

Where the Interests of Justice and Humanitarianism Collide: The International Committee of the Red Cross's "Right" to Non-Disclosure and Evidentiary Privilege

Major Brett A. Warcholak*

*What are the ICRC's views on detainees at GTMO these days? Colin said there are problems. What is up? Thanks.*¹

I. Introduction

On November 6, 2013, a military commission at Guantanamo Bay, Cuba, hearing the case against four alleged 9/11 plotters, including Khalid Shaikh Mohammad, the so-called "mastermind" of the attacks, ruled that the International Committee of the Red Cross (ICRC) did not have a legal right to prevent disclosure of confidential ICRC records in the possession of the U.S. government.² Instead, the commission ordered the prosecution to turn over all correspondence between the ICRC and the U.S. government pertaining to ICRC inspections of Guantanamo Bay detention facilities.³ Observers described the ruling as "extraordinary."⁴ For its part, the ICRC was "disappointed by the ruling" and "dismayed and concerned" that the commission had rejected its argument that confidential ICRC materials are privileged as a matter of customary international law (CIL).⁵

The military commission's ruling is noteworthy, because it runs counter to the international-level recognition that the ICRC has the right not to provide witness testimony or permit the disclosure of confidential ICRC information, even if held by another party, during legal proceedings. This recognition is reflected in several international criminal tribunal decisions, their rules of evidence, and the writings of international legal scholars.⁶ The ICRC has itself

acknowledged, however, that this right is "not carved in stone."⁷ Perhaps the greatest threat to this right is a growing precedent of unfavorable national-level judicial decisions such as in the 9/11 case, *United States v. Mohammad (KSM)*.

Such decisions could have far-reaching effects. The ICRC argues that, without this right, courts would decide when to disclose confidential ICRC information, and if this were the case, the ICRC would not be able to assure its dialogue partners, which include state and non-state authorities and private individuals, that their communications would be confidential.⁸ If the ICRC were unable to maintain the confidentiality of its communications and parties could use confidential ICRC information during legal proceedings, others would be less likely to cooperate with the ICRC, and authorities could restrict ICRC access to otherwise denied areas, especially detention facilities, or so the ICRC's argument goes.⁹ This would certainly impair the ICRC's humanitarian mission, and additional human suffering could be the result, especially among detainee populations.¹⁰ By contrast, the defense bar has expressed keen interest in obtaining confidential ICRC information on conditions of detention, since it may contain mitigating evidence for defendants.¹¹

* Judge Advocate, United States Army. Presently assigned as Command Judge Advocate, 513th Military Intelligence Brigade, Fort Gordon, Georgia. LL.M., 2015, The Judge Advocate General's Legal Center and School, United States Army, Charlottesville, Virginia; MSc., 2004, The London School of Economics and Political Science; J.D., 2003, Drake University Law School; B.A., 1999, Wabash College. Previous assignments include Chief, Operational Law, 25th Infantry Division, Schofield Barracks, Hawaii, 2013-2014; Administrative Law Attorney, U.S. Army Pacific, Fort Shafter, Hawaii, 2011-2013; Trial Counsel, 18th Military Police Brigade, Mannheim, Germany, 2010-2011; Operational Law Attorney, U.S. Army Europe, Heidelberg, Germany, 2009-2010; Rule of Law Attorney, 2008, and Detention Operations Judge Advocate, 2007-2008, 1st Armored Division, Tikrit, Iraq; Chief, Claims Division, 1st Armored Division, Wiesbaden, Germany, 2006-2007. Member of the Bar of Minnesota. This article was submitted in partial completion of the Master of Laws requirements of the 63d Judge Advocate Officer Graduate Course.

¹ Memorandum from Sec'y of Def. Donald Rumsfeld to Dep't of Def. Gen. Council William J. Haynes II, subject: ICRC and GTMO (16 Sept. 2003), <http://library.rumsfeld.com/doclib/sp/1910/2003-09-16%20to%20Jim%20Haynes%20re%20ICRC%20and%20GTMO.pdf>.

² Order on Defense Motion to Compel Discovery in Support of Defense Motion for Appropriate Relief to Compel Defense Examination of Accused's Conditions of Confinement at 12, *United States v. Mohammad* (Nov. 6, 2013) [hereinafter *KSM*, Order on Defense Motion to Compel Discovery]. All military commissions case documents cited in this article are available at <http://www.mc.mil/CASES.aspx>.

³ *Id.* at 13.

⁴ Spencer Ackerman, *US Ordered to Hand over Red Cross Files on Conditions at Guantánamo Bay*, THE GUARDIAN (Nov. 6, 2013, 17:26 EST), <http://www.theguardian.com/world/2013/nov/06/us-red-cross-files-conditions-guantanamo>; Steven Ratner, *Should ICRC Reports on Detainee Visits be Turned Over to Military Commission Defense Counsel?* JUST SECURITY (Nov. 12, 2013, 10:26 AM), <http://justsecurity.org/3116/icrc-reports-military-commission/>.

⁵ Anna Nelson, *Why Confidentiality Matters*, INTERCROSS (Nov. 19, 2013), <http://intercrossblog.icrc.org/blog/why-confidentiality-matters>.

⁶ Most of whom, it bears mentioning, have served as ICRC legal advisors. Cf. Emily Ann Berman, Note, *In Pursuit of Accountability: The Red Cross, War Correspondents, and Evidentiary Privileges in International Criminal Tribunals*, 80 N.Y.U. L. REV. 241 (2005); Joshua McDowell, Note, *The International Committee of the Red Cross as a Witness before International Criminal Tribunals*, 1 CHINESE J. INT'L L. 158 (2002).

⁷ Gabor Rona, *The ICRC Privilege Not to Testify: Confidentiality in Action*, ICRC (Feb. 2, 2004), <https://www.icrc.org/eng/resources/documents/misc/5wsd9q.htm>.

⁸ *Id.*

⁹ Stéphane Jeannot, *Recognition of the ICRC's Long-Standing Rule of Confidentiality: An Important Decision by the International Criminal Tribunal for the Former Yugoslavia*, 82 INT'L REV. RED CROSS 403, 406 (2000).

