

# ICRS And Its Ships: Legal Status, Immunities and Privileges From The Perspective of International Law

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**ICRC AND ITS SHIPS: LEGAL STATUS, IMMUNITIES AND PRIVILEGES FROM THE PERSPECTIVE OF INTERNATIONAL LAW**  
**(ICRC dan Kapal ICRC: Status Hukum, Kekebalan dan Keistimewaan Ditinjau dari Perspektif Hukum Internasional)**

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**Abstract**

*This paper analyses the legal status of two matters from the perspective of International Law which are the International Committee of the Red Cross (ICRC) and the ships' used by the organization by employing qualitative methods through interview with some key personnel of the ICRC Indonesia and the Indonesian Navy. This study shows that the ICRC is not a public inter-governmental organization and cannot be deemed as one. However, ICRC is a subject of International Law thus, this give the organization international legal personality and immunity. Regarding the legal status of the ships used by the organization to carry out its duty, this paper conclude that they are considered as private vessels. Therefore, they do not possess immunity and privileges bestowed by International Law. Nevertheless, they are protected by International Law.*

**Keywords:** *ICRC, International Legal Personality, Legal Status, Privileges and Immunities, Status of Ships*

**Abstrak**

Artikel ini berisi analisis mengenai dua hal dari perspektif hukum internasional, yakni tentang status hukum Komite Internasional Palang Merah (ICRC) dan kapal-kapal yang digunakan organisasi tersebut. Analisis dilakukan dengan menggunakan metode kualitatif dengan melakukan wawancara terhadap pejabat penting ICRC Indonesia dan TNI Angkatan Laut. Hasil pembahasan menunjukkan bahwa ICRC bukan merupakan dan tidak dapat dianggap sebagai suatu organisasi antar-pemerintah yang bersifat publik. Namun demikian, ICRC adalah suatu subjek Hukum Internasional yang memiliki kekebalan dan personalitas hukum internasional. Adapun status hukum kapal-kapal yang digunakan oleh ICRC untuk melakukan tugasnya, disimpulkan bahwa kapal-kapal tersebut dianggap sebagai kapal swasta. Oleh karena itu kapal-kapal tersebut tidak memiliki kekebalan dan keistimewaan yang diperoleh berdasarkan Hukum Internasional. Walaupun demikian, kapal-kapal tersebut tetap dilindungi berdasarkan Hukum Internasional.



public ship is chartered by a private company for commercial purposes, the status of the vessel during the charter is a private vessel.<sup>5</sup> This categorization determines whether a ship is eligible for certain immunity and privilege bestowed by International Law.<sup>6</sup>

Accordingly, this paper first discusses the legal status of ICRC itself. Then it analyses the legal status of the ships used by the organization to determine whether the ships enjoy International Law immunity and privileges.

### Method

Legal research is distinct from other research in Social Sciences. It employs particular research method and approaches. Another distinction is that legal research does not use qualitative data, instead it uses legal materials as its research object.

### Research Approach

<sup>5</sup> Leden Marpaung, *Tindak Pidana Wilayah Perairan Laut Indonesia* (Jakarta: Sinar Grafika, 1993), 54-58.

<sup>6</sup> Chinwe Iyindah Ozobu, "Role and Responsibilities of Flag States under UNCLOS III", *Research gate*, (July, 2015), doi: 10.13140/RG.2.1.4196.464.

Legal issues of this studies are approached using three approaches: 1. statute approach; 2. conceptual approach; and 3. historical approach. Statute approach is carried out by analysing International Law provisions – particularly the 1961 Vienna Convention on Diplomatic Relations, the 1969 Vienna Convention on the Law of Treaties, the Geneva Conventions of 1949 and their Additional Protocols, UNCLOS 1982, the ICRC Statutes and other international conventions related to the issue. The second approach – conceptual approach – is employed to study doctrines, legal opinions of leading scholars in jurisprudence, court decisions, concepts, and principles of law that are relevant to the determination of the legal status of ICRC and its ships. Lastly, historical approach is used to examine the development of law regarding armed conflict in the sea.

### Legal Material

Legal research is not intended to verify or test hypotheses as hypotheses is not recognized in legal research. Therefore,

instead of data, legal research uses legal materials as research object. There are two types of legal materials – primary and secondary legal materials. Primary legal material is a legal material whose existence is based or produced by a particular authority, in the form of official documents such as treaties, laws or other legal regulations relating to the problems examined. Secondary legal material is a legal material that is not in the form of official document. It is found from literature studies and other sources of information including interviews which is also considered as part of qualitative research method by other social sciences. In this research, interviews were conducted with some key personnel of the ICRC Indonesia and the Indonesian Navy.

