MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY

UNITED STATES OF AMERICA **v.** **KHALID SHAIKH MOHAMMAD,** **WALID MUHAMMAD SALIH** **MUBARAK BIN 'ATTASH,** **RAMZI BINALSHIBH,** **ALI ABDUL AZIZ ALI,** **MUSTAFA AHMED AL HAWSAWI**	**Motion of the** **International Committee of the Red Cross** For Leave to Intervene in Opposition to Defense Motion to Compel Production of Confidential ICRC Communications (AE108C) and for Protective Order Denying Request for Production of Confidential ICRC Materials April 4, 2013

1. **Timeliness.** There is no established timeframe for the filing of this motion.

2. **Relief Sought.** The International Committee of the Red Cross ("ICRC") moves for leave to intervene in opposition to the Defense motion to compel discovery of confidential materials in the Government's possession that were generated in the course of the ICRC's activities (AE108C). The ICRC further moves for a protective order denying the Defense request for discovery of these confidential ICRC materials and protecting confidential ICRC materials from future disclosure.

3. **Introduction and Overview.** Confidential materials in the Government's possession that were generated in the course of the ICRC's activities are privileged under well-established principles of customary international law. This absolute right to non-disclosure of the ICRC's confidential information, including the right not to be compelled to testify in judicial proceedings, has been recognized consistently by international tribunals and by the international community, which widely abides by the ICRC's privilege.

Customary international law is itself a part of federal common law incorporated into Mil. Comm. R. Evid. 501. Moreover, regardless of the application of Mil. Comm. R. Evid. 501, the military judge has authority upon a "sufficient showing" under R.M.C. 701(l)(2) to issue a protective order denying or restricting discovery. The military judge should exercise this authority to prevent a violation of the ICRC's privileges and immunities under international law.

By filing this motion, the ICRC takes no position in this matter as to whether this Commission itself complies with international law. Nor does the ICRC take any position on the right of Defense counsel to obtain certain visitation conditions originally sought by the Defense in AE108. But this Commission cannot lawfully compel or authorize the production or disclosure of the ICRC's confidential information in the Government's possession. The ICRC therefore requests leave to intervene for the limited purpose of asserting its non-disclosure privilege and seeking a protective order.

4. Burden of Proof. As the moving party and as the party asserting a privilege, the ICRC bears the burden of proof. *See* R.M.C. 905(c)(2)(A); *United States v. Legal Services of New York City*, 249 F.3d 1077, 1081 (D.C. Cir. 2001).

5. Statement of Facts.

The ICRC has been visiting detainees in Guantanamo since 2002, and these visits continue to occur on a regular basis today. The ICRC maintains a confidential dialogue with the government about the conditions of detention in Guantanamo, and it also engages in confidential private interviews with detainees.

The Defense filed its motion on January 8, 2013, to compel the Government to produce:

> all correspondence between the [ICRC] and the Department of Defense regarding the conditions of the Accuseds' confinement at Guantanamo, to include copies of any and all ICRC reports and recommendations, memoranda, electronic mail or any other records of communications or

> meetings that may have been generated between the Department of Defense and the ICRC regarding the Accuseds' past and present conditions of confinement.

See AE108C, at 1. The Government responded on January 22, 2013, and this Commission heard oral argument on January 29, 2013. The Commission granted the Government additional time to respond to the Defense motion, and subsequently held the Defense motion in abeyance pending the Government's response. AE108J, at 5 (Feb. 19, 2013). The Commission ordered, "[i]f the discovery is not provided to the Defense, the supplement to the motion will be argued at a future session of the Commission." *Id.*

In a series of telephone conversations with Government counsel beginning on February 7, 2013, and by letter to all parties on March 7, 2013, the ICRC, through counsel, objected to any production, disclosure, or use in evidence or in argument of confidential materials in the Government's possession generated in the course of the ICRC's activities. The ICRC files this motion for the limited purposes of asserting its privilege under Mil. Comm. R. Evid. 501 and customary international law, and seeking a protective order under R.M.C. 701(l)(2) denying the Defense discovery request.

6. Legal Basis for Relief Requested.

A. Confidential ICRC Materials Generated in the Course of the ICRC's Activities Are Privileged Under Customary International Law.

The ICRC is an independent, neutral, and impartial humanitarian organization. Its mandate is to provide protection and assistance to victims of armed conflict and other situations of violence and to work for the faithful application of international humanitarian law. This mandate is provided for in the 1949 Geneva Conventions, the 1977 Additional Protocols thereto, and the Statutes of the International Red Cross and Red Crescent Movement. The ICRC's "unique status as an impartial humanitarian body named in the Geneva Conventions of 1949 and

assisting in their implementation …" is also acknowledged in U.S. law in the International Organizations Immunities Act ("IOIA"), 22 U.S.C. § 288f-3. The ICRC also enjoys permanent observer status with the United Nations General Assembly "in consideration of the special role and mandates conferred upon it by the Geneva Conventions of 12 August 1949" and its "special role … in international humanitarian relations." UN GA res. 45/6 (Oct. 16, 1990).

In the course of long field experience and in furtherance of its mandate, the ICRC has developed and adopted a strict policy of confidentiality with respect to its communications with parties involved in armed conflict and other situations of violence, whether State or non-State. *See* ICRC's 2012 Memorandum on Confidentiality, attached hereto as Attachment B. This policy is reflected in a prominent notice on all confidential ICRC reports:

> This report is strictly confidential and intended only for the Authorities to whom it is presented. It must not be published, in full or in part, without the consent of the International Committee of the Red Cross.

All recipients of ICRC reports, including U.S. authorities, are obligated to protect and abide by the ICRC's confidentiality. In particular, they are precluded from disclosing any confidential information in judicial or other legal proceedings. The policy is crucial to enabling the ICRC to establish and maintain a constructive dialogue aimed at helping the parties to adhere to their obligations under international humanitarian law, and to stop or prevent violations of international humanitarian law when and where they occur. The confidential nature of the communications is essential to the trust that enables the ICRC to work for adherence to humanitarian law by means of concrete recommendations aimed at changing behavior, all while maintaining its position of independence, neutrality, and impartiality.

Confidentiality is also essential for the ICRC to persuade parties to an armed conflict to allow it to exercise its right of access to conflict areas, to civilian populations, to persons in

detention or confinement, and to fighting forces. If parties to a conflict believed that information gathered by the ICRC in theatres of conflict or in places of detention would subsequently be used in court cases, this would jeopardize the ICRC's access to vulnerable persons and populations, imperiling the ICRC's unique humanitarian role under international law.

Confidentiality also serves to protect ICRC staff members in the field, many of whom work in highly dangerous operational contexts. ICRC personnel are unique because they are frequently called upon to move about in conflict and other volatile zones without armed protection, entirely reliant upon the trust that parties place in the ICRC.

For these reasons, it is essential that all parties protect the confidentiality of ICRC communications, both with respect to ICRC-generated confidential documents and recipient-generated documents that refer to confidential information regarding specific ICRC activities.

The ICRC's absolute right to non-disclosure of its confidential information and the concomitant legal obligation on parties involved in armed conflict or other situations of violence not to disclose any confidential ICRC information have been recognized consistently by international tribunals as a matter of customary international law. The most complete explication of the ICRC's non-disclosure privilege comes from the International Criminal Tribunal for the former Yugoslavia ("ICTY"), a tribunal authorized by U.N. Security Council resolution with strong United States support. After a thorough discussion of the interests involved and the long-established practices relating to the ICRC's confidentiality, the ICTY held that states have assumed an obligation under customary international law to protect confidential ICRC information from disclosure, and in particular in judicial proceedings:

> [T]he 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.
>
> The ratification of the Geneva Conventions by 188 States [194 States in 2013] 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. ...

Prosecutor v. Simic, Trial Chamber, Case No. IT-95-9, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, at ¶¶ 73-74 (ICTY July 27, 1999) ("*Simic* Decision"), attached hereto as Attachment C.

The court went on to consider whether application of the ICRC's privilege is subject to a balancing test, or whether measures less than exclusion of the evidence would be sufficient. The court determined that the ICRC's privilege is absolute, and not subject to any balancing test or limitation.

> 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.

Id. at ¶ 76. Therefore, the court ruled that protective measures such as determinations of relevance or classification reviews are inappropriate, as admission of ICRC evidence is barred absolutely.

> 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. The use of protective measures proceeds on the basis that the evidence sought is admissible. As admission of the Information is barred by a rule of customary international law, there is no need to address the issue further.

Id. at ¶ 80

The ICTY's holding under customary international law has been upheld by the ICTY Appeals Chamber and by the International Criminal Tribunal for Rwanda ("ICTR"). *See Prosecutor v. Brdjanin*, Appeals Chamber, Case No. IT-99-36, Decision on Interlocutory Appeal, at ¶ 32 (ICTY Dec. 11, 2002) ("[T]he ICRC has a right under customary international law to non-disclosure of information so that its workers cannot be compelled to testify before the International Tribunal"); *Prosecutor v. Muvunyi*, Trial Chamber, Case No. ICTR-2000-55, Reasons for the Chamber's Decision on the Accused's Motion to Exclude Witness TQ, at ¶ 16 (ICTR July 15, 2005) ("[I]nternational law grants the ICRC the exceptional privilege of non-disclosure of information which is in the possession of its employees and which relates to the ICRC's activities, and consequently bars the Chamber from admitting such information ...."). The ICRC is aware of no international tribunal that has refused to recognize the ICRC's non-disclosure privilege.

In light of "the unique role that the Geneva Conventions and their Protocols, other treaties, and customary law confer on the ICRC as the guardian of humanitarian law and its need to operate with an absolute guarantee of confidentiality," the United Nations Preparatory Commission for the International Criminal Court ("ICC") recognized the ICRC's unique non-disclosure privilege with "overwhelming support." Christopher Keith Hall, Current Development: The First Five Sessions of the UN Preparatory Commission for the International Criminal Court, 94 A.J.I.L. 773, 785 (Oct. 2000). The ICRC's privilege is now reflected and incorporated in the Rules of Procedure and Evidence of the ICC, Rule 73:

> 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 [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.

The United States signed but did not ratify the ICC's founding treaty, the Rome Statute of the International Criminal Court. But it was an active participant in the Preparatory Commission that recognized the ICRC's privilege. *See* Hall, Current Development, 94 A.J.I.L. at 775. The Special Tribunal for Lebanon, a tribunal authorized by U.N. Security Council resolution, has recognized the ICRC's privilege in a rule essentially identical to the ICC's Rule 73.4. *See* Special Tribunal of Lebanon Rules of Procedure and Evidence, Rule 164.

Finally, and most recently, the Mechanism for International Criminal Tribunals ("MICT"), established by U.N. Security Council resolution to take over the functions of the ICTR (since July 1, 2012) and the ICTY (starting on July 1, 2013), has also recognized the ICRC's privilege.

> The [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. 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.

MICT Rules of Procedure and Evidence, Rule 10.

This Commission may take judicial notice of "any relevant material or source" when determining "an issue concerning the law of a foreign country, the law of an international forum, or the international law of war." Mil. Comm. R. Evid. 201A(b). The practice of the ICTY and every other international criminal tribunal to have addressed the ICRC's privilege is strong evidence that the privilege is firmly embedded in customary international law.

> [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

The Paquete Habana, 175 U.S. 677, 700 (1900). *See also* Restatement, 3d, of the Foreign Relations Law of the U.S., § 103(2)(a) ("In determining whether a rule has become international law, substantial weight is accorded to … judgments and opinions of international judicial and arbitral tribunals"). U.S. courts routinely rely upon the decisions and statutes of international criminal tribunals like the ICTY, the ICTR, and the ICC as persuasive authority on matters of international law. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 611 n.40 (2006); *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1256 (11th Cir. 2012); *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 676 (7th Cir. 2012); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 31 (D.C. Cir. 2011); *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1290-91 (11th Cir. 2002).