¹⁰ *See id.*

¹¹ *See, e.g.*, Defense Motion to Compel Discovery in Support of Defense Motion for Appropriate Relief to Compel Defense Examination of

Despite clear international-level recognition of the ICRC's absolute right to the non-disclosure of evidence, the degree of legal protection for ICRC information varies from state to state. Two key common-law jurisdictions, the United States and the United Kingdom (U.K.), do not recognize a separate evidentiary privilege for ICRC communications, which would provide such protection.¹² Although U.S. law provides considerable privileges and immunities for the ICRC,¹³ U.S. law should also recognize a separate evidentiary privilege for confidential ICRC communications. Such an evidentiary privilege would be consistent with the law of privileges. This law holds that, although privileges may inhibit litigation by excluding information that would otherwise be discoverable to another party or admissible as evidence,¹⁴ they are nonetheless justified on the grounds that they protect "extrinsic policy,"¹⁵ i.e. interests and relationships that society has deemed "more important and overpowering,"¹⁶ than the disclosure of relevant information in litigation. The public interest in ICRC confidentiality is such an interest.

This article will proceed first by providing background on the ICRC's confidential approach and its "testimony policy." It will then review the international-level treatment of the ICRC's purported right to the non-disclosure of evidence. Next, this article will analyze national-level protections for ICRC information with a focus on U.S. law. Last, it will provide compelling reasons why U.S. law should recognize a separate evidentiary privilege for confidential ICRC communications.

II. The ICRC's Confidential Approach and Testimony Policy

For the ICRC, the confidential approach is "at the core of its identity."¹⁷ It uses the confidential approach during persuasion, a mode of action that consists of attempting to persuade a state or non-state authority, through bilateral

confidential dialogue with the ICRC, to do something that falls within an authority's area of responsibility.¹⁸ The idea behind confidential dialogue is that "by discussing serious issues, such as abuse or ill-treatment, away from the glare of public attention, governments and non-state actors are often more likely to acknowledge problems and commit to taking action."¹⁹ The ICRC also uses the confidential approach to help obtain access from authorities to people under their control.²⁰ It has been described as "the key that enables the ICRC to open doors that would otherwise remain shut, giving [the ICRC] access to people in need and places that many other organizations cannot reach."²¹ Confidentiality gives the ICRC a comparative advantage over human rights organizations that are more public advocacy oriented. Based on their field experiences, ICRC representatives have stated that the confidential approach works,²² although its efficacy is impossible to measure.²³

Due to the ICRC's unique humanitarian mission, information obtained or produced by the ICRC, which it considers confidential, may later become relevant in proceedings to examine the legality of actions of parties to a conflict.²⁴ As the example of *KSM* shows, litigants may seek to obtain confidential information from the ICRC or its dialogue partners to use as documentary evidence, or to call upon ICRC personnel to testify as witnesses regarding their observations during a conflict or interactions with parties to the conflict.²⁵

However, ICRC policy guidelines state that the ICRC "does not provide testimony or confidential documents in connection with investigations or legal proceedings relating to specific violations."²⁶ Remarkably, the ICRC has even sought to prevent two states, Ethiopia and Eritrea, from providing ICRC information to an impartial body during an

Accused's Conditions of Confinement at 4, *United States v. Mohammad* (Jan. 8, 2013) [hereinafter *KSM*, Defense Motion to Compel Discovery].

¹² See *infra* Part IV.

¹³ See *infra* Part V.

¹⁴ See EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: EVIDENTIARY PRIVILEGES* § 1.1 (2d ed. 2009).

¹⁵ JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW*, vol. 8 at § 2175 (McNaughton rev. 1961).

¹⁶ *Id.*

¹⁷ ICRC, *The International Committee of the Red Cross's (ICRC's) Confidential Approach*, 94 INT'L REV. OF THE RED CROSS 1135, 1136 (2012) [hereinafter *The ICRC's Confidential Approach*].

¹⁸ *Id.* at 1135.

¹⁹ ICRC, *Confidentiality: Key to the ICRC's Work but Not Unconditional*, INTERNATIONAL COMMITTEE OF THE RED CROSS (Sept. 20, 2010), <https://www.icrc.org/eng/resources/documents/interview/confidentiality-interview-010608.htm> (interviewing Dominik Stillhart, ICRC Deputy

Director of Operations) [hereinafter *Confidentiality: Key to the ICRC's Work but Not Unconditional*].

²⁰ *The ICRC's Confidential Approach*, *supra* note 17, at 1138-39.

²¹ *Confidentiality: Key to the ICRC's Work but Not Unconditional*, *supra* note 19.

²² *E.g. id.*

²³ Steven A. Ratner, *Behind the Flag of Dunant: Secrecy and the Compliance Mission of the International Committee of the Red Cross*, in *TRANSPARENCY IN INTERNATIONAL LAW* 297, 313 (Andrea Bianchi & Anne Peters eds., 2013).

²⁴ See *Confidentiality: Key to the ICRC's Work but Not Unconditional*, *supra* note 19.

²⁵ See *id.*

²⁶ ICRC, *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*, 87 INT'L REV. OF THE RED CROSS 393, 398 (2005).

international arbitration, even though both sides had supported disclosure.²⁷

III. The Right to Non-Disclosure of Evidence at the International Level

Although the International Criminal Tribunal for the Former Yugoslavia (ICTY) 1999 case *Prosecutor v. Simic* arguably provided a poor foundation for international-level recognition of the ICRC's right to non-disclosure, subsequent decisions and international court rules have clearly established the ICRC's right to non-disclosure of evidence.

A. Judicial Decisions

1. International Criminal Tribunal for the Former Yugoslavia

In *Prosecutor v. Simic*, the prosecution, in an *ex parte* and confidential motion, sought a determination from the Trial Chamber as to whether the prosecution could call a former ICRC employee to testify as to information obtained during the course of his employment.²⁸ The Trial Chamber framed the issue as an evidentiary matter: "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."²⁹ The Trial Chamber stated that the primary considerations in resolving the issue were: one, whether treaty law or CIL recognize that the ICRC has a confidentiality interest that gives it the right to prevent ICRC information from disclosure; two, if the ICRC has such a right, whether it must be balanced against the interests of justice; and, three, whether protective measure can adequately protect the ICRC's confidentiality interest.³⁰

On the first question, the Trial Chamber made its crucial finding, namely, that the ICRC has an absolute right under CIL to prevent the disclosure of the information that would be

provided by the former ICRC employee.³¹ In the Trial Chamber's view, the state practice component of this CIL rule was satisfied by the "general practice of States in relation to the ICRC."³² More specifically, the Trial Chamber looked at the acceptance of states of the ICRC's special role and mandate under the Geneva Conventions,³³ and their recognition of the ICRC's fundamental principles, especially, neutrality and impartiality, from which the practice of confidentiality flows.³⁴ The Trial Chamber was convinced that allowing ICRC employees to testify would dissuade authorities from granting the ICRC access to victims and thereby prevent the ICRC from discharging its mandate under the Geneva Conventions.³⁵ Finally, the Trial Chamber concluded that the universal ratification of the Geneva Conventions satisfied the *opinio juris* component of the CIL rule, and dismissed the remaining questions.³⁶

