undertakes a duty of confidentiality towards the warring parties. An essential feature of that duty is that ICRC officials and employees do not testify about matters which come to their attention in the course of performing their

functions. [...]

19. [...] The ICRC contends that the International Tribunal should exclude evidence to be given without the consent of the ICRC unless the Prosecution can demonstrate that there is an overwhelming need to admit such evidence and that this need is strong enough to outweigh the need for confidentiality and the likely adverse effect on the ICRC's ability to function. The ICRC argues that the following conditions must be met in order for the above-mentioned test to be satisfied:

- (1) the crimes charged must be of the utmost gravity;
- (2) the evidence must be indispensable, in the sense that the case could not be mounted without it; and
- (3) admitting the evidence would not prejudice the work of the ICRC.

In the ICRC's opinion, on the basis of the information currently available, in particular as to the substance of the evidence, these criteria are not met in the present case. [...]

III. Discussion

A. Issues not in dispute between the Prosecution and the ICRC [...]

36. [...] It is the Trial Chamber's view that the ICRC has an interest in this matter sufficient to entitle it to present arguments on the Motion if the Information is based on knowledge gathered by a former employee while carrying out official duties, as ICRC's interests could then be potentially affected. It is acknowledged that a distinction should be drawn between information gathered in an official capacity and information gathered in a private capacity. If the information was obtained in the course of performing official functions, it can be considered as belonging to the entity on whose behalf the individual was working. It follows from this that the relevant entity can be considered to have a legal interest in such information and accordingly may raise objections to the disclosure of the Information. By contrast, in cases where information is acquired by an individual in his private capacity, the entity has no legal interest. Further, if the Information had been obtained in the course of carrying out tasks which do not fall within the competence of the ICRC, it follows that the ICRC could not claim an interest in relation to the non-disclosure of the Information. [...]

B. Issues in dispute and relevant issues

38. The issue is not whether the International Tribunal has jurisdiction over the ICRC and, in particular, it is not whether the International Tribunal has the power to compel the ICRC to produce the Information. In the Trial Chamber's view, the issue to be considered is whether the ICRC has a relevant and genuine confidentiality interest such that the testimony of a former employee, who obtained the Information while performing official duties, should not be admitted. [...]

42. [...] It is trite that the International Tribunal is bound by customary international law, not least because under Article 1 of its Statute it applies international humanitarian law, which consists of both customary and conventional rules [...].

44. The Trial Chamber thus finds that the following considerations are relevant to the determination of the issue at hand: [...]

1. Whether under conventional or customary international law there is a recognition that the ICRC has a confidentiality interest such that it is entitled to non-disclosure of the former employee's testimony

(a) The ICRC's mandate under conventional and customary international law [...]

46. It is widely acknowledged that the ICRC, an independent humanitarian organization, enjoys a special status in international law, based on the mandate conferred upon it by the international community. The Trial Chamber notes that the functions and tasks of the ICRC are directly derived from international law, that is, the Geneva Conventions and Additional Protocols. Another task of the ICRC, under its Statute, is to promote the development, implementation, dissemination and application of international humanitarian law. [...]

50. The specific status and role of the ICRC was also recognised by the General Assembly of the United Nations. "Considering the special role carried on accordingly by the ICRC in international humanitarian relations", the General Assembly granted the ICRC the status of observer to the General Assembly. The Trial Chamber notes that this resolution was sponsored by 131 States and adopted unanimously by the General Assembly. When introducing the resolution on behalf of the co-sponsors, the Permanent Representative of Italy to the United Nations referred to the ICRC in the following terms: "The special role conferred upon the ICRC by the international community and the mandate given to it by the Geneva Conventions make of it an institution unique of its kind and exclusively alone in its status." On the same occasion, the United States representative stated that the "unique mandate of the ICRC sets the Committee apart from the other international humanitarian relief organizations or agencies".