U.S. Government practice is in accord with the unanimous consensus in support of the ICRC's privilege under international law. In *American Civil Liberties Union v. Dep't of Defense*, 04 Civ. 4151 (S.D.N.Y.), for example, the plaintiffs in that case sought disclosure under the Freedom of Information Act of confidential ICRC information in the Government's possession. The Government denied the request on the basis of 10 U.S.C. § 130c, which

exempts sensitive information of foreign governments and international organizations from public disclosure. The Government filed a declaration from Charles A. Allen, Deputy General Counsel (International Affairs) of the Department of Defense ("Allen Declaration"), attached hereto as Attachment D, recognizing that the ICRC's privilege is necessary for the fulfillment of its humanitarian purpose:

> Preserving the confidentiality of ICRC communications is critical to the ability of the ICRC to fulfill its humanitarian role. If the ICRC publicly disclosed the details of detention operations, particularly during the course of an armed conflict, governments likely would restrict or deny altogether ICRC's access to those facilities. Without access, ICRC's humanitarian role could not be discharged effectively.

Allen Declaration at ¶ 7. (Exhibit B to the Allen Declaration is a copy of the DOD's policy then in place for the protection of ICRC reports. An updated version of that policy is at Attachment F to the Government's Response to AE108C.) Accordingly, the Government acknowledged the ICTY's holding in the *Simic* Decision "that all states are bound to ensure non-disclosure of information related to ICRC's conventional roles." *Id.* at ¶ 8 (citing *Simic* Decision). Citing the Government's declaration, the court upheld the Government's claim of exemption. *See American Civil Liberties Union v. Dep't of Defense*, 389 F. Supp. 2d 547, 555 (S.D.N.Y. 2005).

B. This Commission Must Protect the ICRC's Privilege of Non-disclosure.

Military Commission Rule of Evidence 501 allows "any person" to assert a privilege to "[p]revent another from … disclosing any matter or producing any object or writing." Mil. Comm. R. Evid. 501(b)(4). The rule incorporates "[t]he principles of common law generally recognized in the trial of criminal cases in United States district courts pursuant to Rule 501 of the Federal Rules of Evidence, insofar as the application of such principles in trials by military commissions is practicable and not contrary to or inconsistent with chapter 47A of title 10, United States Code, these rules, or this Manual." Mil. Comm. R. Evid. 501(a)(4). Federal Rule

of Evidence 501, in turn, provides that "The common law – as interpreted by United States courts in the light of reason and experience – governs a claim of privilege" unless otherwise provided by the U.S. Constitution, a federal statute, or rules prescribed by the Supreme Court. Fed. R. Evid. 501.

"International law is part of the federal common law, and it should be considered by courts engaging in privilege analysis under FRE 501." Christopher F. Dugan, *Foreign Privileges in U.S. Litigation*, 5 J. Int'l L. & Prac. 33, 44 (1996). It is firmly established and generally recognized in both civil and criminal cases that federal common law includes customary international law. *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004) ("For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations"); *Banco Nacional De Cuba v. Sabbatino*, 376 U.S. 398, 423 (1963) ("United States courts apply international law as a part of our own in appropriate circumstances"); *The Paquete Habana*, 175 U.S. at 700 ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination"); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160 (1820) ("the law of nations ... is part of the common law"); *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (absent an act of Congress, "the Court is bound by the law of nations which is a part of the law of the land"); *Hamdan v. United States*, 696 F.3d 1238, 1250 (D.C. Cir. 2012) ("Customary international law is a kind of common law"); *United States v. Buck*, 690 F. Supp. 1291, 1297 (S.D.N.Y. 1988) ("International law ... is a component of this Nation's domestic law, enforceable in federal courts"). Indeed, the trial of crimes before this Commission is largely based on customary international law (*see Hamdan*, 696 F.3d at 1248), and both the Military Commissions Act and the Manual for Military Commissions contain

numerous references to the law of war, a component of customary international law. *See, e.g.*, 10 U.S.C. § 948d (military commission has jurisdiction to try offenses under the law of war); R.M.C. 203 (same); R.M.C. 1002 (sentences are subject to limitations of the law of war).

U.S. courts are bound to uphold privileges and immunities conferred by customary international law, including in criminal cases. *See, e.g., In re Grand Jury Subpoena*, 218 F. Supp. 2d 544, 553-54 (S.D.N.Y. 2002) ("[C]ourts have long held that foreign governments are entitled to protect their executive deliberations. … International comity dictates that courts in this country give a foreign sovereign the same protection afforded to the executive branch of the United States") (internal quotations omitted); *United States v. Enger*, 472 F. Supp. 490, 504 (D.C.N.J. 1978) ("The United States has long recognized the responsibilities imposed upon individual nations by force of international custom and treats the Law of Nations as the law of the land"). Moreover, the Supreme Court has "long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation. American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state." *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 546 (1987). The D.C. Circuit has also recognized the need for comity, for example, by requiring litigants challenging a production order on the basis of foreign law to seek waivers from foreign authorities. *Montship Lines, Ltd. v. Federal Maritime Board*, 295 F.2d 147, 156 (D.C. Cir. 1961). Accordingly, "a communication privileged where made – for instance, confidential testimony given to a foreign government investigation under assurance of privilege

– is not subject to discovery in a United States court, in the absence of waiver by those entitled to the privilege." Restatement, 3d, Foreign Relations Law of the United States, § 442.

"[A]n international organization is entitled to such privileges and such immunity from the jurisdiction of a member state as are necessary for the fulfillment of the purposes of the organization ..." *Mendaro v. World Bank*, 717 F.2d 610, 615 (D.C. Cir. 1983) (quoting Restatement of the Foreign Relations Law of the United States (Revised) § 464(1) (Tentative Draft No. 4) (1983)); *see also* Restatement, 3d, of the Foreign Relations Law of the United States § 467(1) (same). As noted above, the U.S. Government has acknowledged that "confidentiality of ICRC communications is critical to the ability of the ICRC to fulfill its humanitarian role" (Att. D at ¶ 7). The ICRC is therefore entitled to enforcement of its privilege in U.S. courts. *Mendaro*, 717 F.2d at 615.

The Military Commissions Act and the rules applicable to military commissions "will generally be construed in a manner so as not to violate international law, as we presume that Congress ordinarily seeks to comply with international law when legislating." *United States v. Khadr*, 717 F. Supp. 2d 1215, 1238 (C.M.C.R. 2007) (citing *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)). This principle, known as the *Charming Betsy* canon of statutory construction, is derived from the opinion of Chief Justice John Marshall, "[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Schooner Charming Betsy*, 6 U.S. (2 Cranch) at 118. *See also F. Hoffmann-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155, 164 (2004); *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991) ("[C]ourts will not blind themselves to potential violations of international law where legislative intent is ambiguous"); *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804, 814 (D.C. Cir. 1968) ("[I]t may fairly be inferred, in the absence

of clear showing to the contrary, that Congress did not intend an application that would violate principles of international law"). The rationale for the canon is particularly strong where, as here, a contrary construction would require the United States to breach international law, even against the will of the Executive Branch. Application of the canon "reduces the number of occasions in which the courts, in their interpretation of federal enactments, place the United States in violation of international law contrary to the wishes of the political branches." Curtis A. Bradley, *The* Charming Betsy Canon *and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 Geo. L.J. 479, 525-26 (Jan. 1998). By interpreting statutes and rules so as not to violate international law, the courts avoid interfering with "a delicate field of international relations" absent "the affirmative intention of the Congress clearly expressed." *McCulloch v. Sociedad Nacional De Marineros De Honduras*, 372 U.S. 10, 20 (1963); *Benz v. Compania*, 353 U.S. 138, 147 (1957). If the nation is going to venture into territory forbidden by international law, the courts should not be leading the way. *See* Bradley, *The* Charming Betsy *Canon*, 86 Geo. L.J. at 526.

Applying the *Charming Betsy* canon in this case, the "principles of common law" incorporated in Mil. R. Evid. 501 should be interpreted to include the ICRC's non-disclosure privilege under customary international law. Any order by this military commission compelling or authorizing the production or disclosure of the ICRC's confidential information in the Government's possession would place the United States in violation of international law, a result that neither Congress, in enacting the Military Commissions Act, nor the Secretary of Defense, in promulgating the Military Commission Rules of Evidence, can be deemed to have intended.

C. Regardless of the Application of Mil. Comm. R. Evid. 501, the Commission Should Issue a Protective Order Under R.M.C. 701(l)(2) to Prevent Disclosure in Violation of International Law.

As set forth above, the ICRC's non-disclosure privilege under customary international law is incorporated into Mil. Comm. R. Evid. 501 as a matter of federal common law. But even if Mil. Comm. R. Evid. 501 did not incorporate customary international law as a matter of federal common law, this Commission would still have the authority under R.M.C. 701(l)(2) upon a "sufficient showing" to issue a protective order denying the Defense request for discovery of confidential ICRC information. The rules do not define what showing is "sufficient" to justify a protective order denying discovery, but a showing that compliance with the discovery order would be "unreasonable or oppressive" satisfies the requirement. R.M.C. 703(f)(4)(C). It has been held based on similar language in the Federal Rules of Criminal Procedure that even when documents are not privileged, courts have discretion to protect against unreasonable encroachments upon legitimate expectations of confidentiality. *See In re Grand Jury Proceedings: Subpoenas Duces Tecum*, 827 F.2d 301, 306 (8th Cir. 1987). Here, the ICRC's non-disclosure privilege under customary international law, its 150 years of experience and practice with confidentiality as a humanitarian organization working in armed conflict and other situations of violence, and respect of such confidentiality by States and other parties to armed conflicts or by other actors involved in other situations of violence give it a legitimate expectation of confidentiality that is both extraordinarily strong and extraordinarily important to the public interest. For all of the same reasons that this Court should recognize the ICRC's non-disclosure privilege under Mil. Comm. R. Evid. 501, it would be "unreasonable," to say the least, for this Court to compel the Government to breach its obligations under international law in violation of the ICRC's non-disclosure privilege. *See Societe Nationale Industrielle*

Aerospatiale, 482 U.S. at 546 (requiring courts to consider international comity and interests of foreign states when making discovery orders).

D. Conclusion.

For the foregoing reasons, this Commission should recognize the ICRC's absolute right to non-disclosure of confidential materials in the Government's possession that were generated in the course of the ICRC's activities. The ICRC requests this Commission to grant the ICRC leave to intervene in opposition to the Defense motion to compel discovery of confidential ICRC materials, to deny the Defense motion, and to issue a protective order.

7. **Oral Argument.** The ICRC requests oral argument.

8. **Certification of Conference.** Counsel for the ICRC has conferred with counsel for the parties in this case. The Government has indicated that it does not object to the ICRC's request for leave to intervene, and that it takes no position on the ICRC's request for relief. Counsel for each of the Defense teams that are parties to AE108C have indicated that they do not object to the ICRC's request for leave to intervene, and that they oppose the ICRC's request for relief.