Judge David Hunt authored a separate concurring opinion³⁷ that has taken on new importance since the military commission's ruling in *KSM*. Judge Hunt agreed that the ICRC had a serious interest in the matter, but that there was another "powerful public interest that all relevant evidence must be available to the courts who are to try persons charged with serious violations of international humanitarian law, so that a just result might be obtained in such trials in accordance with law."³⁸ For Judge Hunt, there were just two issues to consider: one, whether the protections against the disclosure of ICRC information were absolute, requiring no balancing of these interests; or, two, if balancing is required, what is the result in this case.³⁹ Judge Hunt was not convinced that CIL provides an absolute right to non-disclosure at the international level,⁴⁰ so he argued instead for a balancing of the interests.⁴¹ The balancing test proposed by Judge Hunt was "whether the evidence to be given by the witness in breach of the obligations of confidentiality owed by the ICRC is so essential to the case of the relevant party (here the prosecution) as to outweigh the risk of serious consequences of the breach of confidence."⁴² In his opinion, the balance in this case was clearly in favor of the ICRC due to the potential damages that could result from the testimony and the

²⁷ Partial Award on Prisoners of War (Ethiopia's Claim 4), 42 I.L.M. 1056, 1064 (Eri.-Eth. Claims Comm'n 2003); Partial Award on Prisoners of War (Eritrea's Claim 17), 42 I.L.M. 1083, 1093 (Eri.-Eth. Claims Comm'n 2003).

²⁸ *Prosecutor v. Simic*, Case No. IT-95-9-PT (Int'l Crim. Trib. for the Former Yugoslavia July 27, 1999) (decision on the prosecution motion under Rule 73 for a ruling concerning the testimony of a witness at 2) [hereinafter *Simic*, Decision on the Prosecution Motion]. All International Criminal Tribunal Former for the Former Yugoslavia (ICTY) case documents cited in this article are available at <http://icr.icty.org/default.aspx>.

²⁹ *Id.* ¶ 39.

³⁰ *Id.* ¶ 44.

³¹ *Id.* ¶ 74.

³² *Id.*

³³ *Id.* ¶ 48.

³⁴ *Id.* ¶¶ 54-55.

³⁵ *Id.* ¶¶ 65-70.

³⁶ *Id.* ¶ 74.

³⁷ *Prosecutor v. Simic*, Case No. IT-95-9-PT (Int'l Crim. Trib. for the Former Yugoslavia July 27, 1999) (separate opinion of Judge David Hunt on prosecutor's motion for a ruling concerning the testimony of a Witness) [hereinafter *Simic*, Separate Opinion of Judge Hunt].

³⁸ *Id.* ¶ 17.

³⁹ *Id.* ¶ 18.

⁴⁰ *See id.* ¶ 23.

⁴¹ *Id.* ¶ 27.

⁴² *Id.* ¶ 35.

prosecution's failure to demonstrate sufficiently the importance of the witness testimony.⁴³ Accordingly, Judge Hunt agreed with the Trial Chamber's ruling to exclude the testimony but on other grounds.⁴⁴

2. *International Criminal Tribunal for Rwanda*

The International Criminal Tribunal for Rwanda (ICTR) has had three occasions⁴⁵ to rule on ICRC witness testimony in light of the *Simic* decision and other developments at the international level. These ICTR decisions have largely confirmed the ICTY Trial Chamber's prediction that finding a right of non-disclosure for the ICRC would not "'open the floodgates' in respect of other organizations,"⁴⁶ due to the unique role of the ICRC under the Geneva Conventions.

B. Rules of Procedure and Evidence

Even before the ICTY publicized the *Simic* decision in October 1999, the ICRC sought a rule before the International Criminal Court (ICC) that would protect its confidentiality interest.⁴⁷ Eventually, the Preparatory Commission for the ICC adopted by consensus the ICC's Rules of Procedure and Evidence, including Rule 73, "Privileged communications and information," which gives the ICRC a privilege against the disclosure of ICRC information.⁴⁸ Crucial for the ICRC, only it can waive the privilege, but it must first consult with the ICC to try to resolve the issue.⁴⁹ Under Rule 73, the ICRC's privilege is thus functionally absolute. Similar rules were later adopted in 2009 for the Special Tribunal for Lebanon,⁵⁰ and in 2012 for the United Nations Mechanism for International Criminal Tribunals.⁵¹

IV. National-Level Protections for ICRC Information

In contrast to the clear picture of the ICRC's right to non-disclosure that has emerged at the international level, the degree of legal protections for ICRC information at the national level varies greatly from state to state. In many states, headquarters agreements with the ICRC and national legislation provide such protections.⁵² The common-law jurisdictions of the U.K. and the United States have not recognized a separate evidentiary privilege for confidential ICRC information in the few judicial decisions on the subject.

A. Headquarters Agreements

The ICRC seeks to conclude "headquarters" or "status" agreements to provide a legal framework for its humanitarian activities,⁵³ including an international law basis for the domestic application of the right to the non-disclosure of evidence.⁵⁴ These agreements typically "contain provisions regarding the seat, status, privileges, and immunities of the international organization or institution, and its activities in the territory of the host State."⁵⁵ According to ICRC information, the number of headquarters agreements has more than doubled in the past twenty years from fifty-one in 1994⁵⁶ to as many as 100 (with thirteen more in negotiation) in 2012.⁵⁷ Unfortunately, very few of these agreements are publicly accessible, which hampers academic research in this area.

Most headquarters agreements appear to contain provisions which grant immunity from process for ICRC delegates and prevent national-level courts from calling them to appear as witnesses or requiring the ICRC to produce other

⁴³ *Id.* ¶¶ 36-40.

⁴⁴ *See id.* ¶¶ 42-43.

⁴⁵ *See* Prosecutor v. Nizeyimana, Case No. ICTR-00-55C-PT, Decision on Nizeyimana's Extremely Urgent and Confidential Motion Challenging the Admissibility of Witness TQ's Testimony (July 26, 2011); Prosecutor v. Muvunyi, Case No. ICTR-2000-55A-T, Reasons for the Chamber's Decision on the Accused's Motion to Exclude Witness TQ (July 15, 2005); Prosecutor v. Nyiramasuhuko and Ntahobali, Trial Chamber, Case No. ICTR-97-21-T, Decision on Ntahobali's Extremely Urgent Motion for Inadmissibility of Witness TQ's Testimony (July 15, 2004).

