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Halil Rahman Basaran

Istanbul Sehir University, Turkey, rahmanbasaran@hotmail.com

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THE INTERNATIONAL COMMITTEE OF THE RED CROSS: AN EVALUATION

Halil Rahman Basaran

Istanbul Sehir University, Turkey
Correspondence: rahmanbasaran@hotmail.com

Abstract

The International Committee of the Red Cross (ICRC) is explicitly mentioned in the 1949 Geneva Conventions and the 1977 Additional Protocols thereto. These explicit references to the ICRC entail respect for and recognition of the ICRC as the oldest humanitarian institution. However, this explicitness does not imply, suggest or confirm legal superiority of the ICRC over other humanitarian institutions, nor does it make the ICRC the exclusive humanitarian organization. Humanitarian assistance can be legally and legitimately undertaken by other humanitarian organizations as well. The practical influence of the ICRC is greater than that of any other NGO. Arguably, the survival of the ICRC as the pre-eminent provider of humanitarian assistance is testimony to the fact that the “practicalities” of international law are as important as treaties. The practices of the undisputed subjects of international law – states and international organizations – have paved way for a half-subject of international law – the ICRC – to enhance its status.

Keywords : Geneva Conventions, international humanitarian law, non-governmental organization, subjects of international law, Switzerland, International Committee of the Red Cross

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I. INTRODUCTION

There is a contradiction between national sovereignty – the utmost principle of international law – and humanitarianism. Humanitarianism ‘intrudes’ upon national sovereign territories in order to help civilians and prisoners of war in conflicts and disasters. Actually, some treaties are entered into by states which have facilitated such intrusion. Indeed, looking at the 1949 Geneva Conventions and the 1977 Additional Protocols thereto, one can notice the paradigm shift from sovereignty to humanitarianism in international affairs.¹ Common Article 3(2) of the 1949 Geneva Conventions stipulates that humanitarian organizations such as the International Committee of the Red Cross (ICRC) can offer their services to the parties even in a conflict not of an international character.² This provision makes it clear that relief activities of humanitarian organizations are not to be seen as hostile acts of intervention in

¹ Amanda Alexander, “A Short History of International Humanitarian Law,” *The European Journal of International Law* 26, no.1 (2015): 110.

² Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949.

the internal affairs of a sovereign state.³

Likewise, Article 70 of the 1977 Additional Protocol I to the 1949 Geneva Conventions states that humanitarian assistance may not be considered an interference in a conflict and that such assistance within the borders of a country is not deemed a breach of national sovereignty. Humanitarian assistance has thus become an exception to national sovereignty. With the humanitarian principle having made significant headway, the institution which provides humanitarian assistance takes on utmost importance and, at present, the ICRC would appear to be the foremost institution providing humanitarian assistance.

There is an identification of sorts of the 1949 Geneva Conventions with the ICRC. Moreover, the neutrality of the ICRC is arguably accepted (at the international level) by the United Nations, individual states and non-state actors.⁴ States find it favourable to their image and in their best interest to engage with the ICRC,⁵ seeing as the Geneva Conventions of 1949⁶ have recognized the “special role” of the ICRC.⁷ Moreover, and interestingly, combatant groups – as non-state actors – look for eventual international recognition through working with the ICRC on the ground.⁸ Indeed, nongovernmental organizations (NGOs), such as national liberation movements, also declare their commitment to the 1949 Geneva Conventions to enhance their standing internationally.⁹ This was the case, for instance, during the Franco-Algerian conflict in 1958, when the Algerian liberation movement proclaimed its adherence to the Geneva Conventions for the duration of the conflict.¹⁰

Humanitarian assistance is not just a matter of written law and treaties but also a matter for trust, reputation and on-the-ground practicalities, which can be provided by capable institutions. This paper thereby posits an analysis of the ICRC, the foremost institution giving humanitarian assistance. The paper

³ Fabian Klose, “The Colonial Testing Ground: The International Committee of the Red Cross and the Violent End of Empire,” *Humanity Journal* 2, no. 1 (June 10, 2014): 109. doi: 10.1353/hum.2011.0010.

⁴ Stephanie Roberts, “The ICRC, Neutrality and Guatemala: A Case for Improving Best Practices,” *Case-specific Briefing Paper* (University of Denver: Humanitarian Aid in Complex Emergencies, 2012), page 2.

⁵ For instance, the Venezuelan government gave permission to the ICRC to visit prisons and detention centers in Venezuela. Arguably, it is an attempt by the government “to gain legitimacy with the international community.” *The Christian Science Monitor*, *Venezuela’s embattled Maduro finally grants Red Cross entry*, April 20, 2019.

⁶ Article 125 and Article 142 Geneva Conventions Relative to the Treatment of Prisoners of War of 12 August 1949 and Article 3 and Article 4 Geneva Conventions Relative to the Protection of Civilian Persons of 12 August 1949.

⁷ Stephanie Roberts, “The ICRC, Neutrality and Guatemala: A Case for Improving Best Practices,” 2.

⁸ *Ibid.*

⁹ Fabian Klose, “The Colonial Testing Ground: The International Committee of the Red Cross and the Violent End of Empire,” 9.

¹⁰ *Ibid.*

clarifies the legal basis of the ICRC and the status of the ICRC within international law, and compares the ICRC with various international institutions. This analysis is all the more important as new organizations have emerged besides the ICRC to provide humanitarian assistance,¹¹ some of which will be analyzed later in this paper.

The next section presents the argument of the paper. The paper presents a comparison of the ICRC with other institutions, following which the status of Switzerland – the host country of the ICRC – as a neutral country is analyzed. The paper then turns to the ICRC and the International Federation of Red Cross and Red Crescent Societies (IFRC), with the subsequent section focusing on the 1949 Geneva Conventions and their Additional Protocols of 1977. The paper then concludes by examining the intriguing place of the ICRC within the international system.

II. ARGUMENT OF THE ARTICLE

The argument of this paper is that the preponderance of the ICRC in conflict zones and its prominence in the enforcement of international humanitarian law is due to the “practice” of the ICRC and the international community. This is a *de facto* situation rather than a *de iure* one. The activities of the ICRC – the presence of the ICRC in conflict zones – have determined the status of the ICRC.¹² The more the ICRC has become operational, the more powers it has exercised.¹³ As a non-governmental organization (NGO), the ICRC has proved that NGOs may increase their powers in the international system alongside states and international organizations. Legally speaking, the ICRC is not a humanitarian organization with exclusive rights and/or privileges to handle humanitarian crises. Yet, in practice, it appears and behaves as if it is exclusive. The ICRC has what we may term a “practical” dominance, which may eventually be susceptible to challenge from other humanitarian organizations.

This argument is useful in three respects: *first*, it proves that practice and custom are important to international law, and, in particular, to international humanitarian law. International humanitarian law is a field where practice, implicit understandings and reputation are important features. The written treaties – e.g., the four Geneva conventions of 1949 and their two Additional Protocols of 1977 – represent a formal treaty façade behind which an infor-

¹¹ Stephanie Roberts, “The ICRC, Neutrality and Guatemala: A Case for Improving Best Practices,” 1.

¹² Simon Chesterman, “How ‘Public’ is Public International Law? Towards a Typology of NGOs and Civil Society Actors,” NUS Working Paper, 2018/003, National University of Singapore, page 12.

¹³ *Ibid.*

mal and practical law-making and law enforcement take place. This creates a certain space for ambiguity. This is a space for creative ambiguity in international humanitarian law and the ICRC takes advantage of this ambiguity. “The ICRC has been in the practice of creating law.”¹⁴

Second, to dominate “in practice”, the ICRC has worked on formal international law.¹⁵ Since its inception, the ICRC has attached importance to working with international lawyers and has made an immense effort to frame its work in a legal language. The ICRC has thus become, in a manner of speaking, the legal guardian of international humanitarian law.¹⁶ The president of the ICRC from 1928 to 1944 was *Max Huber*, who was a judge at the Permanent Court of International Justice from 1922 to 1939.¹⁷ For instance, it was *Max Huber* who encouraged the ICRC to concentrate upon the protection of the rights of prisoners of war.¹⁸ Indeed, arguably, one of the central tasks of the ICRC has become the inspection of prison facilities and detention camps.¹⁹ Again, it was *Max Huber* who, on February 15, 1945, called upon the governments of the United States of America, Great Britain, the Soviet Union, China and France and the national committees of the Red Cross to embark upon a revision of international humanitarian law,²⁰ a call that ultimately led to the signing of the 1949 Geneva Conventions,²¹ the bedrock of international humanitarian law.