51. The widely acknowledged prestige of the ICRC and its "*autorité morale*" are based on the fact that the ICRC has generally consistently adhered to the basic principles on which it operates to carry out its mandate. The fundamental principles on which the ICRC relies in the performance of its mandate are the principles of humanity, impartiality, neutrality, independence, voluntary service, unity, and universality. Of particular relevance to the issue at hand are the principles of neutrality, impartiality and independence.

52. [...] The three principles of impartiality, neutrality and independence have been described as "derivative principles, whose purpose is to assure the Red Cross of the confidence of all parties, which is indispensable to it". They are derivative in the sense that they do not relate to objectives but to means. Neutrality and impartiality are means enabling the ICRC to carry out its functions. According to these principles, the ICRC may not be involved in any controversy between parties to a conflict.

53. The principle of impartiality calls on the ICRC to perform its functions without taking sides. According to the ICRC, impartiality “does in fact correspond to the very ideal of the Red Cross, which bars it from excluding anyone from its humanitarian concern”. According to the neutrality principle, the ICRC may not take sides in armed conflicts of any kind and ICRC personnel should abstain from any interference, direct or indirect in war operations. The ICRC submits that, to comply with this principle, it must avoid behaving in a way that could be perceived by one of the warring parties, past or present, as adopting a position opposed to it. The principle of neutrality also requires that the ICRC not engage in controversies, in particular of a political, racial or religious nature. Neutrality means that the ICRC treats all on the basis of equality, and as to governments or warring parties, does not judge their policies and legitimacy. The principle of independence calls on the ICRC to conduct its activities freely, and solely on the basis of decisions made by its own organs and according to its own procedures. Accordingly, it cannot depend on any national authority. This guarantees its neutrality. [...]

55. The submissions of both the Prosecution and the ICRC also address the issue of confidentiality. The principle of confidentiality, on which the ICRC relies, refers to its practice not to disclose to third parties information that comes to the knowledge of its personnel in the performance of their functions. The ICRC argues that this principle is a key element on which it needs to rely in order to be able to carry out its mandate. It has been described as a “working tool” or, more generally, as a practice. Confidentiality is directly derived from the principles of neutrality and impartiality. The Trial Chamber notes that it is always referred to in relation to its humanitarian activities. Further, all staff employed by the ICRC undertake to respect the principle of confidentiality. A pledge of discretion is incorporated in every employment contract. [...]

59. A consequence of the fundamental principles of neutrality and impartiality, and of the working principle of confidentiality, is the ICRC’s policy not to permit its staff to testify before courts and, in particular, not to testify against an accused. The ICRC is of the view that any testimony by one of its employees, past or present, concerning information acquired while performing ICRC functions cannot be disclosed without the ICRC’s prior approval.

60. The Trial Chamber accepts the ICRC’s submission that it has had a consistent practice as to the non-testimony of its delegates and employees before courts since the Second World War. [...] Headquarters agreements also contain a provision to this effect. [...]

63. The Prosecution submits that the ICRC has not been consistent in its practice because it has issued public statements in relation to violations of international humanitarian law in specific conflicts. The ICRC rebuts the Prosecution submission, arguing that it only releases public statements when certain conditions are met and, in any case, only when it is convinced that its ability to carry out its mandate would not be prejudiced. The ICRC also submits that its public statements are very general and never mention individuals. The Trial Chamber does not find convincing the argument of the Prosecution that the release of public statements by the ICRC constitutes a departure from its confidentiality policy. On the contrary, it is convinced

that the ICRC's practice not to make public statements about specific acts committed in violation of humanitarian law and attributed to specific persons reflects its fundamental commitment to the principle of neutrality. [...]

(b) The impact of disclosure on the ICRC's ability to carry out its mandate

65. As noted before, in order to carry out its mandate, the ICRC needs to have access to camps, prisons and places of detention, and in order to perform these functions it must have a relationship of trust and confidence with governments or the warring parties. [...] These activities within the protective powers system depend on invitation or acceptance by the detaining power. These authorisations in turn are based on a relationship of trust and confidence established by the ICRC with governments and warring parties. The ICRC also needs to gain the confidence of prisoners visited. [...] The ICRC also submits that admission of the Information would have a prejudicial effect on the safety of its delegates and staff in the field as well as the safety of the victims. [...]