⁴⁶ *Simic*, Decision on the Prosecution Motion, *supra* note 28, at 26 n.56.

⁴⁷ Stéphane Jeannot, *Non-Disclosure of Evidence before International Criminal Tribunals: Recent Developments regarding the International Committee of the Red Cross*, 50 INT'L & COMP. L. Q. 643, 651-53 (2001).

⁴⁸ *Id.* at 653.

⁴⁹ Rules of Procedure and Evidence 73.4(a), 73.6, ICC-ASP/1/3/Part-II-A (2002). Rules 73.4-.6 is reprinted at Appendix A.

⁵⁰ Rules of Procedure and Evidence 164, STL/BD/2009/01/Rev. 1 (June 10, 2009).

⁵¹ Rules of Procedure and Evidence 10, MICT/1 (June 8, 2012).

⁵² *See infra* Part IV.A.

⁵³ Giovanni Distefano, *Le CICR et l'immunité de juridiction en droit international contemporain: fragments d'investigation autour d'une notion centrale de l'organisation internationale* [The ICRC and Immunity from Jurisdiction in Contemporary International Law: Fragments of Investigation on an Important Topic in International Organization], 3 Swiss Rev. of Int'l and Eur. L. 355, 368 (2000).

⁵⁴ Rona, *supra* note 7.

⁵⁵ Jochen Herbst, *International Organizations or Institutions, Headquarters*, para. 1, in Max Planck Encyclopedia of Public International Law (Oxford Pub. Int'l L., 2009), <http://opil.ouplaw.com/home/EPIL>.

⁵⁶ Cornelio Sommaruga, President of the International Committee of the Red Cross, Improving Respect for International Humanitarian Law: A Major Challenge for the ICRC, Fourth George Seward Lecture, International Bar Association (June 3, 1994), <https://www.icrc.org/eng/resources/documents/misc/57jm99.htm>.

⁵⁷ 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 at Attachment B, p. 8, United States v. Mohammad (Apr. 4, 2013) [hereinafter *KSM*, ICRC Motion for Leave to Intervene].

evidence.⁵⁸ Other standard provisions grant broad immunity to the ICRC and refer to the inviolability of ICRC property, assets, and archives.⁵⁹ Since 2002, the ICRC has apparently modified its standard proposed headquarters agreement to include a specific provision on ICRC confidentiality, which clearly exempts ICRC communications from use in judicial proceedings.⁶⁰ The ICRC has claimed that recent agreements include this provision,⁶¹ and two of the few publicly available headquarters agreements confirm this.⁶²

B. Legislation

Several states have instead chosen to grant protections to the ICRC by way of national legislation. In some states, general statutes allow the executive branch to determine a level of privileges, immunities, and other rights to confer upon an international organization and its personnel.⁶³ Examples of such states include Australia,⁶⁴ the U.K.,⁶⁵ and the United States.⁶⁶ Of these states, the executive branch in Australia and the United States has given the ICRC legal protections within this legislative framework.⁶⁷ By contrast, France has adopted a brief law giving the ICRC and its personnel the same privileges and immunities of the United Nations and its personnel.⁶⁸

C. Judicial Decisions

Several post-9/11 detainee cases in the U.K. and the United States have confronted national-level courts with the question of how much protection to give ICRC information in the possession of the government. While these courts have recognized the sensitivity of ICRC information and have employed various protective measures, e.g. special advocates,

closed sessions, closed judgments, in camera review, and protective orders, these cases nonetheless made it known that ICRC information was before the court.⁶⁹ These courts have declined to follow the example of the international level and have not recognized a separate privilege for confidential ICRC information.

1. The U.K. Detainee Cases

In two cases, the U.K. courts had to determine how to best protect sensitive evidence, including ICRC information, in the possession of the Ministry of Defence. In both cases, the government claimed public interest immunity (PII), previously known as “Crown privilege,”⁷⁰ for certain categories of information, including the ICRC information.

In a 2010 case, *The Queen (on the application of Maya Evans) v. Secretary of State for Defence*, a High Court reviewed the lawfulness of the detention and subsequent transfer of suspected insurgents captured by the U.K. forces to Afghan detention facilities.⁷¹ In its open judgment, the court explained that it had used certain protective measures, specifically, closed and semi-closed sessions, and special advocates for the claimant, so that it could consider material covered by PII.⁷² The judgment makes plain, however, that the court had considered information on the ICRC’s detainee-related activities in Afghanistan.⁷³ In 2013, the claimant’s counsel and special advocates asked the court in a post-judgment hearing to release into the public domain some of the evidence that the court had previously kept from disclosure in 2010.⁷⁴ In asserting PII, the Foreign Secretary had certified to the court that the disclosure of sensitive information in twelve categories, including materials from the

⁵⁸ See *Simic*, Decision on the Prosecution Motion, *supra* note 28, at 21 n.34; *Rona*, *supra* note 7.

⁵⁹ *Rona*, *supra* note 7.

⁶⁰ *KSM*, ICRC Motion for Leave to Intervene, *supra* note 57, attachment B, p. 8.

⁶¹ *Id.*

⁶² *International Organisations (Privileges and Immunities) (International Committee of the Red Cross) Regulation 2013* (Cth) sched. 1, para. 11 (Austl.); Acuerdo sede entre el Gobierno de la República de Guinea Ecuatorial y el Comité Internacional de la Cruz Roja [Headquarters Agreement Between the Government of the Republic of Equatorial Guinea and the International Committee of the Red Cross] subpara. 5.1 (May 25, 2011).

⁶³ Chanaka Wickremasinghe, *International Organizations or Institutions, Immunities before National Courts*, para. 186, in Max Planck Encyclopedia of Public International Law (Oxford Pub. Intl. L., 2009), <http://opil.ouplaw.com/home/EPIL>.

⁶⁴ *International Organisations (Privileges and Immunities) Act 1963* (Cth).

⁶⁵ *International Organisations Act*, 1968 c. 48.

⁶⁶ *International Organizations Immunities Act*, 22 U.S.C. § 288-2881 (2014).

⁶⁷ *International Organisations (Privileges and Immunities) (International Committee of the Red Cross) Regulation 2013* (Cth); 22 U.S.C. § 288f-3 (2014); Exec. Order No. 12,643, 53 Fed. Reg. 24,247 (June 23, 1988). See *infra* Part V.A.