## Results

This research found some relevant findings to address the issues of the status of ICRC and its ships from the perspective of International Law. The findings are presented as follow.

## Subject of International Law

The subject of law is the holder of all rights and obligations under the law. As a subject of law, an entity may sue and be prosecuted before a court, entered into an agreement, and conducting other legal actions. They have this ability as they have the capacity as a legal person.<sup>7</sup> In order to carry out its function, the State and international organizations have a number of immunities and privileges (Article 105 UN Charter).

## International Organization

A public international organization is an intergovernmental organization whose members are States (Article 2 para.(1) Vienna Convention on the Law of Treaties 1969). Schermers highlights that determining the status of an organization whether it is a public or private international is crucial as it affects the legal status of the organization and its capacity to act under international law.<sup>8</sup>

<sup>7</sup> Malcolm N. Shaw, *International Law*, Sixth ed. (Cambridge: United Kingdom University Press, 2008),195.

<sup>8</sup> Henry G. Schermers and Niels M. Blokker, *International Institution Law* 4 ed (Martinus Nijhoff Publishers: Boston/Leiden, 2003), 26.

Schermers sets-up some requirements for an organization to be able to be referred as a public international organization. These criteria are as follow:

1. The organization shall be established by a treaty. An ICJ advisory opinion confirms this and stated that; "constitution instruments international organizations are, furthermore, treaties of a special kind; their object is to create new subjects of law, endowed with a certain autonomy, to which the parties entrust the task of achieving common objectives."<sup>9</sup>
2. The constituting treaty shall give a capacity to the organization to be an international legal person.
3. The organization should at least has one organ in its structure.
4. The organization should become a subject to existing international law.

#### **International Legal Personality**

Legal personality is an important concept in international law. This is to distinguish between entities that are relevant to the international legal system and those that are not.<sup>10</sup> With the existence of international legal personality, or international legal person (*persona jure gentium*) as first used by German scholar

<sup>9</sup> Nicolae Purda, "Aspects on the International Legal Personality of International Organization", *Journal of Challenges of the Knowledge Society*, ISSN: 2068-7796, 2 (2012): 892.

<sup>10</sup> Portman, Roland, *Legal Personality in International Law* (New York: Cambridge University Press, 2010), 1.

Wilhelm Leibniz in his *Codex juris gentium diplomaticus*,<sup>11</sup> an international organization has the ability to exercise rights and obligations under international law.

#### **Immunities and Privileges**

As a subject of international law who has international legal personality, an international organization enjoys immunities and privileges bestowed by international law.<sup>12</sup> Immunities and privileges of international organizations, particularly the United Nations, are regulated in the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly of the UN on February 13, 1946. This Convention is an implementation of Article 105 UN Charter. In addition, the Specialized Agencies of the UN also receive immunities and privileges.<sup>13</sup>

<sup>11</sup> Janne Elisabeth Nijman, *The Concept of International Legal Personality: An Inquiry Into the History and Theory of International Law* (The Hague: TMC Asser Press, 2003), 29.

<sup>12</sup> Boer Mauna, *Hukum Internasional, Pengertian, Peranan dan Fungsi dalam Era Dinamika Global* ed. 2<sup>nd</sup> (PT. Alumni : Bandung, 2005), 455.

<sup>13</sup> *Convention on the Privileges and Immunities of Specialized Agencies*, New York, 21 November 1947, UNTS 33, 261; see also Leo Gross, "Immunities and Privileges of Delegations to the United Nations", *International Organization*, 16, Issue 3, Summer 1962, 483-520 (Cambridge University Press: 22 May 2009, doi: <https://doi.org/10.1017/S0020818300011279> ; Anthony J. Miller, "Privileges and Immunities of the





International Conference of the Red Cross XX. To date the ICRC is the only non-governmental organization that is subject to international law.

### **Ships Nationality**

Ships are distinguished between public and private ones. The UNCLOS 1982 requires that a ship must only have one nationality. In studying the nationality of ships and genuine links between ships and nationalities,<sup>16</sup> it is first needs to be distinguished between public and private ships.

The difference is based on the use of ships and not of the ships ownership. Thus, a public vessel is a ship used for official government services and is not used for commercial purposes. Private vessels are all vessels that are not included in public vessel. In this case, it is quite clear that the ICRC vessels operated in Sri Lanka, Libya and Yemen as mentioned in introduction part of this paper are public vessels.

<sup>16</sup> Robin R. Churchill and Christopher Hedley, *The Meaning of the 'Genuine Link' Requirement in Relation to the Nationality of Ships*, ISBN: 0901-969508, (October 2000.)

