ICRC Privilege in Canada

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Abstract

This article explores whether the International Committee of the Red Cross (ICRC) enjoys testimonial privilege before Canadian courts. The authors argue that there is strong evidence to suggest that customary international law requires that the ICRC be granted a privilege not to testify or disclose confidential information in domestic court proceedings. Such a privilege, they argue, is entailed by the ICRC's mandate to engage in international humanitarian law protection activities using confidential means. Given that customary international law forms part of the common law in Canada, the authors argue that this privilege should be recognized by Canadian courts despite its potentially uneasy fit with traditional Canadian evidence law.

Keywords: Privilege; international organizations; International Committee of the Red Cross; evidence; immunities.

Résumé

Cet article cherche à savoir si le Comité international de la Croix-Rouge (CICR) bénéficie d'un privilège de ne pas témoigner devant les tribunaux canadiens. Les auteurs font valoir qu'il existe de fortes raisons de croire que le droit international coutumier exige que le CICR soit accordé un privilège ni de témoigner ni de divulguer des informations confidentielles devant les instances nationales. Un tel privilège, affirment-ils, découle du mandat du CICR de se livrer à des activités de protection, en vertu du droit international humanitaire, à l'aide de moyens confidentiels. Étant donné que le droit international coutumier fait partie de la common law au Canada, les auteurs affirment que ce privilège devrait être reconnu par les tribunaux canadiens en dépit du fait qu'il soit potentiellement mal-adapté au droit canadien de la preuve existant.

Mots-clés: Privilège; organisations internationales; Comité international de la Croix-Rouge; preuve; immunités.

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Introduction

In 2013, a US Military Commission judge presiding over the trial of five detainees ordered the US government to produce all correspondence between the United States and the International Committee of the Red Cross (ICRC) with respect to the ICRC's inspection of the Guantanamo Bay detention facility.[1] The ICRC decried the ruling, arguing that it eroded its ability to engage in humanitarian protection during armed conflict. Specifically, the ICRC argued, the ruling impugned one of the key modalities of its work in international humanitarian law (IHL) protection — namely confidentiality — and was contrary to customary international law. The ICRC's position was that a privilege attaches to its materials, which prevents disclosure of those materials in judicial proceedings without its consent. A failure to uphold this privilege, it argued, would undermine the organization's ability to fulfil its mandate under the *Geneva Conventions*.[2] The ICRC's legal advisor in Washington put it this way:

> When visiting detainees, we establish a confidential dialogue with the detaining authorities. Our confidential approach also enables detainees to speak freely — and in private — about their circumstances with the ICRC. By addressing our concerns bilaterally and confidentially with the detaining authorities, we're able to build trust. It also ensures we have access to the detainees… [I]f a court does not uphold the right to non-disclosure of our confidential information, or calls ICRC staff to serve as witnesses, this can have a negative impact on our capacity to negotiate humanitarian access and carry out our mandate under international humanitarian law.[3]

The aim of this article is to explore the ICRC's status in Canada and ask how Canadian courts should respond if faced with the same issue addressed by the US Military Commission in *Guantanamo*.[4] We tackle this question by first discussing the ICRC's assertion that international law entitles the

[1] *United States of America v Khalid Shaikh Mohammad*, Guantanamo Bay, Cuba, Military Commissions Trial Judiciary AE 013BBB/108T (Order) (6 November 2013), online: <http://media.miamiherald.com/smedia/2013/11/06/16/25/16cpHS.So.56.pdf> [*Guantanamo*].

[2] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 UNTS 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 UNTS 85; *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 UNTS 135 [*Geneva Convention III*]; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287 [collectively *Geneva Conventions*].

[3] Daniel Cahen, quoted in Anna Nelson, "Why Confidentiality Matters," *Intercross* (Blog) (19 November 2013), online: <http://intercrossblog.icrc.org/blog/why-confidentiality-matters>.

[4] *Guantanamo*, *supra* note 1.

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organization to a privilege not to testify or disclose confidential information in domestic court proceedings. In our view, there is strong evidence to suggest that customary international law does require that the ICRC be granted such a privilege. We then look at the Canadian context. Here we argue that, given that customary international law forms part of the common law of Canada (despite occasional judicial backpedalling in this regard), this privilege should be recognized by Canadian courts, notwithstanding its potentially uneasy fit with traditional Canadian evidence law. Indeed, as will be shown, there has already been "proto-recognition" of this privilege in the context of a parliamentary inquiry into allegations of abuse of detainees transferred by the Canadian Armed Forces to Afghan national authorities.

The focus of this article is Canada's relationship with the ICRC and, specifically, the question of the organization's testimonial privilege in this country. However, we also aim to contribute modestly to situating Canada within the wider transnational context of the status of international organizations before domestic courts. As Philip Saunders has noted, there are both jurisprudential and scholarly gaps:

> The legal personality and privileges and immunities of international organizations have only infrequently been contested in Canadian courts … [T]he existing jurisprudence has left a number of important questions effectively unanswered at the national level, including, for example, the role of customary international law, the extent of functional grants of immunity in the employment context, and the interaction of jurisdictional immunity with human rights norms (including the role of independent dispute-settlement mechanisms as a means of ensuring accountability). By contrast, these issues have received extensive attention both in foreign courts and in academic commentary dealing with other jurisdictions.[5]

ICRC's Privilege in Customary International Law

Our starting point is the nature of the ICRC's legal personality.[6] Much has been written on this subject elsewhere, and so we will address it only briefly.[7] The ICRC is neither purely an inter-governmental organization nor a non-governmental organization. Rather, it is a *sui generis* hybrid

[5] Phillip M Saunders, "Canada" in August Reinisch, ed, *The Privileges and Immunities of International Organizations in Domestic Courts* (Oxford: Oxford University Press, 2013) 73 at 74–75.

[6] For a view that legal personality is not a necessary or even useful starting point for analyzing the unique role and mandate of the International Committee of the Red Cross (ICRC), however, see Tarcisio Gazzini, "A Unique Non-State Actor: The International Committee of the Red Cross" (2010) 4:1 Hum Rts & Intl Legal Discourse 32.

[7] See, eg, Gabor Rona, "The ICRC's Privilege Not to Testify: Confidentiality in Action: An Explanatory Memorandum" (2002) 84:845 Intl Rev Red Cross 207.

of the two. While formally constituted as a private Swiss organization, it has a mandate to engage in IHL protection and promotion under the *Geneva Conventions* and other international instruments. To illustrate, we can take two examples from *Geneva Convention III* pertaining to prisoners of war (which Canada has incorporated into domestic legislation).[8] With respect to relief activities, "[t]he special position of the International Committee of the Red Cross in this field shall be recognized and respected at all times"; and, with respect to visiting places of detention, ICRC delegates are given the same prerogatives as "protecting powers" (states delegated monitoring authority by the belligerents).[9] It is important that there be a treaty basis for the functional privilege claimed since it is doubtful whether international organizations — unlike states — are inherently imbued with privileges and immunities as a matter of customary international law.[10]

In addition to the ICRC's mandate under international instruments, one can look to the ICRC's standing in international organizations to highlight its international legal personality. Notably, the ICRC has observer status in the United Nations (UN) General Assembly, it has standing consultations with the UN Security Council, and it is the founding member of the International Red Cross and Red Crescent Movement, in whose top deliberative body (the International Conference of the Red Cross and Red Crescent) states — including Canada — participate.[11]

[8] *Geneva Convention III, supra* note 2, incorporated domestically in Canada through the *Geneva Conventions Act,* RSC 1985, c G-3. Note that the ICRC has a broader humanitarian mandate within the context of the International Red Cross and Red Crescent Movement, but that in this article we focus on the organization's role in armed conflict; accordingly we leave open the question of whether privilege should attach to ICRC communications outside of the armed conflict context.

