

Humanitarian organizations and international criminal tribunals, or trying to square the circle

Anne-Marie La Rosa*

Anne-Marie La Rosa is Legal advisor, Advisory Service, Legal Division, ICRC. The author also teaches international criminal law at the University Centre for International Humanitarian Law in Geneva

Abstract

This article looks at the role of humanitarian organizations in the context of judicial procedures in a global environment which was modified by the establishment of international criminal courts. It shows the struggles and tensions that humanitarian organizations face when, on the one hand, they bring assistance and protection to victims of armed conflicts and other situations of violence and, on the other hand, they contribute to the fight against impunity in cases of grave violations of international humanitarian law. The author suggests some elements of an operational framework which should contribute to the achievement of these difficult-to-reconcile objectives.



It is a well-known fact that humanitarian organizations operating in conflict areas to assist and protect the civilian population often learn things that could be used as evidence in international criminal proceedings. Because they work in the field, these organizations are in a position to relate events and may even witness or be direct victims of serious violations of international humanitarian law. They are

* The opinions expressed herein are those of the author and are in no way intended to represent the views of organizations with which she is, or has been, associated.

sometimes the only international presence that the parties to the conflict will allow in sensitive areas, precisely where violations of humanitarian law are most likely to occur. This is not merely speculation; in practice, the prosecutors of international criminal tribunals have had recourse to the voluntary testimony of representatives of humanitarian organizations in various cases. It was, in fact, on the basis of this practice that the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY) sought to have a former employee of the International Committee of the Red Cross (ICRC) testify in 1999. This resulted in an important ruling on the absolute testimonial immunity of the ICRC, which was subsequently included in the constitutive documents of the International Criminal Court (ICC).

With the ICC now becoming operational, the question of the role of humanitarian organizations in international criminal proceedings has particular resonance, extending beyond the limited geographical jurisdiction of ad hoc tribunals. It covers all situations that the ICC might investigate, which are very often those in which humanitarian operations have been, or are being, deployed. In their investigations ICC representatives come into contact with national and international humanitarian players, with representatives of third states, and with international and non-governmental organizations, all working to different ends among the same populations. Some organizations operating in the field are also actively involved in gathering evidence that could be useful to the ICC Prosecutor, making it difficult at times to draw a clear distinction between all the players concerned. Attacks on humanitarian workers just after the ICC issued the first arrest warrants in Uganda would seem to suggest that individuals fearing prosecution by the ICC regard organizations working in the field as auxiliaries in the inquiry, potential informants or key witnesses for the prosecution.¹ They may be tempted to try and get rid of humanitarian organizations, either by directly threatening the safety of their workers or by simply refusing them access to the scenes of their crimes and, consequently, to the populations directly affected by them.

The purpose of this paper is to provide insight into the state of the relationship that has developed between humanitarian organizations and the international criminal tribunals since the latter's establishment. The paper refers to humanitarian organizations as a group, as far as this is possible, although, in practice, the fact that their mandates differ significantly can affect the nature of their relationship with judicial bodies. The paper also seeks to present the legal framework in which this relationship can work and the incentives established to encourage the co-operation of these important players in judicial proceedings. In this connection it examines the relevant provisions of the constitutive documents of the international criminal tribunals and recent developments in related case-law. The second part of the paper focuses on the conditions required to ensure

1 For references to these incidents in the press, see Oxfam International, "Recent killings of aid workers leave hundreds of thousands without help and living in fear in northern Uganda" (press release, 26 October 2005), available at <http://www.oxfam.org/en/news/pressreleases2005/pr051026_uganda> (last visited 5 April 2006).

that the global system for humanitarian action can fulfil the twofold objective of assisting and protecting victims of armed conflict or other forms of violence and of punishing serious violations, when the latter involves co-operation with international criminal tribunals. In this regard, the paper takes a look at the measures that could be adopted with a view to prevention, that is, before judicial co-operation is actually required. This is followed by a review of the different courses of action and arrangements that humanitarian organizations can adopt to minimize the impact of participation in legal proceedings on their operations and those of other organizations, when judicial co-operation is inevitable.

Appraisal of the relationship between humanitarian organizations and international criminal tribunals

The establishment of international criminal tribunals and the fact that humanitarian organizations are seen to possess information that could be used as evidence in international criminal proceedings has forced those organizations to assess the impact of judicial co-operation on their ability to fulfil their mandate. Generally speaking, however, they have not published any policies they may have adopted to establish a framework for such co-operation, although this has not prevented them, in practice, from establishing links with international criminal tribunals. Only the ICRC has felt the need to recall its policy in this regard, including it in the broader framework of its guidelines on action in the event of violations of international humanitarian law.² These guidelines make it clear that the ICRC does not participate in legal proceedings, which means that it does not provide internal or confidential documents or testimony, even when protection is provided. It is, however, prepared to provide to any party that requests them documents that have already been made public, something which has been done on a number of occasions. It is also ready to maintain contacts with judicial bodies on general issues relating to the application or interpretation of international humanitarian law.³ In this way, the ICRC seeks to balance its operational prerogatives and the duty it has to promote international humanitarian law and combat impunity.