### **Exclusive Jurisdiction over a Vessel**

All vessels accessing the international waters must possess a national character and every state that has exclusive jurisdiction and control over their national vessels.<sup>17</sup> In the high seas, all ships are fully subject to the rules and regulations of the flag state.<sup>18</sup>

International law recognized the principle of assimilation. <sup>29</sup> Permanent Court of International Justice (PCIJ) in the *Lotus Case* (1927) states that "the principle of freedom at sea means that every ship in the open sea is assimilated to the territory of the flag country, the flag used by the country, therefore, as in the territory of a country, the country carries out its power on the ship and no other country can carry out the power in question".

However, the assimilation principle applies only in the high seas. Should a ship

<sup>17</sup> Ermal Xhelilaj, "International Implication concerning the Legal Regime of Ship Registration", *Pomorstvo. Scientific Journal of Maritime Research* 27, Issue 1 (2013): 214.

<sup>18</sup> UNCLOS, Article 92 and High Seas Convention, Article 6; Ian Patrick Barry, "The Rights of Visit, Search, and Seizure of Foreign Flagged Vessels on the High Seas Pursuant to Customary International Law: A Defense of the Proliferation of Security Initiative", *Hofstra Law Review* 33, Issue 1(2004):305; Arron N. Honniball, "The Exclusive Jurisdiction of Flag States: A Limitation on Pro-active Port States?", *The International Journal of Marine and Coastal Law* 31, Issue 3 (September 2016): 504.



enters the territorial sea of a foreign state, the ship must be subject to the laws and regulations of the coastal state.<sup>19</sup> However, on the other hand, the general provisions and of the law of war in the sea cannot accept that the flag will always be able to protect the goods carried by the ship, because the warring parties have the right to confiscate the luggage of neutral country ships that are considered dangerous. Regarding warships and other public ships, in general it can be said that both on the high seas and in the territorial sea, the special authority of the flag state remains in force, especially warships which are considered as organs of the state and therefore have immunity.

Regarding the absolute authority of the flag state against its ships sailing on the high seas, it can also be added that this authority was carried out because there was no international power in the open sea. Due to the absence of international authority, each vessel will use and comply with the laws of its flag state. In this

matter, the international law of the sea is applicable, both in the open sea and also for the matters of interaction between the ships and other ships with different flag and between the ship with the environment.

The authority of the flag state against ships flying their flags aims to ensure order and security in the open sea. The flag raising is intended so that ships that sail on the high seas have legal ties with their flag state so that the country through its organs and legal provisions can supervise the vessels. This legal bond is formulated in the form of nationality that connects a ship with a country. After a ship obtains its nationality, a country gives permission to the ship to fly the flag. This is where the ship can enjoy the freedoms at sea. What also needs attention is that if the ship already has nationality, the ship will be protected by the flag state if something happens to the ship and also enjoy the provisions that have been made by the flag state with other countries.

UNCLOS 1982 regulates that each country must establish conditions for granting nationality to a ship, for the

<sup>19</sup> Anne Bardin, "Coastal State's Jurisdiction over Foreign Vessels", *Peace International Law Review* 14, Issue 1 (2002): 30.

registration of ships in its territory and also the right to fly the flag. Regarding the giving of nationality, UNCLOS 1982 requires the existence of a genuine bond between the state and the ship that raises its flag

In connection with this matter, that each country must effectively carry out its jurisdiction and supervision in the administrative, technical and social fields of the vessel flying its flag. According to UNCLOS 1982, there is a genuine link, a substantial relationship between the state and the ship that uses the flag. This real relationship is the basic thing because there are countries that provide nationality with easy conditions to foreign vessels. The granting of nationality with these easy terms is called the pavilion de complaisance or flag of convenience as is done by the countries of Liberia, Panama, Cyprus and Bermuda.

The existence of these genuine link requirements began in the past where certain state practices, especially the United States which provided easy conditions for ships registered in their countries. By other countries, especially European countries,

this practice is considered to be unfair competition, it is also considered to be unfavourable in terms of labour and the conditions of ship safety and crew. So in essence, an intense debate between European countries on the one hand and the United States on the other, is actually a struggle between two competing commercial shipping interests. In its resistance to the "genuine link" the United States was assisted by, among others, Liberia and Panama.<sup>20</sup>

Unlike individuals, ships can only sail with one flag. If a ship sails under two or more flags, then the vessel is deemed to have no nationality and does not get protection from any country for an event that occurred. This provision is confirmed in Article 92.

