IN TRIAL CHAMBER III

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

Registrar:
Mrs Dorothee de Sampayo Garrido-Nijgh

Decision of:
27 July 1999

PROSECUTOR

v

Blagoje SIMIC, Milan SIMIC, Miroslav TADIC,
Stevan TODOROVIC and Simo ZARIC

EX PARTE AND CONFIDENTIAL

SEPARATE OPINION OF JUDGE DAVID HUNT ON PROSECUTOR S MOTION FOR A RULING CONCERNING THE TESTIMONY OF A WITNESS

The Office of the Prosecutor:

Mr Grant Niemann
Ms Nancy Paterson
Mr Christopher Staker

Counsel for the International Committee for the Red Cross:

Mr Alun Jones QC
Professor Christopher Greenwood QC

I Introduction

1. The defendants in this case are charged with thirtyseven counts arising out of events which are alleged to have occurred in the Boskanski {amac and Od ak municipalities in the territory of Bosnia

and Herzegovina between September 1991 and December 1993. The charges in the redacted Second Amended Indictment allege:

> 1.1 grave breaches of the Geneva Conventions of 1949 consisting of unlawful deportation or transfer, wilful killing, wilfully causing great suffering and torture or inhumane treatment;[1]
> 1.2 violations of the laws and customs of war consisting of murder, cruel treatment, humiliating or degrading treatment, torture and cruel treatment;[2] and
> 1.3 crimes against humanity consisting of persecution on political, racial and/or religious grounds, deportation, murder, inhumane acts, rape and torture.[3]

These crimes are alleged to have been committed against the Bosnian Croat, Bosnian Muslim and other non-Serb civilian populations in those municipalities.

2. Pursuant to Rule 73 of the Tribunal s Rules of Procedure and Evidence, the prosecution has sought a ruling in advance of the trial as to whether a witness which it wishes to call should be permitted to give certain evidence. Because of the sensitivity of the issues involved, the motion was filed *ex parte* and upon a confidential basis.

3. The proposed witness was formerly a field interpreter with the International Committee of the Red Cross (to which, for convenience, I shall refer as the "ICRC"). The evidence which the prosecution wishes to lead from him consists of facts relevant to the indictment, and which would therefore usually be admissible, but which came to his knowledge only as a result of accompanying ICRC staff on visits to places of detention and at an exchange of prisoners supervised by the ICRC.

4. At the request of the prosecution, and pursuant to Rule 74, the ICRC was invited to appear as *amicus curiae* and to make submissions in answer to the motion, and it did so. The submissions of both parties have been filed, and it is thus necessary to refer expressly only to a few of them. I have, however, had regard to all of those submissions.

II An issue posed by the ICRC

5. One particular submission of the ICRC must be referred to if only for the purposes of putting it to one side. The ICRC has submitted that the Tribunal has no jurisdiction over the ICRC and, therefore, that the Tribunal may not compel the ICRC to give evidence or to permit its officials or employees to do so.[4] That submission demonstrates a complete misconception as to what the prosecution seeks to have the Tribunal do in this case. At no stage in the present case has the prosecution sought an order from the Trial Chamber directed to the ICRC.

6. The proposed witness is willing to give evidence without the need for a *subpoena* (or a binding order that he attend to do so) pursuant to Rule 54. The Trial Chamber is therefore not being asked to compel the witness to give evidence. Normally, the prosecution would simply call the witness and he would give evidence without any action at all being taken by the Trial Chamber in relation to that evidence. Where a person or body who or which legitimately seeks to protect his or its interests against the disclosure of certain matters is heard upon that issue, the only action which the Trial Chamber would be called upon to take in relation to the evidence would be, at the suggestion of such a person or body, to prevent the evidence being called.

7. The Trial Chamber would, however, have been supplied in advance with a summary of the facts of which the witness was to testify, pursuant to Rule 73*bis*, and (usually) a copy of his witness statement. Where an issue thereby becomes apparent as to whether the evidence which a witness intends to give should be given, it would be open to the Trial Chamber *proprio motu* to raise that issue before the evidence is given. But at no stage up to then has the Trial Chamber played any part in the witness giving evidence.