(c) Findings [...]

73. The analysis in the previous section 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. [...]

2. Whether the ICRC's confidentiality interest should be balanced against the interests of justice

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. [...]

3. Whether protective measures could adequately meet the ICRC's confidentiality interest

80. The Trial Chamber's finding that there is a rule of customary international law barring it from admitting the Information necessarily means that the question of the adoption of protective measures does not arise. [...]

IV. Disposition

For the foregoing reasons

Pursuant to Rule 73 of the Rules of Procedure and Evidence of the International Tribunal,

THE TRIAL CHAMBER DECIDES that the evidence of the former employee of the ICRC sought to be presented by the Prosecutor should not be given.

A Separate Opinion of Judge David Hunt is appended to this Decision. [...]

EX PARTE AND CONFIDENTIAL SEPARATE OPINION OF JUDGE DAVID HUNT ON PROSECUTOR'S MOTION FOR A RULING CONCERNING THE TESTIMONY OF A WITNESS [...]

IV. The interests involved

15. I accept that this obligation of confidentiality that the ICRC has to the warring parties – an obligation which has permitted it to carry out that mandate [...].

17. However, the interest of the ICRC in protecting itself against the disclosure that such information had been revealed in evidence is not the only public interest which exists in this matter. There is also a powerful public interest that all relevant evidence must be available to the courts who are to try persons charged with serious violations of international humanitarian law, so that a just result might be obtained in such trials in accordance with law. [...]

V. Is the ICRC's protection against disclosure absolute ?

19. [...] The joint decision of Judge Robinson and Judge Bennouna (to which I shall refer as the "joint decision") has, however, accepted that the ICRC is afforded an absolute protection against the disclosure of such evidence by customary international law. [...]

22. It has not been suggested by the ICRC that the absolute nature of its protection against disclosure has been *expressly* accepted as having become part of customary international law. At most, it is said only that it has been *tacitly* recognised. But has it? Has the acceptance by the States to which the ICRC refers been that its protection should be treated as absolute by everyone, including the international criminal courts, or merely that the States themselves will support the absolute nature of the ICRC's protection so far as they are able to

give effect to it – for example, by entering into agreements to provide an immunity in their own national courts? It is only if the former is the case that there would be a customary international law which binds this Tribunal.

23. [...] The joint decision has referred to Headquarters Agreements between the States and the ICRC to the effect that its employees enjoy immunity from giving evidence in national courts. Whilst such clauses may constitute *opinio juris* and State practice for the purposes of finding a customary rule that the ICRC's protection before national courts is an absolute one, I am not persuaded that such a rule includes *international* criminal courts whose task it is to try serious violations of international humanitarian law, including grave breaches of those same Geneva Conventions. [...] To my mind, it is an enormous step to assume that the 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 of a century later), or that they have contemplated the existence of such an immunity since in such courts. For these reasons, I am not persuaded that the answer is supplied by customary international law. [...]

28. I have considered the submissions of the ICRC with care, and (I confess) with sympathy, but I am not presently persuaded by its arguments, or by the joint decision, that its protection against disclosure is the absolute one which it asserts. Two situations will suffice to demonstrate why, in my view, it may well be necessary in the rare case that the courts (or at least the international criminal courts) should have the final say.

29. The first situation is where the evidence of an official or employee of the ICRC is vital to establish the innocence of the accused person. Is the accused to be found guilty and sentenced to a substantial term of imprisonment in order to ensure the ICRC's protection against the risk of disclosure? [...]