[9] *Geneva Convention III, supra* note 2, arts 125–26. For other references to the ICRC in international humanitarian law (IHL) treaties and, indeed, for a comprehensive look at the ICRC's legal personality, see A Lorite Escorihuela, "Le Comité international de la Croix Rouge comme organisation sui generis? Remarques sur la personnalité juridique internationale du CICR" (2001) 105 RGDIP 581.

[10] See *Amaratunga v Northwest Atlantic Fisheries Organization*, 2013 SCC 66, [2013] 3 SCR 866 at para 29 [*Amaratunga*]. Having made this point, it is also important to recognize that the ICRC's role, as widely accepted by states, has moved beyond the strict confines defined in the treaty texts. See Rotem Giladi & Steven Ratner, "The Role of the International Committee of the Red Cross" in Andrew Clapham, Paola Gaeta & Marco Sassoli, eds, *The 1949 Geneva Conventions: A Commentary* (Oxford: Oxford University Press, 2015) 525.

[11] *Observer Status for the International Committee of the Red Cross*, GA Res 45/6, UNGAOR, 45th Sess, Supp No 49, UN Doc A/45/49 (1990) at 15; Jakob Kellenberger, "Application of International Humanitarian Law, Human Rights and Refugee Law: UN Security Council, Peacekeeping Forces, Protection of Human Beings in Disaster Situations" (Statement delivered by the President of the ICRC at the International Conference of the International Institute of Humanitarian Law, 8 September 2005), online: <https://www.icrc.org/eng/resources/documents/misc/6g7ahc.htm>; Chandler P Anderson, "The International Red Cross Organization" (1920) 14:1/2 AJIL 210 at 212.

Finally, in assessing the ICRC's international legal personality, we can look to diplomatic agreements between the ICRC and host states. In the first instance, under the ICRC–Swiss status agreement, the Swiss Federal Council "recognizes the international juridical personality and the legal capacity" of the ICRC.[12] The ICRC is party to numerous such headquarters agreements, which acknowledge its diplomatic privileges and immunities,[13] and it has been suggested that over eighty states have recognized the ICRC's testimonial privilege by treaty or in legislative instruments.[14] The existence of these headquarters agreements is not by itself conclusive of the ICRC's legal personality under customary international law. Even if there is significant state practice in this regard, including among states especially affected by armed conflict, the question of *opinio juris* remains. States may not feel obliged as a matter of law to enter into agreements acknowledging the ICRC's international legal status. However, headquarters agreements do indicate state perceptions of the ICRC's personality and mandate, which, when combined with other official pronouncements, provide some evidence of customary international law on the issue. For example, the German government has stated that

> [a]lthough [the ICRC] is an association under Swiss law based in Geneva, it has international legal personality in a number of respects. The ICRC's work in connection with international armed conflicts is based on the four Geneva Conventions of 1949 and Protocol Additional I of 1977, which give it the right to carry out specific activities such as assisting the wounded as well as sick or shipwrecked troops, visiting prisoners of war and providing aid and succour for civilians. In situations of civil war, too, the ICRC is entitled under Article 3 of the Geneva Conventions to offer its services to the warring parties. The basic pre-requisite for its work is strict impartiality and neutrality.[15]

[12] *Agreement between the International Committee of the Red Cross and the Swiss Federal Council to Determine the Legal Status of the Committee in Switzerland*, 19 March 1993, reprinted in (1993) 33:293 Intl Rev Red Cross 152, art 1, online: <www.icrc.org/eng/resources/documents/misc/57jnx7.htm> [*Swiss Agreement*]. On the significance of this and other headquarters agreements for the potential existence of a customary norm related to the ICRC's legal personality, see 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" (2002) 12 SZIER 355.

[13] At the time of writing, the ICRC has not publicly disclosed the precise number of such agreements, but it is generally considered to be over sixty. See Rona, *supra* note 7 at 210.

[14] Dominik Stillhart, "Confidentiality: Key to the ICRC's Work but Not Unconditional," *ICRC Resource Centre* (20 September 2010), online: International Committee of the Red Cross <www.icrc.org/eng/resources/documents/interview/confidentiality-interview-010608.htm>.

[15] Germany, Federal Foreign Office, *International Humanitarian Law* (19 November 2012), online: Federal Foreign Office <http://www.auswaertiges-amt.de/EN/Aussenpolitik/InternatRecht/HumanitaeresVoelkerrecht_node.html>.

It is important to acknowledge that the ICRC does not have a headquarters agreement with Canada at present and that the organization does not enjoy statutory immunities or privileges pursuant to the *Foreign Missions and International Organizations Act* (*FMIOA*), which is the usual vehicle for defining the status of international organizations in Canada.[16] Discussions appear to have been ongoing on this subject for some time, and, informally at least, the ICRC has been treated by Canadian government officials as an international organization in terms of courtesies and access to civilian and military decision makers. We return to this question of the organization's status in Canada briefly in the conclusion to this article since an agreement and *FMIOA* recognition would be the clearest and most comprehensive way to address the various issues — including testimonial privilege — arising from the ICRC–Canada relationship. However, in our view, the failure to grant *FMIOA* recognition does not end the matter, given Canada's treaty obligations, the state of customary international law, and the fact that the *FMIOA* does not preclude legal personality, privileges, or immunities for organizations not explicitly included within its ambit.[17]

Of course, a testimonial or non-disclosure privilege is not an immediate consequence of the fact that the ICRC has an international legal personality and mandate. The *Geneva Conventions* and *Additional Protocols* are silent on the privilege issue, and so we turn to a functional test to determine whether the ICRC requires such a privilege to carry out its work.[18] The International Court of Justice took such an approach in the *Reparations* case, finding that the UN's capacity to engage in diplomatic protection of its agents was implied by the tasks given to it under the *UN Charter*.[19] The functional reasoning of the *Reparations* case has arguably been extended to determine the capacities of other international organizations and is not limited to the UN context.[20]

[16] *Foreign Missions and International Organizations Act*, SC 1991, c 41 [*FMIOA*].

[17] On the legal personality of organizations not subject to *FMIOA* orders, see Saunders, *supra* note 5 at 84.

[18] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, 1125 UNTS 3; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, 1125 UNTS 609 [collectively *Additional Protocols*].

[19] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] ICJ Rep 174 [*Reparations*]; *Charter of the United Nations*, 26 June 1945, 1 UNTS 16 [*UN Charter*].

[20] Philippe Gautier, "The Reparation for Injuries Case Revisited: The Personality of the European Union" in JA Frowein & R Wolfram, eds, *Max Planck Yearbook of United Nations Law* (Alphen den Rijn, Netherlands: Kluwer Law International, 2000) 331, online: <http://www.mpil.de/files/pdf2/mpunyb_gautier_4.pdf>.

As suggested by the ICRC's legal advisor to Washington, cited in the introduction to this article, there are functional and operational reasons for the ICRC's adherence to confidentiality in its work. They boil down to the fact that if the ICRC cannot assure warring parties of confidentiality, combatants will be less likely to provide the ICRC with access to decision makers, places of detention, and the broader battle space. Why would a commander allow an ICRC delegate access to secured facilities if that delegate might later be a witness against him or her, or against soldiers under his or her command, in criminal or civil proceedings? The ICRC must build trust with all of the parties to an armed conflict and cannot effectively do so in the absence of commitments to neutrality, impartiality, and confidentiality — principles that balance the interests of all parties involved in the conflict. These are the functional imperatives of the ICRC's operations. We nevertheless recognize that the ICRC's commitment to confidentiality is not absolute. In extreme cases of ongoing illegality, the ICRC will disclose confidential communications.[21] If it fails to do so in appropriate circumstances, it will suffer reputational and other repercussions. The issue, however, is whether the decision to reveal information obtained in confidence is one for the ICRC or one for the courts.