8. What the prosecution has very wisely done here is to seek a ruling from the Trial Chamber before the need arises for disclosing publicly its intention to call evidence from this witness. The prosecution in its submissions seeks an order that, *inter alia*, it be permitted to call the witness, but such an order would not be appropriate for there can be no valid suggestion that the prosecution cannot *call* a witness. What has been suggested by the ICRC is that the witness should not be permitted to give this particular evidence. In reality, and as it stated in its original motion, the prosecution is seeking a ruling that the witness should be permitted to give the particular evidence even though the ICRC has not consented to him doing so.

9. In its original submission, the prosecution made it very clear that, because the witness was willing to testify, no issue arose as to the Tribunal s powers of compulsion.[5] There was and has been no suggestion at any stage that the prosecution was seeking any order from the Trial Chamber that the ICRC give its consent to the witness giving evidence.[6] There is, on the other hand, every suggestion by the prosecution in its submissions that it should be entitled to have the witness give the evidence notwithstanding that the ICRC does *not* consent.[7]

III The contentions of the parties

10. The ICRC has contended

> 10.1 that it has a protection against the disclosure in evidence by a current or former official or employee of the ICRC of information which came to the knowledge of such witness in his or her official capacity, notwithstanding that the evidence which the witness could give is relevant to the particular proceedings, and notwithstanding that the witness is willing to give that evidence without the necessity for a *subpoena*; and
> 10.2 that such a protection is absolute, whatever the importance of that evidence to the resolution of those proceedings.

11. Such a stand would equate officials and employees of the ICRC to a witness bound by the obligations of professional secrecy as a lawyer concerning information obtained by him from his client in relation to existing or impending litigation. The client has an absolute protection against disclosure. Such an absolute protection (sometimes called an immunity) is recognised in most legal systems. The protection may be waived by the client, but not by the lawyer.

12. The prosecution has contended that the protection against disclosure of the ICRC is not absolute, and that there should be a balancing exercise in a case such as the present. This would equate the ICRC to a State instrumentality making a claim of public interest immunity in relation to the evidence which its officials or employees could otherwise have given. Such a claim is also recognised in most legal systems. Some of those legal systems provide by statute where the balance should lie between the two competing interests. Other legal systems permit the courts to decide

where the balance should lie in the particular case.

13. Where there is a balancing exercise to be performed in such a case, the two competing public interests to be weighed would be the secrecy required for properly conducting matters of State at the highest level and the need for all relevant evidence to be available to the courts so that a just result might be obtained in litigation before them. The damage which would be caused by the disclosure of secret Government information must be weighed against the damage which would be caused to the administration of justice if the information were to be withheld from the court.

IV The interests involved

14. The Geneva Conventions of 1949, the Additional Protocols of 1977 and the Statutes of the Red Cross Movement give to the ICRC a mandate to work for the implementation of international humanitarian law, in particular by Article 126 of the Third Geneva Convention (on Prisoners of War), which provides that the ICRC has a right of access to all places where prisoners of war are held, and by Article 143 of the Fourth Convention, which gives similar rights of access to the ICRC to all places where civilians protected by that Convention are detained or work. The ICRC is often the only body which has access to places of detention in this way, and in practice even its right of access is dependent upon the willingness of the warring parties to permit it to exercise that right. That willingness is in turn dependent upon the impartiality and neutrality of the ICRC and its obligation of confidentiality in relation to information obtained in the course of such access.[8] There is clearly a serious risk that the ICRC will be denied full access in the future if its impartiality, neutrality and its obligation of confidentiality were to be impaired once it became known that evidence had been given by its current or former officials and employees of what was seen or heard by them during such access.

15. I accept that this obligation of confidentiality that the ICRC has to the warring parties an obligation which has permitted it to carry out that mandate gives rise to a powerful public interest. That interest is to protect the ICRC against any public disclosure of the fact that a current or former official or employee of that organisation is to give or has given evidence in any proceedings as to facts which came to the knowledge of the witness in his or her official capacity.[9] I accept also that, once evidence is given by such a witness, there is but little which can be done to avoid that fact becoming known.

