

European University Centre on Human Rights and Democratisation

European Master's Degree in Human Rights and Democratisation

*Confidentiality in front of the International Criminal Court:*

*The specific case of the International Committee of the Red Cross*

**BÉNÉDICTE DE BRABANT**

Supervised by

**SANDESH SIVAKUMARAN**

**University of Nottingham**

**2011-2012**

## **Abstract**

The International Committee of the Red Cross operates according to a very strict policy of confidentiality which is considered vital in order to carry out its mandate. Such confidentiality has been recognized as a matter of international customary law by the International Criminal Tribunal for the Former Yugoslavia and by the Rules of Procedure and Evidence of the International Criminal Court. Thus, the delegates of the International Committee of the Red Cross can never be compelled to testify before such international tribunals and court. However, the establishment of the International Criminal Court has been a very important step in the fight against impunity. In order to function effectively, it has a wide and liberal regime to admit evidence and provides some legal tools so as to protect and encourage witnesses to testify. Testimonies are crucial to bring perpetrators to justice, particularly testimonies of humanitarian workers often direct witnesses of atrocities. This thesis develops the reasons that have led to recognize an evidentiary privilege of the International Committee of the Red Cross and the scope of this privilege. It also explores the differences to war correspondents and other humanitarian organisations in order to evaluate if such differentiation is well justified.

## **Acknowledgements**

*I would like to express my gratitude to my supervisor, Sandesh Sivakumaran, lecturer at the University of Nottingham, for his guidance and comments. I would like to thank Jacques Hartmann, E.MA fellow, for having supported such topic for my thesis. I am also very grateful to Corinna Seiberth, PHD student in international law at the University of Nottingham, for her proofreading.*

## **List of abbreviations**

AP	Additional Protocols to the Geneva Conventions
GC	Geneva Conventions
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
MSF	Médecins sans Frontières
RPE	International Criminal Court, Rules of procedure and evidence
SCSL	Special Court for Sierra Leone
UN	United Nations
UNHCHR	United Nations High Commission on Human Rights

## Table of contents

INTRODUCTION.....	6
<b>PART I. ADMISSIBILITY OF EVIDENCE AND PROTECTION OF WITNESSES BEFORE THE ICC .....</b>	<b>9</b>
<b>1. ICC procedural framework .....</b>	<b>10</b>
<b>2. Evidentiary regime .....</b>	<b>10</b>
2.1. Admissibility of evidence .....	12
2.2. Evidentiary privileges .....	13
a. Professional privileges .....	15
b. Testimonial privileges .....	16
<b>3. Protection of witnesses .....</b>	<b>17</b>
3.1. Protection of confidentiality.....	18
3.2. Protective measures and other measures.....	19
<b>PART II. THE ICRC: OVERVIEW OF ITS MANDATE, PRINCIPLES AND POLICY OF CONFIDENTIALITY .....</b>	<b>21</b>
<b>1. Mandate .....</b>	<b>21</b>
<b>2. Principles .....</b>	<b>22</b>
<b>3. The policy of confidentiality.....</b>	<b>24</b>
3.1. The duty of discretion and the exceptional use of public statements .....	24
3.2. Critics about the ICRC confidentiality .....	26
a. The ICRC confidentiality: a non-consistent practice? .....	26
b. Confidentiality: a non-necessary tool for the ICRC to carry out its humanitarian action? .....	30
<b>PART III. THE ICRC PRIVILEGE BEFORE THE ICC .....</b>	<b>34</b>
<b>1. Arguments of the ICRC for the request of a right to non-disclosure .....</b>	<b>35</b>
<b>2. The recognition of the ICRC privilege in the Simic Decision .....</b>	<b>39</b>
2.1. Prosecution's arguments .....	40

2.2. The Trial Chamber Decision .....	41
a. Recognition of an ICRC's right to non-disclosure.....	42
b. Non-necessity to balance the ICRC interest against the interest of justice .....	46
c. Unanswered question of the adoption of protective measures .....	47
2.3. The dissenting opinion of Judge Hunt .....	47
a. Non-recognition of an ICRC's right to non-disclosure.....	48
b. Balancing exercise .....	50
<b>3. <i>The ICRC privilege in the ICC Rules of Procedure and Evidence</i>.....</b>	<b>52</b>
3.1. Drafting and negotiations.....	52
3.2. The regime of the Rule 73, sub-rules 4 to 6.....	58
<b>4. <i>Another privilege recognized in jurisprudence: that of war correspondents</i>.....</b>	<b>62</b>
4.1. Recognition of a qualified privilege .....	62
4.2. Comparison with the ICRC privilege .....	64
a. The international mandate .....	65
b. Confidentiality .....	66
<b>5. <i>Comparison with other humanitarian organisations</i> .....</b>	<b>67</b>
5.1. The difference between the ICRC and other organisations .....	68
5.2. Privilege of other humanitarian organisations before the ICC.....	70
5.3. Advice for humanitarian organisations.....	74
<b>CONCLUSION .....</b>	<b>76</b>
<b>BIBLIOGRAPHY .....</b>	<b>79</b>