Beyond considerations internal to the functioning of the ICRC itself, the ICRC's unique position within the international legal system is, in many ways, integral to the latter's overall IHL protection and promotion capacity. The ICRC's role as the key international body in this field — a role that extends as a matter of practice beyond the formal confines of its treaty mandate — is widely recognized by states.[22] In addition to these "first principles" perspectives on the functionally implied attributes of international organizations, there are at least three lines of authority that suggest that the ICRC does indeed have an absolute testimonial privilege flowing from its functional need for confidentiality.

The first is a decision of the International Criminal Tribunal for the former Yugoslavia (ICTY). In *Simic*, the ICTY's Trial Chamber was asked to rule on whether a former ICRC employee could be called to give evidence. The employee in question had been an interpreter for the ICRC and, on his own initiative, had contacted the ICTY's Prosecutor with information gathered during his visits to places of detention while assisting ICRC delegates in their protection work. While not denying the importance of the ICRC's confidentiality, the Prosecutor's argument was that there was no automatic or absolute privilege and that a balance should be struck on a

[21] For the criteria used to determine when the ICRC will waive its privilege, see "The International Committee of the Red Cross's (ICRC's) Confidential Approach" (2012) 94:887 Intl Rev Red Cross 1135, online: <www.icrc.org/eng/assets/files/review/2012/irrc-887-confidentiality.pdf> ["Confidential Approach"].

[22] See Giladi & Ratner, *supra* note 10.

case-by-case basis between the interests of justice and the ICRC's need for confidentiality. The Trial Chamber's majority decision rejected the Prosecutor's arguments:

> [T]he ICRC has, under international law, a confidentiality interest and a claim to non-disclosure of the Information, [such] that no question of the balancing of interests arises. The Trial Chamber is bound by this rule of customary international law which, in its content, does not admit of, or call for, any balancing of interests. The rule, properly understood, is, in its content, unambiguous and unequivocal, and does not call for any qualifications. Its effect is quite simple: as a matter of law it serves to bar the Trial Chamber from admitting the Information.[23]

In a separate opinion, however, Judge David Hunt dismissed the notion that customary international law required the grant of an absolute privilege to the ICRC. He expressed concern that the practical result of an absolute rule would be that an innocent person might be convicted or a guilty person set free in the absence of ICRC testimony. Judge Hunt opined that a privilege applied as an exclusionary rule of evidence law might interfere with the court's truth-finding process. He also suggested there was insufficient evidence of state practice or *opinio juris* to support the existence of a customary legal principle requiring such a privilege.[24] Even if such a privilege existed at the national level, he went on, it did not necessarily follow that such a privilege existed before an international tribunal. He concluded that:

> [i]n 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.[25]

[23] *Prosecutor v Blagoje Simic et al*, IT-95-9, Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness (27 July 1999) at para 76 (International Criminal Tribunal for the Former Yugoslavia (ICTY), Trial Chamber), online: ICTY <http://www.icty.org/x/cases/simic/tdec/en/90727EV59549.htm>.

[24] This is similar to the "innocence at stake" exception to informer privilege, which, along with solicitor-client privilege, is one of two "class" or "blanket" privileges recognized in Canadian law. *R v McClure*, 2001 SCC 14 at para 28, [2001] 1 SCR 445 [*McClure*].

[25] *Prosecutor v Blagoje Simic et al*, IT-95-9, Separate Opinion of Judge David Hunt on Prosecutor's Motion for a Ruling Concerning the Testimony of a Witness (27 July 1999) at para 32 (ICTY, Trial Chamber), online: ICTY <http://www.icty.org/x/cases/simic/tdec/en/090727.pdf>.

It was this "balancing of interests" approach in the separate opinion of Judge Hunt that the US Military Commission adopted in the *Guantanamo* ruling, noted earlier in this article. Erroneously categorizing the ICRC as a non-governmental organization — as noted above, it is rather a hybrid type of organization — Military Judge Pohl found that there was insufficient evidence of customary international law to support the existence of an absolute privilege.[26] In making this finding, Judge Pohl essentially ignored the majority opinion in *Simic*. Puzzlingly, in our view, both Judge Hunt in *Simic* and Judge Pohl in the *Guantanamo* case failed to address the basic insight from the *Reparations* case, namely that an organization's attributes are a function of the mandate given to it by the international community.[27]

In terms of the legacy and international acceptance of the ICTY decision in *Simic*, it is significant that the majority ruling is reflected in the *Rules of Procedure and Evidence* for the "Residual Mechanism" of the ICTY and its sister tribunal, the International Criminal Tribunal for Rwanda (ICTR). Negotiated under the auspices of the UN Security Council, Rule 10 states:

> The International Committee of the Red Cross (ICRC) shall not be obligated to disclose any information, including documents or other evidence, concerning the performance of its mandate pursuant to the four Geneva Conventions of 12 August 1949 or their Additional Protocols or concerning its functions under the Statutes of the International Red Cross and Red Crescent movements. Nor shall such information acquired by a third party on a confidential basis from the ICRC or by anyone while in the service of the ICRC be subject to disclosure or to witness testimony without the consent of the ICRC.[28]

The *Simic* decision has also been endorsed in subsequent judicial decisions.[29]

The *Simic* line of authority aside, one can also point to two other sources of authority that suggest that the ICRC's privilege is established under

[26] *Guantanamo, supra* note 1 at para 4(b). Judge Pohl in fact referred, somewhat anachronistically, to "international common law" rather than customary international law. For a view on what "international common law" might mean, as distinct from customary international law, see Andrew T Guzman & Timothy L Meyer, "International Common Law: The Soft Law of International Tribunals" (2008) 9 Chicago J Intl L 515, online: <http://scholarship.law.berkeley.edu/facpubs/1771>.

[27] *Reparations, supra* note 19.

[28] United Nations Mechanism for International Criminal Tribunals, *Rules of Procedure and Evidence*, UN Doc MICT/1 (8 June 2012).

[29] See, eg, *Prosecutor v Tharcisse Muvunyi,* ICTR-2000-55A-T, Judgment (11 February 2010) (International Criminal Tribunal for Rwanda (ICTR)), online: ICTR <http://www.unictr.org>.

customary international law. These are the *Rules of Procedure and Evidence* of the International Criminal Court (ICC) and the ICRC's headquarters agreements. A privilege for the ICRC is explicitly recognized in the ICC's *Rules of Procedure and Evidence*. Rule 73 states:

> 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.[30]

In a strained reading of Rule 73, Judge Pohl in *Guantanamo* held that subsection 6 "seems to permit a balancing of interests similar to Judge Hunt's analysis in *Simic*."[31] With respect, the mandatory language of subsection 4 means that the correct interpretation of subsection 6 is that the Court may engage in discussions with the ICRC with respect to the potential ICRC waiver of its privilege and nothing more. Final decisions concerning disclosure of otherwise privileged information rest with the ICRC and not the court. There is no ambiguity in subsection 4 and, therefore, no need to go beyond the ordinary meaning of the word "consultation" in subsection 6.

Before moving on, it should be noted that Canada is of course a party to the *Rome Statute* of the ICC and, therefore, accepts the ICRC's testimonial

[30] International Criminal Court, *Rules of Procedure and Evidence*, ICC-ASP/1/3 (Part II-A) (9 September 2002), Rule 73.