Third, the ICRC is to be regarded as a Swiss NGO with *de facto* international legal capabilities. The ICRC is a national NGO rather than an international one. Every national relief society has a strong relationship with the state in which it was established. Although national Red Cross and national Red Crescent societies are generally presented as civilian relief societies separate from their (parent) states and which aim to bring relief during both war and peace, they are, in fact, very closely linked to, and indeed, enmeshed with their national states. National civilian relief organizations are, in fact, under close national government supervision. The position of the ICRC vis-à-vis Switzerland is no exception.

¹⁴ Leah M. Nicholls, “The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and its 161 Rules of Customary International Humanitarian Law,” *Duke Journal of Comparative & International Law* 17 (2006): 225.

¹⁵ Sandesh Sivakumaran, “Making and Shaping the Law of Armed Conflict,” *Current Legal Problems* 71, no.1 (2018): 120.

¹⁶ Stephanie Roberts, “The ICRC, Neutrality and Guatemala: A Case for Improving Best Practices,” 10.

¹⁷ Paul Leslie, “A New Low for the International Committee of the Red Cross?” *The Algemeiner*, June 18, 2013, <https://www.algemeiner.com/2013/06/18/a-new-low-for-the-international-committee-of-the-red-cross/>.

¹⁸ *Ibid.*

¹⁹ Fabian Klose, “The Colonial Testing Ground: The International Committee of the Red Cross and the Violent End of Empire,” 8.

²⁰ *Ibid.*, 2.

²¹ *Ibid.*

Almost every national relief society is a semi-official instrumentality of the government. National Red Cross and Red Crescent societies act in the interest of their governments – they are not nonpartisan organizations.²² This close relationship is clearly visible, for instance, in the case of the United States' (U.S.) Red Cross.²³ The U.S. Red Cross is a quasi-governmental organization²⁴ and an integral unit of the government of the U.S.²⁵ Likewise, the ICRC is to be regarded as a Swiss national organization that identifies with and can be identified with Switzerland, rather than a self-standing/self-sufficient international organization.

To further identify the ICRC, the article will now look at four institutions – the Amnesty International (AI), the United Nations Children's Fund (UNICEF), the United Nations High Commissioner for Refugees (UNHCR), and the Bank for International Settlements (BIS). Those institutions are focused upon because they have significant similarities and differences with the ICRC. And, there is a larger lesson to be drawn from the discussion of those institutions and their comparison with the ICRC: an NGO – e.g., the ICRC – may be successful in enhancing its standing notwithstanding the formal limitations of public international law.

III. AMNESTY INTERNATIONAL (AI)

Amnesty International (AI) is a non-governmental organization (NGO) based in London. AI is not a subject of international law but is a subject of a national law – namely, UK law. It does not have international legal personality and cannot sign treaties with governments or international organizations. AI remains a pressure group. It holds informal talks with government representatives and possesses consultative status in the Economic and Social Council of the United Nations (UN), in the Inter-American Commission of Human Rights and in the Council of Europe. Holding informal talks with governments and having consultative status in these institutions does not give AI international legal personality.

Likewise, the ICRC is an NGO. The ICRC is similar to AI in that the ICRC holds informal talks with governments, too. The ICRC argues that this informality gives it access to prisoners of war and secures the cooperation of

²² Fabian Klose, "The Colonial Testing Ground: The International Committee of the Red Cross and the Violent End of Empire," 5-6.

²³ Wesley A. "Sturges, Legal Status of the Red Cross," *Michigan Law Review* 56, no.1 (1957): 9, 11-12, 14-15, 17-19, 29-30, 32.

²⁴ *Ibid.*, 15, 30.

²⁵ *Ibid.*, 30.

governments. Yet, it is still questionable as to whether the ICRC is subject of (and to) international law. That is, the ICRC seems more like an active player in humanitarian assistance; it is admitted as an interlocutor by individual states and the United Nations more often than not. This is obvious from the fact that the ICRC has almost always been present in conflict zones and areas that have suffered natural disaster.

IV. UNITED NATIONS CHILDREN'S FUND (UNICEF)

The UNICEF is a subsidiary organ of the United Nations (UN) General Assembly based in New York, whereas the ICRC is an NGO based in Geneva, Switzerland. The UNICEF was established by the UN General Assembly. Arguably, the UNICEF is semi-autonomous, in that it can hold and dispose of property. However, that does not give UNICEF full international legal personality. In this respect, UNICEF is similar to the ICRC. Without having full international legal personality, both institutions act as if they have one, and both are active on the international scene. UNICEF is financed by government contributions and by donations by private individuals, corporations, NGOs and international organizations. The ICRC is also financed by similar actors. There is a risk that these contributions and donations curtail the independence and the autonomy, that is, the 'self-standing' quality, of both UNICEF and the ICRC.

V. THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR)

Similar to UNICEF, the United Nations High Commissioner for Refugees (UNHCR) is a subsidiary organ of the United Nations (UN) General Assembly. It was established by the latter and is part of the UN Secretariat. The UNCHR is semi-autonomous and has partial international legal personality, as evidenced by the UNCHR's authority to conclude treaties directly with states. (UNHCR Statute, paras 1,8 (b) and 16). Contribution to the UNHCR budget comes from governments, the European Union (EU) and the private sector, mirroring the funding behind both UNICEF and the ICRC. As such, the same questions of independence are relevant here as well.

There is an interesting property of the UNHCR in terms of comparisons with the ICRC: Article 35 of the 1951 Convention Relating to the Status of Refugees²⁶ and Article II of the 1967 Protocol Relating to the Status of Refu-

²⁶ The Convention and Protocol Relating to the Status of Refugees (entered into force 22 April 1954).

gees²⁷ both refer to the supervisory function entrusted to the UNHCR. Both provisions oblige state parties to cooperate with the UNHCR; they do not leave any other institutional choice to state and no alternative institution is permitted when dealing with refugees. The UNHCR is thus unavoidable and has a legal monopoly. Due, in most likelihood, to the aforementioned privileges and the near-monopoly on refugee issues, the UNCHR has what may be considered a conservative organizational culture.²⁸ Some argue that the UNCHR is disdainful of outsiders' views.²⁹

In contrast, the ICRC has no such legal monopoly. The 1949 Geneva Conventions and the Additional Protocols, as will be discussed in the later sections of this paper, allow alternative relief organizations other than the ICRC to operate. Although the ICRC is advanced as the guardian and the promoter of international humanitarian law,³⁰ the ICRC is not the exclusive institution that fulfills that role.

VI. BANK FOR INTERNATIONAL SETTLEMENTS (BIS)

The Bank for International Settlements (BIS), which is based in Switzerland, is interesting in that it was established by an international treaty among governments while also being a company limited by shares under Swiss national law, thus giving it a dual structure. Switzerland – one of the parties to the treaty establishing the BIS – imparted a national legal charter to the BIS. The central bank of each member country subscribes to the capital in the BIS. That is, the BIS is owned by national central banks. Central banks participate in the operation of the BIS, not governments directly.

The BIS is an international organization vested with international legal personality because, notwithstanding its internal corporate structure, the BIS was established by an intergovernmental agreement – viz., a treaty. Arguably, the dual structure of the BIS strengthens the status of the BIS. The Bank has an international character owing to its treaty origin while its internal structure is that of a company limited by shares under Swiss law. Interestingly, a similar dual structure – both international and national – has not been adopted for the ICRC. The ICRC, in contrast, possesses a single structure that excludes states

²⁷ The Convention and Protocol Relating to the Status of Refugees (entered into force 22 April 1954).

²⁸ David P. Forsythe, "The ICRC: A Unique Humanitarian Protagonist," *International Review of the Red Cross* 89, no. 865 (March 2007): 89.

²⁹ *Ibid.*

³⁰ "The Basics of International Humanitarian Law," The International Committee of the Red Cross, accessed on July 5, 2019 at https://www.icrc.org/en/doc/assets/files/other/icrc_002_0850.pdf; Amanda Alexander, "A short history of international humanitarian law," *European Journal of International Law* 26, no.1 (2015): 110.