31. The second situation where, in my view, it may be necessary that the courts should have the final say is where the evidence of an official or employee of the ICRC is vital to establish the guilt of the particular accused in a trial of transcendental importance. The policy of the ICRC would inevitably exclude its consent to such evidence being given.

32. I do not suggest that the international criminal courts would necessarily permit the evidence of an ICRC official or employee to be given in either of those two situations. The peculiar circumstances of individual cases are so various that no such forecast could properly be made. Nor would I restrict the situations in which a balancing exercise should be carried out by the courts to those two which I have mentioned. It is impossible to foresee every situation which may arise. That is why guidelines such as those that have been laid down by the ICRC are an inadequate substitute for the balancing exercise which would be carried out by such a court. In every case, the court would weigh the competing interests – the importance of the evidence in the particular trial and the risk that the fact that the evidence has been given by an official or employee of the ICRC would be disclosed – to determine on which side the balance lies. But I emphasise that it would necessarily be rare that the evidence would be of such importance as to outweigh the ICRC's protection

against disclosure. [...]

VI. The balancing exercise

41. In my opinion, the balance in this case lies clearly in favour of the ICRC. I would therefore not permit the evidence to be given whether or not the ICRC's protection against disclosure is absolute.

VII. Disposition

42. The joint decision gives a ruling that "the evidence of the former employee of the ICRC sought to be presented by the Prosecutor should not be given". I am assured that such a ruling is intended to be limited to the evidence which the prosecution seeks to call from this particular witness – a limitation which is confirmed elsewhere in the joint decision – and that it is not intended to reflect the reasoning of the joint decision itself, that no evidence could ever be given by former officials of the ICRC where the facts came to their knowledge by virtue of their employment.

43. Upon that basis, I agree with that ruling.

B. ICC, Rules of Procedure and Evidence, Rule 73

[Source: ICC-ASP/1/3 (Part II-A), adopted on 09/09/2002; available on <http://www.icc-cpi.int>]

Rule 73

Privileged communications and information [...]

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.

Discussion

1. a. Why are confidentiality and the refusal to testify so important in the eyes of the ICRC? Is it not generally more effective to condemn publicly all violations of IHL committed in an armed conflict? Other organizations use the method of condemnation: what are the differences between the ICRC and those organizations? In terms of mandate, legal status, effectiveness? Can it be said that they compete with each other, or are their roles complementary?
b. Is confidentiality a principle like neutrality, impartiality or independence? Does it necessarily follow from those principles? Would an organization necessarily violate its neutrality or impartiality by allowing its staff to testify before international criminal tribunals?
2. a. What value does the case-law of international criminal tribunals have in international law? What is a customary rule of international law? On what grounds does the Chamber conclude that the ICRC's right to non-disclosure is based on customary law? Does the fact that immunity was granted in headquarters agreements help to make this immunity a customary rule? How can the ICRC contribute towards the formation of customary rules? With respect to IHL? With respect to its immunity? Can its practice constitute the objective element of the custom? The *opinio juris*? Or can the ICRC's practice only contribute towards the emergence of these elements in States?
b. Does the ICTY Trial Chamber infer the ICRC's absolute immunity from the customary law resulting from real practice and the *opinio juris* of States? Or from an interpretation of treaty-based rules? Does it find that the immunity results from practice, or that it is implicit in the mandate given by the States to the ICRC?
3. Don't the interests of justice take precedence over this principle of non-disclosure? Although it did not happen in this case, how would it be if the testimony of an ICRC delegate enabled judges to amend or reverse their decision? What would the direct or indirect consequences be, for the ICRC's field operations and its access to war victims, of an ICRC delegate's testimony involving the disclosure of confidential information?
4. Does the fact that the ICC's Rules of Procedure and Evidence incorporate this privilege granted to the ICRC confirm its customary nature?
5. Compare the immunity granted to the ICRC as set out by the ICTY and by the ICC's Rules of Procedure and Evidence. Do the exceptions provided for in Rule 73 of the latter contradict the theory of absolute immunity put forward by the ICTY?