16. So far as this Tribunal is concerned, its power to impose measures for the protection of victims and witnesses,[10] even measures which may have a practical effect upon of the rights of the accused,[11] *may* in some cases substantially reduce that risk of disclosure, although too much emphasis should not be placed upon this factor. The issue is not, as the prosecution s submissions assume, a question of preventing any disclosure of the identity of the particular witness. It is preventing any disclosure of the fact that an official or employee of the ICRC has given evidence, whether or not the identity of the particular witness is also disclosed. The more important the evidence of the witness to the resolution of the proceedings, the more difficult for any judgment to be written which deals properly with the facts which have been found against the accused but which would not also necessarily reveal the source of the evidence in question although it would not be impossible.

17. However, the interest of the ICRC in protecting itself against the disclosure that such information had been revealed in evidence is not the only public interest which exists in this matter.

There is also a 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. That result must be just not only to the persons charged but also to the international community on whose behalf the prosecution acts, including the victims of the offences charged.[12]

18. There are therefore two issues in this application. First, whether the protection against disclosure afforded to the ICRC by the first of those two powerful public interests is an absolute one, in the sense that there can be no weighing of those public interests to see on which side the balance falls in the particular case. Secondly, if there is to be a weighing of those interests, where the balance lies in this particular case.

V Is the ICRC s protection against disclosure absolute?

19. The Trial Chamber was informed that there has been no previous decision given as to whether a current or former official or employee of the ICRC who is willing to give evidence voluntarily as to facts which are relevant to the particular proceedings, but which came to the knowledge of the witness in his or her official capacity, can be prevented from giving that evidence. The joint decision of Judge Robinson and Judge Bennouna (to which I shall refer as the "joint decision") has, however, accepted that the ICRC is afforded an absolute protection against the disclosure of such evidence by customary international law.

20. It may be accepted that the Tribunal is bound by customary international law, as is the United Nations itself.[13] But that acceptance does not answer the question as to what the content of that customary international law is. One of the fundamental elements of customary international law is *opinio juris* that is, a general acceptance of the existence of a legal obligation, and not merely an obligation of courtesy, fairness or morality. In this case, what must be established is a general acceptance of the legal obligation upon all judicial bodies, national and international, to recognise the ICRC s protection against disclosure as absolute.

21. The reasoning of the joint decision, as I understand it, is that the States parties to the Geneva Conventions (which Conventions are representative of customary law) have agreed in those treaties to the ICRC s special mandate. This special mandate must be interpreted according to the principle of implied powers that an organisation may exercise in order to ensure institutional effectiveness. As it is essential for the efficient functioning of the ICRC in the fulfilment of its mandate under the Geneva Conventions to enjoy immunity from the provision of evidence to judicial organs, then it follows, according to this reasoning, that the States accept this right and thus it is constituted as a customary rule.

22. It has not been suggested by the ICRC that the absolute nature of its protection against disclosure has been *expressly* accepted as having become part of customary international law. At most, it is said only that it has been *tacitly* recognised.[14] But has it? Has the acceptance by the States to which the ICRC refers been that its protection should be treated as absolute by everyone, including the international criminal courts, or merely that the States themselves will support the absolute nature of the ICRC s protection so far as they are able to give effect to it for example, by entering into agreements to provide an immunity in their own national courts? It is only if the former is the case that there would be a customary international law which binds this Tribunal.