9. **List of Attachments.**

A. Certificate of Service

B. ICRC Memorandum on Confidentiality

C. *Prosecutor v. Simic*, Trial Chamber, Case No. IT-95-9, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, at ¶¶ 73-74 (ICTY July 27, 1999)

D. *American Civil Liberties Union v. Dep't of Defense*, Declaration of Charles A. Allen, Deputy General Counsel (International Affairs) of the Department of Defense, 04 Civ. 4151 (S.D.N.Y. Mar. 25, 2005)

April 4, 2013

Respectfully submitted,
INTERNATIONAL COMMITTEE OF
THE RED CROSS

/s/ Matthew J. MacLean

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ATTACHMENT A

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I certify that on April 4, 2013, I filed the foregoing motion with the Office of Military Commissions Trial Judiciary and caused a copy to be served by e-mail on counsel of record.

/s/ Matthew J. MacLean
Matthew J. MacLean

ATTACHMENT B

ICRC Memorandum on Confidentiality

ICRC

ICRC Memorandum on Confidentiality

Proceedings of a judicial, public inquiry, fact-finding or other similar character in which confidential communications of the International Committee of the Red Cross (ICRC) risk being disclosed raise important issues which are at the heart of the ICRC's mandate under international humanitarian law (IHL), and its operational role in the protection of victims of armed conflict. The purpose of this Memorandum is to, first, provide the broad practical context of confidentiality as the ICRC's working method and, second, to outline the legal sources on which the ICRC's bases its requests that national and other authorities protect the confidentiality of its communications from public disclosure.

The ICRC's operational identity and working method

The ICRC is an independent, neutral and impartial humanitarian organization established in Geneva, Switzerland, in 1863. The principle of independence means that the ICRC conducts its activities freely, solely on the basis of decisions made by its own organs and according to its own procedures. The principle of neutrality requires the ICRC not to take sides in armed conflicts of any kind and not to engage at any time in 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 persons it seeks to help. The three principles mentioned above are among the Fundamental

Principles of the International Red Cross and Red Crescent 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 ICRC's mandate is expressly provided for in the 1949 Geneva Conventions that have been ratified by all States in the world, in the 1977 Additional Protocols thereto, as well as in the Statutes of the International Red Cross and Red Crescent Movement which are, *inter alia*, adopted by States. The ICRC's mandate is to provide protection and assistance to victims of armed conflict and other situations of violence and to work for the faithful application of international humanitarian law. The organization does so primarily by means of its activities in the field: the ICRC currently operates in some 80 countries and deploys over 12.000 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 impartiality, were developed as its 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.

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 findings, based on long field experience, that it is crucial to enabling the organization to establish and maintain a constructive dialogue with parties to an armed conflict, whether State or non-State. The dialogue is aimed at helping the parties to adhere to their obligations under international humanitarian law and to put a stop to, or prevent violations of international humanitarian law when and where they occur. The confidential nature of the ICRC's communications with parties to armed conflicts is thus a specific way of ensuring that violations of humanitarian law are addressed by those responsible as they are happening, rather than only in a later, *ex post facto* manner. 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 humanitarian law by means of concrete recommendations aimed at changing behaviour, particularly when violations of international humanitarian law 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.

Confidentiality is also essential if the ICRC is to persuade the parties to an armed conflict to allow it to exercise its right of 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 in similar proceedings, this would not only jeopardize, but would very likely prevent the organization from being able to gather relevant information and submit allegations of violations to the parties. Lack of guarantees of confidentiality would thus, at best, serve as a major disincentive for parties' cooperation with the ICRC, and, at worst, serve to preclude ICRC access to vulnerable persons and populations, with the effect of increasing their vulnerability and the hardship suffered.

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, which is largely based on the parties' understanding that 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 ICRC. 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 in regard of 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. International jurisprudence, referred to further below, has recognized that the ICRC's privilege of non-disclosure includes the testimonial immunity of ICRC staff.

Given its field-based focus as described above, the ICRC places great reliance on the obligation of the relevant national and other authorities to protect its confidential communications from disclosure. This means, in particular, that ICRC communications cannot be introduced in proceedings of a judicial, public inquiry, fact-finding or other similar character as this could undermine the organization's capacity to carry out its operations. Confidentiality is required both in respect of ICRC-generated documents, as well as those issued by the relevant national authority (recipient) or any other third party and referring to confidential information originating within or from the ICRC.

Sources of legal protection of ICRC confidentiality

The ICRC's unique mandate and role, as well as its working method, have been accepted and recognized by international and domestic authorities, including courts. Thus, in 1990, the ICRC was granted permanent observer status with the United Nations General Assembly. The relevant resolution, which was unanimously adopted, is entitled: "Observer status for the ICRC, in consideration of the special role and mandates conferred upon it by the Geneva Conventions of 12 August 1949". The title indicates that the General Assembly was aware of the unusual nature of the resolution, which was the first and still is the only resolution to confer observer status on an international organization not of an inter-State character. In the resolution itself reference is also made to the "special role carried on ...by the ICRC in international humanitarian relations". (UN GA res. 45/6 of 16 October 1990.)

The Yugoslavia Tribunal and subsequent international case-law

As regards courts, the unique role of the ICRC and of confidentiality as its working method have been recognized by the *ad hoc* International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda as well as, indirectly, by the Special Court for Sierra Leone. The ICRC's claim to confidentiality was first upheld in a decision of the International Criminal Tribunal for the former Yugoslavia (ICTY) involving a case in which the Prosecutor intended to call a former ICRC employee to testify. (See *Prosecutor v Simic*, 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.) The Tribunal 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. The Trial Chamber found 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" (Emphasis added).

The ICTY also determined that: "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". (As mentioned earlier, the Geneva Conventions have since been ratified by all States.) In reaching the above conclusions, the Court cited the ICRC's unique status and mandate under the doctrines and practices of international humanitarian law, including States' historical recognition of ICRC confidentiality. The Court also cited its conviction, based on

evidence presented, that the success of ICRC's field operations depended on its continued ability to maintain its confidentiality.

The decision was subsequently confirmed by the ICTY Appeals Chamber, as well as by the International Criminal Tribunal for Rwanda (ICTR) and there has been no decision to the contrary. (See, e.g., for the ICTY: *Prosecutor v Brdjanin*, Appeals Chamber, Case No. IT-99-36, Decision on Interlocutory Appeal, 11 December 2002, par. 32; for the 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, par. 14-16). The Special Court for Sierra Leone established in 2002 follows the jurisprudence of the *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda. Pursuant to article 20 (3) of the Special Court's Statute:

> *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.*

International Rules of Procedure and Evidence

The seminal decision handed down by the Yugoslavia Tribunal has since been reflected and incorporated in the Rules of Procedure and Evidence of the International Criminal Court (ICC). Rule 73 of the Rules 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 inter-governmental 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.

The ICRC's confidentiality has been protected in the founding documents of other courts. Thus, the first paragraph of rule 73 of the ICC Rules of Procedure and Evidence has been included *verbatim* in the 2009 Rules of Procedure and Evidence of the Special Tribunal for Lebanon. Pursuant to Rule 164:

The Tribunal shall regard as privileged, and consequently not subject to disclosure, including by way of testimony of 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.

The Rules of Procedure and Evidence of the Mechanism for International Criminal Tribunals (the MICT) adopted on 8 June 2012 provide in rule 10 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. 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.*

The MICT 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.

ICRC Status Agreements

The ICRC's international legal personality has been recognized by both Switzerland, in which ICRC Headquarters are based, as well as by other States that have signed bilateral agreements with the organization or otherwise recognized in their domestic law the ICRC's legal status and granted the ICRC privileges and immunities necessary to fulfill its functions. The ICRC has concluded as much as 100 such status agreements with States in which it has a presence with the aim of ensuring that the necessary conditions for the performance of its mandate are understood and accepted. Moreover, some 13 more status agreements are currently being negotiated. As regards the confidentiality of its work, States recognize it as so important that recent status agreements include a provision to the effect of:

> *The State of (...) 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.*

Obligation of national and other authorities to protect ICRC confidentiality

The decisions of the international tribunals mentioned above, Rule 73 of the International Criminal Court's Rules of Procedure and Evidence and the provisions of the ICRC's status and other agreements all reflect the international community's respect for the confidentiality of the ICRC's communications with the parties to an armed conflict. As outlined above, such respect is recognized as 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, as the case may be: namely, that they are to be seen only by the authorities to whom they are addressed and only for the 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 other 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.

The ICRC hopes that the reasons outlined in this Memo will facilitate understanding of the importance for the ICRC that full respect of its confidentiality be ensured. The ICRC would like to stress that national and international bodies that have sought the views of the ICRC on the matter have accepted the institution's position and fully protected its confidentiality.

Geneva, 2012

ATTACHMENT C

Prosecutor v. Simic (ICTY July 27, 1999)

27 July 1999
D4406-D4378

D4406
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UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No: IT-95-9-PT

Date: 27 July 1999

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Patrick Robinson, Presiding**
Judge David Hunt
Judge Mohamed Bennouna

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Decision of: **27 July 1999**

PROSECUTOR

v.

BLAGOJE SIMIĆ
MILAN SIMIĆ
MIROSLAV TADIĆ
STEVAN TODOROVIĆ
SIMO ZARIĆ

EX PARTE
CONFIDENTIAL

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

The Office of the Prosecutor:

Mr. Grant Niemann
Ms. Nancy Paterson
Mr. Christopher Staker

Counsel for the International Committee of the Red Cross:

Mr. Alun Jones, QC
Mr. Christopher Greenwood, QC

I. INTRODUCTION

Pending before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("the International Tribunal") is an *ex parte* and confidential "Prosecutor's Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness" ("the Motion") filed by the Office of the Prosecutor ("the Prosecution") on 10 February 1999. The Motion seeks a ruling from the Trial Chamber as to whether a former employee of the International Committee of the Red Cross ("ICRC") may be called to give evidence of facts that came to his knowledge by virtue of his employment (hereinafter "the Information"). On the same date an "Application for Leave to Appear as *Amicus Curiae* Under Rule 74 on Behalf of the ICRC" ("the ICRC Application") was filed. The Trial Chamber heard the Prosecution in a closed *ex parte* hearing on the issue of timeliness of the Motion on 9 March 1999, and subsequently issued an "Order granting leave to appear as *amicus curiae* and Scheduling Order" on 16 March 1999. It also sought the views of the Prosecution and the ICRC as to the need for an oral hearing on the issue. In accordance with the Trial Chamber's Order, on 23 March 1999, the Prosecution filed the "Prosecution Submission Concerning the Proposal to Call a Former Employee of the ICRC as a Prosecution Witness" ("the Prosecution Submission").

On 23 March 1999, the ICRC filed an "Application for an Extension of Time Under Rule 127 in which to File Written Submissions on Behalf of the ICRC". On 25 March 1999, the Trial Chamber issued an Order Granting Extension of Time in which to File Written Submissions. The Trial Chamber issued a further Scheduling Order on 1 April 1999.

On 13 April 1999, the ICRC filed its "Submission by the ICRC Concerning the Proposal to Call a Former Employee of the ICRC as a Prosecution Witness" ("ICRC Submission"), with, *inter alia*, the annexed Opinions of Professor James Crawford ("Crawford Opinion") and Professors Jean Salmon and Eric David ("Salmon Opinion"), and affidavits in support of the ICRC position. On 20 April 1999, the Prosecution filed a "Prosecution Response to the Submission of the ICRC Concerning the Proposal to Call a Former Employee of the ICRC as a Prosecution Witness" ("the Prosecution Response"). On 28 April 1999 the ICRC filed a "Request by the ICRC for an Oral Hearing Concerning the Proposal to Call a Former Employee of the ICRC as a Prosecution Witness" ("the ICRC Request for an Oral Hearing"). All of the above filings have been filed on a confidential and *ex parte* basis.

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions of the Prosecution and of the ICRC, and having determined that an oral hearing is not necessary,

HEREBY ISSUES ITS WRITTEN DECISION.