[31] *Guantanamo, supra* note 1 at para 3(j).

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privilege before the ICC.[32] While the ICC's *Rules of Procedure and Evidence* do not explicitly speak to domestic evidence laws, it is worth pointing out that they were adopted on consensus, after much negotiation, by the ICC's Assembly of States Parties pursuant to the *Rome Statute*.[33] Furthermore, Canada's domestic implementing legislation for the *Rome Statute* provides that by order of the Governor in Council, "counsel, experts, witnesses and other persons required to be present at the seat of that Court shall have the privileges and immunities set out in article 48 of the Rome Statute."[34]

Finally, one can point to the multitude of ICRC headquarters agreements with host states. As indicated above, there are over sixty such agreements, and their standard clauses provide for, among many other things, privileges and immunities before domestic courts.[35] Since the 1970s, the ICRC has sought to conclude headquarters agreements in order to "consolidate and clarify its status" with national authorities — including on the issue of privileges — but these arguably evidence or give effect to the ICRC's privileges rather than create them.[36] In any event, it should be stressed that the ICRC's immunities and privileges are not exclusively based on, or evidenced by, these headquarters agreements. For example, some states that do not have a headquarters agreement with the ICRC unilaterally recognize the privileges and immunities of the organization along the lines of other international organizations. For example, since 1998, the United States has unilaterally applied the terms of its *International Organizations Immunities Act* to the ICRC.[37] And, aside from the *Guantanamo* decision, it is difficult to find jurisprudence from domestic courts where the ICRC's

[32] *Rome Statute of the International Criminal Court*, 17 July 1997, 2187 UNTS 3 [*Rome Statute*].

[33] Stéphane Jeannet, "Testimony of ICRC Delegates before the International Criminal Court" (2000) 84:840 Intl Rev Red Cross 993, online: <www.icrc.org/eng/resources/documents/article/other/57jqte.htm>.

[34] *FMIOA, supra* note 16, s 5(1)(i), activated by *International Criminal Court Privileges and Immunities Order*, SOR/2004-156, C Gaz II (2004) at 1018. See *Rome Statute, supra* note 32, art 48(4): "Counsel, experts, witnesses or any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court."

[35] See note 13 in this article.

[36] Dieter Fleck & Stuart Addy, *The Handbook of the Law of Visiting Forces* (Oxford: Oxford University Press, 2001) at 477.

[37] *International Organizations Immunities Act*, 22 USC § 288 (1945) [*IOIA*]. See Fleck & Addy, *supra* note 36 at 477. Note that the *IOIA* only provides immunities to staff and documents in the possession of the ICRC. See *Guantanamo, supra* note 1 at para 3(e) (defence request for ICRC reports already handed over to the US government).

immunities have not been respected, at least with respect to the organization's core activities.[38]

Although there is no domestic judicial authority directly on point in Canada, it is worth pointing out that the ICRC's privilege has been recognized in a *de facto* manner in a Canadian quasi-judicial context. Specifically, the confidentiality issue was considered by two former Supreme Court of Canada judges acting as impartial arbiters over which documents relating to the transfer of detainees to Afghan authorities by Canadian Forces should be released to a parliamentary committee.[39] Justices Claire L'Heureux-Dubé and Frank Iacobucci held:

> 44 … In order to carry out its work in a neutral and impartial manner, [the ICRC] has a long-standing policy and practice of confidentiality. The ICRC requires confidential bilateral communications with the authorities with which it deals and expects such authorities to respect and protect the confidential nature of its communications. The confidential nature of the ICRC's communications is essential, among other things, to enable the ICRC to conduct a dialogue with states or organized armed groups involved in armed conflicts, to persuade the parties to an armed conflict to allow it to exercise its right of access to conflict areas, and to protect ICRC staff in the field.[40]

After citing the unique role of the ICRC and the facts that the confidentiality principle has been recognized by international tribunals and the ICRC's privilege enshrined in the ICC's *Rules of Procedure and Evidence*, the justices set out an approach that, while not explicitly labelled a privilege, treated ICRC materials as privileged:

> 46. Mindful of the ICRC's concerns, considering its important mandate and taking into account our staff's discussions with ICRC officials, we have adopted the following approach to reviewing redactions respecting information about or from the ICRC:

[38] This "core activities" caveat is mentioned because, as discussed below, the situation in respect of private law matters (and employment, in particular) may be unclear in some jurisdictions. See Thore Neumann & Anne Peters in August Reinisch, ed, *Privileges and Immunities of International Organizations in Domestic Courts* (Oxford: Oxford University Press, 2013) at 264–65. In Canada, however, it appears that immunities remain firmly in place even in cases of employment disputes. See *Amaratunga*, *supra* note 10. For a reaffirmation of strict adherence to the inviolability of the records of international organizations — even in the absence of demonstrated functional necessity — see also *World Bank Group v Wallace*, 2016 SCC 15 [*Wallace*].

[39] Claire L'Heureux-Dubé & Frank Iacobucci, "Afghan Detainee Document Review: Report by the Panel of Arbiters on Its Work and Methodology for Determining What Redacted Information Can Be Disclosed" (15 April 2011) at 15ff, online: <http://beta.images.theglobeandmail.com/archive/01289/Afghan_detainee_do_1289874a.pdf>.

[40] *Ibid* at para 44.

(a) We disclose the fact of any discussions or meetings with the ICRC. The ICRC advised our staff that it is publicly known and expected, by virtue of the ICRC's mandate under the *Geneva Conventions*, that the ICRC meets with state authorities to remind them of their international obligations.
(b) Generally speaking, we do not disclose any information or communications flowing from Canada to the ICRC. There may be instances in which we disclose in summary form information communicated by Canada to the ICRC on issues that are peripheral to the detainee issue.
(c) We do not disclose any information, even in summary form, about or from the ICRC that is directly attributed to the ICRC or that can be inferred comes from the ICRC, unless it has already been publicly disclosed. We may disclose the substance of information, likely by way of summary, communicated by the ICRC, where it is not attributed to the ICRC directly and it is not otherwise apparent that it comes from the ICRC. Given the ICRC's role and privileged access to information about detainees, it will be obvious in many cases, even where information is not attributed to the ICRC, that the ICRC is the source of this information. Where that is the case, we leave the information redacted.[41]

The deference shown to the ICRC's position is particularly evident in the next paragraph:

47. This approach applies to all information flowing between Canada and the ICRC, whether it is information about or assessments of Canadian procedures or information about or assessments of Afghan facilities and national authorities. From the ICRC's perspective there is no basis on which to distinguish these types of information.[42]

With these international and domestic precedents in mind, we can now turn squarely to how courts should apply this privilege in Canadian judicial proceedings. Before doing so, however, one final point is in order. International organizations are not infallible, and in recent years, there have been calls for international organizations to be more accountable.[43] These calls have arisen in the context of human rights abuses (the misfeasance of UN personnel at Srebrenica and "sex for food" scandals involving peacekeepers come immediately to mind) and in private disputes, such as wrongful dismissal cases. Particularly when there are no alternative dispute settlement mechanisms in place, municipal courts have gingerly started to

[41] *Ibid* at para 46.

[42] *Ibid* at para 47.