Other humanitarian organizations have pushed back the boundaries of co-operation, agreeing to take part in international legal proceedings in different ways. Developments show that the ad hoc international criminal tribunals have adopted the practice of submitting reports produced by humanitarian and human rights organizations as evidence for the prosecution, in some cases without the

2 “Action by the International Committee of the Red Cross in the event of violations of international humanitarian law or of other fundamental rules protecting persons in situations of violence”, *International Review of the Red Cross*, Vol. 87, No. 858, June 2005, pp. 393–400, also available at <<http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList598/7DC331BDCEDA586BC1257060002AB5B0>> (last visited 5 April 2006) (hereinafter Guidelines). An earlier version of these guidelines was published in the *International Review of the Red Cross*, No. 221, March–April 1981, pp. 76–83.

3 Guidelines, p. 398.

author having to testify in court. When referred to in judgments, these reports would appear to have probative value, at least for the purpose of putting specific crimes into context. Some humanitarian organizations have also agreed to testify voluntarily for the prosecution, although it may be that they could have been forced to do so by virtue of the broad coercive powers granted to the ad hoc international criminal tribunals to ensure the co-operation of individuals or entities in a position to provide evidence of violations.

As a general rule the co-operation of humanitarian organizations is carefully circumscribed in negotiations with the party that wants them to give evidence, most often the Prosecutor. Testimony may also be conditional on certain requirements, which are discussed in detail below. The jurisprudence of the two ad hoc international criminal tribunals supplements the applicable legal instruments, specifying the conditions under which protective measures or privileges, whether established in their constitutive documents or not, are granted, and stipulating which organizations may benefit from them.

Legal framework for testimony given by humanitarian organizations and applicable provisions

Three cases are distinguished here: the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), the Special Court for Sierra Leone and the ICC.⁴

The International Criminal Tribunals for the former Yugoslavia and Rwanda

The Statutes of the two ad hoc international criminal tribunals impose an express obligation on states to co-operate with them.⁵ They specifically provide that states must co-operate with the tribunals and comply without undue delay with any request for assistance with the taking of testimony and the production of evidence. The binding force of this obligation derives from the provisions of Chapter VII and Article 25 of the Charter of the United Nations.⁶ States are therefore required to adopt domestic measures establishing a system for the purpose of obtaining, by force if necessary, any evidence requested by the tribunals from natural or legal persons. If they refuse to comply, they can be found in contempt of court.

When humanitarian organizations are approached by the defence or the prosecution and asked to co-operate, they can have recourse to various

4 On this subject see K. Mackintosh, “Note for humanitarian organizations on cooperation with international tribunals”, *International Review of the Red Cross*, Vol. 86, No. 853, March 2004, pp. 131–46.

5 ICTY Statute, Article 29; ICTR Statute, Article 28. This obligation is restated in UN Security Council Resolution 827 (1993), para. 4, concerning the ICTY and in Resolution 955 (1994), para. 2, concerning the ICTR. See also Article 54 of the Rules of Procedure and Evidence (RPE) of the Tribunals.

6 ICTY, *Blaskić*, Appeals Chamber, Case No. IT-95-14, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (29 October 1997), para. 26.

mechanisms established in the texts, particularly if they are required to testify in court, in order to minimize the impact of co-operation on their operations and to keep publicity to a minimum, if they so wish and all the conditions are met. For example, they can provide the prosecution with information but ask it not to disclose the source, even when the evidence is exculpatory and regardless of the intended purpose.⁷ They can also ask for protective measures to be applied, such as non-disclosure of the information to the general public and even the defence,⁸ or request leave to provide evidence in a written statement rather than as oral testimony in court.⁹

Sierra Leone

The conditions established for the Special Court for Sierra Leone are similar to those applying to the two ad hoc international criminal tribunals, except that, in this case, only the state of Sierra Leone is bound by the obligation to co-operate with the Court. In an agreement between Sierra Leone and the United Nations, the government undertakes to co-operate with the Special Court.¹⁰ In keeping with the spirit of this agreement, the implementing legislation provides that any orders issued by the Court shall have the same force or effect as orders issued by domestic courts, which means that recalcitrant witnesses on the territory of Sierra Leone, including people associated with humanitarian organizations, can be compelled to testify before the Court.¹¹ However, it is clear that this power does not extend beyond the borders of Sierra Leone and that there is no similar obligation binding on other states.

International Criminal Court

Unlike the two ad hoc international criminal tribunals, which were established by Security Council resolutions in accordance with Chapter VII of the Charter of the United Nations, the ICC was established on a consensual basis. Furthermore, while the international criminal tribunals have primacy over domestic courts, the ICC is intended to complement them, and all the co-operation mechanisms that have been established are based on this premise. Therefore the binding force of the ICC does not derive from the powers vested in the Security Council by the Charter of the United Nations. However, the

7 RPE of the Tribunals, Rules 68 (amended in 2004) and 70. For an extensive interpretation of this provision, which does not take into account the purpose of disclosure on a confidential basis (for example, for the purpose of generating new evidence), see ICTY, *Milosević*, Appeals Chamber, Case No. IT-02-54, public version of the confidential decision on the interpretation and application of Rule 70 of the RPE of the Tribunals (23 October 2002), paras. 20 and 25.