II. SUBMISSIONS

A. The Prosecution

1. The Prosecution submits its Motion on an *ex parte* basis, as it involves the "sensitive issue of whether an employee of the International Committee of the Red Cross (ICRC) may be called as a witness". The Prosecution describes the witness as an eye-witness who, as a former ICRC interpreter, accompanied ICRC staff on visits to places of detention and during exchanges of civilians supervised by the ICRC. The witness was interviewed by the Prosecution's investigators on facts that came to his knowledge by virtue of his employment. The Prosecution emphasises that the witness took the initiative to contact the Prosecution and is willing to give evidence before the International Tribunal. The Prosecution wishes to call the witness and emphasises the importance of calling this particular witness, stating that his testimony is important to prove the guilt of certain of the accused. A brief summary of the types of matters to which the witness could potentially testify was attached as an annex to the Prosecution Submission.

2. The Prosecution acknowledges the general position adopted by the ICRC that its personnel should not be called upon to testify before courts of law because it could impair its ability to perform its humanitarian role in armed conflicts. While acknowledging the ICRC's concerns, the Prosecution does not accept that, as a matter of law, ICRC personnel are entitled to claim any privilege or immunity that would protect them from testifying before the International Tribunal or that the circumstances of this particular witness engage any such claim. The Prosecution therefore proposed that the Trial Chamber hear oral submissions from the Prosecution and solicit the views of the ICRC by inviting it to appear as *amicus curiae* under Rule 74 of the Rules of Procedure and Evidence of the International Tribunal ("the Rules"), prior to determining whether, and under what conditions, the witness may testify.

3. The Prosecution presents more detailed arguments in support of its Motion in the Prosecution Submission. 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[1] 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.

6. As to immunity, the Prosecution submits the following arguments:

- the ICRC does not enjoy immunity from the jurisdiction of international courts as a matter of general international law (such immunity does not flow from the ICRC's functional international legal personality, nor does it have any basis in treaty or customary law); and
- the assertion that an ICRC employee giving evidence in any judicial proceeding would jeopardise the ICRC's ability to carry out its humanitarian mission is not proven.

The Prosecution also notes that the ICRC does make public statements concerning violations of international humanitarian law under certain conditions and that such public statements are difficult to reconcile with its arguments on this point.

[1] 1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field ("Geneva Convention I"); 1949 Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea ("Geneva Convention II"); 1949 Geneva Convention III Relative to the Treatment of Prisoners of War ("Geneva Convention III"); 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War ("Geneva Convention IV").

7. With respect to the privilege argument, the Prosecution contends that witness privileges of this type, which are recognised under national law, are based on narrow and technical rules, whereas the Rules of the International Tribunal are broad and flexible. Where third-party confidentiality interests are to be protected by the International Tribunal, this must be done using a flexible approach so as to allow the evidence to be given whatever protection is appropriate in the particular circumstances, without excluding evidence unnecessarily. In support of its argument, the Prosecution relies, *inter alia,* on the Decision rendered by the Appeals Chamber on the subpoena issue in the *Blaškić* case ("Appeals Chamber Subpoena Decision")[2]. In its view, this case, which addressed the issue of national security claims of a State, should be relied on by analogy to address the issue of third-party confidentiality interests, and a confidentiality claim by the ICRC should be dealt with in the same way. The Prosecution thus concludes that the following procedure should be followed:

(1) it is not for the ICRC to determine unilaterally that a witness should not testify; instead, the ICRC should be required to raise any confidentiality claim before the Trial Chamber;

(2) the Trial Chamber should determine whether the ICRC has a bona fide claim to a legitimate confidentiality interest to which the International Tribunal should have regard and whether the reasons given in respect of that particular witness are persuasive;

(3) if the Trial Chamber finds that such a confidentiality interest exists, it should weigh it against the interest of justice and, in particular, it should balance the confidentiality interest against the need to ensure that all relevant and probative evidence be available to the Trial Chamber;

(4) in the light of that balancing exercise, the Trial Chamber should then decide what measures, such as protective measures, should be adopted to protect that interest.

8. The Prosecution notes that discussions with the ICRC have been held on the issue of the possible testimony of this witness over a period of time but that, ultimately, both sides remained firm on their positions.

B. The ICRC

9. The ICRC opposes the Motion. In the ICRC Application it asserts that the evidence of the proposed witness belongs to the ICRC as it originates from the ICRC's operations. In addition, the

[2] Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-AR 108 *bis*, A.C., 29 Oct. 1997 ("Appeals Chamber Subpoena Decision").

witness signed a pledge of discretion, which remains valid, concerning his activities as an ICRC employee. In the ICRC Submission, the ICRC presents further arguments in support of its opposition, emphasising that these proceedings raise questions of considerable importance. It stresses that it has consistently taken the position that ICRC officials and employees, past and present, may not testify before any court or tribunal on matters which came to their attention in their working capacity. The ICRC submits that this would not only be contrary to its operating principles but would also have disastrous consequences for its operations.

10. The ICRC first notes that it is not contested that the witness would be called to testify about matters which he witnessed in his capacity as an ICRC employee, in particular, visits made by ICRC delegates to prisoner of war and civilian detention centres in Bosanski Šamac and an exchange of prisoners supervised by ICRC delegates. It is also not contested that the witness wishes to testify. However, the ICRC contends that whether or not the evidence can be disclosed cannot depend upon the wishes of a former employee.

11. According to the ICRC, the issues to be addressed are: (a) whether, in the light of the evidence that ICRC testimony regarding its operations would seriously jeopardise its ability to fulfil its mandate, the International Tribunal has the power to require the ICRC to testify or to permit its staff to testify; and (b) may a former employee of the ICRC testify voluntarily, notwithstanding the duty of confidentiality. The ICRC submits that the answer to both questions should be negative. Further, in the ICRC's opinion, there is a clear basis in international law for finding that the testimony of an ICRC employee should not be admitted.

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[3] and the Statute of the ICRC. The ICRC submits that the testimony would jeopardise its ability to discharge its mandate in

[3] 1977 Geneva Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts; 1977 Geneva Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts ("Additional Protocols").

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. This submission is supported by affidavits which, in the ICRC's view, establish that its ability to work effectively for the implementation of international humanitarian law, especially in gaining access to prisoners of war and detainees, is dependent upon establishing a relationship of trust, in particular with the authorities holding those prisoners of war and detainees.

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. The ICRC position is based on its assessment that, if it were perceived that there was any likelihood or possibility that ICRC staff would testify, the warring parties would deny the ICRC access to their facilities. The ICRC notes, however, that this assessment is incapable of complete verification because the ICRC has not given evidence before courts. The ICRC submits that this assertion is supported by the affidavits attached to its Submission. The ICRC also notes that, although ICRC officials were permitted to testify in a very few cases related to the Second World War, the ICRC has consistently refused requests relating to subsequent conflicts.

15. With respect to the Prosecution argument based on the Appeals Chamber Subpoena Decision, the ICRC argues that the issues raised in the present case are not analogous to those considered by the Appeals Chamber in that case. It is the ICRC's submission that the issue at hand does not involve a conflict between the interests of a State and the interests of an international organization charged with the enforcement of international humanitarian law. The ICRC contends that it is also an international body, which has its own separate mandate from the international community to work for the better implementation of international humanitarian law. The mandates of the two institutions, although separate, are complementary and both form part of the international "*ordre publique*". The International Tribunal is thus asked to apply different facets of the same

international interest and not to determine whether that international interest should be limited in response to a claim such as a State national security claim.

16. In response to the Prosecution's comments on ICRC public statements, the ICRC notes that they are of a very general character and are made only in cases of major and repeated violations, as a means to stop an ongoing violation, and when the ICRC is confident that such statements will not prejudice its ability to discharge its mandate.

17. Considering the legal principles governing the relationship between the ICRC and the International Tribunal the ICRC argues that:

(1) the International Tribunal has no jurisdiction over the ICRC;

(2) the ICRC has its own mandate from the international community, separate from but complementary to that of the International Tribunal, which forms part of the law that the International Tribunal is required to respect;

(3) accordingly, the International Tribunal has a duty to respect the principle of confidentiality on which the ICRC operates and not to admit evidence which would involve a violation of that duty.

18. In the alternative, the ICRC submits arguments by analogy based on the doctrine of privilege in common-law systems and of professional secrecy in civil-law systems, although it acknowledges that an international tribunal seeks to apply general principles of law rather than to adopt in its entirety the approach of a particular legal system. In the ICRC's opinion, the rules of national legal systems are not based upon narrow and technical rules, as argued by the Prosecution, but on broad principles. A privilege is recognised by national law because that law considers it important, in the public interest, to develop and protect a particular relationship and recognises that the relationship depends upon trust and confidentiality. The ICRC submits that very similar, if not stronger, considerations apply in the present case.

19. As a further alternative, this time to its primary submission that the evidence of the ICRC witness cannot be admitted, the ICRC further contends that, in the event the International Tribunal determines that it can admit the evidence, it also has a discretion to exclude it. In the ICRC's view, the discretion of a court or tribunal to exclude evidence where there are sufficient reasons of principle and public policy is inherent in the judicial function. 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.

20. Finally, as to the possibility of adopting protective measures, the ICRC submits that such measures would not meet its concerns, as the nature of the evidence would make it clear that it originated from the ICRC. Even if disclosure were limited to the International Tribunal, the mere suggestion that the ICRC had provided evidence to the International Tribunal would be sufficient to cause grave damage to the ability of the ICRC to develop the necessary relationship of trust. The issue is whether the evidence may be disclosed to the International Tribunal and not whether evidence which has been disclosed may be confined within it.

21. The ICRC therefore requests the Trial Chamber to hold that the witness may not testify on matters of which knowledge was acquired in the course of, and in direct execution of, his duties as an employee of the ICRC.

22. In their Opinions attached to the ICRC's Submission, Professors Crawford, Salmon and David addressed, *inter alia,* the following issues: the ICRC's functional international personality, the principles on which it is based, the assertion that the testimony sought belongs to the ICRC and the necessity for the International Tribunal to take into account the ICRC's position in light of the mandate conferred upon it by the international community. Numerous documents in support of the ICRC's arguments are also attached to the ICRC Submission.

C. The Prosecution's arguments in response

23. In its Response, the Prosecution recognises that this is not a question of whether the International Tribunal's interests should prevail over the ICRC's or vice versa, and that the interests of both institutions should be adequately protected. In the Prosecution's opinion, the following issues are not disputed: that it is for the Trial Chamber to determine whether the ICRC has a bona

fide claim to a legitimate confidentiality interest to which the International Tribunal should have regard; that the Trial Chamber could decide to adopt protective measures to protect that interest if found to exist; and that the Trial Chamber may, in extreme cases, of which this is not one, exclude the evidence when there are no other means to protect the confidentiality interest.

24. In the Prosecution's view, there are two main issues of contention. First, it is for the Trial Chamber, and not for the ICRC, to decide whether the witness can appear before the International Tribunal or not. The Prosecution maintains its argument that the ICRC position is wrong in law. The second issue is whether the legitimate concerns of the ICRC can be protected by means other than preventing the witness from testifying, in particular, by permitting the witness to testify with the benefit of protective measures. The Prosecution does not dispute that the ICRC has a form of legal personality under international law nor does it dispute that the ICRC has a mandate recognised by the international community.

