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ICRC AND PRINCIPLE OF NEUTRALITY – CONFIDENTIALITY OF INFORMATION OR NEED TO SATISFY JUSTICE?

Abstract

Neutrality is one of the seven fundamental principles of the International Red Cross and Red Crescent Movement, which were adopted in Vienna in 1965 at the suggestion of Jean Pictet. Even though more than five decades have passed since their adoption, there are still disagreements over theoretical understanding of principle of neutrality and its application in practice. These disagreements become apparent in situations when the ICRC personnel appear as witnesses to grave breaches of the Geneva Conventions of 1949 and Additional Protocols of 1977. The key issue is whether the principle of neutrality is also the principle of silence, i.e. whether confidentiality of information, which the ICRC's personnel has at its disposal on field, is more important than satisfying justice. The author ponders this issue, relying upon specific cases of violation of the rules of international humanitarian law, with the aim to shed light on the essence of the principle of neutrality, primarily in accordance with the manner Jean Pictet interprets it, so it would be easier to understand and possible to examine justification in applying this principle even under circumstances that put the ICRC's personnel in a moral dilemma.

Keywords: *ICRC, international law, Geneva Conventions, neutrality, confidentiality, justice.*

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INTRODUCTION

In the coming year, the International Red Cross and Red Crescent Movement will celebrate 55 years of principles of humanitarian action. In 1965 in Vienna, at Jean Pictet's suggestion, seven basic principles of the Movement's work were adopted – humanity, impartiality, neutrality, independence, voluntary service, unity and universality – and as such, they are reflected in each and every activity of the Movement. Even though the creator of these principles, Jean Pictet, further explained what each of the principles represents and covers, the Movement's fundamental principles are still subject to theoretical considerations and interpretations more than 50 years after their adoption. It is very important to emphasize that all seven principles are interconnected and dependant upon one another, i.e. one principle conditions the existence of other principles and vice versa. Precisely because of this, sometimes it is difficult to draw a line between principles, and therefore analyze one principle without delving into another one's area. This is particularly evident when it comes principles of impartiality and neutrality. Even though these are two completely different notions, often they are confused with one another. Pictet himself pointed out the problem of their identification “because they both imply existence of groups or theories in opposition and because both call for a certain degree of reserve”². At the same time, he pointed out the key difference between these two notions, which is reflected in the fact a neutral person does not take part in making judgements in comparison to the person participating in such processes but doing so impartially “in accordance with preestablished rules”.³ This paper specifically deals with the principle of neutrality, taking into consideration that apparently there are certain differences in theoretical understanding of it and its application in practice. The aim of this paper is to clarify the essence of the principle of neutrality, in a manner that primarily Jean Pictet interprets it, all in order for it to be easier to understand and possible to examine the application of this principle even in those situations when staff members of the International Committee of the Red Cross are witnesses to grave breaches of the Geneva Conventions of 1949 and Additional Protocols of 1977. Some of the significant issues that will be considered further along in the text are whether the principle of neutrality is principle of silence and what stance has been taken when it comes to the ICRC's personnel standing as witnesses before judicial authorities.

² Jean S. Pictet, *Red Cross Principles*, International Committee of the Red Cross, Geneva, 1979, p. 52-53.

³ *Ibid.*

CONCEPT OF NEUTRALITY

When talking about international law, especially about law of armed conflicts, *neutrality* is most often linked with Switzerland, and fairly so for one simple reason – it is the country that decided not to participate in armed conflicts on anyone’s side. Therefore, it is understandable that precisely this fact was significant when deciding to found the International Red Cross and Red Crescent Movement specifically in this country.⁴ Furthermore, this additionally stresses the significance the Movement gives to the principle of neutrality.

The Statute of the International Red Cross and Red Crescent Movement defines the principle of neutrality in this manner – “in order to continue to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature”⁵. Before going into an analysis of the way one of the fundamental principles was defined, we should also mention the origin of the very word *neutrality*. This word originated from the Latin word *neuter*, which in translation means neither one of two things. Therefore, the concept of neutrality is negatively determined and represents the one who does not take a side in an armed conflict.⁶ While explaining the idea of neutrality, Jean Pictet points out two elements: an attitude of abstention and the existence of persons or groups who oppose one another.⁷ If there were no opposing groups, there would be no need to make judgements on who is right and who is wrong. Attitude of abstention refers to precisely the refusal to make judgements, which implies a significant amount of selfcontrol over impulsive drives of one’s personal feelings, because “there are so many who want to be both judge and party, without recourse to any universally valid criterion”⁸. Even though within the context of public international law military neutrality is the one mostly mentioned, owing to the ICRC’s fundamental principles its ideological aspect is equally ob-

⁴ Evgeny Pashentsev, “Enforcing “Humanitarian Wars”: A Case Of Communication Mismanagement”, *Nauka i društvo [Science and Society]*, No 1. 2014, p. 34.

⁵ Statutes of the International Red Cross and Red Crescent Movement, preamble.

⁶ *The Fundamental Principles of the Red Cross – Commentary by: Jean Pictet*, International Federation of Red Cross and Red Crescent Societies, 1979, available at: <https://www.ifrc.org/PageFiles/40669/Pictet%20Commentary.pdf>, p. 61-62.

⁷ Jean S. Pictet, 1979, *op. cit.*, p. 52-53.

⁸ *Ibid.*

served.⁹ In public international law, understanding a country's neutrality inevitably carries certain duties even in peacetime. Such understanding of one aspect of neutrality can also be applied onto the International Committee of the Red Cross (ICRC), as a humanitarian organization and part of the Movement, whose one of the tasks is dissemination of international humanitarian law and supervision over its implementation in peacetime, as well as drawing attention to violations of rules of this law.

The formulation *in order to continue to enjoy confidence*¹⁰ implies ICRC's obligation to constantly care about its neutrality. Still, "any status is both rewarding and restrictive. States certainly have an interest in ensuring that a body operating in countries at war respects the duties of neutrality, and they would never have assigned the ICRC the powers it enjoys without guarantees for their own military and political security"¹¹. However, as it has already been mentioned, one the ICRC's tasks is also pointing out violations of rules of the international humanitarian law, and here we ought to pose the question – do such acts put the ICRC outside the frameworks of its neutrality?

PRINCIPLE OF NEUTRALITY IN THE LIGHT OF GRAVE BREACHES OF GENEVA CONVENTIONS AND ADDITIONAL PROTOCOLS

Abstention is one part of the principle of neutrality and in that sense, it should mean that one ought to refrain from making any comments about another's actions, or activities, but also in a way, it would mean to suppress what we feel as (in) justice. The fact is that on field, the ICRC is represented by individuals, and every human being wittingly or unwittingly forms certain opinions on everything that goes around them. However, the ICRC staff members on field, during an armed conflict, are expected to show a certain level of exclusion in relation to everything besides their task, which is protection and offering care and help to protected per-

⁹ *The Fundamental Principles of the Red Cross – Commentary by: Jean Pictet*, 1979, *op. cit.*, p. 61-62.

¹⁰ *The Fundamental Principles of the Red Cross and Red Crescent*, ICRC publication 1996 ref. 0513, p. 7, available at https://www.icrc.org/en/doc/assets/files/other/icrc_002_0513.pdf.

¹¹ Denise Plattner, "ICRC neutrality and neutrality in humanitarian assistance", *International Review of the Red Cross*, No. 311, 30-04-1996 Article, available at: <https://www.icrc.org/eng/resources/documents/misc/57jn2z.htm>.

sons. If that is the case, would it be too harsh to say that they are expected to be “blind and deaf”? Perhaps it is, but the reality of armed conflicts, particularly the modern ones, is such that the number of violations of the rules of international law is not decreasing – on the contrary, the violations are happening in increasing numbers. Someone would attribute this to the psychological state of participants in the conflict, but that cannot justify the systematic and continuous excessive violence. Not so rarely, it was precisely members of the ICRC who were witnesses to such violations of humanitarian law and that many times, if not more, they were targets of attacks in spite of the fact that they enjoy special protection as well. What kind of stance does the ICRC take in situations like that? “Neutrality is not always easy to make understood. It is often taken for indifference. The ICRC is not neutral in the face of violations of international humanitarian law”¹².

Even though one of its fundamental principles of action is precisely neutrality, the ICRC has constantly asserted that they would not stand by and watch while in some part of the world grave breaches of the Geneva Conventions and Additional Protocols are being committed. Generally speaking, in accordance with its principle of neutrality, the ICRC has always been discreetly trying to draw a party’s attention to the fact that serious violations of international humanitarian law have been committed and persons responsible ought to be properly prosecuted, while persons participating in future operations should refrain from committing such and similar acts. Even besides the fact that the ICRC enjoys great reputation in the eyes of the international community, not every of their discreet appeals is taken into consideration. In such moments, the option to publicly announce the issues in relation to grave breaches of the Geneva Convention and Additional Protocols is contemplated – “only when it observes grave and repeated breaches of international humanitarian law when its confidential representations have been in vain and it considers that the only means of helping the victims is to ask for the support of the international community, does it make public representations”¹³. An example of such public representation can be found in the ICRC’s report on air-raids in Yemen in 1967.¹⁴

¹² Case No. 46, ICRC's Approach to Contemporary Security Challenges; according to: Marco Sassòli and Antoine A. Bouvier, *How does law protect in war?: Volume II, Second, expanded and updated edition, Cases and Documents*, International Committee of the Red Cross, Geneva, 2006, p. 765.

¹³ *The Fundamental Principles of the Red Cross and Red Crescent*, 1996, *op. cit.*

¹⁴ Case No. 96, ICRC Report on Yemen, 1967; according to: Marco Sassòli and Antoine A. Bouvier, 2006, *op. cit.*, p. 1106-1107.

The question of justification of criticizing one or the other side, or both sides simultaneously, was also posed after the ICRC's memoranda about the First Gulf War when the ICRC made an appeal to parties to the conflict, Iran and Iraq, and pointed out in detail the violations of international humanitarian law.¹⁵ Furthermore, in its press release in 1988, in which they condemn the use of chemical weapons in the Iran-Iraq armed conflict, the ICRC did not state which side in the conflict used chemical weapons, and on that occasion the question was posed whether it is precisely the principle of neutrality preventing the ICRC from "pointing fingers" at one or the other side, and name those who used the aforementioned weapons.¹⁶ However, caution in taking such steps is necessary, because despite everything, the ICRC should "continue to enjoy the confidence of all", primarily in order to keep the access to victims of armed conflicts. Additionally, the accent should be put on the fact that in cases like these the ICRC addresses entities, countries, and not individuals. Nevertheless, individual responsibility for committing grave breaches of the Geneva Conventions and Additional Protocols exists. What should be done when it comes to reports, and later on testimonies before judicial authorities, about acts committed by certain individuals, and are they even possible?

Let us repeat once more that individuals represent the ICRC on field, and then let us imagine a situation in which those persons are witnesses to intentional attacks on protected persons and objects, murders, tortures, inhumane treatment, taking hostages, etc. Certainly, these people will realize that such acts are first of all contrary to rules of the international humanitarian law, but also something that is wrong from a general moral point of view. Hence, we could pose the question about what further actions the ICRC's staff members should take after being witnesses to such events. We could pose this question both from the aspect of the international humanitarian law and that of moral and basic principles of humanity. Morally speaking, such acts ought to be condemned, and publicly, not only as a form of preventive measures against similar acts in the future, but also as a form of initiating repressive measures – finding the persons responsible and properly sanctioning their actions. Precisely the principles that the ICRC is guided by, first of all neutrality, are those that put brakes on the instinctive reaction to an act like that. The reason for abstention from making a certain judgement about

¹⁵ Case No. 142, ICRC, Iran/Iraq Memoranda; according to: Marco Sassòli and Antoine A. Bouvier, 2006, *op. cit.*, p. 1529-1540.

¹⁶ Case No. 145, UN/ICRC, The Use of Chemical Weapons; according to: Marco Sassòli and Antoine A. Bouvier, 2006, *op. cit.*, p. 1563-1564.

such acts perhaps lies in the fact that it is possible for neutrality to be linked with indifference, fear and cowardice¹⁷. However, it is difficult to believe that motives of a humanitarian organization such as ICRC could be so selfish. If the origin of neutrality is indeed fear, it would mean that this principle is used to conceal fear from retaliation, or if its origin is indifference, then we could ask how there is even place for humanity. After all, the very principle of neutrality enables the fulfillment of the principle of humanity. From this, we could conclude that the reason for complying with the principle of humanity in situations of serious violations of the international humanitarian law is not so pessimistic. The guiding star of the principle of neutrality is the existence of a higher goal, which is protecting persons in danger as a result of armed conflicts.

Even though the ICRC's motivation not to present certain facts to the public is clear, which can also be seen from Jean Pictet's commentary to the principles, reconsiderations of this principle have not stopped, not in theory and especially not in practice.

ICRC PERSONNEL AS WITNESSES BEFORE JUDICIAL AUTHORITIES

The ICRC acts in accordance with fundamental principles, and all information that comes into its possession is gathered as confidential. Therefore, any information in the ICRC's possession can be made public only with their explicit consent. However, in practice, namely in case Simic before the International Criminal Tribunal for the former Yugoslavia (ICTY), while deciding about testimony of a former ICRC employee, a question arose – what is more important, confidentiality of information or need to satisfy justice?¹⁸ The prosecution posed the question if it would be possible for a third party, in this case the ICRC, to influence, or rather prevent a person from testifying. It is extremely significant to mention that the only relevant testimonies are those given voluntarily, which was the case in case Simic. Therefore, the key questions for solving this problem were whether the ICRC can prevent their current and former employees from testifying in front of court and whether the facts of the case are such that there is a justifiable interest for confi-

¹⁷ Hans Haug, *Humanity for all: The International Red Cross and Red Crescent Movement*, Henry Dunan Institute: Haupt, Berne, 1993, p. 462.

¹⁸ Case No. 183, ICTY/ICC, Confidentiality and Testimony of ICRC Personnel; according to: Marco Sassòli and Antoine A. Bouvier, 2006, *op. cit.*, p. 1900-1910.

dentiality, or the facts of the case are such that they prevail in benefit of satisfying justice. The ICRC's response basically called upon the principles of neutrality and impartiality and stated that giving information in front of court would jeopardize their mission, which is helping protected persons. Besides that, the ICRC pointed out certain conditions that have to be fulfilled for the information in their and their personnel's possession to be presented before court:¹⁹

- (1) the crimes charged must be of the utmost gravity;
- (2) the evidence must be indispensable, in the sense that the case could not be mounted without it; and
- (3) admitting the evidence would not prejudice the work of the ICRC.

Indeed, if we consider the first requirement, it is definitely met when it comes to crimes under the ICTY's jurisdiction. However, the other two conditions are more difficult to meet. In this case, the ICTY decided in favor of the principle of confidentiality because it believed that the ICRC's interest not to present information before court prevailed against the interest of justice. Generally speaking, the ICRC's policy is such that it does not allow its personnel to testify before court, especially not against a defendant.²⁰ What's more, this ICRC's stance in a way presents their "commitment to the principle of neutrality"²¹, while on the other side admitting information could potentially affect the confidence they enjoy as a humanitarian organization, and safety of their personnel on field as well²².

Still, some questions keep rising in relation to the court's judgement and the facts stated in favor of the ICRC. In that sense, separate opinion of judge David Hunt is interesting because it points out certain, if one could say so, deficiencies in the argumentation in favor of the ICRC. In his consideration whether the ICRC's stance against admitting information is absolute, judge Hunt states that the ICRC did not suggest that the absolute nature of protection against disclosure has been *expressly* accepted as a part of customary international law, but that it has been more *tacitly* recognized²³. Hence, we could pose the question whether it is sufficient for something to be tacit practice in order to become a part of customary

¹⁹ *ibid.*, p. 1902.

²⁰ *ibid.*, p. 1904.

²¹ *ibid.*, p. 1905.

²² *ibid.*

²³ *ibid.*, p. 1907.

law. If we take into consideration that the practice of international law subjects relevant to proving the existence of a customary legal rule consists of physical and verbal acts, it is clear to see why there is a dilemma in this sense. Regarding the “joint decision”²⁴, it referred to the *Headquarters Agreements* between the countries and the ICRC based on which its employees enjoy immunity from giving evidence in national courts. Guided by logical thinking, judge Hunt here stressed that he was not convinced such a rule could be applied to international criminal courts.²⁵ The Agreements which were concluded are in effect only in relation to national courts. Therefore, when it comes to international criminal courts, these rules should not apply because there is not an explicit agreement between the countries and the ICRC, despite the already mentioned tacitly recognized absolute protection against disclosure. A possible solution for such unclear situations could be to simply conclude new agreements which would expand ICRC’s personnel’s immunity to cases before international courts, but the question is how long a process like that would take. Judge Hunt believes that two situations would be enough to show why, in his opinion, in rare cases it would be necessary for courts to have the final, decisive word. The first situation is the one where the ICRC’s employees or officials testifying or providing evidence would play a key role in confirming the defendant’s innocence, while in the other situation their testimonies or providing evidence could be vital for establishing the defendant’s guilt in a trial of transcendental significance²⁶. Certainly, in the first situation it could be pernicious for the defendant if relevant information is not revealed, and it would be in opposition to the principles of the ICRC’s, primarily principle of humanity. Bearing in mind that the ICRC’s policy does not allow testifying against the accused, testifying in defendant’s favor seems plausible, but regarding the second situation, surely the ICRC would deny to give information necessary for the accused to be indicted. Finally, it interesting to mention one of judge Hunt’s sentences in which he emphasizes that it would necessarily be rare that the evidence would be of such importance as to outweigh the ICRC’s protection against disclosure.²⁷ This may be interpreted that in most cases, the courts have enough evidence to indict or acquit the defendant, hence rare are such situations in which the ICRC’s personnel’s testimonies would be the ones of crucial significance.

²⁴ This is how judge Hunt calls joint decision of judge Robinson and judge Bennouna.

²⁵ Marco Sassòli and Antoine A. Bouvier, 2006, *op. cit.*, p. 1907.

²⁶ *ibid.*, p. 1907-1908.

²⁷ *ibid.*, p. 1908.

CONCLUSION

Principle of neutrality has shown to be a very confusing and complex problem. Although the aim of its creation is quite clear and logical, including the motivation for respecting this principle, it is obvious that in practice situations occur when the concept of neutrality is brought into question. And even though one case cannot be taken as proof of general practice, on the example of case Simic, we can see that there are persons, employees of the ICRC, former or present, who are willing to testify before courts despite the ICRC's confidentiality policy. At the same time, it is obvious that there are cases when complying with the principle of neutrality and confidentiality does not go in favor of the accused, but it is also contrary to primarily principle of humanity, which was not accidentally put as the first on the Movement's, and therefore the ICRC's list of principles. Besides this, another questions rises – having in mind that the ICRC is a humanitarian organization with great reputation in the international community and a long tradition of humanitarian action, how much of an effect would it even have on them if their personnel testified in extraordinary cases? Certainly, this ought to be taken with reserve because an accused person is still a representative of a country, and that country can take that as a reason to prevent the ICRC from doing their job on its territory. An obvious answer to such considerations would be to balance while deciding which situations are the ones when the ICRC's disclosing information would be without consequences for their neutrality and reputation.

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МКЦК И ПРИНЦИП НЕУТРАЛНОСТИ – ПОВЕРЉИВОСТ ИНФОРМАЦИЈА ИЛИ ПОТРЕБА ЗА ЗАДОВОЉЕЊЕ ПРАВДЕ?

Апстракт

Неутралност је један од седам принципа деловања Међународног покрета Црвеног крста и Црвеног полумесеца, који су на предлог Жана Пиктеа усвојени 1965. године у Бечу. Иако је протекло више од пет деценија од њиховог усвајања, постоје несугласице око теоријског поимања принципа неутралности и његове примене у пракси. Оне долазе до изражаја у ситуацијама када је особље МКЦК у улози сведока тежких повреда Женевских конвенција из 1949. и Допунских протокола из 1977. године. Кључно питање је да ли је принцип неутралности истовремено и принцип ћутања, односно да ли поверљивост информација, којима располаже особље МКЦК на терену, важнија од задовољења правде. Аутор разматра ово питање, ослањајући се на конкретне случајеве кршења правила међународног хуманитарног права, с циљем осветљавања суштине принципа неутралности, у складу са начином на који га тумачи првенствено Жан Пикте, како би се лакше разумело и могло испитати оправданост примене овог принципа и у околностима које пред особље МКЦК ставља наведену моралну дилему.

Кључне речи: МКЦК, међународно право, Женевске конвенције, неутралност, поверљивост, правда.