8 *Ibid.*, Rule 75.

9 *Ibid.*, Rule 92 *bis*.

10 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Article 17 (16 January 2002).

11 The Special Court Agreement, 2002, Ratification Act, 2002, Article 20.

obligation to co-operate remains for both states that are party to the Rome Statute of the ICC and those that are not because they are bound by the provisions of international law in general and international humanitarian law in particular. More specifically, the Rome Statute establishes that states parties have a general obligation to co-operate fully with the ICC in the investigation and prosecution of crimes undertaken by it.¹² It further provides that states must comply with requests by the ICC to provide assistance in facilitating the voluntary appearance of persons as witnesses before the court, which suggests that the ICC itself does not possess the necessary powers to compel a witness to testify.¹³ It is of course possible, however, for domestic implementing legislation to go beyond the requirements of the Statute and establish sanctions for recalcitrant witnesses.

States not party to the Rome Statute are clearly not bound by any obligation to co-operate under treaty law. The possibility established in the Statute for those states to co-operate with the Court¹⁴ fits neatly with their obligation under international humanitarian law to stop grave breaches. It could also be considered that states not party to the Statute that do co-operate are complying with their obligation to take action to put an end to serious violations of international humanitarian law.¹⁵

The constitutive documents of the ICC establish mechanisms similar to those of the ad hoc international criminal tribunals to encourage witnesses to testify or provide evidence. The Prosecutor may agree not to disclose, at any stage of the proceedings, documents or information that were obtained on a confidential basis and solely for the purpose of generating new evidence.¹⁶ Similarly, witnesses may rely on various measures which were established to protect them and which limit the information that is made public.¹⁷ It is expressly provided that any such measures taken by the ICC must be exercised in a manner that is not prejudicial to or inconsistent with the rights of the accused and the standards that ensure a fair and impartial trial and must take into account the needs of all victims, a requirement that is not made for the ad hoc tribunals.¹⁸ In short, humanitarian organizations may take advantage of the confidentiality rule, arguing that the information that they have access to in the course of their work is not subject to disclosure.¹⁹ While only the ICRC is recognized as being covered by professional privilege, which means that any information, documents or other evidence which comes into its possession in the course of the performance of its functions is privileged and therefore not subject to disclosure,

12 Rome Statute, Article 86.

13 *Ibid.*, Article 93(1)(e).

14 *Ibid.*, Article 87(5).

15 Additional Protocol I, Article 89.

16 Rome Statute, Article 54(3)(e), and ICC RPE, Rule 82.

17 Rome Statute, Article 68.

18 *Ibid.*

19 ICC RPE, Rule 73.

the rules do allow other humanitarian organizations to prove that their information is confidential.²⁰

Jurisprudence

Decisions handed down by the two ad hoc international criminal tribunals and the Special Court for Sierra Leone since 1999 have supplemented the ruling issued in the *Simić* case concerning humanitarian workers in general. Some of these decisions consider the provisions described above and stipulate the conditions of application, while others examine the question of recognition of privilege, which would provide protection for humanitarian workers and prevent from them being forced to testify because of the nature of the work they carry out.

The International Committee of the Red Cross: the Simić case

This well-known case raised the question of whether a former ICRC interpreter could testify as a prosecution witness, acting on his own initiative, in a case being tried by the ICTY.²¹ In a decision issued in July 1999, the trial chamber came to the conclusion that the ICRC enjoys an absolute privilege to withhold information and that it therefore cannot be compelled to testify or produce evidence of any kind. The trial chamber added that this privilege is part of international customary law and is binding on the Tribunal.

While recognizing the privilege of non-disclosure, the trial chamber took the precaution of limiting the applicability of the finding in the *Simić* case as a precedent for other humanitarian organizations. It emphasized the *sui generis* status of the ICRC among humanitarian organizations and recognized that it has the international legal personality necessary to carry out the “fundamental task” conferred upon it by the international community in accordance with the relevant provisions of international humanitarian law, namely to “assist and protect the

20 Para. 2 of Rule 73 reads: Having regard to rule 63, sub-rule 5, communications made in the context of a class of professional or other confidential relationships shall be regarded as privileged, and consequently not subject to disclosure, under the same terms as in sub-rules 1 (a) and 1 (b) if a Chamber decides in respect of that class that: a) Communications occurring within that class of relationship are made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure; b) Confidentiality is essential to the nature and type of relationship between the person and the confidant; and c) Recognition of the privilege would further the objectives of the Statute and the Rules. The conditions established in sub-paragraphs (a) and (b) stipulate that disclosure may only be ordered when the interested party consents to such disclosure or when it has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

21 Various authors have discussed this case: G. Rona, “The ICRC privilege not to testify: Confidentiality in action”, available at <<http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList109/C3B5CC5CF93CE974C1256E4E00351893>> (last visited 5 April 2006); S. Jeannot, “Recognition of the ICRC’s long-standing rule of confidentiality”, *International Review of the Red Cross*, No. 838, June 2000, pp. 403–26; S. Jeannot, “Testimony of ICRC delegates before the International Criminal Court”, *International Review of the Red Cross*, Vol. 82, No. 840, December 2000, pp. 993–1000; A.-M. La Rosa, *Juridictions pénales internationales – la procédure et la preuve*, Presses Universitaires de France, Paris, 2003, pp. 157–210.