⁶⁸ Loi 2003-475 du 4 juin 2003 relative aux privilèges et immunités de la délégation du Comité international de la Croix-Rouge en France (1) [Law 2003-475 of June 4, 2003 Relative to the Privileges and Immunities of the Delegation of the International Committee of the Red Cross in France (1)], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 5, 2003, p. 9581; see also Convention on the Privileges and Immunities of the United Nations arts. II and V, Feb. 13, 1946, 1 U.N.T.S. 15.

⁶⁹ See *infra* Parts IV.C.1.-2.

⁷⁰ James Richardson, Archbold: Criminal Pleading Evidence and Practice § 12-26 (2014 ed.).

⁷¹ *Regina (Evans) v. Sec’y of State for Def.*, [2010] EWHC (Admin) 1445, at [1].

⁷² *Id.* at [8].

⁷³ See *id.* at [43]-[47], [98], [105], [115], [140].

⁷⁴ *Regina (Evans) v. Sec’y of State for Def.*, [2013] EWHC 3068 (Admin), [5], [13].

ICRC, “would cause a real risk of serious harm.”⁷⁵ The court agreed that disclosure of those parts of the closed judgment “would even now [in 2013] be damaging to the public interest,”⁷⁶ and that balancing continued to favor non-disclosure, since the materials were no longer needed in current litigation, and the public interest in open justice, while “a weighty factor . . . [was] not sufficient to outweigh the public interest in non-disclosure.”⁷⁷

In 2012, another High Court adopted a different approach in *Regina (Mohammed) v Secretary of State for Defence*.⁷⁸ In this case, the claimant requested that the court review his detention by the U.K. and transfer to Afghan authorities.⁷⁹ The Defence Secretary claimed PII over 121 documents to protect various public interests, including “the confidentiality of communications with various international bodies, including the International Committee of the Red Cross.”⁸⁰ During a pre-trial hearing, the court ruled that, in principle, when it could not uphold a claim of PII, it could still limit disclosure within a “confidentiality ring,” which would include counsel but not the claimant, to mitigate the damage that would result from an invalid PII claim.⁸¹

2. U.S. Military Commissions: *United States v. Mohammad*

The issue concerning ICRC information first came before the military commission in *KSM* as the result of litigation over a joint defense motion to examine the defendant’s conditions of detention at Guantanamo for the purposes of discovery, to develop mitigation evidence, and to mount a possible legal challenge to the current conditions.⁸² Exchanges between the prosecution and defense led to another defense motion on similar grounds, requesting the Commission to compel discovery of ICRC inspection reports on conditions of detention at Guantanamo.⁸³ The prosecution initially opposed the motion on the grounds that the ICRC documents

and communications were “irrelevant and immaterial”⁸⁴ to the original motion and that “disclosure of confidential ICRC communications would be detrimental to national security and the public interest.”⁸⁵

The ICRC sought leave to intervene in the proceedings, requesting a protective order denying the defense motion and guarding against future disclosure of confidential ICRC information.⁸⁶ The ICRC advanced three arguments for the requested relief. First, it claimed that confidential ICRC materials were privileged as a matter of CIL.⁸⁷ Second, the ICRC argued that the military commissions had to apply the privilege, since CIL is a part of federal common law, which is one of the sources of privileges.⁸⁸ Third, the ICRC argued that the Commission could use its discretionary authority under Rule for Military Commissions (RMC) 703(l)(2) to issue a protective order denying discovery of the requested ICRC materials.⁸⁹

The Commission granted the ICRC’s motion for leave to intervene but did not accept any of its arguments.⁹⁰ The Commission first noted a lack of national-level judicial precedent on the subject.⁹¹ The Commission then briefly turned to federal statute, finding no privilege against the disclosure of ICRC generated materials.⁹² Most of the Commission’s remaining discussion looked at the international-level treatment of the issue. It greatly downplayed the Trial Chamber’s decision in *Simic*, merely stating that it “provided an evidentiary privilege for ICRC work,”⁹³ and instead highlighted the balancing approach adopted by Judge Hunt,⁹⁴ analogizing it to the Supreme Court’s jurisprudence regarding privilege.⁹⁵ The Commission narrowly interpreted the ICTR cases, writing that the cases “provided little support for a common law privilege for the ICRC,”⁹⁶ and even interpreted ICC Rule

⁷⁵ *Id.* at [31].

⁷⁶ *Id.* at [34].

⁷⁷ *Id.* at [2].

⁷⁸ *Regina (Mohammed) v Sec’y of State for Def.*, [2012] EWHC 3454 (Admin), [2014] 1 W.L.R. 1071.

⁷⁹ *Id.*

⁸⁰ *Id.* at [29].

⁸¹ *Id.* at [1], [16], [19], [20].

⁸² Defense Motion for Appropriate Relief to Compel Defense Examination of Accused’s Conditions of Confinement at 4, *United States v. Mohammad* (Dec. 5, 2012).

⁸³ *KSM*, Defense Motion to Compel Discovery, *supra* note 11, at 4.

⁸⁴ Government Response to AE 108C (MAH, AAA, RBS, WBA) Defense Motion to Compel Discovery in Support of Defense Motion for Appropriate Relief to Compel Examination of Conditions of Confinement AE 108 (MAH,AAA,RBS,WBA) at 4, *United States v. Mohammad* (Jan. 22, 2013).

⁸⁵ *Id.* at 6.

⁸⁶ *KSM*, ICRC Motion for Leave to Intervene, *supra* note 57, at 1.

⁸⁷ *Id.* at 3.

⁸⁸ *Id.* at 10-14.

⁸⁹ *Id.* at 15.

⁹⁰ *KSM*, Order on Defense Motion to Compel Discovery, *supra* note 2, at 4.

⁹¹ *Id.* at 6.

⁹² *Id.* at 6-7.

⁹³ *Id.* at 7.

⁹⁴ *Id.*

⁹⁵ *Id.* at 10.

⁹⁶ *Id.* at 8.

73.6, which requires consultation between the ICRC and the court, as supporting balancing.⁹⁷

The Commission then applied the four conditions proposed by the jurist John Wigmore, which U.S. courts commonly accept as a test for determining whether to recognize a new privilege for confidential communications.⁹⁸ Those conditions are:

- (1) The communications must originate in a confidence that they will not be disclosed.
- (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
- (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
- (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.⁹⁹

While granting that conditions (1) through (3) “weigh heavily on the side of finding a privilege” for the ICRC materials, the commission claimed, without much discussion, that an ICRC privilege failed condition (4), because the defendants face the death penalty.¹⁰⁰ This analysis led to the Commission’s harshly worded finding that “there is a lack of meaningful or longstanding international common law to service as precedent”¹⁰¹ for determining that the ICRC had a privilege over the materials in question.

