

Red Cross: 'Absolute Right To Non-Disclosure'

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The answer was no, concluded the Tribunal in a decision announced last week, after coming up against this interesting and delicate legal question in the case of four Bosnian Serbs accused of alleged crimes in Bosanski Samac (Simic & Others).

The would-be witness was a former translator for the ICRC, who accompanied ICRC staff on visits to detention centres and during its supervised exchanges of civilians, who later took the initiative to contact the Prosecutor and offer to give evidence before the Tribunal.

Believing that his testimony would be important in "confirming the guilt of some of the accused," the Prosecutor asked the permission from the Trial Chamber to summon the witness to the trial.

However, a third party then became involved - the ICRC itself - which gave its view that both past and present Red Cross employees may not testify before courts of law about information gathered while performing their duties in the field. This would, the ICRC argued, affect the ICRC's perceived impartiality and limit its ability to perform its humanitarian role in armed conflicts. The Prosecution acknowledged the ICRC's concerns. But in its submission, it said it did 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 further contended that the Trial Chamber should make its determinations on a case by case basis and should decide that a witness be precluded from testifying only in exceptional circumstances. It suggested that "protective measures" such as giving testimony in closed session, could give "appropriate protection to the ICRC interests".

The Trial Chamber, the Prosecution contended, "should determine whether the ICRC has a bona fide claim to a legitimate confidentiality interest". If it then found that such interest exists, it should then "weigh it against the interest of justice and, in particular (...) balance it against the need to ensure that all relevant and probative evidence be available to the Trial Chamber". But in their decision announced last week, the Trial Chamber III instead accepted the arguments of the ICRC and decided that "the evidence of the former employee of the ICRC sought to be presented by the Prosecutor should not be given".

In coming to their decision, said the Tribunal's statement, "the Trial Chamber noted the principles derived from the mandate entrusted to the ICRC by international law under the Geneva Conventions and Additional Protocols. "In particular, the Trial Chamber focused on three fundamental principles that guide the movement, that is, impartiality, neutrality and independence, and considered 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. "In addition, the Trial Chamber took note of the ratification of the Geneva Conventions by 188 states. As a result, the Trial Chamber came to the conclusion that customary international law provides the ICRC with an absolute right to non-disclosure of information relating to the work of the ICRC in the possession of an ICRC employee.

"Consequently," the statement concluded, "no issue arises as to balancing the ICRC's confidentiality interest against the interest of justice". While supporting the decision of the Trial Chamber, Judge David Hunt stressed in a separate concurring opinion that he accepted it on the condition that this decision does not rule out the possibility of an ICRC employee ever testifying before the Tribunal. The Tribunal's decision emphasised that the ICRC, even though the Trial Chamber had confirmed its right to the protection of information, could not rule out every form of co-operation with the Tribunal.

Focus: International Criminal Tribunal for the former Yugoslavia

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