victims of armed conflicts”.²² It further specified that this evidentiary immunity is largely based on the ICRC’s long-standing practice of working with the parties to a conflict with utmost discretion and confidentiality, an approach based on its consistent adherence to the basic principles governing its activities, particularly impartiality, independence and neutrality. The chamber adds that “the breach of confidentiality [testifying in particular] would have the adverse effect of destroying the relationship of confidence on which [the ICRC] operates”.²³ This distinguishes the ICRC still further from other humanitarian organizations, whose statutes or practice encourage denunciation of the violations that they witness. Another decision of the ICTY concerning a war correspondent, rendered in 2002 by the Appeals Chamber, gives a clearer indication of the measures that the tribunal is prepared to take to accommodate humanitarian actors.

War correspondents: the Brdjanin case

As part of this case the Appeals Chamber heard an appeal concerning a subpoena issued by the trial chamber to compel a war correspondent to testify in connection with an interview he conducted while reporting on the conflict in the former Yugoslavia.²⁴ Specifically, in February 1993 the *Washington Post* carried an article by the appellant, Jonathan Randal, about an individual who was being prosecuted by the ICTY. The article contained statements by the accused which could have indicated his criminal intent to commit some of the crimes with which he was charged. The subpoena was intended to permit the journalist to be questioned in court about the reliability of the statements quoted in his article. It is important to note that this decision did not concern the protection of confidential sources, as the interview had already been published. The issue here was whether a privilege should be recognized for war correspondents, allowing them to refuse to testify in legal proceedings.

The Chamber considered that it needed to address three questions. First, is there a public interest in the work of war correspondents? If there is – and this is the second question – would compelling war correspondents to testify before a tribunal adversely affect their ability to carry out their work and, if so, what test is appropriate to balance the public interest in accommodating the work of war correspondents against the public interest in having all relevant evidence available to the court and, where appropriate, the right of the defendant to challenge the evidence against him? These questions can also be asked, as discussed below, in respect of the protection of the sources of an official working for the Office of the United Nations High Commissioner for Human Rights (UNHCHR) in a case being tried by the Special Court for Sierra Leone.

22 *Simić*, Case No. IT-95-9, Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness (27 July 1999), paras. 47 and 72.

23 *Ibid.*, para. 64.

24 *Brdjanin*, Appeals Chamber, Case No. IT-99-36, Decision on interlocutory appeal (11 December 2002).

On the first two questions, the Chamber found in the affirmative. In its view, war correspondents play a vital role in bringing the horrors and reality of conflict to the attention of the international community.²⁵ It is because their investigative work and reporting enables citizens of the international community to receive vital information from war zones that it is important to protect the ability of war correspondents to carry out their functions and not because they occupy some special professional category. The Appeals Chamber acknowledged that it is impossible to determine with certainty whether and to what extent compelling war correspondents to testify before the ICTY would hamper their ability to work, but was reluctant to discard such a possibility lightly. What really matters is that war correspondents must continue to be perceived as independent observers and not potential witnesses for the prosecution. It therefore considered that

compelling war correspondents to testify before the International Tribunal *on a routine basis* may have a significant impact upon their ability to obtain information and thus their ability to inform the public on issues of general concern. The Appeals Chamber will not unnecessarily hamper the work of professions that perform a public interest.²⁶

In short, before forcing a war correspondent to testify in court, the Chamber considered that the tribunal must weigh the public interest in facilitating the work of war correspondents against the interest of justice in having all relevant evidence put before it for proper assessment. Taking these conditions into account, the Tribunal can only issue a subpoena to a war correspondent if a two-pronged test is satisfied. First, it must be demonstrated that the evidence sought is of direct and important value in determining a core issue in the case and, second, it must demonstrate that the evidence sought cannot reasonably be obtained elsewhere.²⁷

This decision of the ICTY Appeals Chamber has particular resonance, given the authority issuing it, and is binding on the trial chambers.²⁸ Furthermore, it should not be forgotten that the two ad hoc international criminal tribunals share the same appeal judges²⁹ and that the Special Court for Sierra Leone is guided, as established in its constitutive documents, by the findings of their Appeals Chamber.³⁰

United Nations High Commissioner for Human Rights – the Brima case

In this case, which is still in progress, the prosecution appealed against a trial chamber's decision to order a former member of the UN Mission in Sierra Leone

25 Ibid., para. 36. It further observes that "The information uncovered by war correspondents has on more than one occasion provided important leads for the investigators of this Tribunal."

26 Ibid., para. 44 (emphasis added).

27 Ibid., para. 50.

28 On this subject see ICTY, *Aleksovski*, Appeals Chamber, Case No. IT-95-14/1, Judgment (24 March 2000), para. 107. See also ICTR, *Semanza*, Appeals Chamber, Case No. ICTR-97-20, Decision, Separate Opinion of Judge Shahabuddeen (31 May 2000).