⁹⁷ *Id.* at 9-10. One of the important aspects of the Rule, however, is that it actually codifies the requirement of ICRC consent, making the ICRC’s privilege functionally absolute. *See supra* Part III.B.

⁹⁸ IMWINKELRIED, *supra* note 14, § 3.2.3.

⁹⁹ WIGMORE, *supra* note 15, at § 2285.

¹⁰⁰ *KSM*, Order on Defense Motion to Compel Discovery, *supra* note 2, at 10.

¹⁰¹ *Id.* at 12.

¹⁰² *Id.* at 13.

¹⁰³ *Id.*

¹⁰⁴ Order on Defense Motion to Compel Discovery in Support of Defense Motion for Appropriate Relief to Compel Defense Examination of Accused’s Conditions of Confinement at 2-3, *United States v. Mohammad* (Jan. 15, 2014). The Military Judge later determined that (1) one of the reports did not meet the criteria for discovery and (2) authorized the release of two additional ICRC reports. Order on Defense Motion to Compel Discovery In Support of Defense Motion For Appropriate Relief to Compel Defense Examination of Accused’s Conditions of Confinement at 2, *United States v. Mohammad* (Jan. 31, 2014); *corrected by* Order (Corrected Copy) on Defense Motion to Compel Discovery In Support of Defense Motion For Appropriate Relief to Compel Defense Examination of Accused’s Conditions of Confinement, *United States v. Mohammad* (Mar. 24, 2014); *corrected by* Order (2d Corrected Copy) on Defense Motion to Compel

The Commission then ordered the prosecution to turn over all communications between the ICRC and the U.S. government “concerning ICRC inspections of the detention facilities at Guantanamo.”¹⁰² The Commission deferred the defense motion to compel discovery until it could conduct an in camera review to determine the relevance of the materials,¹⁰³ but on January 15, 2014, the commission authorized the release, under seal, of sixteen ICRC working papers and reports concerning visits to Guantanamo from October 2006 to October 2013 to the defense.¹⁰⁴

The release of these materials has opened new litigation paths. The commission granted a defense motion to use ICRC reports as a basis for other pleadings, including witness requests,¹⁰⁵ which could signal another, even more dramatic showdown with the ICRC over the appearance of ICRC personnel as witnesses before the commission.¹⁰⁶ Also, two co-defendants have requested that the commission compel discovery of ICRC reports regarding U.S. detention facilities in Afghanistan.¹⁰⁷ At the time of this writing, litigation on these defense requests continues.

V. Existing Protections for ICRC Information in the United States

Although the commission rejected the ICRC’s claim of privilege, the ICRC actually enjoys substantial privileges and immunities under U.S. statutory law, while additional protections are available under rules of evidence and procedure.¹⁰⁸

A. Statutory Law

Discovery In Support of Defense Motion For Appropriate Relief to Compel Defense Examination of Accused’s Conditions of Confinement, *United States v. Mohammad* (Mar. 25, 2014).

¹⁰⁵ Order on Defense Motion for Leave to Use ICRC Documents in Litigation and DOD Advocacy at 1, 3, *United States v. Mohammad* (July 21, 2014).

¹⁰⁶ Although a civilian may not be compelled to testify in-person before a military commission at Guantanamo Bay, a civilian may be subpoenaed and, if necessary, compelled by law enforcement to testify from the United States by video-teleconference or deposition. DEP’T OF DEF., REGULATION FOR TRIAL BY MILITARY COMMISSION, ch. 13-5(b)-(d) (2011), <http://www.mc.mil/Portals/0/2011%20Regulation.pdf>. As the author later shows, U.S. law may nonetheless give ICRC employees testimonial immunity in such cases. *See infra* Part V.A.

¹⁰⁷ Defense Motion to Compel Discovery of ICRC Records from Afghanistan, *United States v. Mohammad* (July 18, 2014); Mr. al Baluchi’s Notice of Joinder, Factual Supplement & Argument to Defense Motion to Compel Discovery of ICRC Records from Afghanistan, *United States v. Mohammad* (July 24, 2014).

¹⁰⁸ Remaining sources of law, i.e. the Constitution and federal common law, do not provide clear pathways for an ICRC privilege or other protections. Whether the ICRC’s right to non-disclosure, as a rule of international law, is incorporated into these sources of law is beyond the scope of this article.

The ICRC derives certain privileges, exemptions, and immunities under the International Organizations Immunities Act (IOIA).¹⁰⁹ In particular, ICRC employees are “immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions.”¹¹⁰ In a case concerning a different organization, the Ninth Circuit deferred to an interpretation of a similar provision by the Department of State as conferring “testimonial immunity for all information that a covered individual possesses solely by virtue of his official position.”¹¹¹ The court used this interpretation in determining that a court could not compel a covered employee to testify about “information he possesses solely by virtue of his official position.”¹¹² Consistent with this ruling, ICRC employees should possess testimonial immunity and, if so, courts may not compel them to testify pursuant to *subpoenae ad testificandum*, at least as to ICRC official business. Other IOIA provisions indicate that the ICRC should also be able to withstand compulsory process for ICRC information in its possession, i.e. *subpoena duces tecum*.¹¹³ It is, however, unclear whether such protection would extend to demands for ICRC communications (working papers, reports, etc.) provided to a state authority and no longer under exclusive ICRC control.

Under IOIA, the ICRC’s official communications are entitled to the same “privileges, exemptions, and immunities . . . accorded under similar circumstances to foreign governments.”¹¹⁴ Consistent with the law of foreign relations,¹¹⁵ this section can be interpreted as providing for unfettered communications between or among offices of an international organization covered by IOIA; however, it is unclear, at best, whether this provision would allow the ICRC to prevent the disclosure of confidential ICRC communications in the possession of a state authority. This article also leaves open the question whether Congress intended these privileges and immunities under IOIA as also providing for evidentiary privileges under military rules.¹¹⁶

¹⁰⁹ International Organizations Immunities Act, 22 U.S.C. § 288-2881 (2014); Exec. Order No. 12,643, 53 Fed. Reg. 24,247 (June 23, 1988).

¹¹⁰ 22 U.S.C. § 288d(b) (2014).

¹¹¹ *Taiwan v. U.S. Dist. Ct. for the N.D. of Cal.*, 128 F.3d 712, 718 (9th Cir. 1997) (citing Brief for the United States as Amicus Curiae at 16).

¹¹² *Id.* at 719.

¹¹³ *See* 22 U.S.C. § 288a(b)-(c) (2015).