– that is, the ICRC is a wholly Swiss private association without an intergovernmental dimension.

The BIS deals with intergovernmental financial settlement. This is of a typical public international law nature. The BIS is an international organization fulfilling a public international duty. Indeed, the headquarters agreement between the BIS and the Swiss Federal Council,³¹ and the host country agreements between the BIS and China³² and Mexico,³³ expressly recognize the BIS as an international organization. True, the ICRC has a headquarters agreement with Switzerland, too, and this may be evidence as to the international legal personality of the ICRC. Indeed, this headquarters agreement clearly recognizes the international legal personality of the ICRC, though it does not refer to the ICRC as an international organization³⁴

Be that as it may, there is no intergovernmental treaty establishing the ICRC. The ICRC is a wholly Swiss domestic institution established by a Swiss domestic act. Ironically, the ICRC is engaged in a field that is characterized and structured by the norms of classical public international law, just like the BIS, whereas the ICRC's foundation and structure are only of a national nature. The question thus arises as to why a Swiss national non-governmental organization (NGO) is so prominent and relevant, and this question leads us to examine the status of Switzerland as the host country of the ICRC.

³¹ Article 2 (1), Agreement Between the Swiss Federal Council and the Bank for International Settlements to Determine the Bank's Legal Status in Switzerland 2003: "*The Swiss Federal Council shall guarantee to the Bank the autonomy and freedom of action to which it is entitled as an international organisation.*" Accessible at <https://www.bis.org/about/headquart-en.pdf> (accessed on 12 August 2019).

³² Article 3 (1), Host Country Agreement Between the Bank for International Settlements and the Government of the People's Republic of China Relating to the Establishment and Status of a Representative Office of the Bank for International Settlements in the Hong Kong Special Administrative Region of the People's Republic of China 1998: "*The Government shall guarantee to the Bank the autonomy and freedom of action to which it is entitled as an international organization of central banks and monetary authorities based on international treaties between States.*" Accessible at <https://www.bis.org/about/hostcryhk.pdf> (accessed on 12 August 2019).

³³ Article 2, Host Country Agreement Between the Bank for International Settlements and the United Mexican States Relating to the Establishment and Status of a Representative Office of the Bank for International Settlements in Mexico 2001: "*The State shall at all times ensure that the Bank benefits from or is granted in all respects treatment at least as favourable as that granted by the State to any other intergovernmental organisation in the State. With regard to fiscal matters the Bank shall benefit from treatment at least as favourable as that granted generally by the State to intergovernmental organisations in the State...*" Accessible at <https://www.bis.org/about/basictexts-en.pdf> (accessed on 12 August 2019).

³⁴ Article 1, Agreement Between the International Committee of the Red Cross and the Swiss Federal Council to determine the legal status of the Committee in Switzerland 1993: "*The Federal Council recognizes the international juridical personality and the legal capacity in Switzerland of the International Committee of the Red Cross (hereinafter referred to as the Committee or the ICRC), whose functions are laid down in the Geneva Conventions of 1949 and the Additional Protocols of 1977 and in the Statutes of the International Red Cross and Red Crescent Movement.*" Accessible at <https://casebook.icrc.org/case-study/agreement-between-icrc-and-switzerland> (Accessed on 12 August 2019).

VII. SWITZERLAND

Article 11(6) of the Statutes of the International Red Cross and Red Crescent Movement states: “The International Conference shall not modify either the Statutes of the International Committee (of the Red Cross) or the Constitution of the (International) Federation (of the Red Cross and Red Crescent Societies) nor take decisions contrary to such statutes.” The International Conference is the supreme deliberative body of the International Red Cross where the representatives of the national relief organizations, the International Federation of the Red Cross and Red Crescent Societies (IFRC), the International Committee of the Red Cross (ICRC) and, most importantly, the national governments parties to the Geneva Conventions meet together. This provision clearly demonstrates that, notwithstanding the participation of states in the International Conference, the latter can amend the legal status and basic rules of neither the ICRC nor the IFRC. Therefore, both the ICRC and the IFRC – two NGOs established in Switzerland – are under the cover and protection of Swiss national law and are immune from intervention from the international conferences of the Red Cross and Red Crescent Movement. In this respect, an analysis of Switzerland’s status in international law is necessary.

Switzerland is the depositary for the 1949 Geneva Conventions and in fact convened the Diplomatic Conference of 1949, which led to the conclusion of the 1949 Geneva Conventions, which constitute the bedrock of international humanitarian law.³⁵ Indeed, the ICRC prepared the drafts of the Geneva Conventions that the 1949 Diplomatic Conference worked upon.³⁶ In the same manner, the ICRC prepared the drafts of two Additional Protocols of 1977, which were presented to the 1977 Diplomatic Conference, again convened by Switzerland.³⁷ Hence, modern international humanitarian law – starting after World War II – is based upon the close cooperation between Switzerland and the ICRC. It must be stressed at this juncture that the neutrality of both were a great asset in their success in these initiatives.

As mentioned before, there is a headquarters agreement between the ICRC and the Swiss Confederation to determine the legal status of the ICRC in Switzerland.³⁸ The ICRC aimed to confirm its international status and independence from Switzerland through this headquarters agreement. Every public international organization seated in Switzerland has a headquarters agreement with Switzerland. Arguably, such a headquarters agreement between Switzer-

³⁵ Sandesh Sivakumaran, “Making and Shaping the Law of Armed Conflict,” 121-122.

³⁶ *Ibid.*, 122.

³⁷ *Ibid.*

³⁸ Preamble, Agreement Between the International Committee of the Red Cross and the Swiss Federal Council to determine the legal status of the Committee in Switzerland, 19 March 1993.

land and the ICRC likens the ICRC to classical public international law organizations, and bolsters its legal standing and status in public international law. Indeed, Article 1 of the Switzerland-ICRC headquarters agreement states:

*“The (Swiss) Federal Council recognizes the international juridical personality and the legal capacity in Switzerland of the International Committee of the Red Cross.”*³⁹

The counter argument is that this is merely a domestic agreement between Switzerland and a legal person domiciled in Switzerland – the ICRC. The aforementioned Article 1 merely indicates the view of Switzerland on the ICRC – it does not definitely settle the question of the international legal personality of the ICRC on the international plane. True, the headquarters agreement provides for the inviolability of the ICRC premises,⁴⁰ the inviolability of ICRC archives,⁴¹ the inviolability for all ICRC papers and documents,⁴² the immunity of the ICRC from legal process and execution,⁴³ and immunity from legal process for the ICRC President, the members of the ICRC and the ICRC staff and experts⁴⁴ – all reminiscent of the privileges of classical international organizations having their headquarters in Switzerland.

Still, Article 1 of this headquarters agreement should be seen as representing a unilateral attitude by Switzerland in respect of the ICRC. Switzerland’s conferral of some privileges to the ICRC through the agreement does not give the latter international legal personality. This does not make the ICRC a subject of public international law. The headquarters agreement between Switzerland and the ICRC is not a treaty, viz., an international agreement under international law. Rather, it is a wholly domestic transaction within the confines of Switzerland, Swiss law and Swiss territory. This local–domestic–national agreement cannot grant the ICRC an international legal standing.

True, Switzerland’s neutrality has enabled the creation of the ICRC.⁴⁵ In the past, the law of armed conflict – international humanitarian law – was

³⁹ Article 1, Agreement Between the International Committee of the Red Cross and the Swiss Federal Council to determine the legal status of the Committee in Switzerland, 19 March 1993.

⁴⁰ Article 3, Agreement Between the International Committee of the Red Cross and the Swiss Federal Council to determine the legal status of the Committee in Switzerland, 19 March 1993.

⁴¹ Article 4, Agreement Between the International Committee of the Red Cross and the Swiss Federal Council to determine the legal status of the Committee in Switzerland, 19 March 1993.

⁴² Article 11, Agreement Between the International Committee of the Red Cross and the Swiss Federal Council to determine the legal status of the Committee in Switzerland, 19 March 1993.

⁴³ Article 5, Agreement Between the International Committee of the Red Cross and the Swiss Federal Council to determine the legal status of the Committee in Switzerland, 19 March 1993.

⁴⁴ Article 11, Agreement Between The International Committee of the Red Cross and the Swiss Federal Council to determine the legal status of the Committee in Switzerland, 19 March 1993.

⁴⁵ Alex de Waal, “Dangers of Discretion: International Law,” *London Review of Books* 21, no. 2 (January 1999): 4-5.

closely linked to the notion of neutrality. Due to a lack of collective security organizations in the 19th century, neutral states were predominant in the operation of the law of armed conflict. Indeed, the historical pre-eminence of Switzerland in the law of armed conflict was heavily linked to its neutrality. The establishment and the development of the ICRC in Switzerland should thus be seen in this context. Due to what may be seen as a historical neutrality, Switzerland was regarded as the ideal place to establish an institution of neutral humanitarian assistance.

However, in modern times, where collective security organizations such as the UN exist, the notion of neutrality has become problematic: “if force may only be used lawfully with the United Nations (UN) authorization (UN Chapter VII), or in self-defence,⁴⁶ many would argue that there is no room for neutrality. Third States must follow the directions of the UN, or side with the State defending itself against aggression.”⁴⁷ In particular, if a country is a member of the UN, one can no more speak of the neutrality of that country. That is, the notion of collective security through the UN has replaced the notion of neutrality.

Switzerland became a member of the UN in 2002. As a UN member, its (absolute) neutrality has been thus put into question. Under Chapter VII of the UN Charter, the UN may oblige Switzerland to participate in collective security actions – that is, enforcement measures. From a legal perspective, Switzerland cannot shun or avoid these obligations. Permanent neutral countries, such as Switzerland, are not exempt from participating in Security Council sanctions against another country. While under Article 25 of the United Nations Charter, Switzerland has to comply with decisions of the UN Security Council,⁴⁸ Article 2(5) of the UN Charter states:

All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

These two aforementioned provisions cancel out the right to neutrality of the UN members. There is thus an incompatibility between neutrality and membership of the United Nations.⁴⁹ Importantly, Switzerland cannot trade

⁴⁶ Article 51 Charter of United Nations signed June 26, 1945.

⁴⁷ Vaughan Lowe, *International Law* (Oxford University Press, Oxford, 2007), 287.

⁴⁸ Article 25, Charter of United Nations signed June 26, 1945: “The members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”

⁴⁹ Alexander R. McLin, “The ICRC: An Alibi for Swiss Neutrality,” *Duke Journal of Comparative & International Law* 9 (1999): 501.

with belligerent states, whereas in the past, before the establishment of the UN system, such trade was permissible.⁵⁰ Besides, Switzerland has the legal right to give aid to a country which has been attacked by another in the name of collective self-defense under Article 51 of the UN Charter. That is, the UN collective security system has replaced the old system where permanently neutral states fulfilled an important function.

The question of the protection of the ICRC under Swiss law has never gone away. Since 1864, when the ICRC was founded in Geneva, Switzerland has organized a flurry of conferences on international humanitarian law,⁵¹ which have arguably created a close association between the Swiss state's neutrality and the neutrality of the ICRC.⁵² Yet it may also be noted that the ICRC is and has been too closely connected to Swiss politics and to the Swiss business world, with a visible regular rotation of notable figures between the Swiss government, Swiss corporations and the head of the ICRC. That is, there has always existed a close proximity between the Swiss government, Swiss business circles and the ICRC.⁵³ For instance, the current head of the ICRC is a former high-ranking diplomat in the Swiss Foreign Ministry.⁵⁴

Moreover, at a symbolic level, the Swiss 'national' nature of the ICRC is manifest in the latter's emblem. While the International Federation of Red Cross and Red Crescent Societies (IFRC) uses both the red cross and the red crescent in its emblem, the ICRC uses only the red cross with a white background – the inverse of the Swiss national flag – as its emblem,⁵⁵ which may be seen as further evidence that the ICRC is a *Swiss* national institution. Indeed, it has been disclosed in Article XVIII of the 1906 Geneva Convention that the emblem was conceived in a way so as to honour Switzerland by reversing the colours its (federal) flag.⁵⁶ Furthermore, the ICRC's informal and confidential way of working smacks of the role of Switzerland in the international community. Switzerland has hosted many arbitrations and negotiations – some

⁵⁰ Rune Müller, "The Law of Neutrality – Obstruction or Completion to the System of Collective Security?" (working paper Faculty of Law Lunds University, 2013), 8, 10, 17.

⁵¹ Frederic Burnand, "The ICRC as a Swiss Political Tool," *Swissinfo.ch*, September 4, 2017, https://www.swissinfo.ch/eng/dangerous-liaisons-_the-icrc-as-a-swiss-political-tool/43487480

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ "The President of the ICRC, Peter Maurer," International Committee of the Red Cross, accessed on August 12, 2019, <https://www.icrc.org/en/president-icrc-peter-maurer>.

⁵⁵ Leah M. Nicholls, "The Humanitarian Monarchy Legislates: the International Committee of the Red Cross and its 161 Rules of Customary International Humanitarian Law," *Duke Journal of Comparative & International Law* 17 (2006): 228.

⁵⁶ Article XVIII, the 1906 Geneva Convention: "Out of respect to Switzerland the heraldic emblem of the red cross on a white ground, formed by the reversal of the federal colors, is continued as the emblem and distinctive sign of the sanitary services of armies." A similar provision exists also in Article 19 of the 1929 Geneva Convention. Wesley A. Sturges, "Legal Status of the Red Cross," *Michigan Law Review* 56, no. 1 (1957): 5.

public, but many, also, off the record.⁵⁷

The next section offers a more focused analysis of the ICRC, with a view to understanding its nature and status.

VIII. THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC)

The liberal world order established after World War II is based upon the notions and bodies of international organizations, international treaties and law and civil society. All aim to fill the gaps that exist between nations and the ICRC should arguably be seen in this light, as part of the liberal world order. The ICRC fills some of the ‘gaps’ left by states, international organizations and international law. The insidious relationship among governments and the consequent loopholes in the laws of war have often necessitated the intervention of an NGO, the ICRC, as a neutral go-between and an intermediary between governments. The luck and the uniqueness of the ICRC stems from the fact that its founders have noticed the necessity for an NGO in the conduct and regulation of war and humanitarian disasters so much early on – that is, in 1863. From then on, the ICRC has helped identify questions which need be resolved and for that it convenes expert groups and engages in debates with states.⁵⁸

Some international legal provisions give a robust role to the ICRC in developing international law. Under the Statutes of the International Red Cross and Red Crescent Movement (which were adopted by the International Conference of the Red Cross and Red Crescent),⁵⁹ the ICRC has a role in developing international humanitarian law and universal humanitarian principles. Article 5(2)(g) of the Statutes of the International Red Cross and Red Crescent Movement states that the ICRC is to work for the understanding and dissemination of knowledge of international humanitarian law and to prepare any development thereof.⁶⁰

Moreover, the special position of the ICRC is recognized in the Geneva Conventions of 1949: Article 125 of Geneva Convention III pertaining to the treatment of prisoners of war states:

⁵⁷ Daniel Warner, “Switzerland as a Symbol of Peace and Switzerland 2.0,” *Swissinfo.ch*, February 9, 2015, https://www.swissinfo.ch/eng/society/opinion_switzerland-as-a-symbol-of-peace-and-switzerland-2.0/41262066.

⁵⁸ Sandesh Sivakumaran, “Making and Shaping the Law of Armed Conflict,” 146-147.

⁵⁹ Article 5(2)(g), Statutes of the International Red Cross and Red Crescent Movement, adopted 21 December 2017 (entered into force 1 January 2018).

⁶⁰ *Ibid.*

*“The Detaining Power may limit the number of societies and organizations whose delegates are allowed to carry out their activities in its territory and under its supervision.... The **special position of the International Committee of the Red Cross** in this field shall be recognized and respected at all times.” (emphasis added)*

Interestingly, there is no clarification of the term “special position”. Does “the special position” mean that the decisions and the opinions of the ICRC overrule those of other humanitarian organizations? Does the ICRC have priority over other humanitarian organizations? If so, in what way?

Be that as it may, visibility in legal documents is an asset. The ICRC has benefited immensely from being explicitly mentioned in the 1949 Geneva Conventions and the 1977 Additional Protocols. Arguably, the ICRC’s power may well stem from this visibility. For example, by being explicitly referred to, the ICRC seems to be in an advantageous position with regard to the Mixed Medical Commission, which visits and examines prisoners of war (under the auspices of Geneva Convention III relative to the Treatment of Prisoners of War and its annexes).⁶¹

Nevertheless, one cannot speak of the ICRC’s unique status in giving humanitarian assistance. Visibility does not ensure monopoly. Other institutions may also provide humanitarian assistance. True, the ICRC is the only institution explicitly named in the 1949 Geneva Conventions as a controlling authority. Nevertheless, this explicitness does not mean that it is the only institution to deal with humanitarian law and humanitarian issues. Neither explicitness nor special position gives the ICRC a monopoly on matters of humanitarian assistance. Hence the motivation of the ICRC to further develop its standing through the study of customary international law.

The intense effort of the ICRC to bring together and publish customary international humanitarian law rules should be seen in this light.⁶² The ICRC has been heavily engaged in declaring customary international law. The ICRC Customary International Humanitarian Law study consists of a list of 161 rules of customary international humanitarian law, together with a commentary and the supporting practice.⁶³ This study – the list of customary rules – is important in that it is becoming a handy source for governments and non-state

⁶¹ e.g., Article 11, Article 81, Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949

⁶² IHL Database, International Committee of the Red Cross, accessed on 12 August 2019, <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>.

⁶³ Jean-Marie Henckaerts and Louise Doswald-Beck, “Customary International Humanitarian Law,” in *Customary International Humanitarian Law, Volume 2*, Jean-Marie Henckaerts and Louise Doswald-Beck, eds. (Cambridge University Press, 2005).

entities to identify customary international law. The study is conceived as a shortcut to a detailed exploration of complex customary international law.⁶⁴ The more a custom becomes visible and accessible, the more it turns into a norm. Due to the ease of access to the ICRC study, the ICRC will increase its visibility and power too.

Normally, governments and international organizations do not declare customary international law in a proactive way. They can be said to be reactive, in that they react to crises as they unfold. It is these reactions that shed light on a certain view of customary international law. From time to time, it may be difficult or even impossible to identify a rule of customary international law by looking at these spontaneous reactions. The practice and the belief (*opinio iuris*) of the international community in respect of a specific situation may be difficult to identify. There may exist a complex picture where it may be difficult to dredge out the practice and the *opinio iuris*, which form the two constituents of custom. Hence the importance of the study of customary international law by the ICRC. By bringing together the rules of customary international law, the ICRC actually establishes a handy and practical instrument for the actors of the international community and for international courts and tribunals.

“The ICRC’s identification of a rule of customary international law can prove constitutive of a rule of customary international law.”⁶⁵ Arguably, ascertaining custom may be considered a form of creating and making custom.⁶⁶ By clarifying ambiguous rules and by identifying scattered customary rules, the ICRC is, in fact, to some extent, ‘making’ or ‘creating’ customary international law.⁶⁷ The border between *opinio iuris* and state practice may be difficult to delineate as there is often overlap between the two.⁶⁸ Moreover, what a state or states declare to believe may be vastly different from what they actually practice.⁶⁹ Hence, customary international law may appear somewhat nebulous.

The “overburdened judges often rely on scholarly works as definitive evidence of customary international law or general principles instead of conducting independent assessments of primary sources.”⁷⁰ Hence, the ICRC gives

⁶⁴ Leah M. Nicholls, “The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and its 161 Rules of Customary International Humanitarian Law,” 232.

⁶⁵ Sandesh Sivakumaran, *Making and Shaping the Law of Armed Conflict*, Current Legal Problems, vol.71, no.1, 2018, p.126, 135.

⁶⁶ *Ibid.*, p.160.

⁶⁷ Leah M. Nicholls, “The Humanitarian Monarchy Legislates: the International Committee of the Red Cross and its 161 Rules of Customary International Humanitarian Law,” *Duke Journal of Comparative & International Law* 17, (2006): 225.

⁶⁸ *Ibid.*, p.243.

⁶⁹ *Ibid.*, p.246.

⁷⁰ *Ibid.*, p.224.

them a shortcut and this study of customary international law by the ICRC in turn makes it influential.⁷¹ The ICRC has made its voice apparent in the formation and functioning of international humanitarian law.⁷² It has been forming a database while its study has been bringing together some practices in humanitarian assistance.⁷³ Hence, the ICRC is deeply involved in the practicalities of international law. Arguably, the ICRC, apart from the direct support it gets from the Geneva Conventions of 1949 (treaty law), wishes to engage in customary law to further justify its engagement in humanitarian assistance, as treaty law and customary law are the two most important sources of international law. This ICRC study highlights the prominence of the ICRC as a customary law-making body, and not merely a passive receiver of the status granted it by the international community.

The status of the ICRC in the international system has always been an important issue. Interestingly, notwithstanding the references to the ICRC in the 1949 Geneva conventions and the 1977 Additional Protocols thereto, the legal basis of the ICRC is Swiss national law. The ICRC is not an international organization but a private association registered in Switzerland. It is not sovereign but under the sovereignty of Switzerland and is a private Swiss body/membership corporation under the authority of Swiss civil law.⁷⁴

Interestingly, though based upon Swiss national law, the ICRC has been given an international humanitarian mandate by the 1949 Geneva Conventions and the Statutes of the International Red Cross and Red Crescent Movement. Though a Swiss non-governmental organization (NGO), the ICRC has been given a mandate in intergovernmental relations in times of war and natural disasters. Arguably, the functions assigned to the ICRC by the 1949 Geneva Conventions and the 1977 Additional Protocols thereto justify the attribution of international personality to the ICRC.⁷⁵ In this context, in order to fulfil these functions, the ICRC needs a certain international legal personality.

The existence of international legal personality due to the functions fulfilled is common in international law. In the *Reparations* case, the International Court of Justice (ICJ) has stated that the United Nations (UN) is a subject of international law since it, in fact, had functions and rights which can be

⁷¹ Sandesh Sivakumaran, "Making and Shaping the Law of Armed Conflict," 134.

⁷² Leah M. Nicholls, "The Humanitarian Monarchy Legislates: the International Committee of the Red Cross and its 161 Rules of Customary International Humanitarian Law," 251.

⁷³ IHL Database, International Committee of the Red Cross, accessed on 12 August 2019, <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>.

⁷⁴ Wesley A. Sturges, "Legal Status of the Red Cross," *Michigan Law Review* 56, no.1 (1957): 3.

⁷⁵ Tarcisio Gazzini, "A Unique non-State actor: the International Committee of the Red Cross," *Human Rights & International Legal Discourse* 2010, no. 1 (2010):7.

explained only by possessing international personality.⁷⁶ That is, the performance of functions creates a certain international legal personality. In this context, an entity becomes subject of international law due to its practice in fulfilment of its duties.

Likewise, the ICRC benefits from the functions it fulfils. In fact, these functions are not specific to the ICRC – as the 10th section of this paper on the Geneva Conventions will further make clear. But the ICRC, being a pioneer organization via its immense scale of activities and its multiple initiatives in humanitarian assistance and in international humanitarian law, has acquired a *de facto* powerful status. This, therefore, makes the ICRC a *sui generis* NGO, although with admittedly more powers and greater recognition than other NGOs.

On the one hand, in formal legal terms, the ICRC possesses a more powerful status in comparison with other classical NGOs due to its international mandate, as granted by the 1949 Geneva Conventions and the Statutes of the International Red Cross and the Red Crescent Movement. On the other hand, in practical terms, the ICRC's prominent role on the ground is recognized by states and international institutions. For instance, the ICRC has observer status in the United Nations (UN) General Assembly, which gives it a certain “practical” international legal personality. Still, this personality is not as powerful or as clear as that of a classical public international organization. This partial international personality of the ICRC comes from merely being recognized as an interlocutor by governments and international organizations.

This purported international legal personality is not anchored in any written international legal instrument. Interestingly, there is provision neither in the 1949 Geneva Conventions nor in the 1977 Additional Protocols on the international legal personality of the ICRC. There is no obligation on states that are party to the Geneva Conventions and Additional Protocols to recognize the personality of the ICRC.⁷⁷ Hence, it is not a formal legal basis as such but the way the ICRC is treated in practice by governments and international organizations – such as the United Nations (UN) – that determines the personality of the ICRC. Therefore, the ICRC is, to a degree, a *sui generis* subject of international law, a status that is, in and of itself, prone to some ambiguity.

This ambiguity has consequences in respect of the ICRC's responsibility for its wrongful acts. Although the ICRC promotes international humanitarian law and arguably has a partial international legal personality, it has no responsibility under international law. Although the 1949 Geneva Conventions are

⁷⁶ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949, para.179.

⁷⁷ Tarcisio Gazzini, “A Unique non-State actor: the International Committee of the Red Cross,” 3.

international law instruments, and although they refer to the ICRC regularly, interestingly those conventions do not provide for the ICRC's responsibility under international law. The 1949 Geneva Conventions grant an explicit role to the ICRC in humanitarian assistance and international humanitarian law-making. However, contradictorily, the ICRC is not held responsible for its internationally wrongful acts.

From one perspective, this is natural in that, not being subjects of international law, NGOs cannot be held directly responsible in international law for their wrongful acts. The ICRC, as an NGO, cannot be held directly responsible under international law. The responsibility of the ICRC is limited to the confines of Swiss law. That is, Switzerland is to be held responsible for the wrongful acts of the ICRC. This is ironic (and contradictory) in that the ICRC's field of activity takes place within the sphere of international law in general and within the domain of international humanitarian law in particular.

States are not members of the ICRC's governing body, the General Assembly. Membership of the ICRC administration is limited to Swiss persons and (only) Swiss nationals may be members of the ICRC General Assembly. The ICRC has not been established by a treaty between states;⁷⁸ it is a Swiss domestic institution established by a Swiss domestic act. The ICRC is to answer directly to Switzerland – not directly to states. Hence, this imbalance between the role of the ICRC in humanitarian assistance and in international law on the one hand and its lack of responsibility under international law on the other constitutes a legal problem. The ICRC's actions, as well as its power and its status, would suggest, or indeed, demand that it take on some formal responsibility in and under international law.

Shall Switzerland – the home state of the ICRC – therefore be held responsible for the internationally wrongful acts of the ICRC or should this responsibility be taken on by the sponsor governments of the ICRC? Financially, the ICRC is dependent primarily upon states, with the primary donors of the ICRC being the United States of America (U.S.), Switzerland and the United Kingdom (UK).⁷⁹ The U.S. seems the foremost among the ICRC's donors, providing the largest percentage of its annual budget.⁸⁰ Yet, if local Swiss public contributions and private donations are considered, the Swiss seem the largest donors by far on a per capita basis.⁸¹ Thus, there is a strong financial

⁷⁸ Leah M. Nicholls, "The Humanitarian Monarchy Legislates: the International Committee of the Red Cross and its 161 Rules of Customary International Humanitarian Law," 227.

⁷⁹ Alexander R. McLin, "The ICRC: An Alibi for Swiss Neutrality," 511.

⁸⁰ Sonni Efron, "GOP Committee Targets International Red Cross," *Los Angeles Times*, June 15, 2005.

⁸¹ Alexander R. McLin, "The ICRC: An Alibi for Swiss Neutrality," 511-512.

link between Switzerland and the ICRC.⁸²

Is the ICRC therefore under Swiss “control”? The question is certainly problematic as the term *control* is contestable and any such ‘control’ may be difficult to prove. Can the ICRC then be said to be under the *direction* of, or *directed* by, donor governments? If yes, Switzerland and the donor states would be held responsible for the wrongful acts of the ICRC. Indeed, Article 8 of the UN’s International Law Commission Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001) states:

*“The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the **instructions** of, or under the **direction** or **control** of that State in carrying out the conduct.” (emphases added)*

However, Article 20 of the 1993 Host State Agreement between the ICRC and the Swiss Federal Council (which determines the legal status of the ICRC in Switzerland) states:⁸³

“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.”

However, this provision can have validity only in Swiss law, not public international law. Switzerland, via an agreement with the ICRC, cannot determine the question of international responsibility for the acts of the ICRC as Switzerland does not have such authority in international law. Any such provision with regard to the issue of Swiss responsibility for the acts of the ICRC can only be considered a private understanding between Switzerland and the ICRC. This understanding binds neither international courts nor other governments or international organizations.

In this respect, a look at the International Federation of the Red Cross and Red Crescent Societies (IFRC) can further enhance our understanding of the ICRC.

⁸² *Ibid.*, 512.

⁸³ The Agreement between the International Committee of the Red Cross and the Swiss Federal Council 1993 accessed on 12 August 2019 <https://casebook.icrc.org/case-study/agreement-between-icrc-and-switzerland>.

IX. INTERNATIONAL FEDERATION OF RED CROSS AND RED CRESCENT SOCIETIES (IFRC)

Similar to the ICRC, the IFRC is a non-governmental organization (NGO), based in Geneva, Switzerland. The IFRC members are not states but national relief societies (Article 1, Constitution of the IFRC) – that is, national Red Cross and Red Crescent societies. In other words, the IFRC is the umbrella NGO of a group or a collective of national NGOs. The IFRC represents national relief societies in the international field under Article 5/1/B/d of the Constitution of the IFRC.⁸⁴ Yet, the text of that article does not contain the term “only”. That is, the IFRC cannot claim to be the only representative of national societies. There is no legal monopoly of the IFRC for the representation of national Red Cross and Red Crescent societies. Another institution can also represent national Red Crescent and Red Cross societies. In legal terms, there are no obstacles to the cooperation of national Red Cross and Red Crescent societies under the roof of another NGO.

In fact, the IFRC mitigates the opposition to an exclusive Swiss administration of the ICRC. Indeed, the IFRC was established in 1919 (as the “League of Red Cross Societies”) under the presidency of *Gustave Ador*, who was at that time both a Swiss Federal Councillor (and thus a member of the Swiss government) and the president of the ICRC.⁸⁵ By engaging national Red Cross and Red Crescent societies worldwide, the IFRC has provided a level playing field for national relief societies. Arguably, it was envisaged that the ICRC could keep its exclusively Swiss governing structure thanks to the IFRC. The IFRC has become a shield of sorts and a pretext for the ICRC not to open or expand its governing membership to non-Swiss nationals.

Similar to the ICRC, the IFRC is a private association under Swiss law. Article 6 of the Statutes of the International Red Cross and Red Crescent Movement (the Movement) and Article 1 of the Constitution of the IFRC state that the IFRC is a “corporate body with legal personality.”⁸⁶ This is not international legal personality but a personality within the confines of Swiss national law. Within both provisions, there is a deliberate lack of the term “international” qualifying the term “legal personality”.

⁸⁴ The Agreement between the International Committee of the Red Cross and the Swiss Federal Council 1993 accessed on 12 August 2019 <https://casebook.icrc.org/case-study/agreement-between-icrc-and-switzerland>.

⁸⁵ Benedikt von Tschärner, *Max Huber*, in Benedikt von Tschärner, *Inter Gentes: Statesmen, Diplomats, Political Thinkers*, trans. Nathasha Proietto, (Infolio editions & Editions de Penthes, 2012) in Thomas Cottier, Isabel Kölliker & Jack Williams, *The Anthology of Swiss Legal Culture*, Legal Anthology, 3-4 accessed on 6 July 2019, <http://www.legalanthology.ch/international-relations/5-biographies-of-authors/max-huber-2>.

⁸⁶ Statutes of the International Red Cross and Red Crescent Movement adopted by the 25th International Conference of the Red Cross at Geneva in 1986, amended in 19951 and 2006.

Because of its mandate as given by the Statutes of the Movement, by the headquarters agreement between the IFRC and Switzerland, by the IFRC's host agreements with other countries and by the IFRC's observer status with the United Nations, the IFRC may be considered an "NGO with a functional international legal personality."⁸⁷ The IFRC possesses a practical international legal personality – to the extent it is necessary for the international duties that fall upon the IFRC.

Similar to the ICRC, the IFRC is a Swiss national NGO engaged in international humanitarian action that is recognized by governments and international organizations for only functional purposes. The IFRC's "functional" international legal personality signifies that it has only "partial" international legal personality. This is a limited international legal personality whose boundaries are not clear-cut and which are open to challenge from states, international organizations and other NGOs. The IFRC is not an international governmental organization possessing a full-fledged international legal personality.

In fact, the functional international legal personality of the IFRC is understandable due to its wide and genuinely representative base in the international community and its being recognized as an interlocutor. In this context, the IFRC has a stronger international legal basis than that of the ICRC, in that national relief societies worldwide are members of the IFRC. While the ICRC administration is composed of only Swiss nationals and the latter are elected through co-optation⁸⁸ – a mysterious term in itself – in an ambiguous way rather than through a democratic election, the IFRC administration is democratically elected by the worldwide national relief societies in a transparent way. In contrast to the exclusively Swiss governed ICRC, the IFRC is governed by all kinds of nationalities.

Finally, a closer look at the positive law provisions and at the 1949 Geneva Conventions and its 1977 Additional Protocols can give us a clearer overview of the ICRC.

⁸⁷ Sigrid Mehring, *International Federation of Red Cross and Red Crescent Societies*, (Max Planck Encyclopedia of Public International Law, February 2016) para.8.

⁸⁸ Statutes of the International Red Cross and Red Crescent Movement, Article 5(1): "*The International Committee, founded in Geneva in 1863 and formally recognized in the Geneva Conventions and by International Conferences of the Red Cross, is an independent humanitarian organization having a status of its own. It co-opts its members from among Swiss citizens.*"

X. THE 1949 GENEVA CONVENTIONS AND THE 1977 ADDITIONAL PROTOCOLS

It is crucial to point out that international humanitarian law is more than the 1949 Geneva Conventions⁸⁹ and the 1977 Additional Protocols⁹⁰ thereto. One cannot boil down humanitarian assistance and international humanitarian law to the Geneva Conventions and the Additional Protocols alone. They do not monopolize humanitarian activities; the field of humanitarian activity is far wider. The humanitarian activities of other humanitarian organizations outside the system of the Geneva Conventions and Additional Protocols are legal and do not violate international law. What counts is the consent of the parties to the conflict or that of the country experiencing the natural disaster to intervention and intermediation by the humanitarian assistance institution. Therefore, one should not only focus on explicit references to the ICRC in these treaties in order to locate and position the ICRC in international humanitarian law.

The 1949 Geneva Conventions and their 1977 Additional Protocols explicitly refer to the ICRC. As mentioned above, implications of this explicitness are immense. The prominence and the popularity of the ICRC are partially explained by this explicitness, which does not give a legal primacy to the ICRC over other humanitarian institutions but is rather an acknowledgement of the existence of the ICRC as an interlocutor to the states in the operation of the ICRC, and is a result of the recognition of the long history of the ICRC. As the ICRC is the oldest institution in the field of humanitarian activities, the references to the ICRC in the Geneva Conventions and the Additional Protocols are an acknowledgement of respect for the ICRC but this does not imply that other humanitarian organizations may not act as well. This can be inferred from the provisions that the section below shall now explore.

It is appropriate to look at the 1949 Geneva Conventions and the 1977 Additional Protocols thereto due to the universal acceptance of them by the international community – 194 countries have acceded to the Geneva Conventions, in whole or with reservations.⁹¹ A survey of the Geneva Conventions and the Additional Protocols thereto lead to the view that they encourage the activity of humanitarian organizations other than the ICRC. Indeed, common Article 3(2) of the 1949 Geneva Convention I, Geneva Convention II, Geneva Convention III, Geneva Convention IV states:

⁸⁹ The Conventions of 12 August 1949.

⁹⁰ *Ibid.*

⁹¹ Accessible at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=375 (accessed on 12 August 2019)

*“The wounded and sick shall be collected and cared for. **An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.**” (emphasis added)*

Although the ICRC is explicitly referred to in that Article, other humanitarian organizations, critically, are not legally prevented from operating. The term “such as” signifies that the ICRC is merely an example among other humanitarian bodies. The direct reference to the ICRC does not make it the exclusive humanitarian organization.

Article 9 of the Geneva Conventions I, II, III and Article 10 Geneva Convention IV provides:

*“The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross **or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of wounded and sick, medical personnel and chaplains, and for their relief.**” (emphasis added)*

True, the ICRC possesses an explicitness in this provision, just as in the previous provision. But the article also makes it clear that other humanitarian bodies may offer their services too, just like the ICRC. The humanitarian activities of another organization “within” the system of the Geneva Conventions are legal and do not violate international humanitarian law and international law.

Article 10 (3) of the Geneva Conventions I, II and III and Article 11 (3) of the Geneva Convention IV states:

*“If protection cannot be arranged accordingly, the Detaining power shall request or shall accept, subject to the provisions of this article, the offer of the services of **a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers under the present Convention.**” (emphasis added)*

Thus, like the explicitly mentioned ICRC, any other humanitarian organization has the right and the freedom to fill the gap left by the protecting power under the Geneva Conventions.

In a similar manner, Article 56(3), Geneva Convention III pertaining to labour detachments stipulates:

*“The camp commander shall keep an up-to-date record of the labour detachments dependent on his camp, and shall communicate it to the delegates of the Protecting Power, of the **International Committee of the Red Cross, or of other agencies giving relief to prisoners of war, who may visit the camp.**” (emphasis added)*

Thus, other relief organizations may also receive the records of a prisoner of war camp’s labour detachments.

Moreover, Article 73 and Article 75 of the Geneva Convention III state that shipments by the ICRC or any other organization are protected by law. As such, with regards to the protection of their shipments and cargoes, other organizations are on an equal footing with the ICRC.

Article 30 (3) of Geneva Convention IV provides:

*“Apart from the visits of the delegates of the Protecting Powers and of the **International Committee of the Red Cross, provided for by Article 143, the Detaining or Occupying Powers shall facilitate as much as possible visits to protected persons by the representatives of other organizations whose object is to give spiritual aid or material relief to such persons.**” (emphasis added)*

This also testifies to the fact that, other organizations may also provide aid.

Article 59 of Geneva Convention IV (1,2) states:

*“If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal. Such schemes, which may be undertaken either by States or by **impartial humanitarian organizations such as the International Committee of the Red Cross, shall consist, in particular, of the provision consignments of foodstuffs, medical supplies and clothing.**” (emphasis added)*

As in the previous examples, although the ICRC is explicitly mentioned, other humanitarian organizations may also undertake relief schemes.

Protocol I Additional to the Geneva Conventions, Article 5(3) states:

*“If a Protecting Power has not been designated or accepted from the beginning of a situation referred to in Article 1, **the International Committee of the Red Cross, without prejudice to the right of any other impartial***

humanitarian organization to do likewise, shall offer its good offices to the Parties to the conflict with a view to the designation without delay of a Protecting Power to which the parties to the conflict consent.”

Hence, other impartial humanitarian organizations are on an equal footing with the ICRC in terms of offering their good offices as to the process of the designation of Protecting Powers.

Protocol I Additional to the Geneva Conventions Article 5(4) states:

*“If, despite the foregoing, there is no Protecting Power, the parties to the conflict shall accept without delay an offer which may be made **by the International Committee of the Red Cross or by any other organization** which offers all guarantees of impartiality and efficacy, after due consultations with the said Parties and taking into account the result of these consultations, to act as a substitute.” (emphasis added)*

Therefore, any other organization, and not just the ICRC, may be a substitute for a Protecting Power via the consent of the parties to the conflict.

Likewise, Article 60 (1,2), Protocol I Additional to the Geneva Conventions states that agreements on demilitarized zones can be made through any impartial humanitarian organization, and not just through the ICRC.

Finally, Article 81(4) of the 1977 Protocol I Additional to the 1949 Geneva Conventions states:

*“The High Contracting Parties and the Parties to the conflict shall, as far as possible, make facilities similar to those mentioned in paragraphs 2 and 3 available to **the other humanitarian organizations** referred to in the Conventions and this Protocol which are duly authorized by the respective Parties to the conflict and which perform their humanitarian activities in accordance with the provisions of the Conventions and this Protocol.” (emphasis added)*

Hence, other humanitarian organizations can act under this protocol.

All those aforementioned provisions clearly reject any exclusiveness whatsoever of the ICRC in respect of the provision of humanitarian assistance. The ICRC does not possess any *de iure* superiority over other humanitarian institutions.

XI. CONCLUSION

The ICRC is explicitly mentioned in the 1949 Geneva Conventions and the 1977 Additional Protocols thereto. These explicit references to the ICRC entail respect for and recognition of the ICRC as the oldest humanitarian institution. However, this explicitness does not imply, suggest or confirm legal superiority of the ICRC over other humanitarian institutions, nor does it make the ICRC the exclusive humanitarian organization. Humanitarian assistance can be legally and legitimately undertaken by other humanitarian organizations as well.

In addition to foundational treaties, the ICRC's status has been strengthened by the recognition of the ICRC as a partner by governments and international organizations and the acknowledgement of the ICRC's humanitarian activities on the ground. As humanitarian law is partially based upon customary law, the ICRC practice and the acknowledgement of this practice by states and international organizations have reinforced the ICRC's status within international humanitarian law and international law. The ICRC has come to possess an "accumulated" functional international legal personality of sorts, although, it must be stressed, not a full-fledged one.

This is unique in that non-governmental organizations (NGOs) are not deemed as subjects of international law. Rather, NGOs are confined within the borders of their national jurisdictions. An NGO is under the authority and the supervision of the national law of the state in which it is established. However, the ICRC has, arguably, and perhaps demonstrably, overstepped Swiss national borders and has succeeded in projecting itself as a *de facto* subject of international law. The ICRC is recognised and acknowledged as an interlocutor by many states and international organizations, the latter both being undisputed subjects of international law. Arguably, the ICRC fills a gap left by the liberal international order as constituted by governments, international organizations, international law and treaties, which is perhaps why the ICRC is granted such leeway.

The practical influence of the ICRC is greater than that of any other NGO. Arguably, the survival of the ICRC as the pre-eminent provider of humanitarian assistance is testimony to the fact that the "practicalities" of international law are as important as treaties. The practices of the undisputed subjects of international law – states and international organizations – have paved way for a half-subject of international law – the ICRC – to enhance its status. To be sure, this practically enhanced status is facilitated by the favourable wording and a flexible and favourable interpretation of the 1949 Geneva Conventions and the 1977 Additional Protocols. Hence, while the proactive engagement of the

ICRC with international humanitarian law reflects the ICRC's humanitarian purposes, it may also be regarded as an attempt by the ICRC to further solidify its practical advantages and status through the language and discourse of law.

REFERENCES

Articles in journals and periodicals

- Alexander, Amanda. "A Short History of International Humanitarian Law." *The European Journal of International Law* 26, no.1 (2015): 109-138.
- Forsythe, David P. "The ICRC: A Unique Humanitarian Protagonist." *International Review of the Red Cross* 89, no. 865 (March 2007): 63-96.
- Gazzini, Tarcisio. "A Unique non-State actor: The International Committee of the Red Cross." *Human Rights & International Legal Discourse* 2010, no. 4 (2010): 32-46.
- Klose, Fabian. "The Colonial Testing Ground: The International Committee of the Red Cross and the Violent End of Empire." *Humanity Journal* 2, no. 1 (June 10, 2014): xx-xx.
- McLin, Alexander R. "The ICRC: An Alibi for Swiss Neutrality." *Duke Journal of Comparative & International Law* 9 (1999): 495-518.
- Nicholls, Leah M. "The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and its 161 Rules of Customary International Humanitarian Law." *Duke Journal of Comparative & International Law* 17 (2006): 223-252.
- Sivakumaran, Sandesh. "Making and Shaping the Law of Armed Conflict." *Current Legal Problems* 71, no.1 (2018): 119-160.
- Sturges, Wesley A. "Legal Status of the Red Cross," *Michigan Law Review* 56, no.1 (1957): 1-32.
- Waal, Alex de. "Dangers of Discretion: International Law." *London Review of Books* 21, no. 2 (January 1999)

Books and book chapters

- Henckaerts, Jean-Marie and Louise Doswald-Beck. "Customary International Humanitarian Law." in *Customary International Humanitarian Law, Volume 2*, Jean-Marie Henckaerts and Louise Doswald-Beck, eds. Cambridge University Press, 2005.
- Lowe, Vaughan. *International Law*. Oxford University Press, Oxford, 2007.
- Mehring, Sigrid. *International Federation of Red Cross and Red Crescent Societies*. Max Planck Encyclopedia of Public International Law, February 2016.
- Tscharner, Benedikt von. *Max Huber*; in Benedict von Tscharner, *Inter Gentes: Statesmen, Diplomats, Political Thinkers*, trans. Nathasha Proietto, (Infolio editions & Editions de Penthes, 2012) in Thomas Cottier, Isabel Kölliker & Jack Williams, *The Anthology of Swiss Legal Culture*, Legal Anthology, 3-4 accessed on 6 July 2019, <http://www.legalanthology.ch/international-relations/5-biographies-of-authors/max-huber-2>.

Legal documents

- Agreement Between the International Committee of the Red Cross and the Swiss Federal Council to determine the legal status of the Committee in Switzerland of 19 March 1993.
- Agreement Between the Swiss Federal Council and the Bank for International Settlements to Determine the Bank's Legal Status in Switzerland of 10 February 1987 (text as amended effective 1 January 2003). Available at <https://www.bis.org/>

- about/headquart-en.pdf, accessed on 12 August 2019.
- Convention Relating to the Status of Refugees of 28 July 1951 (entered into force 22 April 1954).
- Convention relative to the Treatment of Prisoners of War of 1929.
- Geneva Convention on Wounded and Sick of 1906.
- Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949.
- Geneva Conventions Relative to the Protection of Civilian Persons of 12 August 1949.
- Host Country Agreement Between the Bank for International Settlements and the Government of the People's Republic of China Relating to the Establishment and Status of a Representative Office of the Bank for International Settlements in the Hong Kong Special Administrative Region of the People's Republic of China of 11 May 1998. Available at <https://www.bis.org/about/hostctryhk.pdf>, accessed on 12 August 2019.
- Host Country Agreement Between the Bank for International Settlements and the United Mexican States Relating to the Establishment and Status of a Representative Office of the Bank for International Settlements in Mexico of 5 November 2001. Available at <https://www.bis.org/about/basictexts-en.pdf>, accessed on 12 August 2019.
- Reparation for Injuries Suffered in the Service of the United Nations (1949), ICJ Advisory Opinion.
- Statutes of the International Red Cross and Red Crescent Movement (adopted on 21 December 2017 and came into force on 1 January 2018).
- United Nations Charter.

Others

- “The Basics of International Humanitarian Law.” The International Committee of the Red Cross, accessed on July 5, 2019 at https://www.icrc.org/en/doc/assets/files/other/icrc_002_0850.pdf.
- “The President of the ICRC, Peter Maurer.” International Committee of the Red Cross. accessed on August 12, 2019, <https://www.icrc.org/en/president-icrc-peter-maurer>.
- “Venezuela’s embattled Maduro finally grants Red Cross entry.” *The Christian Science Monitor*, April 20, 2019, <https://www.csmonitor.com/World/Americas/2019/0410/Venezuela-s-embattled-Maduro-finally-grants-Red-Cross>.
- Burnand, Frederic. “The ICRC as a Swiss Political Tool.” *Swissinfo.ch*, September 4, 2017, https://www.swissinfo.ch/eng/dangerous-liaisons-_the-icrc-as-a-swiss-political-tool/43487480.
- Efron, Sonni. “GOP Committee Targets International Red Cross.” *Los Angeles Times*, 15 June 2005.
- Kenner, David. “Syria is threatening to break the aid world.” *Foreign Policy*, 27 March 2018, <https://foreignpolicy.com/2018/03/27/syria-is-threatening-to-break-the-aid-world/>.
- Leslie, Paul. “A New Low for the International Committee of the Red Cross?” *The Algemeiner*, 18 June 2013, <https://www.algemeiner.com/2013/06/18/a-new-low-for-the-international-committee-of-the-red-cross/>.
- Müller, Rune. “The Law of Neutrality – Obstruction or Completion to the System of

- Collective Security?” (working paper Faculty of Law Lunds University, 2013).
- Roberts, Stephanie. “The ICRC, Neutrality and Guatemala: A Case for Improving Best Practices.” *Case-specific Briefing Paper*. University of Denver: Humanitarian Aid in Complex Emergencies, 2012.
- Warner, Daniel. “Switzerland as a Symbol of Peace and Switzerland 2.0.” *Swissinfo.ch*, February 9, 2015, https://www.swissinfo.ch/eng/society/opinion_switzerland-as-a-symbol-of-peace-and-switzerland-2.0/41262066.