29 ICTR Statute, Article 13, para. 4; ICTY Statute, Article 14, para. 4.

30 Statute of the Special Court for Sierra Leone, Article 20, para. 3.

to disclose the names of his sources for information contained in the reports that he produced on the situation in the country during the period relevant to the indictment of the case.³¹ In other words, the Prosecutor is opposed to such an official being compelled by the Court to breach the understanding of confidentiality established with a third party prior to and in order to obtain information relevant to the performance of his functions.³²

The appeal examines the scope of the provisions of the Rules of Procedure and Evidence aimed at protecting the sources of information submitted to the court and raises the question of whether this category of employee can, by reason of the nature of the work they carry out, claim privilege, which would allow them to decline to reveal the identity of their sources. In the past, this question had been resolved by simply not compelling witnesses to disclose such information without the chamber having to rule on whether privilege existed or not.³³ In view of their prominent role in this area, UNHCHR, Amnesty International and Human Rights Watch were granted leave to appear as *amici curiae*.³⁴

While bearing some resemblance to the earlier cases mentioned above, this case differs substantially in various respects. It involves a United Nations official who belongs to the same system as the ad hoc international criminal tribunals and whose primary function is to report human rights violations. In this capacity, the sole purpose of his work is denunciation, and he should be encouraged to testify before the international criminal tribunals – as mentioned by the Chamber – because the purpose of the reports he produces is to gather first-hand information from people who have been witnesses to or victims of violations within the jurisdiction of these tribunals. As some of the people he talks to fear the publicity that their testimony could attract, he usually promises not to reveal their identity. In this case, then, confidentiality is associated with the relationship of trust developed with the people able to provide information and not with the authorities, with which he generally has no contact at all in this respect. He needs to ensure confidentiality in order to establish sufficient credibility to encourage the people he approaches to confide in him. The international criminal tribunals have systematically recognized jurisdictional immunity for such employees, in their capacity as United Nations officials, which requires the chambers to seek a waiver

31 Special Court, *Brima*, Case No. SCSL-04016, Decision on the Prosecution's oral application for leave to be granted to witness TF1-150 to testify without being compelled to answer any questions in cross-examination that the witness declines to answer on grounds of confidentiality pursuant to rule 70 (B) and (D) of the Rules (16 September 2005). See *ibid.*, Dissenting Opinion of Justice Doherty on the Prosecution's oral application for leave to be granted to witness TF1-150 to testify without being compelled to answer any questions in cross-examination that the witness declines to answer on grounds of confidentiality pursuant to rule 70 (B) and (D) of the Rules (22 September 2005).

32 *Ibid.*, Prosecution appeal against decision on oral application for witness TF1-150 to testify without being compelled to answer questions on grounds of confidentiality (19 October 2005), para. 50.

33 ICTY, *Blaskić*, Case No. IT-95-14, Decision of Trial Chamber I on protective measures for General Philippe Morillon, witness of the Trial Chamber (12 May 1999); ICTR, *Bizimungu*, Case No. ICTR-99-50, Decision on Defence motion for exclusion of portions of testimony of expert witness Dr. Alison Des Forges (2 September 2005).

34 Their briefs were filed on 15 and 16 December 2005, and the joint defence response was issued on 17 January 2006.

of immunity from the Secretary-General if they want them to testify in court. The privilege of non-disclosure of sources would then be added to jurisdictional immunity, which in this case had been waived on the condition that he testify in closed session, which had already been allowed.³⁵

In the light of the foregoing, it seems difficult to draw any kind of analogy between this and the *Simić* case, which is concerned with the absolute testimonial immunity of the ICRC and is based on legal considerations that do not apply here. Taking into account the *sui generis* nature, the legal status and the fundamental mission of the ICRC to help victims, which are derived from the fundamental texts of international humanitarian law recognized by the international community as a whole, the principles underlying the organization's activities and the working procedures it employs, the *Simić* case cannot be considered as a precedent to be relied on in this case or in other cases involving other humanitarian actors. The ICRC's hallmark practice of working with the utmost discretion and confidentiality has the objective of establishing the relationship of trust with the authorities and the parties to the conflict upon which the ICRC depends to obtain access to the victims, and therefore to carry out its mandate, and not of gathering evidence for reporting and denunciation purposes, as in the *Brdjanin* case. The *Brdjanin* case could, however, provide some guidance in that it establishes an approach that recognizes the existence of competing public interests, balances them against each other and proposes a solution that ensures that justice is done and that fair trial standards are fully respected. This is, in fact, the view put forward in the dissenting opinion issued by one of the judges.³⁶

Volunteers of National Red Cross and Red Crescent Societies

Two decisions have been issued in connection with two different cases brought before the ICTR concerning volunteers working in the field for national societies in the territory of a third state during a conflict. They raised the question of whether humanitarian workers belonging to institutions that are part of the International Red Cross and Red Crescent Movement, as the ICRC is, are entitled to the same kind of testimonial immunity that the ICRC enjoys when they are involved in international relief operations and, if so, to what extent and under what conditions. In both cases, the defence objected to prosecution witnesses testifying, arguing that it was necessary first to obtain permission from the ICRC, because the principle of testimonial immunity recognized in the *Simić* case applied.