[43] Niels Blokker, "International Organizations: The Untouchables?" (2013) 10:2 Intl Org L Rev 259.

erode the "untouchable" status of international organizations.[44] However, it should be noted that the ICRC has alternative dispute settlement mechanisms in place, including an ombudsperson.[45] Furthermore, it may be possible to distinguish private law disputes with employees, suppliers, and so on from the core testimonial privilege needs of the ICRC in the armed conflict context. In any case, aside from cases where international organizations have waived their privileges, Canadian courts have taken fairly absolutist views of their immunity.[46]

ICRC's Privilege and Canadian Courts

If we are correct that the ICRC is entitled to a testimonial privilege under customary international law, then Canadian courts should recognize this privilege, subject to explicit statutory override. As a majority in the Supreme Court of Canada put it in *Hape*, embracing an adoptionist approach to customary international law,

> following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly. Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law.[47]

Furthermore, there is a presumption of conformity of domestic legislation with customary international law. Canadian courts, Justice Louis LeBel continued, "will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations," as the legislature is "presumed to act in compliance with Canada's obligations."[48] Finally, the "legislature is presumed to comply with the values and

[44] *Ibid* at 260.

[45] Unfortunately, however, it is difficult to access information about these mechanisms, let alone assess their effectiveness. See Neumann & Peters, *supra* note 38. The present authors urge greater transparency here.

[46] See generally *Amaratunga*, *supra* note 10. On the waiver of immunities, see *Wallace, supra* note 38.

[47] *R v Hape,* 2007 SCC 26 at para 39, [2007] SCR 292 (LeBel J).

[48] *Ibid* at para 53.

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principles of customary and conventional international law. Those values and principles form part of the context in which statutes are enacted, and courts will therefore prefer a construction that reflects them."[49]

Since *Hape*, however, there has been some judicial backpedalling, muddying the waters of Canadian reception law.[50] In *Kazemi Estate v Islamic Republic of Iran,* Justice LeBel writing for the majority stated that "the mere existence of a customary rule in international law does not automatically incorporate that rule into the domestic legal order … Should an exception to state immunity for acts of torture have become customary international law, such a rule could likely be *permissive* — and not *mandatory* — thereby, requiring legislative action to become Canadian law."[51] In other words, while a prohibitive rule is automatically incorporated, a permissive rule requires legislation to be received within the Canadian legal order. In our view, to the extent that this is a sensible distinction, the ICRC's entitlement to non-disclosure/testimonial privilege is a mandatory rule. There are no recognized permissive exceptions to the customary law entitlement of the ICRC to non-disclosure/testimonial privilege if one accepts that there is such a privilege. The competing "balancing of interests" approach rejects the notion that there is a testimonial privilege for the ICRC. Judges Hunt and Pohl did not suggest that there is a permissive exception to a customary entitlement to testimonial privilege; rather, they refused to recognize that there is such an entitlement at all.

If we are correct that a mandatory non-disclosure privilege for the ICRC is recognized under customary international law, which is binding on Canadian courts in the absence of clear legislation to the contrary, how precisely should this privilege be incorporated into Canadian common law? Before examining this issue, a proper understanding of what is at stake with respect to the ICRC's non-disclosure/testimonial privilege requires a brief preliminary discussion of the difference between confidence and privilege as understood in Canadian jurisprudence.

PRIVILEGE AND CONFIDENTIALITY IN CANADIAN LAW

To start, while all privileged communications are necessarily confidential, not all confidential communications are necessarily privileged. In other words, the doctrine of privilege acts as an umbrella under which certain — but not all — categories of confidential information may be protected from ordinary disclosure requirements. Privilege originates as

[49] *Ibid.*

[50] For an argument that *Hape* itself is unclear, see John H Currie, "Weaving a Tangled Web: *Hape* and the Obfuscation of Canadian Reception Law" (2007) 45 Can YB Intl Law 55 at 59–71.

[51] *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at para 61, [2014] 3 SCR 176.

a rule of evidence.[52] It is a rule that protects against the disclosure in court of certain categories of confidential information. The law of privilege in Canada recognizes, in specific cases, the overriding social importance of protecting certain classes of communications in order to encourage the just functioning of society and foster the special relationships that depend upon confidentiality for their operation. As a rule of evidence, the Supreme Court of Canada has said that "[t]he categories of privileged communications are, however, very limited — highly probative and reliable evidence is not excluded from scrutiny without compelling reasons."[53] And further that

> [t]he doctrine of privilege acts as an exception to the truth-finding process of our adversarial trial procedure. Although all relevant information is presumptively admissible at trial, some probative and trustworthy evidence will be excluded to serve other overriding social interests … Since the existence of privilege impedes the realization of the central objective of our legal system in order to advance other goals, the question of privilege is essentially one of public policy.[54]

Confidentiality, on the other hand, is a condition precedent to privilege, which reflects an obligation most often imposed by law on a party to hold in secret certain facts and/or information. The Superior Court of Justice for Ontario has considered confidentiality in the following way:

> The concept of confidentiality is a chameleon, taking different legal hues from the circumstances in which it is found. It may arise in respect of information because of the nature of the information itself, because of the nature of the relationship between the persons giving and receiving the information, or both. In some cases, confidentiality gives rise to an obligation resting on the recipient to maintain the secrecy in which the information was shrouded before it was communicated to the recipient. Secrecy may also be required of a recipient despite relatively widespread knowledge of the information. Confidentiality may also give rise to an obligation resting on the recipient not to disclose or to make use of communicated information even though that information is so widely known that it is public knowledge.[55]

[52] See generally *Descôteaux v Mierzwinski*, [1982] 1 SCR 860, 141 DLR (3d) 590 [*Descôteaux*, cited to SCR].

[53] *R v Gruenke*, [1991] 3 SCR 263 at 296, [1991] SCJ No 80 (QL) (L'Heureux-Dubé J) [*Gruenke*, cited to SCR].

[54] *A (LL) v B (A)*, [1995] 4 SCR 536 at 559, [1995] SCJ No 102 (QL) (L'Heureux-Dubé J).

[55] *Stewart v Canadian Broadcasting Corp*, [1997] OJ No 2271 (QL) at para 91, 1997 CanLII 12318 (Sup Ct).

In short, any claim to confidentiality necessarily requires as its foundation some form of unique relationship between the parties claiming it (for example, lawyer-client, doctor-patient, priest-penitent, and so on), while the nature and extent of any privilege attaching to such confidential relationship is founded upon and established only through considered public policy. In Canadian law, privilege tends to be the exception rather than the rule, and it has been interpreted restrictively.

MAIN TYPES OF "CLASS" PRIVILEGE IN CANADA

While there are many types of legal privilege in Canadian law,[56] given our argument in favour of an absolute non-disclosure/testimonial privilege for the ICRC, this section focuses on the so-called "class" or "blanket" privileges currently recognized in Canadian law. According to the Supreme Court of Canada, a so-called class privilege

> used to refer to a privilege which was recognized at common law and … for which there is a *prima facie* presumption of inadmissibility (once it has been established that the relationship fits within the class) unless the party urging admission can show why the communications should not be privileged (i.e., why they should be admitted into evidence as an exception to the general rule).[57]

These categories of privileged communications are very narrow and are ostensibly limited to solicitor-client privilege and confidential informant privilege.[58]

Solicitor-Client Privilege: The "Gold" Standard

Unsurprisingly, the Supreme Court of Canada has deliberated on the nature and limitations of the legal advice privilege, or solicitor-client privilege, in a number of cases. The earliest of such cases is *Solosky*,[59] in which the Court considered the boundaries of the right of prison inmates to communicate in confidence with their lawyers. Confirming that "[t]he concept of privileged communications between a solicitor and his client

[56] Examples include litigation privilege, settlement privilege, spousal privilege, joint client privilege, common interest privilege, and the implied undertaking rule.

[57] *Gruenke, supra* note 53 at 286.