¹¹⁴ 22 U.S.C. § 288a(d) (2015).

¹¹⁵ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 466 cmt. f. (1987).

¹¹⁶ A determination would also have to be made that the International Organizations Immunities Act (IOIA) is “applicable to trial by courts-martial [or military commissions].” MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 501(a)(2) (Supp. 2014) [hereinafter MCM]; MANUAL FOR MILITARY COMMISSIONS, UNITED STATES, MIL. COMM’N R. EVID. 501(a)(2) (2012) (reprinted at Appendix B) [hereinafter MMC].

B. Rules of Evidence and Procedure

Although there is no separate privilege for ICRC information under rules of evidence or procedure, *KSM* has validated that ICRC information in the government’s possession can be privileged under Military Commission Rules of Evidence (MCRE) 506 and, therefore, MRE 506, as other-than-classified government information, the disclosure of which “would be detrimental to the public interest.”¹¹⁷ Such information is nonetheless subject to disclosure to the defense, when a “request demonstrates a specific need for information containing evidence that is relevant to the guilt or innocence or to punishment of the accused, and is otherwise admissible.”¹¹⁸ Even before the commission had ruled on the defense motion to compel discovery, the prosecution reserved the right to exercise MCRE 506(g) to allow for limited disclosure of the ICRC materials to the defense, subject to the terms of a protective order, and use of such materials at trial after *in camera* review by the Military Judge.¹¹⁹ Moreover, at the time of the commission’s first ruling on the subject, it stated that the ICRC materials, if disclosed to the defense, would be protected according to an existing protective order for unclassified discovery materials.¹²⁰

A military judge also has discretionary authority under RCM 701(g)(2) and RMC 701(l)(2) to deny or restrict discovery upon “sufficient showing.”¹²¹ In *KSM*, the ICRC requested that the commission exercise this authority to deny discovery of the ICRC materials;¹²² however, the commission did not address this request.¹²³

VI. Toward a Privilege for Confidential ICRC Communication

As the previous section shows, U.S. law does not provide a separate evidentiary privilege for confidential ICRC communications; however, such a privilege is desirable for the following reasons: one, judicial balancing is ill-suited for weighing the extraordinary public interest in ICRC

¹¹⁷ MMC, *supra* note 116, MIL. COM’N R. EVID. 506(a); MCM, *supra* note 116, MIL. R. EVID. 506(a).

¹¹⁸ MMC, *supra* note 116, MIL. COM’N R. EVID. 506(i)(4)(C); MCM, *supra* note 116, MIL. R. EVID. 506(j)(1)(D);

¹¹⁹ Government Response to AE013GG(AAA) Defense Motion to Amend AE013AA Protective Order #1 to Protect Confidential ICRC Materials at 8-12, *United States v. Mohammad* (May 2, 2013).

¹²⁰ *KSM*, Order on Defense Motion to Compel Discovery, *supra* note 2, at 11; *see also* Protective Order #2 To Protect Unclassified Discovery Material Where Disclosure is Detrimental to the Public Interest, *United States v. Mohammad* (Dec. 20, 2012).

¹²¹ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 701(g)(2) (2012); MMC, *supra* note 116, R.M. COM’NS R. EVID 701(l)(2).

¹²² *KSM*, ICRC Motion for Leave to Intervene, *supra* note 57, at 15.

¹²³ *See KSM*, Order on Defense Motion to Compel Discovery, *supra* note 2.

confidentiality; two, the interests of the U.S. government in litigation are not necessarily aligned with ICRC confidentiality; three, protective measures have failed to adequately protect ICRC confidentiality; and, four, an ICRC privilege is consistent with the U.S. law of privilege.

A. The Problem of Judicial Balancing

For at least two reasons, judicial balancing is a poor construct for determining whether to disclose confidential ICRC information. First, there is a danger that courts will misidentify the public interest in non-disclosure as the ICRC's own interest in maintaining confidentiality. Judge Hunt, for example, referred to the "obligation of confidentiality that the ICRC has to the warring parties"¹²⁴ and "the interest of the ICRC in protecting itself against the disclosure."¹²⁵ Clearly, the ICRC has certain organizational interests in maintaining confidentiality. For example, confidentiality helps to safeguard the presence of ICRC employees¹²⁶ and protect ICRC communications from unwanted politicization.¹²⁷ But the public interest in ICRC confidentiality extends far beyond these limited organizational interests. If the ICRC is correct that the confidential approach achieves humanitarian results that would not be possible without it, then the public interest lies in the instrumental value of ICRC confidentiality. Viewed as a humanitarian instrument, the public interest in ICRC confidentiality is similar to the public interest in a particular medical treatment. It is hard to imagine a weightier public interest in any legal proceeding than preserving the efficacy of such methods for the alleviation of human suffering. Second, although a court will be able to readily determine the effects of non-disclosure of confidential ICRC communications, a court will have difficulty in ascertaining the risk of harm caused by the disclosure of confidential ICRC information, even after hearing the advocacy of the parties. Faced with a lack of proof as to the risks of disclosure, a court may feel judicially obligated to rule in favor of it. Such decisions could, however, produce a "butterfly effect," leading to unpredictable but devastating consequences for the ICRC's brand of impartial humanitarianism. Similarly, the cumulative effect of multiple decisions in favor of disclosure could produce a "death by a thousand cuts" for the confidential approach.

B. The Failure of Protective Measures

¹²⁴ *Simic*, Separate Opinion of Judge Hunt, *supra* note 37, ¶ 15.

¹²⁵ *Id.* ¶ 17.

¹²⁶ *The ICRC's Confidential Approach*, *supra* note 17, at 1139.

¹²⁷ *Confidentiality: Key to the ICRC's Work but Not Unconditional*, *supra* note 19.

¹²⁸ See *Simic*, Decision on the Prosecution Motion, *supra* note 28, ¶ 20; *Simic*, Separate Opinion of Judge Hunt, *supra* note 37, ¶ 17.

Unfortunately, the use of protective measures has not adequately protected the public interest in ICRC confidentiality. As the ICRC had argued and Judge Hunt had agreed in *Simic*, the issue with protective measures was not whether they would protect the form or even, for that matter, the content of the ICRC information, but if they would protect the fact that ICRC information was before the court.¹²⁸ In the ICRC's view, even the "mere suggestion" that confidential ICRC information is the subject of judicial proceedings acts as a disincentive to future cooperation with the ICRC.¹²⁹ Courts have done a poor job of preventing outside knowledge that litigation has involved confidential ICRC information, even when protective measures were deployed. Before the Trial Chamber lifted the confidentiality of the *Simic* decision, counsel for one of the co-defendants apparently learned of the matter and filed a motion seeking essentially the same ICRC information the prosecution wished to enter.¹³⁰ The detainee cases in the U.K. and the *KSM* case before the military commissions also show that national-level courts are not guarding against outside knowledge that confidential ICRC information is the subject of legal proceedings. In both jurisdictions, the protective measures employed have only protected the content of confidential ICRC information from public disclosure but not the fact that litigants were presenting such information to the bench.