Both decisions recognize the absolute testimonial immunity of the ICRC, which prevents any current or former employee from testifying in a court of law.³⁷

35 It should be noted that this same witness was compelled (but refused) to reveal his sources in the *Norman* case (Case No. SCSL-03-14), in which he testified in closed session.

36 *Brima*, above note 31.

37 ICTR, *Nyiramasuhuko*, Case No. ICTR-97-21, Decision on Ntahobali's extremely urgent motion for inadmissibility of witness TQ's testimony (15 July 2004); *Muvunyi*, Case No. ICTR-2000-55, Reasons for the Chamber's decision on the accused's motion to exclude witness TQ (15 July 2005).

While in the first decision the chamber avoided deciding the question of fact, arguing that neither the ICRC nor the national society in question was opposed to the witness testifying, in the second, it comes to the conclusion that the witness was working for the national society and not the ICRC when he observed the events relevant to the case.³⁸ The chamber further finds that the testimonial privilege of the ICRC does not apply to national societies,³⁹ except in cases in which national society employees are integrated into ICRC teams for a limited period of time.⁴⁰ In such cases, the integration to which the Chamber refers is distinct from international relief operations where the components of the Movement co-ordinate themselves.⁴¹ However, it adds that no evidence has been proffered to establish that national societies could, in certain situations, be entitled to testimonial immunity in their own right, implying that it does not completely rule out the possibility of demonstrating the existence of a form of testimonial immunity for national societies that is not dependent on the immunity granted to the ICRC. However, the conditions and methods of application remain to be defined. In short, while the Chamber considered that it was under no obligation, under international law, to seek the permission of the national society to hear the testimony of the witness, it is nonetheless regrettable that the party intending to call the volunteer as a witness – the prosecution in this case – did not first contact the national society at the appropriate time in order to offer it an opportunity to intervene if it so wished.

Assistance for victims and repression of violations: reconciling the irreconcilable in the global system for humanitarian action?

In the face of the growing complexity of the humanitarian environment, it is legitimate to ask whether it is still possible and workable to pursue the twofold objective of assisting victims and publicly condemning violations in the current humanitarian environment, particularly when the latter involves co-operating with international criminal tribunals working in the same theatre of operations. If humanitarian organizations are associated with judicial bodies in the field, those

38 *Muvunyi*, above note 37, para. 14.

39 More specifically, the Chamber emphasizes: 15. ... the ICRC and national Red Cross societies are entirely different organizations in law and a clear distinction between them needs to be drawn at all times. The [Belgium Red Cross Society] is a *national* organization with a *national* statute and *national* arrangements. It is governed by means of organs set up by its statutes...16. While international 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, it is the Chamber's view that such privilege is *not* granted to national Red Cross societies. The privilege derives from the ICRC's pivotal and unique role in the regime established by the Geneva Conventions and the first Protocol. (citations omitted)

40 *Muvunyi*, above note 37, para. 17.

41 *Ibid.*, para. 16. On this subject, see Agreement on the organization of the international activities of the components of the International Red Cross and Red Crescent Movement ("Seville Agreement"), Council of Delegates, 25–27 November 1997, particularly Articles 5 and 6 (situations where the ICRC undertakes general direction and co-ordination).

individuals who are liable to prosecution are likely to feel threatened and may attempt to neutralize them. They may decide to cease all co-operation, denying or restricting access to victims, without making any distinction between the different organizations operating in the area. Experience has shown that, unfortunately, there are those who will not hesitate to threaten or compromise the safety of the staff of humanitarian organizations, forcing them to leave the area and cease their activities aimed at helping the affected populations. In the resulting climate of tension and hostility, the organizations that are still allowed access to the victims are likely to see the humanitarian dialogue with the parties concerned deteriorate.

This is by no means a plea to standardize the modes of action employed by humanitarian organizations, to favour one working procedure over another or to remain inactive in the face of violations of fundamental rights. The existence of a variety of modes of action seems, in practice, to serve the interests of the victims. The aim, rather, is to focus attention on the formulation of conditions that make for a better understanding of the working procedures of humanitarian organizations by all their contacts and ensure that their policy on co-operation with international criminal tribunals is as consistent and predictable as possible. However, if, in the light of established criteria, a humanitarian organization decides to co-operate with an international criminal court or is compelled to do so, it must be fully aware of the consequences and make use of the mechanisms established in the relevant provisions to minimize the impact of such action on other activities that it carries out and on the global humanitarian environment.

More predictable policy: thinking before the need to co-operate in judicial proceedings arises

Denunciation and persuasion are two courses of action or approaches adopted in response to or in anticipation of violations, with a view to promoting greater respect for international law. Persuasion is used to convince the authorities responsible for unlawful conduct to prevent or put an end to violations of international norms, while public condemnation of violations is used as a means of putting pressure on the authorities or other entities that have committed violations to change their behaviour. These are complementary modes of action used in response to violations, and it is up to each individual organization to assess the situation and choose the approach that will enable it to achieve the best results. For example, the ICRC's preferred mode of action in response to a violation of international humanitarian law committed by a specific party is to make representations within the framework of a bilateral confidential dialogue with that party.⁴² This institutional choice arises from a pragmatic approach based on years

42 With regard to the guidelines mentioned above, this approach is also preferred in other situations of violence in which the ICRC operates. See above, note 1. See also J. Kellenberger, "Speaking out or remaining silent in humanitarian work", *International Review of the Red Cross*, Vol. 86, No. 855, September 2004, pp. 593–609. For an analysis of ICRC working procedures relating to detention, see A. Aeschlimann, "Protection of detainees: ICRC action behind bars", *International Review of the Red Cross*, Vol. 87, No. 857, March 2005, pp. 83–122.

of experience, which has shown that confidentiality enables candid talks to take place with the authorities and entities concerned, avoiding the risk of politicization associated with public debate. This policy also has the long-term objective of achieving a permanent change in behaviour and thereby contributing to a lasting improvement in the situation and, in turn, easing the plight of populations affected by conflicts or situations of violence.