[58] Although the Court in *McClure, supra* note 24 at para 28, had included spousal privilege among the "class" privileges, the spousal privilege is far from absolute. See, eg, *Canada Evidence Act*, RSC 1985, c C-5, s 4 (enumerated exceptions to this privilege); Bill C-32, *An Act to Enact the Canadian Victims Bill of Rights and to Amend Certain Acts*, 2nd Sess, 41st Parliament, 2013 (assented to 23 April 2015), SC 2015, c 13 (amending the *Canada Evidence Act* to make spouses compellable witnesses).

[59] *Canada v Solosky*, [1980] 1 SCR 821 [*Solosky*].

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has long been recognized as fundamental to the due administration of justice,"[60] the Court nevertheless concluded that such a right was not without limits. Although a comment made in *obiter* more than anything else, the Court noted that one of the exceptions to this near-absolute class privilege was the so-called crime/fraud exception.[61] The Court's ratio, on the other hand, concluded that the maintenance of the safety and security of a penal institution, its staff, and inmates outweighed the interest represented by insulating the solicitor-client relationship.[62] In the result, while the Court recognized the "unique relationship of solicitor and client" and "the right to communicate in confidence with one's legal adviser [as] a fundamental civil and legal right," this class privilege was circumscribed on the basis of public policy reasons.[63]

In *Descôteaux*, the Supreme Court of Canada once again considered the solicitor-client privilege, this time in relation to a law office search.[64] The Court confirmed the existence and importance of solicitor-client privilege, citing its earlier decision in *Solosky*, once again referring to the "unique relationship of solicitor and client."[65] Importantly, in *Descôteaux*, the Court concluded that the solicitor-client privilege was not just a rule of evidence but also had achieved the status of a substantive rule. In formulating this substantive rule, the Court contemplated that exceptions could be formulated to the near-absolute privilege in the following way:

> When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation … [Such] enabling legislation … must be interpreted restrictively.[66]

In a case perhaps more akin to the type of case in which the assertion of the ICRC's right to absolute non-disclosure/testimonial privilege might arise (as with the *Simic* and *Guantanamo* cases), the Court in *McClure* addressed the issue of whether solicitor-client privilege should yield to an

[60] *Ibid* at 833.

[61] *Ibid* at 835: "[I]f a client seeks guidance from a lawyer in order to facilitate the commission of a crime or fraud, the communication will not be privileged and it is immaterial whether the lawyer is an unwitting dupe or knowing participant."

[62] *Ibid* at 840.

[63] *Ibid.*

[64] *Descôteaux, supra* note 52.

[65] *Ibid* at 870.

[66] *Ibid* at 875.

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accused person's constitutionally protected right to make full answer and defence.[67] While noting that "solicitor-client privilege is almost absolute"[68] and that "[s]olicitor-client privilege and the right to make full answer and defence are principles of fundamental justice,"[69] the Court concluded that "[r]ules and privileges will yield to the [*Canadian*] *Charter* [*of Rights and Freedoms*'] guarantee of a fair trial where they stand in the way of an innocent person establishing his or her innocence … Our system will not tolerate conviction of the innocent."[70] The exception to this near-absolute privilege is what the Court has called the "innocence at stake" exception, explored in greater detail below.[71] For present purposes, however, the Court's comments about the nature of the solicitor-client privilege require consideration, as these comments may assist in constructing an argument in favour of recognition of ICRC privilege as a new class privilege in Canada.

In considering the unique relationship that exists between a lawyer and her client, the Court in *McLure* confirmed that the privilege attaching to that relationship was

> fundamental to the justice system in Canada. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented.

The Court also referred to solicitor-client privilege as occupying "a unique status within the legal system. The important relationship between a client and his lawyer stretches beyond the parties *and is integral to the workings of the legal system itself*. The solicitor-client relationship is a part of that system, not ancillary to it."[72]

The Supreme Court of Canada decisions in *Solosky*, *Descôteaux*, and *McClure* all point to the near-absolute nature of the solicitor-client privilege in light of the unique relationship that exists between a lawyer and her client, of the unique status that such a relationship holds within the Canadian legal landscape, and the fact that the protection of this privilege

[67] *McClure, supra* note 24.

[68] *Ibid* at para 38.

[69] *Ibid* at para 41.

[70] *Ibid* at para 40; see also para 4: "Solicitor-client privilege is not absolute so, in rare circumstances, it will be subordinated to an individual's right to make full answer and defence."

[71] *Ibid* at para 46.

[72] *Ibid* at paras 28, 31 [emphasis added].

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is integral to the workings of the legal system itself. Given our position that the non-disclosure/testimonial privilege of the ICRC is the law of the land in Canada in the absence of express legislative override, it is strictly speaking unnecessary to apply the Canadian common law test to this privilege. Nonetheless, we investigate whether the solicitor-client benchmarks are met in order to assess the compatibility of the asserted class privilege of the ICRC with the traditional Canadian common law of privilege. If we are wrong in our assertions that a non-disclosure/testimonial privilege for the ICRC is required by a customary international legal rule, or that this rule is automatically incorporated in Canadian common law, we nonetheless suggest that a proposed new class privilege for the ICRC might be compatible with the Canadian common law of privilege.

Confidential Informant Privilege and the "Innocence at Stake" Exception

As alluded to above, one of the exceptions to the almost-absolute solicitor-client privilege is what the Supreme Court of Canada refers to as the "innocence at stake" exception. This exception also applies to "confidential informant" (CI) privilege.[73] Before exploring the exception, a look at the rule is first warranted. CI privilege attaches to confidential communications between the police and their informants, namely those who share information with the police in furtherance of the demands of law enforcement. CI privilege only attaches, however, where the individual informant seeks confidentiality and the police agree to it. In *Basi,* the Supreme Court of Canada stated that

> [t]he privilege arises where a police officer, in the course of an investigation, guarantees protection and confidentiality to a prospective informer in exchange for useful information that would otherwise be difficult or impossible to obtain. In appropriate circumstances, a bargain of this sort has long been accepted as an indispensible tool in the detection, prevention and prosecution of crime.[74]

The rationale for the privilege is perhaps self-evident — it is to protect those who provide confidential information to the police from risks of retribution or retaliation by criminal elements and to encourage future informers to cooperate with, and assist, the police with their law enforcement duties.

So hallowed is CI privilege that it has been described by the Supreme Court of Canada as being "of fundamental importance to the workings of a criminal

[73] *Ibid* at para 45.

[74] *R v Basi*, 2009 SCC 52 at para 36, [2009] SCJ No 52 (QL).

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justice system."[75] Referring to CI privilege as a "public interest privilege," Justice Ian Binnie for the majority in *Barros* explained once again that "informer's privilege was created and is enforced as a matter of public interest rather than contract."[76] As Vancouver lawyer David Layton notes, CI privilege "operates as a legitimate derogation from the accused's constitutional right to disclosure."[77] Indeed, once established, "courts are not entitled to balance the benefit enuring from the privilege against countervailing considerations, as is the case, for example, with Crown privilege or privileges based on Wigmore's four-part test."[78] This near-absolute privilege, however, is subject to one exception — the "innocence at stake" exception.[79]

Layton succinctly describes the "innocence at stake" exception as having three preconditions: (1) the accused must establish that the privileged information is not available from any other admissible source; (2) the accused must show that he or she will be convicted if access to the privileged information is not provided; and (3) if the accused can satisfy the first two preconditions, she must then demonstrate an evidentiary basis to conclude that the privileged information could raise a reasonable doubt as to guilt. If these three prongs of the test are met by the accused, only then will the trial judge review the information sought in order to determine whether disclosure of the information is likely to raise a reasonable doubt in the accused's case.[80]

As with the near-absolute nature of solicitor-client privilege, the Supreme Court of Canada has emphasized the unique role and important public policy interest that confidential informant privilege serves in our criminal justice system. The common factor between these two privileges, of course, is that they each occupy truly unique positions within our legal system. Without these privileges, our legal system would not function properly, and the very public interest that the legal system aims to promote and protect would be undermined. Our argument is that the same rationale can be applied to the ICRC and its unique role within the international system governing armed conflict.

