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Chapter 8

The laws and principles governing preparedness, relief and rehabilitation operations: the unique case of the International Federation of Red Cross and Red Crescent Societies

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Introduction

For the International Federation of Red Cross and Red Crescent Societies, ensuring both short and long-term access to the territories of each of its National Societies and an operational space in which it can function in accordance with the Fundamental Principles of the International Red Cross and Red Crescent Movement is critical to the successful fulfilment of its constitutional functions.¹

As expressed in the *International Disaster Response Laws (IDRL) Project Report 2002-2003*, presented by the International Federation to the 28th International Conference of the Red Cross and Red Crescent, one of the focuses of the project is the identification of laws and principles applicable to the access and facilitation of international disaster response activities.² This paper presents the specific legal regime applicable to the International Federation in terms of access and facilitation.

Access refers to an organization's legal ability to enter and act in an affected country, including through assuring visas for personnel, importation and exportation of goods and equipment, renting premises, hiring staff, securing vehicles and communications lines, procuring needed relief items, and contracting service providers. Facilitation is the extent to which the host government ensures that the organization is able to carry out its mandate effectively and efficiently, in accordance with its governing principles and rules, free from unreasonable interference.

Since the applicable laws, in regards to both access and facilitation depends on the legal nature of the entity being governed, the first part of this chapter considers the legal personality of the International Federation and its applicable legal regime, concluding that the International Federation has a *sui generis* legal personality.

The chapter then discusses how the International Federation has been able to achieve the explicit recognition of its international legal personality and application of a regime of privileges and immunities for its international disaster relief operations through the conclusion of status agreements. Finally, the chapter summarizes a few of the coping methods used when a status agreement has not yet been concluded.

The legal personality of the International Federation

The manner in which a humanitarian agency gains access to an affected territory and the rights it enjoys therein depends on the legal box in which it is placed. Apart from states and individuals, international humanitarian actors are polarized into two categories, international governmental organizations (IGOs) otherwise known as international organizations and international non-governmental organizations (NGOs).

The defining characteristic between the two is the extent of state involvement. To be considered an IGO, an agency must normally have met the following three criteria:

- be created by a collective of states through an international agreement;
- have a membership consisting entirely or principally of states; and
- be endowed with an independent personality and function.³

NGOs, on the other hand, are generally defined as non-governmental associations created by private persons under national law.

The essential consequence of this dichotomy is that IGOs, due to their unique nature, have been recognized as possessing international legal personality or being capable of holding rights and obligations under international law.⁴ As a corollary to international recognition, IGOs also benefit from a generally undisputed worldwide national personality – the ability to contract, possess moveable and immoveable property, and bring suits within a national legal system.

Furthermore, in order to ensure that the mandate of the IGO, as agreed and governed by the collective, is not jeopardized by the acts of any one state, IGOs benefit from a regime of privileges and immunities.⁵ Grounded in the functions of the organization, these privileges and immunities include immunity from jurisdiction, inviolability, fiscal and customs exemptions, and freedoms in regards to communications and exchange facilities.⁶

The legal basis for this regime of privileges and immunities is often set out in the constituent documents of the organizations. Elaboration was provided in the 1947 Conventions on the Privileges and Immunities of the United Nations and of its Specialized Agencies, widely considered today as customary international law.⁷

NGOs, on the other hand, have to date not been recognized as possessing an international legal personality in the same way as IGOs.⁸ These entities, organized under national legal systems, derive their rights in regards to access to affected populations and facilitation of their activities primarily from the national legal systems of the host states in which they operate.

Apart from being obliged to register with the government or to form a national subsidiary in the host state, often a complex and lengthy process,⁹ the agency remains subject to the vagaries of the national legal systems, including taxation regimes, import/export restrictions, immigration restrictions, and labour laws. These sometimes jeopardize the operations of the organization by placing exorbitant taxes or custom duties on its property or assets, restricting the importation of goods, or blocking visa applications. Given such threats to their operations, certain NGOs have sought to conclude private arrangements with host governments assuring the organization's ability to carry out its tasks in the country and according it a minimal level of operational facilities, including fiscal and custom exemptions.¹⁰

Applying these legal definitions, the International Federation cannot be considered either an NGO or an IGO. Unlike IGOs, the International Federation was not founded by states through an international agreement, but as a private Swiss association upon the instigation of five National Red Cross Societies.¹¹ Furthermore, the International Federation is by definition not governmental.