However, in many situations the ICRC works side by side with other organizations, which may be more vocal in speaking out to condemn violations while at the same time pursuing the other component of the twofold objective, that of assisting those affected by violations. It is not a matter of favouring one mode of action over another or of evaluating which is more effective; they should simply be regarded as complementary modes of action that are implemented to deal with violations and that enrich the global system of humanitarian protection and assistance.

The advent of international criminal tribunals with the authority to try people responsible for serious violations of international humanitarian law has undoubtedly changed the face of humanitarian action in terms of the potential consequences of the modes of action preferred by humanitarian actors and, more importantly, the way that they are perceived by the parties to the conflict. In this new environment, where humanitarian organizations are believed to possess first-hand information, denunciation is no longer confined to issuing public statements, but has become synonymous with judicial proceedings. As mentioned above, this association is likely to affect the quality of humanitarian dialogue and encourage people who are potential targets of such tribunals to limit access to the scenes of their crimes, which would have disastrous consequences for humanitarian action as a whole. Efforts to minimize these adverse consequences would be greatly furthered by rendering more predictable the conditions that would ensure that the parties concerned have a better understanding of the cases where these organizations could have recourse to a denunciation policy involving co-operation in international criminal proceedings. It should be clearly established that humanitarian organizations, that is, organizations that endeavour to relieve the suffering of individuals, being guided solely by their needs, without discrimination of any kind,⁴³ do not work for international criminal tribunals, even if they do share the same ideals.

This is the context in which the ICRC published its guidelines in June 2005 on action in the event of violations of international humanitarian law or other fundamental rules protecting persons in situations of violence. While emphasizing that the preferred mode of action of the ICRC is to make bilateral confidential representations, the guidelines also make it clear that confidentiality is not an end in itself, nor is it unconditional: in reality, the “purpose and the

43 Taken from the Fundamental Principles declared by the 20th International Conference of the Red Cross, quoted by the International Court of Justice in the case of *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), Judgment of 27 June 1986, Merits, Rec. 1986 pp. 14 ff., para. 242.

justification of the ICRC's confidentiality thus rest on the quality of the dialogue that the ICRC maintains with the authorities and on the humanitarian impact that its bilateral confidential representations can have".⁴⁴ In the event that its representations do not have the desired impact, the ICRC reserves the right to have recourse to other subsidiary modes of action, including public condemnation, the conditions for which are specified in detail in the guidelines.⁴⁵

The ICRC will issue a public statement to the effect that acts attributed to a party to a conflict constitute a violation of international humanitarian law only in exceptional circumstances and when all of the following four conditions are met:

- (1) the violations are major and repeated or likely to be repeated;
- (2) its delegates have witnessed the violations with their own eyes, or the existence and extent of those violations have been established on the basis of reliable and verifiable sources;
- (3) bilateral confidential representations and, when attempted, humanitarian mobilization efforts have failed to put an end to the violations; and
- (4) such publicity is in the interest of the persons or populations affected or threatened.⁴⁶

The guidelines explain that the ICRC resorts to issuing a public declaration when it hopes that this will prompt the authorities or other parties to a conflict to improve the substance of its dialogue with the ICRC and take account of its recommendations. By laying down strict conditions under which the ICRC may resort to this mode of action and making them public, it seeks to avoid taking any of the parties unawares, which could lead to reactions that are counterproductive for humanitarian dialogue.

Public condemnation by the ICRC must not, however, be confused with providing evidence to an international criminal tribunal. These are two different modes of action which do not serve the same purpose, are not part of the same logic and do not involve the same authorities. The purpose of humanitarian action is, above all else, to save lives, not to establish criminal responsibility. This is a justification for the ICRC not to provide testimony or confidential documents in connection with investigations or legal proceedings relating to specific violations, even on a confidential basis.⁴⁷ In practice, those working for humanitarian organizations are generally ill-equipped to collect evidence in accordance with the technical standards required for judicial proceedings.

44 Guidelines, above note 2, p. 395.

45 In addition to public condemnation, the guidelines also mention humanitarian mobilization and a public statement on the quality of the bilateral confidential dialogue as other subsidiary modes of action that could be employed before proceeding to public condemnation.

46 The same guidelines apply to violations of fundamental rules protecting persons in situations of violence.

47 Guidelines, above note 2, pp. 398–9.

Development of modes of action aimed at minimizing the impact of judicial co-operation

There are various ways of minimizing the impact of judicial co-operation on the humanitarian environment, based on practice and the relevant texts of the ad hoc international criminal tribunals. However, it is important to note that it is not so much the actual act of co-operating in judicial proceedings as the risks such co-operation entails that can jeopardize activities intended to protect and assist victims.