[75] *R v Leipert*, [1997] 1 SCR 281 at para 10, [1997] SCJ No 14 (QL) [*Leipert*, cited to SCR]; *R v Barros*, 2011 SCC 51 at para 1, [2011] 3 SCR 386 [*Barros*].

[76] *Barros, supra* note 75 at para 32.

[77] David Layton, "Confidential Informer Privilege" at 5, online: <www.cba/org/cba/cle/PDF/CRIM12_Paper_Layton.pdf>.

[78] *Leipert, supra* note 75 at para 12; *Barros, supra* note 75 at para 1 (note that Wigmore's four-part test is described later in this article).

[79] *Leipert, supra* note 75 at para 20; *Barros, supra* note 75 at para 28.

[80] Layton, *supra* note 77 at 6–7.

ICRC's Privilege as a New Class Privilege

Although the range of class privileges is limited, the Supreme Court of Canada has specifically contemplated that "the identification of a new class [may arise] on a principled basis."[81] Indeed, "it is now accepted that the common law permits privilege in new situations where reason, experience and application of the principles that underlie the traditional privileges so dictate … [T]he law of privilege may evolve to reflect the social and legal realities of our time."[82] Our position is that the overwhelming support by states of the ICRC's functional and operational *raison d'être* invites the recognition of ICRC privilege as a new form of class privilege under Canadian common law. In our view, the "application of the principles that underlie the traditional privileges" support recognizing ICRC privilege as a new class privilege.

The Supreme Court of Canada in *Gruenke* considered whether the policy reasons underlying the treatment of solicitor-client communications as a special class of confidential communications were equally applicable to religious communications (priest-penitent). Finding that the latter were not comparable to the former, Chief Justice Antonio Lamer (as he then was) held for the majority: "In my view, religious communications, notwithstanding their social importance, are not inextricably linked with the justice system in the way that solicitor-client communications surely are."[83] Rather,

> [t]he *prima facie* protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the legal system. Such communications are inextricably linked with the very system which desires the disclosure of the communication.[84]

So goes our argument in favour of recognizing the ICRC's privilege. Even putting to one side the reception of customary international law, the protection of the ICRC's confidential information would be based on the fact that the nature of both the relationships and the communications between the ICRC and states (and/or armed groups) are essential to the effective operation of the international legal system regulating armed conflict. Such communications are inextricably linked with the international legal protection of vulnerable persons during armed conflict, including

[81] *AM v Ryan*, [1997] 1 SCR 157 at para 20, [1997] SCJ No 13 (QL) [*Ryan*].

[82] *Ibid* at para 21.

[83] *Gruenke, supra* note 53 at 288–89.

[84] *Ibid.*

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captured or wounded members of the Canadian Armed Forces and members of the civilian population. Without the ability to protect such information, the ICRC would see its access to prisoner of war camps and places of detention, among other points of access to warring parties and decision makers, eroded. It is no exaggeration to suggest that the role of the ICRC's delegates during armed conflict is as central to the proper functioning of the law of armed conflict as the role of lawyers to the functioning of the legal system in Canada.

In the *Gruenke* case, the Court referred to the "Wigmore test" in determining whether communications between a priest and penitent are entitled to the same level of privilege and legal protection as those between a lawyer and client — that is, whether they benefit from a new form of class privilege. The Court described the Wigmore criteria as follows:

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; and
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.[85]

The Court stated that "these considerations provide a general framework within which policy considerations and the requirements of fact-finding can be weighed and balanced on the basis of their relative importance in the particular case before the court. *Nor does this preclude the identification of a new class on a principled basis.*"[86] In view of the widespread acknowledgement by courts, tribunals, and scholars of the pragmatic need for the protection of confidential information flowing between the ICRC, states, combatants, detained persons, and civilians, we argue that the recognition of a common law ICRC non-disclosure/testimonial privilege can be justified through the application of the Wigmore criteria.

Inviting characterization of the ICRC's mandate as being in the international and truly public interest, "states now expect the ICRC to insert itself in situations of international armed conflict (IAC) and non-international armed conflict (NIAC), as well as in other non-conflict situations, and warring parties are expected to allow the ICRC to carry out its mandate."[87]

[85] *Ibid* at 284.

[86] *Ibid* at 290 [emphasis added].

[87] Giladi & Ratner, *supra* note 10.

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Canada has been directly involved in some of these armed conflicts (Afghanistan, Libya, Iraq, and Syria, to take recent examples), and given the human protection role carried out by the ICRC in these and other theatres of combat, the importance of the ICRC's access cannot be overestimated. Even though it is possible that confidential ICRC information could be relevant before domestic courts, disclosure of this confidential information should neither automatically nor easily be compelled nor should potential disclosure of such information become the subject of a casual balancing of interests.

Instead, confidential information in the possession of the ICRC should at all times be zealously protected from disclosure to ensure the functional and operational integrity of the system of protection established under IHL. In our view, the confidentiality that promotes and advances the humanitarian mission of the ICRC in times of armed conflict — whether international or non-international — is so fundamental to the functioning of the system of IHL that it should be protected by nothing short of a class privilege. To hold otherwise would be a disservice not only to the ICRC but also to the victims of war who rely upon its protection. In our view, the ICRC's special role in the system of IHL provides a principled basis for recognition of a new class privilege in Canadian evidence law.

ICRC's Privilege on a Case-by-Case Basis

Alternatively, if Canadian courts resist recognizing both the customary international legal rule and a new class privilege for the ICRC, a sound argument could still be advanced for recognition of an ICRC privilege on a case-by-case basis. This may be the more likely avenue for achieving recognition of an ICRC privilege in Canada, as recent Supreme Court of Canada decisions appear to suggest a predilection for deference to the legislative branch in the recognition of new class privileges. In the case of *R. v National Post*, for example, the Court considered the limits of journalistic privilege.[88] Noting that "courts should strive to uphold the special position of the media and protect the media's secret sources where such protection is in the public interest,"[89] the majority nevertheless decided that on the facts of this case — where the *National Post* received a copy of a likely forged monetary instrument from an anonymous source that would have implicated former Prime Minister Jean Chrétien in serious criminal activity — "the media claim to immunity from production of the physical evidence is not justified

[88] *R v National Post,* 2010 SCC 16, [2010] 1 SCR 477 [*National Post*].

[89] *Ibid* at para 3.

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in the circumstances … even if the end result proves to be information that may lead to the identification of the secret source(s)."[90]

In rejecting the *National Post*'s arguments that journalistic, confidential source privilege was a class privilege, the Court did leave the door open for the recognition of future class privileges but suggested that such recognition would likely, "if at all, only be by legislative action."[91] Nevertheless, the Court did embark upon a Wigmore analysis for recognition of the privilege on a case-by-case basis. Finding this to be the preferred method of analysis, the Court endorsed the Wigmore test as "a mechanism with the necessary flexibility to weigh up and balance competing public interests in a context-specific manner."[92] Underlying this analysis, the Court said, "is the need to achieve proportionality in striking a balance among the competing interests," and this balancing would occur at the fourth branch of the Wigmore test.[93] This balancing exercise would require the Court to "weigh up the evidence on both sides (supplemented by judicial notice, common sense, good judgement and appropriate regard for the 'special position of the [party claiming the privilege]')."[94] On the Wigmore analysis, the Court found that the *National Post* had not established secret source privilege on the facts of the case.