### **Legal Status of the ICRC**

Currently there are 95 states which equate ICRC with a public international

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<sup>20</sup> Don F. Dagenais, "Foreign Ships in American Ports: The Question of National Labor Relations Board (NLRB) Jurisdiction", *Cornell International Law Journal* 9, Issue 1(December 1975): 50-53; Alex G. Oude Elferink, *The Genuine Link Concept; Time for a Post Mortem?*, NILOS, Utrecht University, The Netherlands, (March 1999) [https://www.academia.edu/5605381/Genuine\\_link](https://www.academia.edu/5605381/Genuine_link) (accessed October 14, 2019).

organization and 8 other countries provide privileges and immunities as an international organizations.<sup>21</sup> Through UN General Assembly Resolution A/RES/45/6, 16 October 1990, the ICRC was granted observer to the UN status. The ICRC is the first non-governmental international organization to obtain this status. Granting observer status does not mean equalizing the ICRC with other public international organizations.<sup>22</sup>

In principle, the ICRC is not a public inter-governmental organization. The ICRC is not established by treaties. Although the ICRC is an organization formally recognized by international law based on the Geneva Conventions 1949, Additional Protocols 1977 and the 1986 Statutes of International Red Cross and Red Crescent Movement, the establishment of the ICRC is not shaped by these treaties. The establishment of the ICRC is based on Swiss national law (Swiss Civil Code, Art.

60). The fact that the ICRC was firstly established as a Swiss private organization does not decrease its character as a public international organization, because the service provided by the ICRC is for public with international scope. In addition, the ICRC was not established by states and its members are not States. Under Article 7 of the ICRC Statute, it is said that ICRC members consist of 15 to 25 people, all of whom are Swiss citizens. Thus, the ICRC is not an inter-governmental organization.

In order to fulfill its humanitarian mandate and mission, the ICRC enjoys an equivalent status to an international organization and has international legal personality in carrying out its work. According to Els Debuf in the International Review of the Red Cross, 97th edition of 2016, the purpose of providing immunities and privileges for the ICRC is: "to ensure and facilitate an efficient, speedy and independent operational capacity to fulfill the ICR's mandate, and this at the lowest cost possible; ..., guarantee the ICRC capacity to act as a neutral, independent and impartial humanitarian actor, and –

<sup>21</sup> Els Debuf, "Tools to do the Job: The ICRC's Legal Status, Privileges and Immunities", *International Review of the Red Cross*, 97, no. 897/899 (February 2016): 319-344.

<sup>22</sup> Christian Koenig, "Observer Status for the International Committee of the Red Cross at the United Nations – A Legal Viewpoint", *International Review of the Red Cross*, 31, Issue 280 (February 1991): 37-48.

importantly – to be perceived as such; ..., protect the confidential nature of the ICRC's work; and facilitate smooth financial, administrative and human resources management".<sup>23</sup>

Regarding international legal personality, the ICRC has international legal personality not because it is included in the Statute, but long before the ICRC Statute, namely when the ICRC was confirmed as the subject of international law. The ICRC recognized its status as an international law subject because of its role in developing international humanitarian law, namely since 1864, when the Geneva Convention was first enacted.

### Status of ICRC's Ships

During an interview, Rina Rusman – Legal Advisor of ICRC Delegation in Jakarta – stated that the Ship used by the ICRC is a private ship and does not have immunity from the jurisdiction of any country. More often, the ICRC rents a ship. However, the ICRC ships are protected under international law, specifically the

1949 Geneva Convention. Accordingly, the ICRC ships must be protected from attack, as long as not participating in the military operation of the warring parties. That protection is not only during armed conflicts, but also in all situations, as stated by Drapper that the Geneva Convention must be respected both in times of peace and armed conflict.<sup>24</sup>

According to Kushartoyo as one of the ICRC officer in Jakarta, the immunity possessed by the ICRC is limited to what is agreed with each country, and includes certain matters that have been agreed upon. Apart from that, there is no immunity for the ICRC. During this time, immunity was given to the ICRC Head of Delegation in certain countries. Because the ICRC ship was not included in the agreement, it did not get immunity.

Although the ICRC is a subject of international law and has international legal personality, ICRC's ships need to fly the flag of a particular country. This relates to the flag state's exclusive jurisdiction against

<sup>23</sup> *Ibid.*

<sup>24</sup> Arlina Permanasari, et.al, *Pengantar Hukum Humaniter* (Jakarta: ICRC, 1999).

ships flying their flags. The ICRC cannot fly its own flag. The ICRC has no jurisdiction. Jurisdiction is only possessed by a State as jurisdiction is a reflection of sovereignty and only a state has sovereignty.

### Conclusion

ICRC is not a public inter-governmental organization as it does not fit within its definition. However, the ICRC has a special position in international law. The ICRC is equivalent to public international organization.

Ships used by the ICRC are private vessels and the exclusive jurisdiction of the flag state applies. There is no immunity and privilege for ICRC vessels under international law. However, the ICRC is a vessel protected by international law, especially under the Geneva Convention of 1949.

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