Argument based on privilege

The above-mentioned developments in jurisprudence reveal that some international and non-governmental organizations operating mainly in the field of human rights rely on the nature of their mandate (UNHCHR) or the functions that they perform (Amnesty International and Human Rights Watch) for recognition of the right of non-disclosure of information in judicial proceedings. If recognized, this privilege could, by analogy, be extended to other humanitarian organizations. It has already been observed that the precedent set by the *Simić* decision is of little use in establishing such recognition. The *Brdjanin* case, however, offers more possibilities, as the tribunal considers that it is a matter of weighing competing public interests and ensuring that justice is done according to fair trial standards. This is, in fact, what the *amici curiae* and the Prosecutor of the Special Court for Sierra Leone are attempting to demonstrate in the case involving a former member of the United Nations Mission in Sierra Leone, when they argue for recognition of privilege allowing him not to reveal the sources of the information used in the reports he produced, on the grounds that he needs to preserve the relationship of trust with potential witnesses and direct victims of violations in order to obtain information from them.

Obviously, all these organizations can also claim a non-disclosure privilege for employees belonging to certain professional categories (lawyers, doctors, etc.), for which professional privilege is traditionally acknowledged, owing to the confidential nature of the work involved.

Protection of confidentiality

As mentioned above, humanitarian organizations can also provide information to the requesting party on condition that it is kept confidential.⁴⁸ Although there is no guarantee that the information provided by the organization or the fact that it co-operated will not be leaked, resulting in the undesirable consequences described above, this mode of action enables humanitarian organizations to concentrate, at least in the public eye, on providing assistance to populations in

⁴⁸ See above, text accompanying footnotes 7 to 20.

need. The mechanisms available for preserving confidentiality can also be useful in cases in which organizations are compelled to provide information in their possession.

Testifying: protective measures and forms of testimony

Testifying in court is the most visible form of co-operation with international criminal tribunals. However, there are certain mechanisms that can be employed to minimize visibility. For example, a humanitarian organization can ask for protection measures to be applied provided that the conditions established in the relevant provisions – mainly related to safety and security – are met. Measures include testifying in closed session, non-disclosure of the records of the trial to the public and removing names and identifying information from the court's public records. A request can also be made for witnesses to provide evidence in a written statement rather than testify in court or to appear as expert witnesses, who, in practice, seem to be granted more latitude to maintain the confidentiality of their sources.⁴⁹

However, when an organization is asked by one of the parties to testify in international criminal proceedings, it should not wait for the court to issue a binding order before negotiating the conditions under which it will appear. In practice, the court is generally disposed to grant measures of protection agreed with the parties in advance, including testifying in closed session, even if this sometimes compromises the principle of openness in judicial proceedings.

Concluding remarks

International criminal repression as a means of punishing, preventing and putting a stop to serious violations of international humanitarian law has become one of the preferred modes of action supported almost unanimously by states, international organizations and the civil society, and the fact that international criminal tribunals have become operational has undoubtedly changed the face of the global humanitarian environment. It has been seen that the presence of a judicial component in the field can cause individuals liable to criminal investigation and prosecution – who are often those in a position to improve the situation – to withdraw from humanitarian dialogue and even deny humanitarian organizations access to the scenes of their crimes and, consequently, the victims. They may also be tempted to threaten the safety of humanitarian workers, regarding them as potential witnesses for the prosecution.

Admittedly, humanitarian organizations face a very difficult dilemma, and finding a solution is like trying to square the circle. On the one hand they cannot ignore the important role of international criminal prosecution in efforts

49 ICTR, *Bizimungu*, above note 33.

to achieve greater respect for the law, while on the other they are reluctant to put their operations in the field at risk by being seen to co-operate in judicial proceedings. Furthermore, a categorical refusal to co-operate could lead to their being compelled to testify by virtue of the powers vested in international criminal courts, when immunity does not apply.

In the light of this, it is suggested that humanitarian organizations address the issue before any actual involvement in judicial proceedings is required, with a view to incorporating the terms and conditions under which they would resort to public condemnation and the extent to which this would involve judicial co-operation within the framework of a coherent operational strategy. This would allow all the parties concerned to gain a clearer perception of the modes of action employed by humanitarian organizations and make their actions more consistent and predictable. This, in turn, would help to avoid surprises and reactions that could prove counterproductive for the humanitarian environment as a whole. Efforts to increase the awareness of international criminal tribunals about these issues must continue, with a view to providing a better understanding of the scope of co-operation and the different forms it may take.

It has also been seen that, when a humanitarian organization decides to co-operate with an international criminal court or is compelled to do so, there are mechanisms, established in the relevant texts, which can be used to minimize the impact of such co-operation on its other activities and on humanitarian action in general. It is hoped that this paper, by identifying the push-and-pull factors and tensions involved in this issue, will help to define the balance to be struck between effective assistance and protection for victims – the fundamental purpose of humanitarian action – and progress in the fight against impunity, with national and international courts working together to create a truly universal system of justice.