25. The Prosecution notes that the ICRC arguments are based on two alternative arguments: one that, under general principles of international law, the International Tribunal is bound to respect the confidentiality of official ICRC information and, two, that the evidence is subject to a doctrine of privilege analogous to privilege under domestic law. The Prosecution contends that there is no international rule which requires that the ICRC gives its consent before one of its former employees be allowed to testify before a court. It submits that this cannot be based on an analogous reasoning based on the law of diplomatic immunities and privileges, or on customary law. Further, the Prosecution submits that the International Tribunal cannot be legally bound to accept the ICRC's assessment and that it would be an abdication of the judicial function for the International Tribunal to accept the ICRC argument as controlling.

26. In response to the ICRC's submissions as to the nature of the relationship between the two institutions, the Prosecution argues that, where there is a conflict between the requirements of the mandates of two different and independent international institutions, neither one has a legal power to require the other to defer to its assessment of how the matter should be resolved. If no agreement can be reached following good faith attempts to do so, the Trial Chamber must make its own assessment of what is appropriate, having due regard to the ICRC mandate. Where the question is whether testimony should be excluded, the Trial Chamber should assess the potential damage to the ICRC on a case by case basis.

27. As to the privilege argument, the Prosecution further submits that there is no broad principle recognised in national systems generally that a doctrine of privilege or confidentiality will necessarily involve an absolute privilege of the kind claimed by the ICRC. The broad principle underlying doctrines of privilege and confidentiality in national law is simply that certain types of confidential communications will be afforded certain types of protections, in the public interest. The Prosecution contends that its approach is consistent with this principle.

28. Discussing the three requirements which the ICRC proposes should be taken into account in balancing the competing interests, the Prosecution argues that they should not each be treated as essential requirements and should be balanced against each other. Other factors such as the rights of the accused also need to be considered. The Prosecution reiterates that the evidence should only be excluded in the most extreme cases and that it is necessary to weigh the risk to the ICRC against the gravity of the offence and the importance of the evidence.

29. With respect to the importance of the evidence, the Prosecution submits that the Trial Chamber should rely on the assurances of the Prosecution that it regards this witness as very important to its case. The Prosecution contends that it would be inappropriate to provide the Trial Chamber with the witness' statement at this stage of the proceedings so as to respect the rights of the accused should the witness not be called. The gravity of the offences can be judged from the indictment in this matter.

30. Lastly, the Prosecution submits that appropriate protective measures adopted by the International Tribunal would prevent the fact that an ICRC employee has testified from becoming known outside the International Tribunal and thus prevent any prejudice to its work. The Prosecution details seven practical measures that could, in its view, address this concern. The Prosecution argues that if appropriate orders were made, the degree of risk to the ICRC would be minimal and could not outweigh the interests of justice in ensuring that this evidence be considered by the Trial Chamber.

31. The specific relief requested by the Prosecution is:

(1) that the Prosecution be permitted to call the witness, subject to such protective measures as the Trial Chamber may order at a future time;

(2) that the Prosecution and the ICRC should continue to consult with each other with a view to reaching agreement on the appropriate protective measures;

(3) that in the event of such agreement, the Prosecution should file an application for protective measures on which the Trial Chamber will rule;

(4) that, in the event that agreement cannot be reached between the Prosecution and the ICRC by a specified date, the Prosecution should so advise the Trial Chamber and the Trial Chamber will then determine whether it will order any protective measures for the witness *proprio motu;*

(5) in the meantime, the Prosecution shall not be required to disclose details of this witness or his statement to the Defence.

D. The Request for a Hearing

32. The Prosecution originally requested oral arguments on this matter. However, in the Prosecution Response, the Prosecution concludes that oral argument on this issue is not necessary and asks the Trial Chamber to rule on the basis of the written submissions. The ICRC then filed the ICRC Request for an Oral Hearing, emphasising the importance of the issues involved and the danger said to be posed to the ICRC by an adverse decision of the Trial Chamber. The ICRC also noted that, if the Trial Chamber were to determine that the admissibility of such evidence should be decided on a case by case basis, balancing the importance of the evidence against the likely threat to the ICRC, then the ICRC had not yet been able to address the Trial Chamber fully on this.

33. In view of the detailed written submissions and supporting material, and in light of the findings set out herein, the Trial Chamber finds it unnecessary to hear oral argument on the Motion.

III. DISCUSSION

34. At the outset, the Trial Chamber states that it considers the issue at stake to be of special significance, in particular in view of the Prosecution's submission that the Information is important to establish the guilt of certain of the accused, and of the ICRC's claim that the very exercise of its mandate would be impaired if the Information were to be admitted. The Trial Chamber notes that the issue of the admissibility of the testimony of a witness can involve the interests of third parties and, if such interests exist, due account should be taken of them[4]. In view of this, the Trial Chamber deemed it particularly important to afford the ICRC an opportunity to present its views as *amicus curiae*.

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

35. The Trial Chamber first notes that the Prosecution and the ICRC agree that the following issues are not disputed:

- the Information came to the knowledge of the potential witness by virtue of his work for the ICRC as an interpreter, while he accompanied ICRC delegates during their visits to detention sites in places relevant to the indictment, and during an exchange of civilians under ICRC supervision;
- the potential witness is willing to testify; and
- the ICRC has an international legal personality, and its mandate was conferred upon it by the international community. However, the Prosecution and the ICRC disagree as to the consequences that flow from the ICRC's status.

36. The Trial Chamber will briefly address the first issue on which there is agreement between the Prosecution and the ICRC, i.e., the origin of the Information, as it finds it necessary to assess the significance to the ICRC of the Information. 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

[4] ICRC Submission, *Prosecutor v. Simić*, Case No. IT-95-9-PT, 13 Apr. 1999, ("ICRC Submission"), Crawford Opinion, para.3.

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.

37. In the instant case, it is not disputed that the Information was acquired in the course of official duties, namely during visits to places of detention and while attending an exchange of prisoners supervised by the ICRC. The Trial Chamber notes that, as will be discussed below, these functions are entrusted to the ICRC by the Geneva Conventions and form part of the ICRC's mandate. The proposed witness would not have acquired the Information, had he not worked for the ICRC. The Trial Chamber is of the view that the Information relates directly to the performance of the ICRC's functions under its mandate.

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.

39. The issues raised by the Motion are primarily of an evidential nature, that is to say, they deal with questions relating to the admission of evidence. It is the contention of the ICRC that it has a right to the non-disclosure of the Information. The Prosecution, on the other hand, argues against that contention.

40. It is convenient therefore to examine the Rules in order to determine the extent to which they contain provisions that would affect the admission of the Information. In general terms, the Rules establish a regime for the admission of evidence which is wide and liberal. The Prosecution, in its submissions advocating the admission of the evidence, has stressed the wide powers of the Trial Chamber in admitting evidence[5]. Thus Rule 89 (C) provides for the admission of any

[5] Prosecution Submission, *Prosecutor v. Simić,* Case No. IT-95-9-PT, 23 Mar. 1999, ("Prosecution Submission"), para. 32.

evidence which is relevant and probative[6], and for that reason the jurisprudence of the International Tribunal has clearly established the admissibility of evidence that in other jurisdictions might not be admissible, as being outside the personal knowledge of the witness (hearsay), and leaves it for the Trial Chamber to determine the weight to be accorded to it[7].

41. Notwithstanding the latitude of the discretionary power vested in a Chamber under Rule 89 (C) to admit any evidence that is relevant and probative, that discretion is not limitless, and indeed the Rules themselves place several limitations on the discretion. Thus Rule 89 (D) provides for the power to exclude evidence "if its probative value is substantially outweighed by the need to ensure a fair trial". Another example of a qualification on the discretionary power in Rule 89(C) is the provision in Rule 95 which proscribes the admission of evidence "if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings".

42. Quite apart from the provisions in the Rules themselves which affect the proper exercise of the discretionary power in Rule 89 (C), there is another situation in which the exercise of that discretion may be affected on a basis that has not been expressly provided for in the Rules. 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, and its jurisprudence is entirely consistent with that approach. It follows, therefore, that the International Tribunal's Rules may be affected by customary international law, and that there may be instances where the discretionary power to admit any relevant evidence with probative value may not be exercised where the admission of such evidence is prohibited by a rule of customary international law. A relevant area of enquiry in the instant case must therefore be the impact of customary international law on the admission of the Information.

43. Before embarking on that enquiry, it is as well to determine first whether, apart from the general provision in Rule 89 (C), there are any provisions in the Rules that specifically address the question of the admissibility of the Information. The only provision in the Rules that may be considered relevant to this question is the provision in Rule 97 for the treatment of communications

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[6] Rule 89 (C) provides: "A Chamber may admit any relevant evidence which it deems to have probative value."

[7] Decision on the Defence Motion on Hearsay, *Prosecutor v. Tadić*, Case No. IT-94-1-T, T. Ch. II, 5 Aug. 1996; Decision on Prosecutor's Appeal on Admissibility of Evidence, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR73, A. C., 16 Feb. 1999, finding that the transcript of proceedings from another Chamber was admissible as hearsay, and Dissenting Opinion in the same case that argued against the admission of the transcript of proceedings on the grounds, *inter alia*, that its admission was inconsistent with the general scheme for the admission of evidence established by the Rules, and that it conflicted with the *lex specialis* of Rule 94 *bis* on the testimony of expert witnesses.

between lawyer and client as privileged in certain circumstances[8]. Rule 97 does not address the questions raised as to the admissibility of the Information and, there being no provision in the Rules dealing specifically with this question, the enquiry must be broadened to ascertain whether there is a rule of customary international law that impacts on its admissibility.

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 that would entitle it to prevent disclosure of the Information;

(2) if the Trial Chamber determines that the ICRC has such a right under international law, whether this interest should be balanced against the interests of justice, on a case by case basis, having regard in particular to the importance of the Information to the Prosecution's case;

(3) if the Trial Chamber finds that the ICRC has a relevant confidentiality interest in the Information, whether protective measures could adequately protect this interest and meet the ICRC's concern.

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

45. The ICRC presents arguments which are essentially based on the mandate entrusted to it by international law under the Geneva Conventions and Additional Protocols and on the principles derived from it, on which it operates, in particular the principles of neutrality and impartiality. The Prosecution submits that there is no rule of international law which requires ICRC consent before the Information may be admitted.

[8] Rule 97 (Lawyer-Client Privilege) states: "All communications between lawyer and client shall be regarded as privileged, and consequently not subject to disclosure at trial, unless: (i) the client consents to such disclosure; or (ii) the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure."

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[9]. 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.

47. The fundamental task of the ICRC to protect and assist the victims of armed conflicts is provided for in the following provisions of the Geneva Conventions and Additional Protocols: Article 9 of Geneva Conventions I, II, and III, and Article 10 of Geneva Convention IV provide for the humanitarian activities of the ICRC[10]. Article 81, paragraph 1, of Additional Protocol I[11] expands on this provision. Article 10, paragraph 3, of Geneva Conventions I, II and III, and Article 11, paragraph 3, of Geneva Convention IV spell out the ICRC's right to substitute for the Protecting Powers[12]. The system for the supervision of the internment of prisoners of war and civilians is established in Articles 126 and 143 respectively of Geneva Conventions III and IV[13]. Lastly, Article 3 common to the Geneva Conventions provides for the ICRC's right of initiative in non-international armed conflicts[14].

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[9] It is generally acknowledged that the ICRC, although a private organization under Swiss law, has an international legal personality, as agreed by the Prosecution and the ICRC; see also Crawford Opinion, *supra* n. 4, and ICRC Submission, *supra* n. 4, Salmon Opinion.

[10] Article 9 of Geneva Convention III reads: "The provisions of the present Convention constitute no obstacle to the humanitarian activities which the ICRC or any other impartial humanitarian organisation may, subject to the consent of the Parties concerned, undertake for the protection of prisoners of war and their relief."