23. The material supplied by the ICRC does not demonstrate either a general practice of such an acceptance or any consensus in the literature that it exists, and it is conceded that there have been no previous decisions upon this issue.[15] The joint decision has referred to Headquarters Agreements between the States and the ICRC to the effect that its employees enjoy immunity from giving evidence in national courts. Whilst such clauses may constitute *opinio juris* and State practice for the purposes of finding a customary rule that the ICRC s protection before *national* courts is an absolute one, I am not persuaded that such a rule includes *international* criminal courts whose task it is to try serious violations of international humanitarian law, including grave breaches of those same Geneva Conventions. As the ICRC itself concedes, it permitted its employees to provide evidence in the Nuremberg trials, even though that evidence did not, it seems, disclose anything against the accused,[16] and it retains the right to permit its employees to give evidence again in the future.[17] To my mind, it is an enormous step to assume that the States had contemplated at the time of the Geneva Conventions the existence of a similar immunity in international criminal courts (created for the first time almost a half of a century later), or that they have contemplated the existence of such an immunity since in such courts. For these reasons, I am not persuaded that the answer is supplied by customary international law.

24. It is not easy to discover general principles of law in relation to this issue which are recognised by the domestic laws of (all) civilised nations.[18] This is because most civil law systems have detailed statutory provisions in relation to evidence which is the subject of claims of confidentiality, whereas most common law systems leave it to the courts to determine where the balance lies between competing public interests. It is therefore necessary, in my view, to commence from first principles.

25. It is the fundamental obligation of this Tribunal, imposed by Articles 20 and 21 of its Statute, to ensure the fair and expeditious trial of those indicted before it. A fair trial is one which is fair to both the accused who is on trial and to the prosecution which, as I have already said, acts on behalf of the international community, including the victims of the offences charged.[19] The Tribunal also has an inherent power, deriving from its judicial function, to control its proceedings in such a way as to ensure that justice is done.[20] Whether or not evidence which is relevant should nevertheless not be permitted to be given is a matter of procedural rather than substantive law, and it is in relation to such procedural matters that the Tribunal s obligation and inherent power become particularly important, for it is these matters which primarily ensure that the trial proceeds fairly and expeditiously. It is against this background that the present application must be determined.

26. It cannot be emphasised too strongly that this Tribunal deals with criminal trials and not with litigation between sovereign States, and that save for some perhaps analogous problems such as those arising from the non-compliance by a State with orders made against it, with which the *Blakic Subpoena Decision*[21] was concerned the procedure of this Tribunal is primarily concerned with ensuring the fair and expeditious disposition of criminal trials. In those circumstances, there is little relevance to matters of procedure within the Tribunal of the oft quoted passage from that decision concerning the confusion which may be caused by the adoption in an international tribunal of approaches prevailing in national law systems,[22] where those national approaches may well assist in ensuring the fair and expeditious disposition of the international proceedings before the Tribunal. Indeed, in relation to the rules of evidence and matters of procedure, international law chooses, edits and adapts elements from the rules of the better developed systems of law, employing their legal reasoning and analogies in order to do so.[23]

27. In most systems where the balance between competing public interests is not dictated by statute, the courts are required to carry out their own balancing exercise, to see whether the harm which would be done by the allowance of the evidence outweighs the harm done by the frustration or the

impairment to justice if the evidence is not available. In my view, such a procedure is the most appropriate one to be adopted in the present situation in order to ensure a fair trial in accordance with the Tribunal s Statute. The only exception to such a procedure common to most legal systems is that to which I referred earlier, the absolute protection of the client against the disclosure by his lawyer of information which he has obtained from his client in relation to existing or impending litigation. Apart from statutory provisions relating to litigation in national courts, there is no wider category of absolute protection available in those systems which would include the ICRC.

28. I have considered the submissions of the ICRC with care, and (I confess) with sympathy, but I am not presently persuaded by its arguments, or by the joint decision, that its protection against disclosure is the absolute one which it asserts. Two situations will suffice to demonstrate why, in my view, it may well be necessary in the rare case that the courts (or at least the international criminal courts) should have the final say.