In the more recent case of *Canada (Citizenship and Immigration) v Harkat*, the Supreme Court of Canada considered whether Canadian Security and Intelligence Service (CSIS) human sources were covered by a class privilege.[95] The majority rejected such a privilege, noting that the CI privilege afforded in the context of law enforcement was distinct from the information-gathering role that human sources played in a CSIS investigation. Specifically, the Court found that the "differences between traditional policing and modern intelligence gathering preclude automatically

[90] *Ibid.* It is worth mentioning that Binnie J (for the majority) seemed to place some emphasis on the fact that "this is not the usual case of journalists seeking to avoid testifying about their secret sources. *This is a physical evidence case*" [emphasis added]. Later in his judgment, Binnie J. repeats: "[I]t is important to remind ourselves that *there is a significant difference between testimonial immunity against compelled disclosure of secret sources and the suppression by the media of relevant physical evidence*" [emphasis added]. This distinction is relevant because it underscores the fact that privilege cannot be asserted over physical objects that may ultimately prove to be evidence of a criminal offence. See, eg, *R v Murray* (2000), 48 OR (3d) 544, 144 CCC 3d 289 (Sup Ct). However, the distinction also leads one to ponder whether the Court's decision might have been different has it been faced with a straightforward question of journalist-confidential source privilege.

[91] *National Post, supra* note 88 at para 42.

[92] *Ibid* at para 51.

[93] *Ibid* at para 59.

[94] *Ibid* at para 64.

[95] *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37, [2014] 2 SCR 33 [*Harkat*].

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applying traditional police informer privilege to CSIS human sources."[96] As in *National Post*, the Court held that "[i]f Parliament deems it desirable that CSIS human sources' identities and information be privileged, whether to facilitate coordination between police forces and CSIS or to encourage sources to come forward to CSIS … it can enact the appropriate protections."[97]

This recent judicial reluctance to recognize new class privileges would appear to be grounded in judicial deference to the legislative branch. And, yet, this deference would still not preclude Canadian courts from considering an ICRC privilege on a case-by-case basis using the Wigmore criteria. For convenience, we repeat these criteria here:

- the communications must originate in a confidence that they will not be disclosed;
- this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
- the relation must be one which in the opinion of the community ought to be sedulously fostered; and
- 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.[98]

Concerning the first and second branches of this test, the ICRC has described its confidential approach as being "at the core of its identity."[99] The ICRC characterizes its role as that of "an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance."[100] In carrying out its mandate, the ICRC maintains that its confidential approach "is a key argument for obtaining access to the people that the organization assists and protects. Bilateral and confidential dialogue has proven its effectiveness from the humanitarian point of view, in particular in contexts in which a

[96] *Ibid* at para 85.

[97] *Ibid* at para 87.

[98] To establish a case-by-case privilege, the claimant has to overcome a burden of persuasion on the facts that "[t]he injury that would inure to the [relationship] by the disclosure of the communications [would] be *greater than the benefit* thereby gained for the correct disposal of the litigation." See *National Post, supra* note 88 at para 116 (Abella J, dissenting on another point).

[99] "Confidential Approach," s*upra* note 21 at 1136.

[100] ICRC Resource Centre, "The ICRC's Mission Statement" (19 June 2008), online: International Committee of the Red Cross <http://www.icrc.org/eng/resources/documents/misc/icrc-mission-190608.htm>.

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neutral and independent player is needed."[101] On this basis, therefore, the first and second branches of the Wigmore test would arguably be met. The ICRC generally undertakes to act in confidence in its relationships with the various parties to an armed conflict, and such confidence is essential to the full and satisfactory maintenance of those relationships.

On the third branch, it is worth pointing out that the ICRC has been assisting victims of war for more than 150 years. The International Red Cross and Red Crescent Movement is the largest humanitarian network in the world. The importance of its role in alleviating human suffering, protecting life and health, and upholding human dignity during times of armed conflict and other emergencies is beyond question and has been recognized in various ways by Canada through treaties and domestic implementing legislation, as outlined earlier in this article. Accordingly, we would argue, there should be near-unanimous community support for the proposition that the confidential relationships between the ICRC and those with whom it engages in support of its humanitarian functions should be sedulously fostered. Consistent with the Supreme Court of Canada's reasoning in *National Post* regarding the balancing exercise a court would undertake, a Canadian court faced with this issue could take judicial notice of the vital role the ICRC plays internationally and in Canada when weighing up the evidence in favour of recognizing the privilege.[102]

The fourth branch of the Wigmore test — the balancing of interests — may prove to be more challenging. As the Court stated in *National Post*:

> [T]he fourth Wigmore criterion does most of the work. Having established the value to the public of the relationship in question, the court must weigh against its protection any countervailing public interest such as the investigation of a particular crime (or national security, or public safety or some other public good).[103]

In this case, the ICRC would bear the persuasive burden of convincing a court that the injury that would inure to the ICRC-confidential source relationship by the disclosure of the alleged probative communications or by compelling testimony would be greater than the benefit gained thereby for the correct disposition of the litigation.

In real terms, in light of the ICRC's unique role in theatres of armed conflict, it is likely that such a balancing of interests would arise in the context of a prosecution under the *Crimes against Humanity and War Crimes Act*

[101] "Confidential Approach," *supra* note 21 at 1136.

[102] *National Post, supra* note 88 at para 64.

[103] *Ibid* at para 58.

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or perhaps under the torture provisions of the Canadian *Criminal Code*.[104] In such a case, the court would have to weigh the ICRC's claim to privilege against the accused party's rights under the *Canadian Charter of Rights and Freedoms*, including the right to full answer and defence under section 7.[105] The outcome would depend heavily upon the facts of the case, but it would not be surprising to see a court engage in a kind of "innocence at stake" analysis to resolve the matter, as is the case with CI privilege. In sum, the ICRC would fairly easily be able to persuade a court of the first three Wigmore criteria. The specific facts before the court, however, would dictate the strength or weakness of its claim to satisfaction of the fourth branch of the test and, hence, whether the court would recognize the ICRC's privilege on a case-by-case basis.

Conclusion

We have argued that there is a customary rule of international law entitling the ICRC to testimonial privilege and that this rule is, in the absence of overriding legislation, part of the common law in Canada. If we are incorrect in that conclusion, we nonetheless suggest that the requirements set out by the Canadian courts for recognition of a class privilege, or at least a strong case-by-case privilege, would be met. Unfortunately, ambiguity in this area will continue until a headquarters agreement between the ICRC and Canada is concluded to cover privileges and immunities — as well as a host of other outstanding issues — and the ICRC is granted appropriate privileges and immunities pursuant to the *FMIOA*.[106] Canada has granted privileges and immunities to dozens of international organizations, commissions, and even summits — from the African Development Bank, to the North Pacific Anadromous Fish Commission, to the 2010 Group of 20 Summit.[107] It is time for Canada to acknowledge the crucial role of the ICRC in promoting and protecting IHL by formally protecting the ICRC's confidentiality principle that guarantees the integrity of its work.

[104] *Crimes against Humanity and War Crimes Act*, SC 2000, c 24; *Criminal Code*, RSC 1985, c C-46, s 269.1.

[105] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 7.

[106] *FMIOA*, *supra* note 16.

[107] *African Development Bank Privileges and Immunities Order*, 1984, SOR/84-360; *North Pacific Anadromous Fish Commission Privileges and Immunities Order*, 1994, SOR/94-562; *G20 Summit Privileges and Immunities Order*, 2010, SOR/2010-62.

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