C. The Government's Interests

A government's immediate interest in securing a "successful" outcome in legal proceedings may be inimical to the ICRC's confidentiality interest. While the U.K. detainee cases show that a government may claim some legal protections for confidential ICRC information, the Ethiopia-Eritrea arbitration of claims¹³¹ and *KSM* demonstrate that a government may in fact support some degree of disclosure. A government may be in favor of disclosure for several reasons: the confidential ICRC information may actually support the government's position; disclosure would eliminate one possible ground for defense appeal; or the government may wish to promote the fairness of the litigation. For a government involved in legal proceedings, these interests are likely to predominate over, and could conflict with, the public interest in ICRC confidentiality.

D. The Law of Privileges

¹²⁹ *Simic*, Decision on the Prosecution Motion, *supra* note 28, ¶ 20.

¹³⁰ See *Prosecutor v. Simic*, Case No. IT-95-9-PT, Accused Stevan Todorovic's Motion for an Order Requesting Assistance in Securing Documents and Witnesses from the International Committee of the Red Cross (Int'l Crim. Trib. for the Former Yugoslavia Sept. 22, 1999).

¹³¹ See *supra* p. 5 and note 26.

Wigmore's four conditions largely remain "the litmus test for determining the propriety of recognizing a privilege."¹³² The commission in *KSM* accepted that a privilege for confidential ICRC communications met the first three conditions of the Wigmore test but not the fourth.¹³³ This section argues that the commission was mistaken in this respect.

From the outset, it is important to note that the "injury," as contemplated by the fourth criterion, is not, as the commission identified, the punishment faced by the accused. The "injury" is the damage caused by disclosure to the "the relation," or better said, the relationship "between the parties" at issue, as the second criterion indicates. Correctly identifying the parties to the relationship is key. In this case, the best view is that the ICRC stands alone on one side of the relationship, because the ICRC is truly in a class by itself, apart from other humanitarian organizations, due to its special role and mandate under the Geneva Conventions. On the other side of the relationship stands not just the United States, but the many dialogue partners with whom the ICRC communicates on a confidential basis.

The remaining task is to weigh the "injury" to the ICRC's relationship with its dialogue partners against the "benefit" of the evidence that would be gained by disclosure. As described previously, such balancing tests are ill-suited to determining whether to disclose ICRC information, but, due to the overwhelming public interest in the instrumental value of ICRC confidentiality, balancing should easily break in favor of the ICRC.

VII. Conclusion

Courts in the United States are not likely to create a new evidentiary privilege for confidential ICRC communications. Such protections will have to come from outside the courtroom. This could take the form of a headquarters agreement between the United States and the ICRC, which includes a confidentiality provision. The next Geneva law or other international humanitarian law treaty could expressly state obligations with regard to the confidentiality of ICRC information. Military rules of evidence could be changed.¹³⁴ This is the most accessible point of entry for an ICRC privilege. Although military courts-martial and commissions occupy but a small part of the U.S. judicial landscape, additional protections for ICRC information are clearly needed there first, as the ongoing litigation in *KSM* shows.

The military commissions are making decisions as to the disclosure of confidential ICRC communications that could very well affect the sentencing of defendants, if convicted, and setting precedent for courts-martial, federal criminal prosecutions under the anti-torture statute,¹³⁵ and federal civil litigation under the Alien Tort Statute¹³⁶ and Torture Victim Protection Act.¹³⁷ This article urges greater public awareness of these decisions, because they are not just technical, legal decisions but moral choices as well: choices between administering fair justice and preserving a capability to mitigate human suffering. The public should not leave such choices to judges alone.

¹³² IMWINKELRIED, *supra* note 14, § 3.2.3 (original emphasis).

¹³³ "The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation." WIGMORE, *supra* note 15, § 2285.

¹³⁴ See UCMJ art. 36(a) (2014) (requiring Presidential approval to change the Military Rules of Evidence); Military Commissions Act of 2009, 10 U.S.C. § 949a(a) (2014) (allowing the Secretary of Defense, in consultation

with the Attorney General, to make changes to the Military Commission Rules of Evidence).

¹³⁵ 18 U.S.C. § 2340-2340b (2015).

¹³⁶ 24 U.S.C. § 1350 (2015).

¹³⁷ Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

Rule 73

Privileged communications and information

4. The Court shall regard as privileged, and consequently not subject to disclosure, including by way of testimony of any present or past official or employee of the International Committee of the Red Cross (ICRC), any information, documents or other evidence which it came into the possession of in the course, or as a consequence, of the performance by ICRC of its functions under the Statutes of the International Red Cross and Red Crescent Movement, unless:

(a) After consultations undertaken pursuant to sub-rule 6, ICRC does not object in writing to such disclosure, or otherwise has waived this privilege; or

(b) Such information, documents or other evidence is contained in public statements and documents of ICRC.

5. Nothing in sub-rule 4 shall affect the admissibility of the same evidence obtained from a source other than ICRC and its officials or employees when such evidence has also been acquired by this source independently of ICRC and its officials or employees.

6. If the Court determines that ICRC information, documents or other evidence are of great importance for a particular case, consultations shall be held between the Court and ICRC in order to seek to resolve the matter by cooperative means, bearing in mind the circumstances of the case, the relevance of the evidence sought, whether the evidence could be obtained from a source other than ICRC, the interests of justice and of victims, and the performance of the Court's and ICRC's functions.

Rule 501. General rule

(a) A person may not claim a privilege with respect to any matter except as required by or provided for in:

- (1) The Constitution of the United States, as applicable;
- (2) An Act of Congress applicable to trials by military commissions;
- (3) These rules or this Manual; or

(4) The principles of common law generally recognized in the trial of criminal cases in the 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.

(b) A claim of privilege includes, but is not limited to, the assertion by any person of a privilege to:

- (1) Refuse to be a witness;
- (2) Refuse to disclose any matter;
- (3) Refuse to produce any object or writing; or
- (4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

(c) The term “person” includes an appropriate representative of the Federal Government, a State, or political subsection thereof, or any other entity claiming to be the holder of a privilege.

(d) Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity.