

Tools to do the job: The ICRC's legal status, privileges and immunities

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Abstract

The International Committee of the Red Cross (ICRC) enjoys a specific legal status and specific privileges and immunities under both international and domestic law. They enable the ICRC to effectively carry out its mandate, and to do so in full conformity with its Fundamental Principles and standard working modalities. This article clarifies the ICRC's particular legal status and explains the rationale, scope and legal sources of its privileges and immunities.

Keywords: ICRC, legal status, headquarters agreements, privileges, immunities, observer status, neutrality, independence, confidentiality, testimony.

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Introduction

The International Committee of the Red Cross (ICRC) is a neutral, independent and impartial humanitarian organization mandated by the international community of States to protect and assist victims of armed conflicts and other situations of violence. As such, the ICRC enjoys a specific legal status as well as specific

privileges and immunities under both international and domestic law.¹ This status and these privileges and immunities are granted to the ICRC by States in order to enable the organization to carry out its mandate and to do so in full conformity with the principles of neutrality, impartiality and independence and its standard working modalities, in particular confidentiality. As such, they are colloquially referred to as “tools” given to the ICRC by States “to do the job”. This article aims to clarify the particular legal status of the ICRC, to set out the privileges and immunities necessary for the ICRC to carry out its mandate, and to explain the rationale, legal sources and limits of such privileges and immunities.

The article is divided into four main parts. The first part discusses the ICRC’s legal status as an, albeit atypical, international organization (IO). The second part explains why States grant privileges, facilities and immunities to the ICRC and how these privileges and immunities are established in law. The third part discusses in more detail the specific privileges and immunities that are necessary for the ICRC to effectively carry out its humanitarian mandate and activities in full conformity with its Fundamental Principles and standard working modalities, in particular confidentiality. The final part deals with the limits to the ICRC’s privileges and immunities and with the settlement of disputes between the ICRC, States and third parties.

ICRC legal status: From a private association to an international organization

The ICRC’s mandate as the basis for its legal status

The ICRC was established as a private association under Swiss law in 1863. Ever since its foundation, the ICRC has worked to protect and assist victims of armed conflict and other situations of violence and has served as a neutral intermediary between parties to armed conflicts.² Originally working as a private initiative, though often upon the request of States, the ICRC was later officially mandated by States to carry out its humanitarian mission and activities. Today the ICRC’s mandate is enshrined in the 1949 Geneva Conventions, their Additional Protocols and the Statutes of the International Red Cross and Red Crescent Movement (the Movement),³ and can be summarized as follows:

- 1 For a definition of privilege and immunity, see note 47 below.
- 2 See Article 3 of the original ICRC Statutes, adopted on 15 November 1915 (on file with author), and the ICRC’s mission statement, available at: www.icrc.org/en/who-we-are (all internet references were accessed in April 2015).
- 3 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I); Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II); Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into

- to ensure the protection of and assistance for victims of armed conflicts and other situations of violence;
- to promote and work for the faithful application of international humanitarian law; and
- to serve as a neutral intermediary between parties to armed conflicts.⁴

With the conventional mandate entrusted to it by the international community of States,⁵ the ICRC obtained legal status as an IO, albeit an atypical one.⁶ Today, the ICRC is generally recognized, while in a class of its own, as having a legal status equivalent to that of an IO.⁷ In the following section, the legal status of the ICRC is discussed in more detail.

An international organization of its own kind

Admittedly, the ICRC is an atypical IO and is really one of a kind. There is no general definition of what qualifies an organization as an IO under international law, but there is a general tendency and practice by States to limit IO status and establish international legal personality and grant privileges and immunities to

force 21 October 1950) (GC IV), Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Geneva, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (AP I); and Protocol Additional (II) 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 (entered into force 7 December 1978) (AP II), all available at: www.icrc.org/ihl; Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross at Geneva in 1986 and amended in 1995 and 2006 (entered into force 8 November 1986), available at: www.icrc.org/eng/resources/documents/misc/statutes-movement-220506.htm.

- 4 The following provisions of the 1949 Geneva Conventions make specific reference to the ICRC: GC I, Arts 3, 9, 10, 11, 23; GC II, Arts 3, 9, 10, 11; GC III, Arts 3, 9, 10, 11, 56, 72, 73, 75, 79, 81, 123, 125, 126; GC IV, Arts 3, 10, 11, 12, 14, 30, 59, 61, 76, 96, 102, 104, 108, 109, 111, 140, 142, 143. In accordance with Article 10 of GC I–III and Article 11 of GC IV, the ICRC can – and in practice does – exercise many of the functions entrusted to the Protecting Power by the following provisions: GC I, Arts 8, 16, 23, 48; GC II, Arts 8, 19, 44, 49; GC III, Arts 20, 121, 122, 128; GC IV, Arts 9, 23, 24, 35, 39, 42, 43, 45, 49, 52, 55, 60, 71, 72, 74, 75, 83, 98, 101, 105, 113, 129, 131, 137, 145. The relevant provisions in AP I are Articles 5, 6, 33, 78, 81, 97 and 98. Articles 2, 11, 45, 60, 70 and 84 of AP I deal with the Protecting Power. The status of the ICRC is also recognized in Article 24 of AP II. The role and functions of the ICRC are also helpfully summarized in Article 5 of the Statutes of the International Red Cross and Red Crescent Movement.
- 5 The ICRC's mandate is a universal one, as is illustrated by the universal ratification of the 1949 Geneva Conventions, the very widespread ratification of the 1977 Additional Protocols thereto (at the time of writing, there were 174 States party to AP I and 168 States party to AP II), and the adoption by consensus of the Movement's Statutes by the International Conference of the Movement, which enjoys universal State participation (all States party to the Geneva Conventions are represented at the International Conference). A full and up-to-date list of States party to the Geneva Conventions and their Additional Protocols is available at: www.icrc.org/ihl.
- 6 In Switzerland, where the organization was founded, the ICRC has a dual status: while maintaining its legal capacity as a private association for administrative reasons directly related to the presence of its headquarters in Geneva, the ICRC – per its headquarters agreement of 1994 – also has the legal status of an IO in Switzerland. See also note 8.
- 7 This recognition by States and IOs will be discussed in detail later in the article. See also Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public*, 10th ed., Dalloz, Paris, 2010, p. 301; Yves Beigbeder, *The Role and Status of International Humanitarian Volunteers and Aid Organizations*, Martinus Nijhoff, Dordrecht, Boston and London, 1991, p. 327.

intergovernmental IOs only – that is, to those IOs established by a treaty and governed by the States party to that treaty. While some States have a broad and rather inclusive definition of an IO and grant IO status and privileges and immunities to a variety of international entities,⁸ the majority of States only grant IO status and privileges and immunities to IOs of an intergovernmental nature.⁹ In what follows, the term “international organization” is therefore used in this stricter meaning of an intergovernmental organization.

The typical example of an IO is the United Nations (UN). Its founding treaty, the UN Charter, sets up the organization, defines its functions and defines the inherently intergovernmental composition of its governing bodies.¹⁰ Interestingly enough for our present purposes, Articles 104 and 105 of the Charter provide that:

104. The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

105. (1) The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes. (2) Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in

8 The 2006 *Loi fédérale sur les privilèges, les immunités et les facilités, ainsi que sur les aides financières accordés par la Suisse en tant qu'Etat hôte* (available at: www.admin.ch/ch/fr/rs/c192_12.html) distinguishes between three types of international organizations to which Switzerland grants privileges and immunities: (1) intergovernmental organizations (such as the UN, its specialized agencies or the World Trade Organization), (2) other international organizations or so-called “international institutions” (such as the ICRC, the International Federation of Red Cross and Red Crescent Societies, or the Organization for Security and Cooperation in Europe), and (3) quasi-governmental international organizations (such as the International Air Transport Association or the World Anti-Doping Agency). For further details on the rationale for broadening the international beneficiaries of privileges and immunities and the definition and characteristics of the three types of IOs referred to above, see the official commentary on the law: *Message relatif à la loi fédérale sur les privilèges, les immunités et les facilités, ainsi que sur les aides financières accordés par la Suisse en tant qu'Etat hôte*, 13 September 2006, pp. 7609–7619, 7643–7646, available at: www.admin.ch/opc/fr/federal-gazette/2006/7603.pdf.

9 In some States this is even officially enshrined in domestic legislation regulating the privileges and immunities of IOs. See, for example, Australia's International Organisations (Privileges and Immunities) Act of 1963, which describes an IO to which the Act applies as “an organisation: (a) of which Australia and a country or countries other than Australia are members; or (b) that is constituted by a person or persons representing Australia and a person or persons representing a country or countries other than Australia”. Section 5, available at: www.comlaw.gov.au/Details/C2013C00673; Malaysia's International Organisations (Privileges and Immunities) Act of 1992, which contains a definition identical to that of the Australian Act quoted above. Section 3.1, available at: www.agc.gov.my; or the US International Organizations Immunities Act of 1945, which describes an IO to which the Act applies as “a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities provided in this [Act]”. Section 288, available at: www.law.cornell.edu/uscode/text/22/288.

10 Charter of the United Nations (UN Charter), 26 June 1945, 1 UNTS XVI (entered into force 24 October 1945) (UN Charter), available at: www.un.org/en/documents/charter/.

connexion with the Organization. (3) The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

These provisions reflect the principle of functionality, which is the cornerstone of the international legal regime on privileges and immunities of IOs and will be the starting point for discussion of the ICRC's status and privileges and immunities later in the article.

While the ICRC, like the majority of IOs, has received its mandate from the international community of States through international treaties,¹¹ it has neither been founded by States through a constitutive treaty, nor is it governed by States, not even by those that are party to the treaties that lay down its mandate. The ICRC was established by private individuals as a private association under Swiss law, and its governing body is composed of private individuals as opposed to State representatives.¹² In that sense, the ICRC is fundamentally different from the UN and other IOs and more similar to a private or non-governmental organization (NGO).¹³ This being said, it is worth pointing out that, even after being entrusted with an official mandate under the Geneva Conventions, at no point in time did States even suggest that the ICRC should be governed by States. On the contrary, the fact that the ICRC is governed by a body of private individuals, who act in their private capacity and are all of the same (Swiss) nationality, is generally seen as one of the mechanisms for ensuring the ICRC's capacity to be fully neutral, and to be perceived as such.¹⁴

- 11 See above notes 3 and 4. The Statutes of the International Red Cross and Red Crescent Movement do not necessarily qualify as "treaties", but the fact that they were adopted, by consensus, by a body of which all States party to the universally ratified 1949 Geneva Conventions are members, demonstrates their relevance as an international legal instrument for the purpose of defining the mandate entrusted to the ICRC by States.
- 12 The ICRC's governing body, the Assembly (also referred to as the Committee), co-opts its fifteen to twenty-five members, who serve in a private capacity, from among Swiss nationals. Statutes of the ICRC, above note 2, Articles 7 and 9; see also ICRC, "Who we are: Governance", available at: <https://www.icrc.org/en/who-we-are/the-governance>.
- 13 The term "NGO" is used here in the sense of a not-for-profit organization of a non-governmental nature – i.e., one set up and governed by private individuals, rather than States, and defining its own mission and functions, rather than being given a treaty-based mandate by States.
- 14 The Code of Conduct for Assembly Members (on file with author) prevents Assembly members from exercising any activity that could reflect negatively on the ICRC's neutrality or could otherwise be prejudicial to the ICRC. This includes holding high public office in Switzerland, working for an intergovernmental organization or working for an organization that supports or favours one or more parties to an armed conflict (Articles 2 and 6). The independence of Assembly members from their country of nationality, Switzerland, is further endorsed and guaranteed by the ICRC's headquarters agreement with Switzerland, which provides that the Swiss government "guarantees the ICRC's independence and freedom of action" and, conversely, that "Switzerland shall not incur, by reason of the activity of the ICRC on its territory, any international responsibility for acts or omissions of the ICRC or its staff" (Articles 2 and 20). These provisions mirror those in the headquarters agreements of other IOs – such as the International Labour Organization, the World Health Organization and the World Meteorological Organization – with Switzerland.

Thus, while the ICRC's existence and governance are not mandated by States, its functions and activities are. In that sense, the ICRC is really hybrid in nature and is neither a classic IO nor a typical NGO. As a matter of both law and practice, the ICRC – based on its mandate and its unique role in the regime established in particular by the 1949 Geneva Conventions – has come to be granted a legal status and treatment equivalent to that of an IO. Just like an IO, but unlike a national or international NGO,¹⁵ the ICRC not only has a treaty-based mandate but – directly derived therefrom – enjoys both international legal personality¹⁶ and privileges and immunities in both the international and domestic legal orders.¹⁷

This evolution in the ICRC's status – from a private association under Swiss law to an IO with legal personality – is illustrated well by the evolution of

15 Private associations and national and international NGOs do not enjoy international legal personality and as such have no legal capacity to act in the international legal order and generally do not enjoy any privileges and immunities but remain fully subject to the domestic law of their country of origin and of the countries in which they operate.

16 International legal personality generally can be derived from three criteria, all of which the ICRC fulfils: (1) capacity to conclude treaties (e.g. at the time of writing, the ICRC had concluded status agreements, which are by nature international treaties, with ninety-five States, and was negotiating thirteen more); (2) capacity to enter into diplomatic relations (in order to carry out its mandate, the ICRC has always engaged and continues to engage intensively in bilateral relations with States, bilateral relations that take place in accordance with formal diplomatic practice; moreover, observer status at the UN and almost thirty other international and regional intergovernmental organizations allows the ICRC to fully participate in multilateral diplomacy); (3) capacity to operate and entertain claims in its own right in the international legal order (contrary to an NGO, the ICRC acts in the international legal order in its own capacity and as such does not require intervention by any State to carry out its mandate or enforce its rights. For example, the ICRC directly intervenes with States to ensure they respect their obligations under the Geneva Conventions and their Additional Protocols, ICRC status agreements provide for direct and bilateral dispute settlement mechanisms – usually negotiation and arbitration – in case of disputes between the host State and the ICRC, and the ICRC intervened directly before the International Criminal Tribunal for the Former Yugoslavia (ICTY) to claim its right under international law to non-disclosure of confidential information: see ICTY, *Prosecutor v. Simić et al.*, Case No. IT-95-9, Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999). For a slightly outdated but still relevant analysis, see Christian Dominicé, “La personnalité juridique internationale du CICR”, in Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ICRC and Martinus Nijhoff, Geneva and The Hague, 1984. See also Malcolm N. Shaw, *International Law*, 6th ed., Cambridge University Press, Cambridge, 2008, p. 262 (“[International legal p]ersonality may be acquired by a combination of treaty provisions and recognition or acquiescence by other international persons. For instance, the [ICRC], a private non-governmental organisation subject to Swiss law, was granted specific functions under the 1949 Geneva Red Cross Conventions and has been accepted as being able to enter into international agreements under international law with international persons”). See also Christian Walter, “Subjects of International Law”, in *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Heidelberg and Oxford, 2012, para. 7, available at www.mpepil.com (referring to “atypical subjects of international law” such as the Holy See, the Sovereign Order of Malta and the ICRC, whose “role in the promotion and implementation of the laws of war has led it to being endowed with specific functions under the 1949 Geneva Conventions. It has also entered into international treaties with a number of States and international organizations such as the UN”); James Crawford (ed.), *Brownlie's Principles of Public International Law*, 8th ed., Oxford University Press, Oxford, 2012, p. 116 (“[I]t is states and organizations which represent the normal types of legal person on the international plane. However, the realities of international relations are not reducible to a simple formula. The ‘normal types’ have congeners which create problems, and various entities which are of neither type can have a certain personality – for example, the [ICRC]”).

17 For example, at the time of writing, the ICRC enjoyed privileges and immunities – through bilateral status agreements or on the basis of domestic legislation – in 103 countries, and was negotiating status agreements granting privileges and immunities in a further thirteen countries (numbers are up to date

the ICRC's observer status at the UN and by the treatment that States reserve for the ICRC in practice.

The ICRC at the UN: From consultative status as an NGO to observer status as an international organization

Initially, the ICRC enjoyed consultative status as an NGO with the United Nations' Economic and Social Council (ECOSOC).¹⁸ Article 71 of the UN Charter indeed provides for the establishment of "arrangements for consultation with [national or international] non-governmental organizations which are concerned with matters within its competence". But as of the end of the 1960s, this status – which predated and thus did not take into account the ICRC's mandate entrusted to it by the 1949 Geneva Conventions – quickly became both inadequate and inappropriate and no longer reflected the required relationship between the ICRC and the UN, two key actors on the international scene dealing with situations of armed conflict. In order to address this situation, UN General Assembly Resolution 45/6, sponsored by 138 UN member States, was adopted by consensus on 16 October 1990, granting the ICRC observer status to the UN General Assembly and effectively putting the ICRC on the same footing as IOs with UN observer status. The ICRC is the first and one out of only four IOs not of an intergovernmental nature to enjoy such a status in the UN system.¹⁹ As Resolution 45/6 spells out, the ICRC's status – which gives it observer access to the sessions of the UN General Assembly and Security Council and their commissions – derives directly from and is justified by its unique mandate. The Resolution states that the General Assembly,

Recalling the mandates conferred upon the [ICRC] by the Geneva Conventions of 12 August 1949,

Considering the special role carried on accordingly by the [ICRC] in international humanitarian relations,

until 1 April 2015). In at least four countries, the ICRC and its staff, in the absence of formal privileges and immunities, are *de facto* treated as (officials of) an IO. In the international legal order, the ICRC enjoys status and treatment as or equivalent to that of a classic IO with almost thirty international and regional intergovernmental organizations (usually through observer status as an IO). It also enjoys privileges and immunities before all international criminal tribunals. For more detail on the specific privileges and immunities of the ICRC, see the section "Privileges, Facilities and Immunities Necessary for the ICRC to Carry Out Its Mandate", below.

18 ECOSOC is one of the six main organs of the UN, responsible for coordination, policy review, policy dialogue and recommendations on economic, social and environmental issues (UN Charter, above note 10, Art. 62). NGOs working in these areas can register for consultative status with ECOSOC; currently, over 4,000 NGOs enjoy this status. See ECOSOC Office for Support and Coordination, NGO Branch, available at: <http://csonet.org/>).

19 The following three IOs of a non-governmental nature have also been granted observer status as IOs to the UN General Assembly: the International Federation of Red Cross and Red Crescent Societies (UN Doc. A/RES/49/2, 19 October 1994), the Inter-Parliamentary Union (UN Doc. A/RES/57/32, 19 November 2002) and the International Olympic Committee (UN Doc. A/RES/64/3, 20 October 2009). UN Permanent Observers, available at: <http://www.un.org/en/members/intergovorg.shtml>.

Desirous of promoting co-operation between the United Nations and the [ICRC],

1. *Decides* to invite the [ICRC] to participate in the sessions and the work of the General Assembly in the capacity of observer;

2. *Requests* the Secretary-General to take the necessary action to implement the present resolution.²⁰

In the debates on Resolution 45/6, several States took care to point out the unique nature and role of the ICRC, as a justification for the organization being granted observer status in spite of its non-intergovernmental character. The Permanent Representative of Italy, who introduced the Resolution on behalf of its 138 sponsors, noted:

In the view of the sponsors, this proposal should not be considered—indeed could not be considered—in any way as a precedent for any possible request to grant the same status to non-governmental organizations. The special—I would even say unique—role conferred upon the ICRC by the international community and the mandates given to it by the Geneva Convention[s] make of it an institution unique of its kind and exclusively alone in its status.²¹

The Permanent Representative of India reinforced this proviso in his statement before the Assembly:

Mr. Barjinder Singh (India): ... We are considering granting observer status in light of the special role and mandates conferred upon the ICRC by the Geneva Conventions of 12 August 1949. It is against this background that India is happy to be one of the sponsors of this draft resolution. At the same time, ... my delegation would like to suggest that the draft resolution not be considered a precedent for other non-governmental organizations to seek or be granted observer status; in other words, the case of the ICRC should be considered unique in view of its status.²²

Moreover, the representative of the US stated:

Mr. Moore (United States of America): ... The ICRC ... is also a unique organization with a unique international legal standing stemming from its mandate The unique mandate of the ICRC ... sets the Committee apart from other international humanitarian relief organizations or agencies. It is, in part, the public recognition of this distinction that has led the Committee to seek, and the Members of the United Nations to grant, this observer status. Our consensus decision should in no way set a precedent for any other humanitarian organization, no matter how worthy, to be accorded the

20 UNGA Res. 45/6, “Observer Status for the International Committee of the Red Cross, in Consideration of the Special Role and Mandates Conferred Upon It by the Geneva Conventions of 12 August 1949”, 16 October 1990. The ICRC subsequently renounced its consultative status with ECOSOC.

21 UN General Assembly, Verbatim Record of the 31st Meeting, UN Doc. A/45/PV.31, New York, 16 October 1990, pp. 76–77.

22 *Ibid.*, p. 77.

status we have just given the ICRC. No other humanitarian organization possesses the ICRC's unique legal personality, as recognized by its specific responsibilities under international conventions.²³

Treatment as an international organization by States

Recognition of the ICRC's status as, or at least as equivalent to, that of an IO is further demonstrated by the fact that the ICRC is either *de jure* or *de facto* treated by States as an IO. At the time of writing, the ICRC had concluded bilateral status agreements granting it legal status and privileges and immunities similar to those of other IOs with ninety-five countries. Many of these agreements include an explicit provision that the status of the ICRC shall be, and its treatment shall in any case not be less favourable than, that of an IO.

In another eight countries, the ICRC has been brought – by legislative or executive action – into the scope of application of domestic legislation granting privileges and immunities to IOs. For some of these, legislative action was required to amend or otherwise remedy definitions of IOs that were restricted to intergovernmental IOs. Typically, such legislative action was justified by the unique mandate and status of the ICRC. For example, the Haitian decree extending IO privileges and immunities to the ICRC provides that

[T]he International Committee of the Red Cross is a private association under Swiss law with its headquarters in Geneva Considering, however, the special status granted to the International Committee of the Red Cross by international humanitarian law, its status as permanent observer to the United Nations and its specificity recognized by both the International Criminal Tribunal for the former Yugoslavia and the International Criminal Court [and] [c]onsidering that to ensure the tasks entrusted to it by the international community, the International Committee of the Red Cross must benefit from the protection of the law; it is therefore appropriate that the Republic of Haiti should grant it a special status; ... The International Committee of the Red Cross ... [enjoys] privileges and immunities identical to those granted to the United Nations.²⁴

23 *Ibid.*, pp. 81–82. For some historical background and the practical effects of the change in status at the UN, see Christian Koenig, “Observer Status for the ICRC at the United Nations: A Legal Viewpoint”, *International Review of the Red Cross*, No. 280, 1991, available at: www.icrc.org/eng/resources/documents/misc/57jnwj.htm.

24 Unofficial translation. Original French text: “Le Comité international de la Croix-Rouge est une association privée de droit Suisse ayant son siège social à Genève Considérant cependant le statut particulier accordé au Comité international de la Croix-Rouge par le droit humanitaire international, son statut d’observateur permanent auprès des Nations Unies et sa spécificité reconnue tant par le Tribunal Pénal pour l’ex-Yougoslavie que par la Cour Pénale Internationale [et] [c]onsidérant que pour assurer les tâches que lui confie la communauté internationale, le Comité international de la Croix-Rouge doit pouvoir disposer de la protection de la loi; qu’il convient en conséquence, que la République d’Haïti lui accorde un statut dérogatoire; ... Le Comité international de la Croix-Rouge ... [bénéficie] de privilèges et immunités identiques à ceux accordés à l’Organisation des Nations Unies.” Préambule et article 1 du Décret relatif au Comité International de la Croix-Rouge, *Journal officiel de la République d’Haïti*, Vol. 160, No. 28, 11 April 2005, pp. 1–4.

The report of the French Senate submitted in the framework of a proposed law extending the scope of application under French law of the Convention on the Privileges and Immunities of the United Nations to the ICRC points out that:

[T]he parliamentary initiative helps to avoid any precedent. The privileges granted to [the ICRC] in France will remain an exception, which cannot be taken over by another non-governmental organisation, the *sui generis* status of the ICRC justifying its special treatment.²⁵

After several years in which the US State Department refused to consider and treat the ICRC as an IO, an amendment to the US International Organizations Immunities Act, followed by a presidential Executive Order implementing that amendment, brought the ICRC into the Act's scope of application, highlighting the ICRC's mandate and unique status as the justification for treating it as an IO:

The International Committee of the Red Cross, in view of its unique status as an impartial humanitarian body named in the Geneva Conventions of 1949 and assisting in their implementation, shall be considered to be an international organization for the purposes of this [Act] and may be extended the provisions of this [Act] in the same manner, to the same extent, and subject to the same conditions, as such provisions may be extended to a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation.²⁶

In order to give effect to the bilateral status agreement concluded with the ICRC, Australia amended its International Organisations (Privileges and Immunities) Act, which has a restrictive definition of an IO.²⁷ In an explanatory memorandum circulated when submitting the proposed amendment to Parliament, the ministry of foreign affairs explained:

Currently, the Act allows privileges and immunities to be conferred on “international organizations” and “overseas organizations”. However the Act

25 Unofficial translation. Original French text: “L’initiative parlementaire permet d’éviter tout précédent. Les privilèges accordés [au CICR] en France resteront une exception, qui ne pourra être reprise par une autre organisation non gouvernementale, le statut *sui generis* du CICR expliquant un traitement particulier.” *Rapport fait au nom de la Commission des Affaires étrangères, de la défense et des forces armées sur la proposition de loi, adoptée par l’Assemblée Nationale, relative aux privilèges et immunités de la délégation du Comité international de la Croix-Rouge en France*, Annexe au procès-verbal de la séance du Sénat du 12 mai 2003 (on file with author), p. 16 (the report describes in detail the mandate and functions of the ICRC under international law and the recognition of its unique legal status, similar to that of an international organization, by a significant number of States, international organizations and international tribunals).

26 International Organizations Immunities Act, 9 December 1945 (approved 29 December 1945), Section 288f-3, available at: www.law.cornell.edu/uscode/text/22/288f-3. This section was included by presidential Executive Order No. 12643 signed on 23 June 1988 pursuant to Section 743 of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 (PL 100–204), in order to overcome the Act’s restrictive definition of IOs as intergovernmental organizations and allow for its applicability to the ICRC.

27 See above note 9.

defines these terms too narrowly to accommodate the independent and non-governmental character of the ICRC. New Section 9D addresses this by permitting the enactment of Regulations conferring privileges and immunities on the ICRC in accordance with the [bilateral status agreement concluded between Australia and the ICRC]. By inserting a new section 9D, rather than extending the definition of “international organizations” or “overseas organizations”, it is ensured that, in amending the Act to provide a legal basis for conferring privileges and immunities on the ICRC, the amendment will not inadvertently encompass any other organizations. It also ensures that the privileges and immunities conferred upon the ICRC will be limited to those set out in the [bilateral status agreement concluded between Australia and the ICRC].²⁸

The general recognition and treatment of the ICRC as an IO by both States and IOs is also demonstrated by the way in which these relations are managed in practice. Official correspondence and communications between the ICRC and States usually takes the form of verbal notes, in accordance with common diplomatic practice between States and IOs. In Geneva, home to the ICRC's headquarters, many Permanent Representatives of States to the UN and other IOs based in Geneva include the ICRC in their remit, and a courtesy visit to the ICRC president by incoming and outgoing Permanent Representatives has become common practice. In most countries where the ICRC has a permanent presence, its reference ministry is the Ministry of Foreign Affairs, usually through the department responsible for relations with IOs. The ICRC is generally registered in the protocol department's “Blue Book”, which registers States and IOs with an official representation in the country. Circulars sent by the Ministry of Foreign Affairs to diplomatic missions and IOs – informing them of issues relevant to their presence and administration – usually include the ICRC as an addressee. Expatriate ICRC staff are notified and often accredited to the Ministry of Foreign Affairs, and ICRC vehicles are issued diplomatic license plates, as is often the case for other IOs. The ICRC's head of delegation in a host country is usually treated in a manner equivalent to heads of diplomatic missions or IOs' country representatives. The ICRC's president is generally received and addressed in a manner equivalent to the treatment reserved for heads of State or government or for the highest officials of IOs, such as the Secretary-General of the United Nations.

As far as IOs are concerned, it has been noted above that the ICRC enjoys observer status and is generally treated as an IO by almost thirty international and regional intergovernmental organizations. The ICRC's unique status as an IO has also been recognized by, and has resulted in specific privileges and immunities before, the international criminal tribunals.²⁹

28 Australia, Ministry of Foreign Affairs, International Organisations (Privileges and Immunities) Amendment Bill, 12 June 2013, Explanatory Memorandum, available at: <http://parlinfo.aph.gov.au>.

29 For a full overview of the jurisprudence and the rules of procedure and evidence of the international criminal tribunals, see Memorandum, “The ICRC's Privilege of Non-Disclosure of Confidential Information”, in this issue of the *Review*.

The ICRC's privileges and immunities: Sources and rationale

This part of the article explains why States grant privileges and immunities to the ICRC (rationale) and how they do so (sources), before discussing the concrete privileges and immunities of the ICRC in more detail.

Legal sources

Being an IO with a mandate to assist and protect victims of armed conflicts and other situations of violence, the ICRC operates both in the international and in the domestic legal order of States. As these are two distinct legal orders, one can distinguish between the legal personality and privileges and immunities that the ICRC enjoys internationally – which are regulated exclusively by international law – and the legal personality and privileges and immunities that it enjoys domestically – which, depending on a State's particular legal system, will be regulated either exclusively by domestic law or by both domestic and international law.

International legal order

The ICRC's international legal personality – which devolves directly from its treaty mandate – has been discussed in detail above.³⁰ With regard to the ICRC's privilege of non-disclosure of confidential information, the International Criminal Tribunal for the former Yugoslavia explained in the *Simić* case that this privilege too is both implicit in the treaties that enshrine the ICRC's international mandate and part of customary international law:

72. The ICRC has a pivotal role in the regime established by the Geneva Conventions and their Protocols to guarantee the observance of certain minimum humanitarian standards. This role is unique. ... The Geneva Conventions and their Protocols must be construed in the light of their fundamental objective and purpose as described above, and for that reason they must be interpreted as giving to the ICRC the powers and the means necessary to discharge its mandate effectively.

73. The analysis [of the Court, based on submissions by the parties] has clearly indicated that the right to non-disclosure of information relating to the ICRC's activities in the possession of its employees in judicial proceedings is necessary for the effective discharge by the ICRC of its mandate. The Trial Chamber therefore finds that the parties to the Geneva Conventions and their Protocols have assumed a conventional obligation to ensure non-disclosure in judicial proceedings of information relating to the work of the ICRC in the possession of an ICRC employee, and that, conversely, the ICRC has a right to insist on such non-disclosure by parties to the Geneva Conventions and

30 See above note 16.

the Protocols. In that regard, the parties must be taken as having accepted the fundamental principles on which the ICRC operates, that is impartiality, neutrality and confidentiality, and in particular as having accepted that confidentiality is necessary for the effective performance by the ICRC of its functions.

74. The ratification of the Geneva Conventions by 188 States can be considered as reflecting the *opinio juris* of these State Parties, which, in addition to the general practice of States in relation to the ICRC ... leads the Trial Chamber to conclude that the ICRC has a right under customary international law to non-disclosure of the [information relating to its activities].³¹

Domestic legal order

In the majority of countries in which the ICRC enjoys privileges and immunities, these are established by a bilateral status agreement between the ICRC and the host State.³² At the time of writing, the ICRC had concluded ninety-five such agreements, most but not all of which are with countries where the ICRC has a permanent presence or is otherwise operational today.³³ The provisions of such status agreements to a large extent mirror provisions of the Vienna Convention on Diplomatic Relations and the Convention on the Privileges and Immunities of the United Nations.³⁴ In eight countries, the ICRC has been granted privileges and immunities on the basis of domestic legislation establishing the privileges and immunities of IOs, the scope of application of which was extended to include the ICRC.³⁵ As such domestic legislation is usually implementing legislation for the

31 ICTY, *Simić*, above note 16, paras 72–74.

32 As bilateral treaties, these status agreements require, in many States, an act of ratification to fully enter into force.

33 Status agreements are negotiated and concluded in the framework of a bilateral and confidential dialogue between the ICRC and the host State. As such, it is not for the ICRC to disclose the existence or content of such agreements.

34 Vienna Convention on Diplomatic Relations (VCDR), 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964); and Convention on the Privileges and Immunities of the United Nations, 13 February 1946, 1 UNTS 15 and 90 UNTS 327 (entered into force 17 September 1946), both available at: <https://treaties.un.org>. The provisions of the UN Convention are also mirrored in treaties establishing the privileges and immunities of other IOs, such as those of the UN Specialized Agencies, the International Labour Organization, Food and Agriculture Organization, United Nations Educational, Scientific and Cultural Organization, International Monetary Fund, World Health Organization and World Trade Organization, all available at: <https://treaties.un.org>. For examples on where ICRC status agreements typically differ from the provisions of the VCDR and the UN Convention, see note 35 below.

35 Publicly available examples include Australia's International Organisations (Privileges and Immunities) Act, as amended in 2013, Malaysia's International Organisations (Privileges and Immunities) Act, as amended in 2011, and the US International Organizations Immunities Act, as amended in 1988 (all referred to in above note 9 and France's *Loi n° 2003-475 du 4 juin 2003 relative aux privilèges et immunités de la délégation du Comité international de la Croix-Rouge en France*, available at: www.legifrance.gouv.fr/affichTexte.do?jsessionid=353EAE4AC94611A1953F62A7D7618531.tpdila08v_1?cidTexte=JORFTEXT00000604191&dateTexte=20150615), as well as Hong Kong's Ordinance to Grant Privileges and Immunities in Hong Kong to the International Committee of the Red Cross and its Delegates, and for Connected Purposes, 1989, available at: www.legislation.gov.hk/blis_ind.nsf/CurEngOrd/F6705D2C1B4FC530C82564830033925F?OpenDocument.

Convention on the Privileges and Immunities of the United Nations, it generally reflects the privileges and immunities established in that Convention.

While the majority of bilateral status agreements concluded by the ICRC with host States to a large extent cover the same privileges and immunities as those granted to the UN, these bilateral agreements are more tailored to the specific nature and mandate of the ICRC and include a number of privileges and immunities that are either absent or only implicit in the UN Convention and domestic legislation which mirrors that Convention.³⁶

Why does the ICRC need privileges and immunities?

Underlying the legal regime of privileges and immunities of IOs is the principle of functionality, aptly though summarily expressed in the text of Article 105 of the UN Charter, which provides that IOs (in this case the UN) should enjoy “such privileges and immunities as are necessary for the fulfilment of its purposes”.³⁷ Following the precedent of the Charter, it has become a matter of common form to adhere to the principle of functionality as the measure of granting privileges and immunities to IOs.³⁸ The *travaux préparatoires* of the UN Charter further illustrate the meaning of the principle of functionality, including its inherent need to guarantee the independence of the organization:

The terms *privileges* and *immunities* indicate in a general way all that could be considered necessary to the realization of the purposes of the Organization, to the free functioning of its organs and to the independent exercise of the functions and duties of their officials [I]f there is one certain principle it is that no member state may hinder in any way the working of the Organization.³⁹

Miller explains moreover that:

The drafters of a prior version of this text noted that they had “seen fit to avoid the term ‘diplomatic’ and ha[d] preferred to substitute a more appropriate standard, based, for the purposes of the Organization, on the necessity of realizing its purposes and, in the case of the ... officials of the Organization, on providing for the independent exercise of their functions.”⁴⁰

36 Examples include the undertaking by the host country not to permit the disclosure of confidential ICRC information in legal proceedings, the explicit mention of testimonial immunity of ICRC staff, the explicit granting of air traffic rights and exemptions from overflight and landing fees, the issuance of radio frequencies assigned specifically to the ICRC, and the explicit inviolability of person of staff (for more detail, see the discussion of specific privileges and immunities below).

37 For background and a good description of the principle of functionality, see Anthony J. Miller, “The Privileges and Immunities of the United Nations”, *International Organizations Law Review*, Vol. 6, 2009, pp. 9–23 and 62.

38 C. Wilfred Jenks, *International Immunities*, Stevens & Sons and Oceana Publications, London and New York, 1961, p. 18.

39 *Documents of the United Nations Conference on International Organizations, San Francisco, 1945*, Vol. 13, Doc. 933, 12 June 1945, p. 705 (emphasis in original).

40 A. J. Miller, above note 36, p. 15; also see above note 24.

Article 105 of the UN Charter empowered the UN General Assembly to determine the details of the application of these privileges and immunities. The Assembly did so through the adoption of the Convention on the Privileges and Immunities of the United Nations in 1946, which has to a large extent become *the* reference point for the definition of the privileges and immunities of other IOs.⁴¹ The purpose of that Convention, as described by the Rapporteur of the Sixth Committee, also reflects the principle of functionality:

It is important that in setting up this great new international Organization we should not ask for it to possess privileges and immunities which are greater than those required for its efficient organization. That would lead to unnecessary conflicts with the national sovereignty of particular Member States. On the other hand, equally important is to ensure that it has adequate privileges and immunities. To give too few would fetter the ... Organization in the discharge of its tasks.⁴²

Jenks refers to the principle of functionality and its component principle of independence as “principles which are now regarded as the foundation of international immunities”⁴³ and explains that the rationale underlying privileges and immunities of IOs is “not concerned with the status, dignity or privileges of individuals, but with the elements of functional independence necessary to free international institutions from national control and to enable them to discharge their responsibilities impartially.”⁴⁴

In sum, privileges and immunities are tools granted to an IO to enable it to effectively carry out the mandate or functions entrusted to it by the international community of States, and to do so independently and in an efficient manner. In this sense, the ICRC's mandate or functions – enshrined in the 1949 Geneva Conventions, their Additional Protocols and the Statutes of the International Red Cross and Red Crescent Movement – are both the legal basis and justification for its legal personality and its privileges and immunities, and, as will be discussed further below, the limits thereto.⁴⁵ In pursuing its mission and mandate, the ICRC adheres strictly to its Fundamental Principles and its standard working modalities. Of particular relevance, as will be discussed in more detail below, are the principles of neutrality and independence, and confidentiality as the ICRC's standard working modality flowing directly from these principles.⁴⁶ Crucial to the

41 Convention on the Privileges and Immunities of the United Nations, above note 33.

42 Records of the First Part of the First Session of the General Assembly, Plenary Meetings of the General Assembly, GAOR, 10 January–14 February 1946, Verbatim Record of 13 February 1946, p. 452.

43 While they essentially mean the same, from a legal perspective the principle of independence as a principle of international law regulating the privileges and immunities of IOs is to be distinguished from the principle of independence that is part of the Fundamental Principles of the International Red Cross and the Red Crescent Movement, referred to below in note 45 and accompanying text.

44 C. W. Jenks, above note 37, p. 17.

45 See also above notes 23–27.

46 On the ICRC's Fundamental Principles, see further detail below. For the ICRC's standard working modalities, see ICRC, “Action by the International Committee of the Red Cross in the Event of Violations of International Humanitarian Law or of Other Fundamental Rules Protecting Persons in Situations of Violence”, *International Review of the Red Cross*, Vol. 87, No. 858, 2005, pp. 393–400;

ICRC's capacity to carry out its mandate around the world, these offer further justification for some of its privileges and immunities.

In light of the above, and applying the principle of functionality, the purpose of the ICRC's privileges and immunities is four-fold. They serve to:

- ensure and facilitate an efficient, speedy and independent operational capacity to fulfil the ICRC's mandate, and this at the lowest cost possible;
- guarantee the ICRC's capacity to act as a neutral, independent and impartial humanitarian actor, and – importantly – to be perceived as such;
- protect the confidential nature of the ICRC's work; and
- facilitate smooth financial, administrative and human resources management.

Before setting out in more detail the specific privileges and immunities required to serve this four-fold purpose, it is necessary to distinguish between two categories of beneficiaries of these privileges and immunities. While all privileges and immunities are for the benefit of the institution's capacity to carry out its mandate, some apply directly to the institution itself – i.e., the ICRC, the first and principal beneficiary of the ICRC's privileges and immunities – while others concern the individuals representing or working for the institution.⁴⁷ With regard to the latter, it is important to stress from the outset that privileges and immunities conferred upon such persons are granted in the interest of the ICRC and not for the personal benefit of the individuals themselves.

Privileges, facilities and immunities necessary for the ICRC to carry out its mandate

This part deals with the privileges, facilities and immunities⁴⁸ that are necessary for the ICRC to effectively carry out its humanitarian mandate and activities in full

and ICRC, *The ICRC, Its Mission and Work*, Geneva, March 2009, available at: www.icrc.org/eng/assets/files/other/icrc_002_0963.pdf.

47 These include the ICRC's representatives (i.e., the Committee members) and staff members, as they constitute the very large majority of individuals through whom the ICRC carries out its mandate and activities. However, privileges and immunities of ICRC representatives and staff also extend to persons who directly contribute to the exercise of the ICRC's mandate and activities, albeit on a temporary or even occasional basis. These may include, for example, certain consultants but also staff or volunteers of National Societies who have been seconded to the ICRC for a specific period of time or take part in specific ICRC operations as an integral part of an ICRC team. See also International Criminal Tribunal for Rwanda, *Prosecutor v. Muvunyi*, Reasons for the Chamber's Decision on the Accused's Motion to Exclude Witness TQ, Case No. ICTR-2000-55A-T, 15 July 2005, paras 17–18.

48 "The distinction between an immunity and a privilege is not easy to define precisely, and the terms have often been used interchangeably, but in general a privilege denotes some substantive exemption from laws and regulations ..., whereas an immunity does not imply any exemption from substantive law but confers a procedural protection from the enforcement process in the receiving State." Sir Ivor Roberts (ed.), *Satow's Diplomatic Practice*, 6th ed., Oxford University Press, Oxford, 2009, p. 121. While most international treaties dealing with this subject matter only refer to "privileges" and "immunities" in their titles, a number of provisions do not really fit either of the definitions above, but are rather "facilities" granted by States to IOs to enable them to carry out their functions. Examples include facilities in respect of communications and currency or exchange restrictions, or repatriation facilities for staff and their relatives.

conformity with its Fundamental Principles and standard working modalities, in particular confidentiality. These privileges, facilities and immunities reflect and correspond to the specificity of the ICRC's mandate and activities, its identity and working modalities and the environments in which it operates. While many of the ICRC's privileges, facilities and immunities are similar or even identical to those generally enjoyed by IOs, they differ at times in order to take into account the specificity of the ICRC and the situations in which it is mandated to work.⁴⁹

Legal capacity and administrative and financial privileges and facilities

Legal capacity in the domestic legal order

Usually amongst the first provisions of a bilateral status agreement or law establishing the privileges and immunities of the ICRC is a provision transposing the ICRC's international legal personality into the domestic legal order.⁵⁰ This is a quintessential provision as it establishes the ICRC's legal capacity to enter into contracts, acquire and dispose of property and institute legal proceedings in the host country. As such, it is often a *conditio sine qua non* for basic administrative operationality as it enables the ICRC to hire staff, rent or acquire premises, open and operate bank accounts, and purchase goods and materials necessary to function and to carry out its operations. Legal capacity thus directly contributes to enabling the ICRC to carry out its operations and to facilitate administrative, financial and human resources management.

Administrative and financial privileges and facilities

Administrative privileges and facilities guarantee the ICRC the capacity to carry out its mandate and operations independently, speedily and efficiently, by minimizing administrative hurdles or burdens. They also facilitate smooth global administrative and human resources management. Financial privileges and facilities serve to minimize the expenses of the organization and to facilitate smooth and efficient global management of the ICRC's financial resources. They also ensure that these financial resources are spent as much as possible to the direct benefit of the victims whom the ICRC is mandated to assist and protect.

The ICRC as an institution is the primary beneficiary of administrative and financial privileges and facilities to meet these purposes. They typically include:

- the right to hold national or foreign currency and other financial assets, and to operate accounts in any currency, without being subject to laws and regulations governing exchange control and related matters;

⁴⁹ See also above note 35.

⁵⁰ Walter correctly points out that "a distinction must be made between domestic and international legal personality. International legal personality does not automatically imply national legal personality and vice versa. For many international organizations it is not sufficient that they possess international legal personality; for their proper functioning they also need to possess legal personality in the national legal orders of ... States." C. Walter, above note 16, para. 27.

- the right to freely transfer funds in national or foreign currency to, from and within the country, and to convert such assets freely into other currencies at the most favourable exchange rate at the time of conversion;
- exemption from all direct taxes, except for dues which constitute charges for public utility services;
- exemption from, or remission or reimbursement of, all indirect taxes (including value-added taxes) paid by the ICRC, in particular those paid on services or construction contracts, and those paid for purchases of articles intended for official use and articles intended for ICRC assistance programmes within the host country or in another country;
- exemption from customs duties, import duties and charges having equivalent effect and from all taxes and restrictions on the import, export or transit through the country of all goods and materials (including ICRC publications and audio-visual materials) intended for official use and/or for ICRC assistance programmes within the country or in another country;
- air traffic rights and exemption from overflight and landing fees for all transports over, through or to the country;
- freedom to use, for official purposes and without any interference, the means of communication that the ICRC deems most appropriate, in particular as regards its communication with its headquarters in Geneva and its offices around the world, with other related international agencies and organisations, with government departments, and with bodies corporate or private individuals;
- the right to install on its premises radio and telecommunication equipment and to use mobile equipment within the national territory, and exemption from licensing fees and from all other related fees, rates, taxes and charges;
- issuance of radio frequencies assigned to the ICRC in accordance with Resolution No. 10 (Rev.WRC-2000) of the International Telecommunication Union;⁵¹
- treatment not less favourable than that accorded to IOs or States' diplomatic missions in matters relating to official communications;
- registration of ICRC vehicles as vehicles of diplomatic missions, and issuance of diplomatic license plates; and
- authorization to own or hold or be granted, alienated, leased or transferred to, any land or any interest in any land for the purposes of the ICRC or the residence or office of its expatriate staff members.

It is relatively straightforward to see how these privileges and facilities contribute to the smooth and efficient administration of ICRC operations and infrastructure and to minimizing the organization's financial costs and expenses. Indirectly, they also guarantee that States in which the ICRC has a permanent presence do not derive direct financial benefits from that presence and as such contribute to ensuring

51 International Telecommunication Union, Resolution No. 10, "Use of Two-Way Wireless Telecommunications by the International Red Cross and Red Crescent Movement", Rev. WRC-2000, adopted by the World Radiocommunication Conference, Istanbul, 2000, available at: www.itu.int/dms_pub/itu-s/oth/02/01/S020100002E4001PDFE.PDF.

both independence of the ICRC from host States and equality between all States party to the treaties entrusting the ICRC with its international mandate. Incidentally, the capacity to reduce indirect or so-called overhead costs to an absolute minimum also responds to legitimate expectations by donors that the ICRC spend as much of their contributions as possible directly on the victims that it is mandated to protect and assist.⁵²

A few practical examples will illustrate how these privileges and facilities also contribute to speedy, efficient and independent humanitarian operations. For instance, the exemption from restrictions on the import of goods and materials intended for ICRC assistance programmes is crucial for responding quickly to urgent medical needs in the field when appropriate and adequate medical equipment or drugs are not available in the country, or are not available in sufficient quantities. Undue restrictions under domestic law on the type or quantity of equipment or drugs that may be imported may hamper a qualitatively and quantitatively adequate response by the ICRC to the needs of the populations affected. Moreover, procedures for obtaining authorization to import certain goods or materials or for overcoming restrictions are usually cumbersome and time-consuming. An exemption for goods and materials intended for ICRC assistance programmes can at times make the difference between life and death for the victims whom the ICRC seeks to assist.

Another example relates to the need to be granted air traffic rights. The ICRC often operates its own aeroplanes, rather than using commercial or government aeroplanes or those of other IOs. It does so in order to ensure that it can carry out its activities when other aeroplanes are unavailable or restricted from flying and/or to ensure that the ICRC is perceived by all parties to an armed conflict, as well as by the victims it seeks to protect and assist, as a truly neutral and independent humanitarian actor (a *conditio sine qua non* for guaranteeing both access and security). Hence the need to be granted appropriate air traffic rights and to be exempt from any landing or overflight fees. Diplomatic license plates are a clear indication for those who encounter ICRC vehicles that the organization has an international status and enjoys privileges and immunities, without the need to explain the “what” and the “how” in much detail. Together with visual identification of ICRC vehicles,⁵³ diplomatic license plates often facilitate and speed up the crossing of borders or the passing of checkpoints and roadblocks. Finally, the right to install and use mobile radio and telecommunications equipment and the issuance of Red Cross radio frequencies remains key, even in this age of satellite internet connections and smart phones.

52 The ICRC is funded primarily by voluntary contributions from States party to the Geneva Conventions, which account for about 80% of its budget. Other donors include National Red Cross and Red Crescent Societies, supranational organizations (such as the European Commission), and public and private sources. The ICRC accounts for its work and expenditure in its *Annual Report*. For further details, see: www.icrc.org/en/who-we-are/finances.

53 In order to allow quick and easy identification, ICRC vehicles, boats and aircraft generally carry the ICRC's logo (a red cross against a white background in a circle, with the words “Comité International Genève”) on all sides, and depending on the circumstances, also on the rooftop.

Radio is the one and only means of communication that continues to work in situations where phones and the Internet are down due to inclement weather, natural disasters, hostilities or other forms of violence, or manmade interventions. Key to ensuring the security of its staff and to the coordination and implementation of its humanitarian activities, radio remains of significant importance to the ICRC today.

ICRC representatives and staff who are assigned to work in countries of which they are not nationals or residents also enjoy certain administrative and financial privileges and facilities. These are granted not for the individuals' personal benefit but rather to facilitate the smooth administrative and financial management by the ICRC of its expatriate human resources. They include:

- the right of such individuals to import personal effects, including vehicles, duty-free upon their arrival, and the right to enjoy the same exemptions upon their departure;
- the right to sell their personal belongings under the same conditions as those accorded to members of diplomatic missions;
- in the event of armed conflict or other emergencies, the necessary facilities to leave the country, if they wish to do so, by the means they consider to be safest and quickest;
- the same privileges in respect of exchange facilities as are accorded to members of diplomatic missions; and
- exemption from taxes on salaries and other emoluments paid by the ICRC or received by them from outside the country in general.

Privileges and immunities required to uphold the Fundamental Principles of neutrality, independence and impartiality, as well as the working modality of confidentiality

In its operations, the ICRC adheres strictly to its Fundamental Principles of neutrality, impartiality and independence.⁵⁴ As a neutral humanitarian actor, the ICRC abstains from taking sides – or being perceived as taking sides – in armed conflicts or other situations of violence, or in any controversies of a political, racial, religious or ideological nature. Under the principle of impartiality, the ICRC seeks to protect and assist victims guided solely by their needs and regardless of their nationality, allegiance, race, ethnicity, gender, age, religion or political beliefs. This enables the ICRC to prioritize its activities on the basis of the degree of urgency and the types of needs of those affected. The ICRC's independence – from States and IOs, but also from any other persons, groups or entities that may seek to exert pressure or influence in situations of armed

54 The ICRC adheres to, and as a component of the Movement is bound by, all seven of the Fundamental Principles set out in the preamble of the Statutes of the International Red Cross and Red Crescent Movement, above note 3. The three principles mentioned here are, however, those that are immediately relevant to, and part of the legal basis and justification for, the ICRC's privileges and immunities.

conflict or other situations of violence – means that it has the autonomy it needs to accomplish the exclusively humanitarian task entrusted to it and directly contributes to its capacity to be neutral and impartial, and perceived as such, when attending to needs on the ground. The ICRC's standard working modality of confidentiality, under which it tries to persuade parties to armed conflicts and other situations of violence to abide by their obligations under international law and address humanitarian concerns through a confidential and bilateral dialogue, derives directly from these principles.⁵⁵

These principles, and the related working modality of confidentiality, have been widely recognized to be essential for the effective discharge of the ICRC's mandate and functions. By adhering to them, the ICRC has been able to obtain and maintain the trust of both parties to and victims of armed conflicts, as well as of all actors involved in other situations of violence. That trust has proved to be crucial in securing access to areas and populations affected by armed conflicts and other situations of violence and the security of ICRC staff.

In what follows we will list the privileges and immunities of the ICRC and its staff that guarantee the organization's capacity to adhere to its Fundamental Principles and abide by its commitment to confidentiality. We will then illustrate these with a few concrete examples.

Privileges and immunities for the ICRC as an institution:

- immunity for the ICRC, its property and assets, wherever located and by whomsoever held, from every form of legal and administrative process;
- inviolability of ICRC premises, property and assets, wherever located and by whomsoever held, including immunity from search, requisition, confiscation, expropriation or any other form of interference, whether by executive, judicial, administrative or legislative action;
- inviolability of ICRC archives and, in general, all documents belonging to the organization or held by it, including electronic documents and data, wherever located;
- exemption from obligations to provide evidence in legal proceedings;
- freedom to use, for official purposes and without any interference, the means of communication that the ICRC deems most appropriate, in particular as regards communication with its headquarters in Geneva, with other related international agencies and organizations, with government departments, and with bodies corporate or private individuals;
- the right to dispatch and receive its correspondence by courier or in sealed bags, which shall have the same immunities and privileges as diplomatic couriers and bags, provided these bags bear visible external marks of their character and contain only documents or articles intended for official use; and
- undertaking by the host country to respect the confidentiality of ICRC reports, letters and other communications to its government representatives, which

55 For more detail, see Memorandum, above note 28.

includes neither divulging their content to anyone other than the intended recipient, nor permitting their use in legal proceedings, without prior written consent of the ICRC.

Privileges and immunities of ICRC staff and representatives:⁵⁶

In relation to any acts, omissions, words spoken or written or information obtained in the performance of their functions for the ICRC, and even after they have left the service of the ICRC:

- immunity from any form of legal or administrative process;
- inviolability of person, including personal arrest or detention and seizure of personal baggage;
- inviolability of private residences, vehicles, documents, manuscripts and all other personal effects;
- exemption from obligations to provide evidence in legal proceedings; and for the duration of employment with the ICRC;
- exemption from all immigration fees and restrictions and alien registration obligations – the government shall provide, free of charge and as quickly as possible, the appropriate travel documents, visas or other necessary certificates;
- exemption from all national service obligations; and
- freedom of movement and travel to, from and throughout the national territory.

In addition to the above-mentioned privileges and immunities, the head of the ICRC's representation in the host country and his or her deputy usually benefit from the same status accorded to diplomatic agents under the Vienna Convention on Diplomatic Relations of 16 April 1961.⁵⁷

Like most if not all multilateral conventions and bilateral status agreements governing the privileges and immunities of IOs, the ICRC's status agreements or equivalent domestic laws invariably include immunity from legal and administrative process (also referred to as immunity from jurisdiction) and inviolability of premises, property, assets, archives and data for both the organization and its staff. These are essential and effective guarantees to ensure the independence the ICRC needs to be able to carry out its mandate without interference by third States or other IOs. Due to the particularly volatile, dangerous and geopolitically sensitive environments in which the ICRC operates and to the specificity of its mandate and identity (in particular with regard to neutrality and confidentiality), the lack or disrespect of such guarantees of independence would have even more severe repercussions on the ICRC's capacity to carry out its mandate than they would have for other IOs. The exemption from the full application of the domestic law of States around the globe also contributes directly to the ICRC's capacity to be, and be perceived as, a neutral

56 Privileges and immunities are granted to individuals through whom the ICRC carries out its mandate – i.e., all persons who are assigned by the ICRC to perform functions for the ICRC, or represent the ICRC as members of its governing body.

57 VCDR, above note 33.

and independent humanitarian actor. A typical example is the exemption from obligations under domestic law to testify or otherwise provide evidence in legal proceedings. Were the ICRC to be compelled to testify in favour or against one of the parties to an armed conflict, it would almost certainly be perceived as being neither neutral nor independent in that conflict. Finally, appropriate privileges and immunities for ICRC staff allow the ICRC to abide by its duty of care towards its employees by effectively shielding them from negative consequences⁵⁸ resulting from the mere exercise of their functions for the ICRC (such as engaging with proscribed groups to secure access to affected populations or address humanitarian concerns and alleged violations of international law) or from their efforts to respect their contractual duties to the ICRC (such as their duty of discretion, which includes a prohibition against providing evidence in legal proceedings without the prior consent of the ICRC⁵⁹).

Immunity from jurisdiction, inviolability of documents, manuscripts, archives and data, non-interference with official communications and the right to dispatch and receive correspondence by diplomatic courier or in sealed bags also contribute to the protection of confidential information related to the ICRC's mandate and activities. Further protections of such information include the exemption from obligations to provide evidence in legal proceedings and the undertaking by the host country to respect the confidentiality of ICRC reports, letters and other communications to its government representatives, by neither divulging their content to anyone other than the intended recipient nor permitting their use in legal proceedings without the prior written consent of the ICRC.

It is uncontested that the disclosure of confidential information related to the ICRC's activities – be it by authorities or entities with which the ICRC engages in a confidential dialogue to achieve its purposes, or by the ICRC itself as a result of an obligation under domestic law – would cause significant and at times irreparable damage to the ICRC's capacity to carry out its humanitarian mandate and to its reputation as a strictly neutral humanitarian actor. If, for example, parties to a conflict were under the impression that information gathered by the ICRC in theatres of armed conflict or in places of detention would subsequently be used in a court case, a public inquiry or similar proceedings, this would not only jeopardize the organization's efforts to gather relevant information and submit allegations of violations to the parties but would very likely prevent them altogether. Lack of guarantees of confidentiality would thus, at best, serve as a major disincentive for parties' cooperation with the ICRC, and at worst, preclude ICRC access to vulnerable persons and populations, with

58 Depending on the domestic legislation of the host country, such consequences may be as far-reaching as the imposition of a prison sentence, a fine or an obligation to pay damages, or a suspension or withdrawal of a license to exercise one's profession.

59 The duty of discretion also prevents staff from notifying local authorities of possible violations of domestic law about which they may become aware in the exercise of their functions, in spite of obligations under domestic law to report violent injuries (such as victims of gunshot or other "war" wounds), rape or other forms of sexual violence, child abuse or terrorist sympathies or activities. The duty of discretion is an absolute obligation; only the ICRC can relieve its present or former staff and representatives of that obligation.

the effect of increasing their vulnerability and the hardship suffered. In the same vein, public disclosure of confidential information may put the security of both ICRC staff in the field and the victims they seek to protect and assist at high risk.⁶⁰

The exemptions from immigration restrictions and alien registration obligations allow the ICRC to be fully independent in its selection of employees to be deployed to or employed in any given country. As such, the organization can assign the most qualified individuals for deployment in each given context, taking into account both the technical expertise and the linguistic and cultural baggage required to achieve the ICRC's objectives. These exemptions also limit the administrative hurdles and financial cost of adequate resourcing of ICRC activities and allow expatriate staff, once they are in the country, to fully dedicate themselves to their humanitarian tasks. In a similar vein, the speedy provision of appropriate visas, travel documents or other necessary certificates contributes significantly to the efficiency and speed of staffing in ICRC humanitarian operations. Efficiency and speed also benefit directly from the ICRC and its staff's freedom of movement and travel to, from and throughout national territories. That freedom, while of course always subject to reasonable constraints in order to ensure the security of ICRC staff and beneficiaries, moreover guarantees the ICRC's independence and contributes to its reputation of neutrality.

Where ICRC staff and representatives enjoy the full set of privileges and immunities listed above, the status equivalent to that of diplomatic agents granted to the head of the ICRC representation in a given country and his or her deputy does not add all that much. In some countries, however, it remains important to have direct access to government ministers, many of whom are indispensable interlocutors for enabling the ICRC to carry out its activities and programmes in the country.

Limits to privileges and immunities and dispute settlement

The ICRC's privileges and immunities are not and should not be without limits. The principle of functionality underlying the international legal regime on privileges and immunities of IOs also circumscribes their limits. Consequently, the ICRC is obliged to cooperate with the authorities of host States in order to facilitate the proper administration of justice and prevent the occurrence of any abuse of privileges and immunities. The ICRC can also waive immunities where, in its opinion, they would impede the course of justice, and they may be waived without prejudice to the interests of the ICRC, in particular its capacity to carry out its mandate and functions under international law.⁶¹ Provisions to that extent are also customarily

60 For the rationale for the ICRC's confidentiality and the sources of its legal protection, as well as the scope of application of the ICRC's evidentiary privilege, see Memorandum, above note 28.

61 To be valid, waivers of ICRC privileges or immunities must be explicit, in writing (usually through a verbal note to the Ministry of Foreign Affairs) and issued by the competent authority within the ICRC (i.e., its president or the person to whom the president has delegated this power).

included in ICRC status agreements and in domestic legislation regulating the privileges and immunities of IOs.

In this respect, it is helpful to reiterate that privileges and immunities conferred upon individuals representing or working for the ICRC are granted in the interest of the organization (i.e., its capacity to carry out its mandate) and not for the personal benefit of the individuals themselves, and that it is for the ICRC, not the individual, to decide on any waivers of the privileges and immunities they enjoy.

Moreover, ICRC staff and representatives undertake – to the extent that it is compatible with the ICRC's mandate, principles and working modalities – to respect the laws and regulations in force in the countries in which they work. Finally, the ICRC informs the Ministry of Foreign Affairs of the names, titles and functions of staff working in the country, the dates of their arrival in and departure from the country, and the commencement and termination of their service with the ICRC, as well as the names of accompanying relatives of expatriate staff.

In light of their immunity from the jurisdiction of domestic courts, IOs are required to provide for alternative mechanisms to settle disputes with host States and with private parties. In the absence of such mechanisms, States, or third parties with a private law claim, would not have any access to justice.

ICRC status agreements generally provide that disputes between the ICRC and the host country are to be settled by negotiation and that such negotiations are to take place in good faith, equitably taking into account both the national interests of the State and the interests of the ICRC related to its activities, mandate and mission, and with the discretion essential to continued good relations. Where such negotiations fail, disputes are generally submitted for final decision to an arbitral tribunal.

Arbitration clauses are also systematically included as the appropriate mechanism for settling disputes of a private law nature in contracts that the ICRC concludes with third parties. As far as labour law disputes with ICRC employees are concerned, it is worthwhile to note that expatriate staff whose employment contracts are subject to Swiss law have access to the Swiss labour courts. For other staff, the ICRC, as a matter of institutional policy, waives its immunity from jurisdiction if efforts to settle the case amicably or through the ICRC ombudsman's office have failed.

Conclusion

By granting the ICRC legal capacity and privileges and immunities that are similar to those granted to other IOs, but taking into account the distinct mandate and identity of the ICRC, States not only reaffirm their commitment to the ICRC's mandate under the Geneva Conventions, their Additional Protocols and the Statutes of the International Red Cross and the Red Crescent Movement, but offer the ICRC the means to fulfil that mandate fully and efficiently. Adequate

legal capacity and privileges and immunities allow the ICRC to protect and assist victims of armed conflict and other situations of violence in a timely and efficient manner, tailored to their immediate needs. They enable the ICRC to fully live up to its Fundamental Principles of neutrality, independence and impartiality and its commitment to a confidential bilateral dialogue with those concerned. As such, they contribute significantly to the ICRC's capacity to ensure better respect for international humanitarian law and to act as a neutral intermediary between parties to armed conflicts, as well as to the ICRC's access and proximity to victims and to the security of its staff on the ground. Finally, they facilitate sound and smooth financial, administrative and human resources management and allow the organization to carry out its humanitarian activities at the lowest cost possible and maximizing expenditures to the direct benefit of the victims it is mandated to protect and assist. Granting privileges and immunities to the ICRC is not a matter of courtesy, but is rather a concrete manner in which States reaffirm their commitment to the ICRC's humanitarian mandate and role and give the ICRC the tools that are indispensable for its efforts to alleviate as much as possible the human suffering caused by armed conflicts and other situations of violence.