[11] Article 81, entitled Activities of the Red Cross and other, paragraph 1, concerned with humanitarian organizations reads:

1. The Parties to the conflict shall grant to the International Committee of the Red Cross all facilities within their power so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and this Protocol in order to ensure protection and assistance to the victims of conflicts; the International Committee of the Red Cross may also carry out any other humanitarian activities in favour of these victims, subject to the consent of the Parties to the conflict concerned."

[12] Article 10, paragraph 3, of Geneva Convention III reads: "If protection cannot be arranged accordingly, the Detaining Power shall request or shall accept, subject to the provisions of this Article, the offer of the services of a humanitarian organisation, such as the ICRC, to assume the humanitarian functions performed by Protecting Powers under the present Convention."

[13] Article 126 of Geneva Convention III reads: "Representatives or delegates of the Protecting Powers shall have permission to go to all places where prisoners of war may be, particularly to places of internment, imprisonment and labour .... They shall be able to interview the prisoners ... without witnesses .... The delegates of the ICRC shall enjoy the same prerogatives. The appointment of such delegates shall be submitted to the approval of the Power detaining the prisoners of war to be visited."

[14] Common article 3 of the Geneva Conventions reads: "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: An impartial humanitarian body, such as the ICRC, may offer its services to the Parties to the conflict...."

48. As is well known, the Geneva Conventions enjoy nearly universal participation as virtually all States are parties to the four Geneva Conventions[15]. It is also generally accepted that most of their provisions are regarded as declaratory of customary international law. The Trial Chamber is of the view that, by accepting to be bound by the Geneva Conventions, the States party to them have agreed to the special role and mandate of the ICRC.

49. As to the status and role of the ICRC, the Appeals Chamber of the International Tribunal has 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"[16]. In addition, the ICRC was requested by the President of the International Tribunal to inspect the conditions of detention and the treatment of accused persons in detention at the United Nations Detention Unit. In the letter of agreement, 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"[17].

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[18]. 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"[19].

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,

[15] As of March 1999, 188 States are party to the Geneva Conventions.
[16] *Tadić* (1995) I ICTY JR 435, para. 73.
[17] Letter, 28 Apr. 1995, ICTY Basic Documents 1998, p. 381.
[18] G.A. res. 45/6, 16 Oct. 1990, para. 1. In the Crawford Opinion it is noted that the ICRC was the first non-governmental body to be granted permanent observer status, Crawford Opinion, *supra* n. 4, para. 14(h).
[19] ICRC Submission, *supra* n. 4, Gnaedinger Affidavit, attachment F.

unity, and universality[20]. Of particular relevance to the issue at hand are the principles of neutrality, impartiality and independence.

52. These fundamental principles are contained in the Preamble of the Statutes of the International Red Cross and Red Crescent Movement[21] which states that "the Movement should be guided by its Fundamental Principles". 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"[22]. 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"[23]. According to the neutrality principle, the ICRC may not take sides in armed conflicts of any kind[24] 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[25]. 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[26]. 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.

54. Eight examples which, in the ICRC's view, show the practical recognition that States and parties to conflicts give to the ICRC fundamental principles are provided in the affidavit of Angelo Gnaedinger, Delegate General of the ICRC, annexed to the ICRC submission ("the Gnaedinger

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[20] Fundamental Principles of the International Red Cross and Red Crescent Movement proclaimed by the 20th International Conference of the Red Cross, Vienna, 1965, as revised during the 25th International Conference of the Red Cross, Geneva, 1986, contained in the Statutes of the International Red Cross and Red Crescent Movement.
[21] Published in the Handbook of International Red Cross and Red Crescent Movement, 13th ed. 1994.
[22] Pictet J., *The Fundamental Principles of the Red Cross*, Commentary, Henri Dunant Institute, Geneva, (1987) p.48.
[23] *Ibid.*, p.49.
[24] *Ibid.*, p.54.
[25] Salmon Opinion, *supra* n. 9, p.9.
[26] Pictet, *op. cit.*, p.59.

Affidavit") [27]. In the Crawford Opinion, Professor Crawford asserts that the principle of neutrality is widely recognised by States and by the United Nations[28], a view also supported by the Salmon Opinion[29].

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"[30] or, more generally, as a practice. Confidentiality is directly derived from the principles of neutrality and impartiality[31]. The Trial Chamber notes that it is always referred to in relation to its humanitarian activities[32]. Further, all staff employed by the ICRC undertake to respect the principle of confidentiality. A pledge of discretion is incorporated in every employment contract[33].

56. That the ICRC consistently relies on confidentiality to carry out its mandate is also supported by State practice, in relation to agreements between States and the ICRC[34]. It is emphasised in the Gnaedinger Affidavit[35] that confidentiality is of critical importance for the ICRC when negotiating access to detainees and presenting recommendations, and is sometimes a precondition for access. The Gnaedinger Affidavit also provides examples of instances where the ICRC was requested to testify, for example, before commissions of experts and national courts, and no further action was taken after the ICRC explained its position[36].

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[27] Gnaedinger Affidavit, *supra* n. 19, para. 20, pp. 7-9.
[28] Crawford Opinion, *supra* n. 4, para.16.
[29] Salmon Opinion, *supra* n. 9, paras. 9 and 10.
[30] *Ibid.*, para. 9.
[31] According to Professor Salmon, it 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 organisation to carry out its other missions." *Ibid.*, paras. 9 and 10.
[32] *See, for instance,* Article 126 of Geneva Convention III and Article 143 of Geneva Convention IV, *supra,* n.13.
[33] *See* ICRC Submission, *supra* n. 4, affidavit of Werner Hupfer. The Trial Chamber notes that the proposed witness, under the terms of his employment contract, is bound to secrecy. The Trial Chamber does not address the issue of the breach of an employment contract as this specific question is not before it. However the Trial Chamber finds it relevant in assessing the consistency of the conduct of the ICRC as to the protection of the material gathered by its officials or employees in the performance of its mandate.
[34] For example, Article 10, paragraph 3, of the Headquarters Agreement with the Republic of Croatia reads in relation to members of the ICRC delegation: "They shall enjoy immunity from personal arrest or detention and from seizure of their personal baggage, and in respect of words spoken or written and all acts done by them in the discharge of their official duties, immunity from legal process of any kind, even after they have left the service of the delegation. They shall not be called as witnesses." Gnaedinger Affidavit, *supra* n. 19, Attachment O. A similar provision is to be found, for instance, in agreements with Belgium, Kuwait, the Philippines, Switzerland, the Russian Federation, Rwanda and Turkmenistan.
[35] Gnaedinger Affidavit, *supra* n. 19, p.11, citing a specific example.
[36] *Ibid.*, para. 57-60, pp. 20-21.

57. The ICRC's practice as to confidentiality has also been recognised by the International Tribunal itself. In a letter addressed to the President of the ICRC, the former President of the International Tribunal, referring to the forthcoming visit of an ICRC representative to the International Tribunal, wrote "we will not deal with specific cases and, in addition, will fully respect the duty of discretion incumbent upon officials of the ICRC"[37]. Similarly, the Prosecutor has stated: "I understand and appreciate the policy of the ICRC which precludes it from complying fully with some of our requests for information."[38] The Trial Chamber notes, however, that this practice does not exclude any form of cooperation by the ICRC with the International Tribunal[39].

58. The Trial Chamber finds that there has been no effective rebuttal by the Prosecution of the ICRC's submissions as to the general consistency of its practice of confidentiality.

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[40]. The ICRC acknowledges that it permitted evidence from three delegates to be filed before the International Military Tribunal at Nürnberg in 1946, in the form of written responses to questions submitted by the Defence. The ICRC submits that these written depositions did not contain any specific information about the alleged violations committed by the accused. The ICRC emphasises that the decision to disclose the evidence was taken by the ICRC[41]. This practice is incorporated in its Règlement interieur, dated 24 June 1998, which provide: "Should members of honorary members of the ICRC be called upon to testify in connection with legal proceedings – whether as parties to those proceedings, as witnesses or as expert witnesses – regarding facts which have come to their knowledge as a result of their membership of the ICRC, they must seek prior permission from the Assembly to do so."[42] Since that time, however, the ICRC has had a consistent practice of

[37] Letter, 2 Nov. 1995, ICRC Submission, *supra* n. 4, Annex 5, attachment 1.
[38] Letter, 7 Dec. 1995, *ibid.*, attachment 2.
[39] *See, for instance,* letter 12 June 1995, *ibid.*, attachment 3.
[40] Gnaedinger Affidavit, *supra* n. 19, para. 56, p.19.
[41] *Ibid.*, para. 55, p.19.
[42] *Règlement Interieur du CICR du 24 Juin 1998,* Article 6 (unofficial translation).

non-testimony[43]. This practice has been recalled and relied upon on many different occasions by the ICRC[44]. Headquarters agreements also contain a provision to this effect[45].

61. In addition, this practice has been specifically emphasised by the ICRC with respect to international criminal proceedings when submitting comments on the establishment of an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law on the territory of the former Yugoslavia[46]. As to ICRC involvement in war crimes proceedings, the ICRC reiterated that "any participation by the ICRC in war-crimes proceedings involving providing information or giving testimony would ... place the institution's work at serious risk"[47]. The ICRC among others stated that any such participation "would violate the ICRC's pledge of discretion and confidentiality vis à vis both the victims and the parties to conflicts"[48]. No specific reference to a different approach, which in the Trial Chamber's view would have been controversial, was incorporated in the Statute of the International Tribunal.

62. On the same issue, the ICRC reiterated, in a letter addressed to all Red Cross and Red Crescent Societies in 1994, that "any cooperation of this kind might be perceived by one or other of the parties to a conflict as taking a stand against them and might, as a consequence, have detrimental effects on the humanitarian operations, present and future of the Movement ... especially those carried out in conflict zones"[49].

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[50]. The ICRC also submits that its public statements are very general and never mention individuals. The Trial Chamber does not find

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[43] Dissertation by A. Faite, ICRC Submission, *supra* n. 4, Annex IV, p.12.
[44] *See* Gnaedinger Affidavit, *supra* n. 19.
[45] *Ibid.*, Attachment O.
[46] Some Preliminary Remarks by the ICRC on the setting up of an international criminal tribunal for the former Yugoslavia (Security Council Resolution 808 (1993)), reprinted in Morris and Scharf, Insider's Guide to the ICTY, vol. II, pp. 391-398.
[47] *Ibid.*, p. 396.
[48] *Ibid.*
[49] ICRC Submission, *supra* n. 4, Annex 5, attached document 10.
[50] These conditions are detailed in the Gnaedinger Affidavit, *supra* n. 19, at paragraph 39: (1) the ICRC delegates have witnessed the violations with their own eyes, or the existence or extent of those breaches were established by reliable and verifiable sources; (2) the violations were major and repeated; (3) the steps taken confidentially have not succeeded in putting an end to the violations; (4) such publicity is in the interest of the persons or populations affected or threatened.

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.

64. It is the Trial Chamber's opinion that the ICRC's principled position of non-testimony before courts can be regarded as a consequence of the principles which underlie its activities, in particular the principles of neutrality, impartiality and independence. The ICRC argues that its practice of non-testimony before courts is based on the concern that the breach of confidentiality would have the adverse effect of destroying the relationship of confidence on which it operates. While the Trial Chamber cannot embark on an exhaustive factual assessment of the ICRC's claim, it will nonetheless proceed to a general assessment of the ICRC's claim that its ability to carry out its mandate would be jeopardised if the Information were to be admitted.

(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. For instance, in relation to prisoners of war, representatives of the ICRC may visit internees in their camps at any time and talk to them individually and without witnesses. These activities within the protective powers system depend on invitation or acceptance by the detaining power[51]. 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. It is the ICRC's contention that the disclosure of information gathered by its employees while performing official duties would destroy the relationship of trust on which it relies to carry out its mandate. 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. The ICRC's submissions are supported primarily by two affidavits, that of General Sir Rupert Smith and the Gnaedinger Affidavit. The Trial Chamber further notes that these concerns are also expressed in many ICRC documents attached to the ICRC Submission.

[51] However, in resolution 771 of 13 August 1992, the Security Council called on all the parties to the conflict in Bosnia and Herzegovina to grant all responsible international humanitarian organizations, and the ICRC in particular, access to camps, prisons and detention centres in the former Yugoslavia.

66. General Sir Rupert Smith states in his affidavit that, because the ICRC behaves in an impartial and neutral way with all parties to the conflict, "on this basis of trust it is possible for all parties engaged in the conflict to co-operate" with the ICRC. Further: "The essential prerequisite for their impartial, independent and neutral stance is that all are confident in the confidentiality of the information they gain". General Smith provides an example of the role played by the ICRC during the conflict in the former Yugoslavia in the enclave of Zepa in 1995. In his opinion, the ICRC was able to enter an agreement with the Bosnian Serbs regarding the evacuation of civilians because it was seen as an independent organization. General Smith holds the view that these civilians would most likely not have survived in the absence of intervention by the ICRC.

67. The view that the relationship of trust enables the ICRC to gain access to the victims is also expressed in the Gnaedinger Affidavit. It is reiterated that the effectiveness of the ICRC's work depends upon access to the victims and that access is dependent on the will of the parties and on their perception of the ICRC and its working methods. The affidavit provides an overview of the working methods of the ICRC through the example of visits to persons deprived of their liberty and concludes that the receptiveness of a given authority to requests to visit prisoners of war, detainees or civilian internees is heavily dependent on two factors. The first is neutrality and the ability to ensure that only humanitarian considerations are taken into account. The second is independence and the ability to remain outside of political controversies. Confidentiality is essential in reinforcing both these factors. Mr. Gnaedinger emphasised that the ICRC has always insisted on maintaining independence and neutrality even with the United Nations, as a result of which it has been granted access to United Nations personnel in conflict situations, such as Somalia. The affidavit also emphasises the importance of locally recruited staff and their particular vulnerability to reprisals.

68. Mr. Gnaedinger is of the opinion that if national authorities believed that an ICRC employee could testify, "at best, it would be a major disincentive to co-operate, and at worst it would be the rationale for complete denial of access to all victims". He refers to four examples of situations where a suspicion as to the independence and neutrality of the ICRC arose as a result, emphasising the fragile nature of the relationship of trust in those circumstances. Mr. Gnaedinger concludes:

> In fragile situations such as that currently prevailing in the Federal Republic of Yugoslavia where almost all other humanitarian organisations have had to leave and in a highly politicised context, it is crucial that the ICRC perceived as independent and neutral. I have no doubt that being seen as potential witnesses collecting evidence or as investigators, while carrying out humanitarian work under the ICRC

> mandate and using the Red Cross emblem, would destroy the image of neutrality and independence.[52]

69. Nine letters from prominent individuals in the international sphere, stating their personal opinion that the ICRC's ability to carry out its mandate would be jeopardised if it were called to testify before a tribunal, are attached to the Gnaedinger Affidavit. In particular, Mr. Carl Bildt wrote that giving testimony "could be perceived as a breach of its principles and modalities and would affect its effectiveness"[53].

70. The prejudicial impact that a breach of confidentiality would have on the ICRC's activities was also emphasised by the President of the ICRC in a letter addressed to the President of the International Tribunal on 8 April 1994 in the following terms:

> The commitment made by the ICRC to the governments and various warring parties demands that it not allow itself to be required to reveal what its staff have learned in the course of their work, in particular during visits to places of detention. Breaching the confidentiality of its relationship with those entities would most certainly lead to the ICRC being denied access to the victims of the situation concerned and would seriously jeopardise future action.[54]

71. Although, for instance in the case of the conflict in the former Yugoslavia, functions of protecting powers were also carried out by other international organizations or representative, such as the Conference for the Security and Cooperation in Europe, and United Nations Human Rights Commission Special Rapporteur Mazowiecki[55], the ICRC's role still retains a specificity derived from international law and the consistent adherence of the organisation to the principles on which it operates. The Trial Chamber also notes that on many occasions, and in particular in highly politicised situations, the ICRC is the only humanitarian organization granted access.

(c) Findings

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[56]. The functions of the ICRC have been broadly described earlier[57] as those of protecting and assisting victims of armed conflicts by its right to be substituted for a protecting power, its right

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[52] Gnaedinger Affidavit, *supra* n. 19, para. 85.
[53] *Ibid.*, Attachment R.
[54] *Ibid.*, Attachment PQ.
[55] Fleck (ed) Handbook of Humanitarian Law in Armed Conflicts, p.704.
[56] For this reason, the finding by the Trial Chamber that the ICRC has a right to non-disclosure does not "open the floodgates" in respect of other organizations.
[57] *See supra*, para. 47.

to visit places of detention of prisoners of war and to interview prisoners and its right of initiative in conflicts of a non-international character. 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 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[58].

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.

75. The Trial Chamber will now consider the second issue.

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

[58] *See* analysis as to impact of disclosure on ability of ICRC to carry out its mandate, *supra*, paras. 52 - 58.

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.

77. Notwithstanding that position, the Trial Chamber finds it appropriate to deal with some of the arguments raised in the submissions of the Prosecutor and the ICRC.

78. First, the Appeals Chamber Subpoena Decision is not applicable to the instant case, which deals with the relationship between the ICRC and an international institution; that Decision deals with the relationship between the International Tribunal and States under Article 29 of the Statute, which provision does not apply to international organisations.

79. Second, the 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.

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. The use of protective measures proceeds on the basis that the evidence sought is admissible. As admission of the Information is barred by a rule of customary international law, there is no need to address the issue further.

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.

Done in English and French, the English text being authoritative.

Patrick Robinson
Presiding

Dated this twenty-seventh day of July 1999
At The Hague
The Netherlands

[Seal of the Tribunal]

ATTACHMENT D

Declaration of Charles A. Allen (Mar. 25, 2005)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION, CENTER FOR CONSTITUTIONAL RIGHTS, PHYSICIANS FOR HUMAN RIGHTS, VETERANS FOR COMMON SENSE AND VETERANS FOR PEACE,

Plaintiffs,

v.

DEPARTMENT OF DEFENSE, AND ITS COMPONENTS DEPARTMENT OF ARMY, DEPARTMENT OF NAVY, DEPARTMENT OF AIR FORCE, DEFENSE INTELLIGENCE AGENCY; DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF JUSTICE, AND ITS COMPONENTS CIVIL RIGHTS DIVISION, CRIMINAL DIVISION, OFFICE OF INFORMATION AND PRIVACY, OFFICE OF INTELLIGENCE POLICY AND REVIEW, FEDERAL BUREAU OF INVESTIGATION; DEPARTMENT OF STATE; AND CENTRAL INTELLIGENCE AGENCY,

Defendants.

ECF CASE

04 Civ. 4151 (AKH)

DECLARATION OF CHARLES A. ALLEN

CHARLES A. ALLEN, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am the Deputy General Counsel (International Affairs) in the Office of the General Counsel of the Department of Defense ("DoD"). I have served in this capacity since May 22, 2000. In this capacity, I advise the General Counsel and other senior officials of the Department, including the Under Secretary of Defense (Policy) and his staff. The attorneys in my office are responsible for advising on legal matters related to the stationing and activities of U.S. Armed Forces. My duties as Deputy General Counsel have included advising senior DoD officials concerning matters related to the International Committee of the Red Cross (the

"ICRC"). I have participated in meetings and other interactions with various ICRC officials, as have members of my staff. During the relevant time period, my office was involved with ICRC matters in the Office of the Secretary of Defense ("OSD").

2. The statements in this declaration are based upon my personal knowledge and upon my review of information available to me in my official capacity.

The International Committee of the Red Cross

3. I am familiar with the operations, activities and responsibilities of the ICRC under the law of war, including the 1949 Geneva Conventions. The Armed Forces of the United States and DoD have a long-standing relationship with the ICRC because of its role in regard to prisoners of war and other detainees held during armed conflict. The 1949 Geneva Conventions prescribe and recognize express roles for the ICRC, i.e., Articles 9 and 126 of the Third Geneva Convention (Prisoners of War), and Articles 10 and 143 of the Fourth Geneva Convention (Civilians). These roles include accounting for persons protected by the Geneva Conventions through collecting information reported to the ICRC by detaining powers, visiting places where such persons are interned, imprisoned or held pending transfer, privately interviewing such persons, and advising and reporting to governments engaged in hostilities on the condition of prisoners of war and detainees held by the various nations involved. Information about those detained, access to them, and confidentiality during the visits form the cornerstone of the ICRC's role under the Geneva Conventions. The Geneva Conventions also provide for the ICRC to fulfill the humanitarian role of facilitating communications between persons detained and their families. In 2003, ICRC representatives visited more than 460,000 detainees held in more than 1,900 places of detention in some 73 nations. A copy of the ICRC's summary of its role is

provided at Exhibit A. No other entity has the role as recognized by the Geneva Conventions and the degree of access to detention operations of a government as that enjoyed by the ICRC.

4. When ICRC representatives visit a detention facility operated by the United States or the government of another country, ICRC representatives meet directly with government officials at that facility and communicate to them ICRC observations and findings with respect to the detainees and their conditions of detention. ICRC representatives also communicate ICRC views and observations related to armed conflict with DoD officials through written reports, letters, telephone calls, and meetings.

5. Under long-standing practice, communications between the ICRC and governments regarding the ICRC's observations and findings as to detainees are conducted on a confidential basis in order to enable the ICRC to ensure its continued access and thereby conduct its missions effectively.

6. Congress has recognized the ICRC's unique status as an impartial humanitarian body named in the Geneva Conventions of 1949 that assists in their implementation. Because of the ICRC's special status, Congress has specifically authorized and the President has designated the ICRC under the International Organizations Immunities Act, 22 U.S.C. § 288f-3, to ensure that the privileges and immunities afforded under that Act are extended to the ICRC and its employees in the same manner, to the same extent, and subject to the same conditions, that they are extended to any public international organization in which the United States participates. See Executive Order No. 12643 of June 23, 1988.

7. Preserving the confidentiality of ICRC communications is critical to the ability of the ICRC to fulfill its humanitarian role. If the ICRC publicly disclosed the details of detention

operations, particularly during the course of an armed conflict, governments likely would restrict or deny altogether ICRC's access to those facilities. Without access, ICRC's humanitarian role could not be discharged effectively.

8. In The Prosecutor v. Simic (Case No. It-95-9-PT) (July 27, 1999), a trial court of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") recognized the unique status of the ICRC under international law and found that the ICRC's effectiveness could be jeopardized if ICRC officials testified before courts, since the ICRC could lose the confidence of governments of warring parties. ICRC confidentiality was found to be a necessary attribute of the ICRC, and the ICTY trial court found that all states are bound to ensure non-disclosure of information related to ICRC's conventional roles.

9. As stated above, detaining powers require such confidentiality to protect the security of their military and detention operations and to protect the lives and safety of their military and security personnel. U.S. Armed Forces personnel and other U.S. persons captured in the course of an armed conflict are direct beneficiaries of the unique access that the ICRC is provided under the law of armed conflict. When U.S. personnel are captured by hostile forces, they know that ICRC representatives will insist on gaining access to them to ensure that they are being treated properly under international law. For example, ICRC representatives gained access to three United States Army personnel who were captured and held as prisoners of war by the former government of Yugoslavia during NATO operations in 1999.