29. The first situation is where the evidence of an official or employee of the ICRC is vital to establish the innocence of the accused person. Is the accused to be found guilty and sentenced to a substantial term of imprisonment in order to ensure the ICRC s protection against the risk of disclosure? The ICRC has said that, in certain "very restrictive" circumstances, it will consider whether to authorise evidence to be given notwithstanding that it is based on information obtained by its officials or employees in the performance of their functions.[24] Those circumstances as revealed do not include this situation. It is understandable why they do not, for exactly the same damage to the ICRC s impartiality, neutrality and its obligation of confidentiality would be caused by knowledge that such evidence had been given as would be caused by knowledge of evidence given in favour of the prosecution. Even if these very restrictive circumstances were to be amended to include a discretion to authorise evidence to be given in such a situation, I find it difficult to accept that the liberty of an accused person should depend upon the exercise of such discretion by the very body whose interests are at stake.

30. I do not accept that it is necessarily for the greater good to sacrifice the liberty of an innocent person in order to ensure the ICRC s protection against disclosure, yet this is the inevitable consequence of the ICRC s claim. There is at least one species of public interest immunity available in some systems of law which is excluded where its application would deny to the accused person an opportunity to establish his innocence. That public interest immunity protects the identity of a police informer against disclosure because, if the identity of the informer were liable to be disclosed in a court of law, sources of information would dry up and the police would be hindered in their duty of preventing and detecting crime. This immunity has been accepted since at least 1890,[25] if not earlier, and it is recognised in many leading cases.[26] An exception to this public interest immunity permits the disclosure of the identity of the informer to be ordered when required to establish the innocence of the accused,[27] an exception recognised by senior appellate courts.[28] There is, of course, a distinction to be drawn between the resultant damage in each case, but it is only one of degree.

31. The second situation where, in my view, it may be necessary that the courts should have the final say is where the evidence of an official or employee of the ICRC is vital to establish the guilt of the particular accused in a trial of transcendental importance. The policy of the ICRC would inevitably exclude its consent to such evidence being given.

32. I do not suggest that the international criminal courts would *necessarily* permit the evidence of an ICRC official or employee to be given in either of those two situations. The peculiar circumstances of individual cases are so various that no such forecast could properly be made. Nor would I restrict the situations in which a balancing exercise should be carried out by the courts to

those two which I have mentioned. It is impossible to foresee every situation which may arise. That is why guidelines such as have been laid down by the ICRC are an inadequate substitute for the balancing exercise which would be carried out by such a court. In every case, the court would weigh the competing interests the importance of the evidence in the particular trial and the risk that the fact that the evidence has been given by an official or employee of the ICRC would be disclosed to determine on which side the balance lies. But I emphasise that it would necessarily be rare that the evidence would be of such importance as to outweigh the ICRC s protection against disclosure.

33. In the end, however, I find it unnecessary to come to any final conclusion as to whether the protection against disclosure of the ICRC is absolute, and that is because, even assuming that it is *not* an absolute one, the balancing exercise consequently required would necessarily result in the evidence being excluded in the present case (as I demonstrate next). Although the nature of the ICRC s protection is both important and interesting, whatever views I expressed in the present case would be no more than *obiter dicta*, and, moreover, expressed in a confidential decision.

VI The balancing exercise

34. The prosecution submits that it would only be in the most extreme and compelling case where the powerful public interest in protecting the ICRC against disclosure of the fact that such evidence had been given would be so strong, and where the protective measures available to the Tribunal would be so inadequate, that the Trial Chamber would exclude the testimony altogether.[29] I do not accept that this is the test.

35. The correct test is 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 in the particular case. Both the gravity of the charges and the availability of means to avoid disclosure of the fact that the evidence has been given would be relevant to that determination.[30] Where the breach of confidentiality leads to the serious risk of damage which exists in the present case, the test must be correspondingly more severe. Either the word "essential" or the word "indispensable" may be used, as I understand them to mean the same thing in this context.

36. The damage to the legitimate interests of the ICRC caused by the breach of confidence involved in disclosing what was seen or heard by its officials or employees in the performance of his functions have already been described. What then of the importance of this evidence to the prosecution case?

37. The prosecution has declined to provide a copy of the proposed witness s statement, relying instead upon a brief description of his "possible testimony". It says that it has adopted this course because of the *ex parte* nature of the proceedings and that, in the event that the Trial Chamber decides that the evidence is to be excluded, the content of the witness s statement will be known to the Trial Chamber without the knowledge of the accused. Had the accused known that this had occurred, the prosecution says, they might regard it as a potential ground of appeal.[31] For this reason, the prosecution says, the Trial Chamber should accept its assessment of the evidence as being "very important" to its case.[32]

38. With all due respect to the prosecution, this is nonsense. Professional judges are often required to read documents in order to determine whether the documents themselves or their contents are

admissible in evidence. Where the Trial Chamber rules against the admissibility of that evidence, it could not sensibly be suggested that an appeal would lie in favour of the party whose objection to the evidence had been upheld. There would be no valid ground for arguing that the judges knowledge of the excluded material in such circumstances disqualified them from continuing in the case. Professional judges are expected to be able, and are able, to disregard such material. Even if the accused in the present case did know that the Trial Chamber had learnt of the contents of the statement, an appeal based upon what had happened must inevitably fail. The fact that the accused will not know does not, therefore, deny them any ground of appeal which would otherwise reasonably have been open to them.

39. Neither do I accept that the consequence of such a stand by the prosecution is that we should accept its own assessment of the importance of the evidence. It is surprising that the prosecution, whilst criticising the ICRC for its claim to be the sole arbiter of whether its officials or employees should give evidence, should itself claim to be the sole arbiter of the importance of that evidence to its own case. In my opinion, the Trial Chamber should proceed with its own assessment of the importance of this evidence to the prosecution case upon the basis of what the prosecution itself has been prepared to reveal to it.

40. First, the prosecution s description of the evidence as "very important" or of "great importance" does not constitute it "essential" to its case. Secondly, insofar as the evidence (as described by the prosecution) will relate to the conditions in which persons were detained and will report hearsay statements made by those persons as to their state of mind at some previous time concerning being "exchanged", it will be no more than corroborative. Insofar as it will establish actions by certain of the accused to prevent the ICRC from carrying out its functions, that evidence (if accepted) is no more than evidence of a guilty conscience, which could not be "essential" to the prosecution case. Finally, insofar as the evidence relates to conversations with certain of the accused, it is not suggested that they included admissions by the accused which are "essential" to the prosecution case.

41. In my opinion, the balance is this case lies clearly in favour of the ICRC. I would therefore not permit the evidence to be given whether or not the ICRC s protection against disclosure is absolute.

VII Disposition

42. The joint decision gives a ruling that "the evidence of the former employee of the ICRC sought to be presented by the Prosecutor should not be given". I am assured that such a ruling is intended to be limited to the evidence which the prosecution seeks to call from this particular witness a limitation which is confirmed elsewhere in the joint decision[33] and that it is not intended to reflect the reasoning of the joint decision itself, that no evidence could *ever* be given by former officials of the ICRC where the facts came to their knowledge by virtue of their employment.

43. Upon that basis, I agree with that ruling.

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

Dated this 27th day of July 1999

At The Hague
The Netherlands

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Judge David Hunt

[Seal of the Tribunal]

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1. The jurisdiction of the Tribunal to try these charges is to be found in Article 2 of its Statute.
2. Article 3 of the Statute.
3. Article 5 of the Statute.
4. ICRC Submission, para 39(1).
5. Prosecutor s Submission, 23 March 1999, paras 9, 18.
6. It seems that the Tribunal would not have the power to make such an order in any event: cf *Prosecutor v Kovacevic*, Case No IT-97-24, Decision of Trial Chamber II*bis* Refusing Defence Motion for Subpoena, 23 June 1998, p 2, in which it was held that the Tribunal has no authority to issue a subpoena to the Organisation for Security and Co-operation in Europe, upon the basis that it is an international organisation and not a State.
7. See, for example, Prosecutor s Submission, 23 March 1999, paras 10, 14, 38.
8. The unanimously recognised authority, competence and impartiality of the ICRC, as well as its statutory mission to promote and supervise respect for humanitarian law has been noted by the Appeals Chamber, in *Prosecutor v Tadic* (1995) 1 ICTY JR 353 at 435 (para 73).
9. There is also an interest (but of considerably less public importance) in protecting the ICRC against any breach of the obligation of confidentiality which the official or employee has to the ICRC itself.
10. Statute, Article 22; Rules 69, 75.
11. *Ibid*, Article 20.1.
12. *Prosecutor v Aleksovski*, Case IT-95-14/1-AR73, Decision on Prosecutor s Appeal on Admissibility of Evidence, 16 February 1999, par 25.
13. Opinion of Professors Salmon and David, para 27.
14. *Ibid*, para 12.
15. cf Browlie, "Principles of Public International Law", (5th Edn, 1998), p 7.
16. Affidavit of Angelo Gnaedinger in Support of Submissions of the ICRC, paras 54-55.
17. ICRC Submission, para 29.
18. Statute of the International Court of Justice, Article 38(1)(c), as interpreted by its proposers: Browlie, "Principles of Public International Law", (5th Edn, 1998), p 16.
19. *Prosecutor v Aleksovski*, Case IT-95-14/1-AR73, Decision on Prosecutor s Appeal on Admissibility of Evidence, 16 February 1999, par 25.
20. See, generally, in relation to such inherent power: *Northern Cameroons Case* (ICJ Reports 1963, p 29) and the *Nuclear Tests Case* (ICJ Reports 1974, pp 259-260 (para 23)), followed by the Appeals Chamber of this Tribunal in the *Blakic Subpoena Decision*: *Prosecutor v Blakic*, Case IT-95-14-AR108*bis*, Judgment on Request of Republic of Croatia for Review of Decision of Trial Chamber II of 18 July 1997, 29 Oct 1997, footnote 27 (para 25). The *Blakic Subpoena Decision* was in turn followed in *Prosecutor v Tadic*, Case IT-94-1-A, Judgment, 15 July 1999, para 322.
21. *Prosecutor v Blakic*, Case IT-95-14-AR-108*bis*, Judgment on Request of Republic of Croatia for Review of Decision of Trial Chamber II of 18 July 1997, 29 Oct 1997.
22. *Ibid*, para 40.
23. Browlie, "Principles of Public International Law", (5th Edn, 1998), p 16.
24. ICRC Submission, para 29. Excerpts from guidelines laid down by the ICRC s Executive Board on 7 March 1985 are reproduced in the opinion of Professors Salmon and David, para 34.
25. *Marks v Beyfus* (1890) 25 QBD 494 at 498, 500.
26. *Duncan v Cammell Laird* S1942C AC 624 at 633-634; *Rogers v Home Secretary* S1973C AC 388 at 401, 407; D v NSPCC S1978C AC 171 at 218, 232, 241; *Sankey v Whitlam* (1978) 142 CLR 1 at 61, 65-66;

Cain v Glass (No 2) (1985) 3 NSWLR 230 at 233-234, 242, 246-247.
27. *Marks v Beyfus* (at 498, 500).
28. The House of Lords in the United Kingdom: *D v NSPCC* (at 218, 232); the High Court of Australia: *Sankey v Whitlam* (at 42).
29. Prosecutor s Submission, 23 March 1999, para 33(4).
30. Courts do not usually require a witness to break *any* confidence or, if objection is taken, they do not usually permit a witness to do so unless there is no other source from which the evidence might be produced and the evidence is of substantial importance.
31. Prosecutor s Submissions, 20 April 1999, para 46.
32. Prosecutor s Submissions 23 March 1999, para 6. In its submissions dated 20 April 1999, the prosecution implies that the evidence is of "great importance" to its case (para 46).
33. For example, para 35: "The Trial Chamber first notes that the Prosecution and the ICRC agree that the following issues are not disputed: - the Information came to the knowledge of the potential witness by virtue of his work for the ICRC as an interpreter [)]". "Information" is defined as "facts that came to [the former employee s] knowledge by reason of his employment" (Joint decision, unnumbered paragraph on p 2).