10. Commencing in early 2002, the United States transferred enemy combatants captured abroad to detention facilities at Guantanamo Bay, Cuba ("Guantanamo"). The United States also has detention facilities in Iraq, including a facility at Abu Ghraib, at which persons

captured in Iraq are detained. The ICRC has requested opportunities to visit detainees at Guantanamo and in Iraq, and the United States has granted those requests. I have been informed that during and after such visits, ICRC employees have communicated, orally and in writing, with U.S. officials at Guantanamo and in Iraq regarding ICRC observations and findings.

11. ICRC representatives have met with DoD officials concerning detention operations at Guantanamo and in Iraq. I have attended such meetings with ICRC representatives. DoD does not publicly disclose confidential communications by and with the ICRC, such as communications during meetings that I have attended.

12. Consistent with the ICRC's policy of confidentiality, the ICRC has indicated that it treats as confidential its communications with DoD regarding ICRC observations and findings with respect to detainees and detention facilities, and the ICRC has provided such information to DoD on the condition that the information be treated as confidential. The following statement appears prominently on ICRC reports: "This report is strictly confidential and intended only for the authorities to whom it is presented. It must not be published, in full or in part, without the consent of the International Committee of the Red Cross." Pursuant to ICRC policy, the ICRC has adhered to this policy of confidentiality in connection with its observations and findings regarding detainees at Guantanamo and in Iraq. The ICRC does not comment publicly on the treatment of detainees or on conditions of detention.

13. ICRC communications to DoD have included information pertaining to military operations and have identified by name U.S. military units and personnel, detention facilities, and detainees. The Secretary of Defense has directed that written ICRC communications received by DoD are to be marked as confidential, restricted-use documents, handled as if they were

classified SECRET, and disseminated only to DoD officials who need access to them in the course of their duties and have been authorized to have that access. This directive-type memorandum provided explicit guidance, but it did not change DoD's previous practice of confidential handling of ICRC communications and limiting access to and dissemination of ICRC documents. A copy of the memorandum is provided at Exhibit B.

Plaintiffs' FOIA Requests

14. I am familiar with the requests submitted by plaintiffs under the Freedom of Information Act ("FOIA") seeking records relating to communications between the ICRC and DoD with respect to detainees held at Guantanamo and in Iraq. During the relevant time period, my office retained DoD correspondence with the ICRC and other records of communications with the ICRC. This was the case both as to documents concerning detainees held at Guantanamo and in Iraq, and as to documents concerning detainees held by DoD at facilities located in other areas of the world. The files of the Office of the General Counsel have been searched for documents responsive to plaintiffs' requests, and I understand that my colleague, Associate Deputy General Counsel (Legal Counsel) Stewart Aly, in his capacity as Initial Denial Authority, has denied the request with regard to all responsive documents pursuant to FOIA Exemption 3(B), except as to certain minutes of ICRC meetings from which material subject to FOIA Exemption 3(B) has been redacted. An index of these documents is attached to Mr. Aly's declaration.

15. FOIA Exemption 3(B) permits the withholding of records that are "specifically exempted from disclosure by statute . . . provided that such statute . . . establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C.

§ 552b(3)(B). Documents constituting communications from the ICRC or containing information derived from such communications are exempt from release by statute, specifically 10 U.S.C. § 130c ("Nondisclosure of information: certain sensitive information of foreign governments and international organizations"). The communications and information contained in the responsive documents listed in the index attached to Mr. Aly's declaration meet each of the requirements of 10 U.S.C. § 130c. Such documents contain information provided or produced by or in cooperation with an international organization; that organization is withholding the information from public disclosure; and that information was provided to the United States on the condition that it not be released to the public. ICRC qualifies as an international organization under this statute pursuant to Executive Order 12643, codified in 22 U.S.C. § 288f-3.

16. In order to maintain its neutrality and its continued access to government installations, the ICRC does not release its reports to the public. Release of confidential ICRC reports would impair the ICRC's mission to protect and aid victims of conflict. The United States recognizes and respects the ICRC's need for confidentiality of its communications with all governments because of the unique role of the ICRC under international law, including the Geneva Conventions, and the beneficial contributions that the ICRC has been able to make following these principles. The United States has an interest in protecting ICRC confidentiality to ensure that other governments will allow the ICRC access to Americans held in future conflicts.

I declare under penalty of perjury that the foregoing is true and correct.

Date: Washington, DC
March 25, 2005

Charles A. Allen

CHARLES A. ALLEN

EXHIBIT A

27-02-2004

ICRC visits to persons deprived of their freedom: an internationally mandated task, implemented worldwide

Topics: Why visit prisoners? - The role of the ICRC - Purpose of the visits

Why visit prisoners?

In 2003, the ICRC visited 469'647 prisoners and detainees held in 1'933 places of detention in 73 countries. Of these, 126'922 were followed up individually.

Visiting people deprived of their freedom in connection with conflict is a core protection task of the International Committee of the Red Cross (ICRC).

The principle of the visits is that because people who are taken prisoner or detained during, or as a result of, a conflict, are regarded by their captors as the enemy, they need the intervention of a neutral, independent body to ensure that they are treated humanely and kept in decent conditions, and that they have the possibility of exchanging news with their families.

During the First and Second World Wars, countless numbers of prisoners - whether American, British, French, German or of other nationalities - benefitted from these visits, and from the dispatch of parcels and messages from home. This work continues today, for example through the visits to prisoners of war taken in the conflict between Ethiopia and Eritrea, or in the Western Sahara.

Humanity, impartiality, neutrality....

The point about international humanitarian law - including the Geneva Conventions and all other treaties which protect people during conflict - is that no distinction is made between one side or another; there are no degrees of humane treatment reserved for certain groups according to their supposed merits; no "good or "bad" victims, "worthy" or unworthy": **all prisoners are entitled to humane treatment.**

The role of the ICRC

The ICRC was created almost 140 years ago to deal with the problems of one specific group of war victims: wounded soldiers. But it was not long before the organisation, because of its widely recognised neutrality, was able to compile lists of prisoners taken in the Franco-Prussian war of 1870. The simple fact of transmitting these lists provided immense relief for anxious families back home, and remains at the heart of the ICRC's role in war-time.

Over the years the ICRC increased its activities in this field, and in the revised Geneva Conventions of 1949 was given a clear mandate from the international community to ensure that the detailed rules of the Conventions were applied. Prisoners of war are specifically protected under these rules.

The ICRC also has the recognized right to offer its services to visit another category of people detained during internal conflicts and strife - variously known as "security" or "political" detainees. In an overwhelming number of cases, the ICRC has been able to persuade the warring parties in conflicts around the world to treat these detainees in accordance with the humanitarian principles set out in the Geneva Conventions, which have been adopted by virtually every country in the world.

This principle has enabled the ICRC, as a specifically neutral intermediary in conflicts, to insist on access to prisoners on all sides, whether UN peacekeepers in Bosnia, US soldiers in Yugoslavia, or British soldiers in Iraq, to give but a few examples. And this same principle underlies the ICRC's action in visiting

Taliban and al-Qaida members held by US or Afghan forces - no more, no less.

Experience has shown that respect for basic humanitarian rules in war-time, apart from preventing or at least limiting atrocities, also helps restore trust and eases reconciliation in the post-conflict stage. Non-respect for the rules, on the other hand, can lead to a vicious spiral of cruelty in which there are no winners.

The purpose of the ICRC visits

First, what they do NOT seek to achieve: the liberation of prisoners (other than particular individual cases, on strict medical or other humanitarian grounds).
The standard ICRC procedures, which are made clear with the detaining authorities prior to the visits, include registration of the prisoners; an overview of all facilities used by, or intended for, them; a private talk with any or all of them, to discuss any problems they might have over their treatment or conditions; the provision of standard forms for writing a brief message to their families (which after approval by the detaining authorities will be delivered by the ICRC, insofar as this is possible). If the prisoners agree, their problems are taken up with the authorities immediately, with the aim of trying to solve them.

The reports written by the ICRC after each visit are given to the detaining authorities and are not intended for publication **- the point being that detention problems are best solved through constructive dialogue based on mutual confidence, rather than in the glare of publicity which inevitably carries the risk of politicizing the issues. This is why the ICRC will not comment publicly on such issues as possible problems concerning the transportation of prisoners or their conditions of detention.**

Other documents in this section:
ICRC Activities > Protection > Detention

In other sections:
The ICRC worldwide\Asia and the Pacific\Afghanistan
The ICRC worldwide\The Americas\United States

Back to previous page

 27-02-2004

EXHIBIT B

THE SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

JUL 14 2004

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
COMMANDERS OF THE COMBATANT COMMANDS
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTOR, PROGRAM ANALYSIS AND EVALUATION
DIRECTOR, NET ASSESSMENT
DIRECTOR, FORCE TRANSFORMATION
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Handling of Reports from the International Committee of the Red Cross

Prompt evaluation and transmission of reports from the International Committee of the Red Cross (ICRC) to senior DoD leaders is of the utmost importance. Recognizing that information may be reported at various command levels and in oral or written form, I direct the following actions:

- All ICRC reports received by a military or civilian official of the Department of Defense at any level shall, within 24 hours, be transmitted to the Under Secretary of Defense for Policy (USD(P)) with information copies to the Director, Joint Staff; the Assistant Secretary of Defense for Public Affairs; the General Counsel of DoD; and the DoD Executive Secretary. ICRC reports received by officials within a combatant command area of operation shall also be transmitted simultaneously to the commander of the combatant command.

- The USD(P) shall be responsible for determining the significance of ICRC reports and immediately forwarding those actions of significance to the Secretary of Defense.

- For all ICRC reports, the USD(P) shall, within 72 hours of receipt, develop a course of action, coordinate such actions with the Chairman of the Joint Chiefs of Staff, the pertinent Combatant Commander, the General Counsel of DoD, and, as appropriate,

OSD 10190-04

the Secretaries of the Military Departments, the Assistant Secretaries of Defense for Public Affairs and Legislative Affairs, and other DoD officials. Actions of significance shall be submitted to the Secretary of Defense for approval.

- Combatant Commanders shall provide their assessment of the ICRC reports they receive to the USD(P) through the Director, Joint Staff within 24 hours of receipt.
- To ensure essential information is reported, oral reports shall be summarized in writing. The following information shall be included:
  - Description of the ICRC visit or meeting: Location? When? Has corrective action been initiated if warranted?
  - Identification of specific detainee or enemy prisoner of war reported upon (if applicable).
  - Name of ICRC Representative.
  - Identification of U.S. official who received the report. Also, identify the U.S. official submitting the report.
- All ICRC communications shall be marked with the following statement: "ICRC communications are provided to DoD as confidential, restricted-use documents. As such, they will be safeguarded the same as SECRET NODIS information using classified information channels. Dissemination of ICRC communications outside of DoD is not authorized without the approval of the Secretary or Deputy Secretary of Defense."

These temporary procedures are effective immediately and shall be reviewed in six months with a view to incorporating these changes into pertinent DoD issuances.

At the same time, the USD(P) shall establish an ICRC Interagency Group, consisting of representatives of the Defense and State Departments and the National Security Council Staff, and other appropriate agencies, that will meet, initially monthly, to review ICRC matters, coordinate responses, and ensure that all ICRC matters are appropriately addressed.

Your compliance with the procedures in this memorandum is a matter of DoD policy and is essential to enabling the Department to continue to meet its responsibilities and obligations for the humane care and full accountability for all persons captured or detained during military operations.