As defined in the Statutes of the International Red Cross and Red Crescent Movement, the International Federation is an "independent humanitarian organization which is not governmental, political, racial or sectarian in character".¹² The statutory principles of the Movement of which the International Federation is a component¹³, requires autonomy from government in order that relief may be brought to the suffering "solely guided by need" disregarding nationality, race, religion, class or political opinion; and that "the confidence of all" is attained through strict impartiality, refusing to take sides in hostilities or engaging in political, racial, religious or ideological controversies.¹⁴

Finally, the membership of the International Federation is not governmental. The 179 National Red Cross and Red Crescent Societies which form the membership of the organization are constituted as voluntary aid societies under the national laws of their home states and do not represent their governments.

Neither, however, is it fitting to consider the International Federation an NGO. The National Societies, though not representing their governments, are "auxiliaries of the public authorities in the humanitarian field" and as such are considered quasi-public entities.¹⁵ The mandate, functions, and statutory rules of the International Federation, though necessitating an independence from the public authorities to ensure neutrality and impartiality, are themselves embedded in international legal instruments and were adopted by the International Conference of the Red Cross and Red Crescent which includes all States Parties to the Geneva Conventions.

On the basis of this unique membership, the specificity of the Movement founded under international law, the fundamental principles of the Movement and its international mandate, the International Federation is considered to have a *sui generis* legal identity that by analogy to IGOs has led numerous states and intergovernmental entities to recognize the international legal personality of the organization.¹⁶ Furthermore, it has been acknowledged by these states that the successful undertaking of the International Federation's mandate in accordance with the Movement's governing principles requires a regime of privileges and immunities similar to those enjoyed by IGOs.

In 1996, the International Federation concluded a headquarters agreement with the Swiss authorities similar to those granted to the intergovernmental organizations headquartered in Geneva. In this international legal instrument, the Swiss government explicitly recognizes the international legal personality of the International Federation and grants the International Federation the standard regime of privileges and immunities.¹⁷ To date, 58 other countries have afforded a similar recognition and regime of privileges and immunities to the International Federation through the conclusion of status agreements. In addition, the United Nations (UN) General Assembly has granted the International Federation observer status.¹⁸

The conclusion of status agreements

As discussed above, unlike IGOs, the International Federation must assure the recognition of its legal identity and the applicable regime of privileges and immunities through bilateral agreements with each country in which it will have operations. This bilateral negotiation process can be long, arduous and without guarantee of success. However, where a status agreement has been concluded, the access and facilitation of the International Federation's disaster relief operations are generally relatively protected.

Prior to the commencement of a negotiation process, the International Federation must convince the government, particularly the ministry of foreign affairs, that it has an international legal personality and has the right to benefit from and the need for a regime of privileges and immunities similar to those of intergovernmental organizations. In some countries these requests are quickly accepted. In others, the leap required to assimilate the International Federation to an IGO, is hindered by political or systemic blockages.

Fear is often expressed that granting the International Federation's request would set a precedent for NGOs to claim similar rights. In some cases, such recognition requires an act of parliament, either to amend the relevant international organizations act or to include the International Federation under it. At this stage, it is crucial to have the support of the relevant National Society which often has close connections to the relevant ministries.

Once a government has accepted to negotiate such an agreement, the model text provided by the International Federation, based on the 1947 UN conventions and adapted to the International Federation's operations and governing principles, is circulated for discussion. Reaching an agreement on the final text normally takes at least a year if not longer, depending

on the extent of the changes proposed by the various ministries, the political situation in the country, and the priority the file is given.

Often the presence of an International Federation representative in the country actively following and pushing the file is crucial for assuring the continuation of negotiations. Once a final text is agreed and signed, the agreement may then need to be ratified prior to its entering into full force (a procedure which again could take months or years). Given the work and time involved, the International Federation is generally only able to begin such an endeavour when it has or will establish a permanent presence in the country, and has secured the support of the National Society.

Status agreements generally secure the following four essential elements:

Recognition of the national and international personality of the International Federation

The recognition of the national and international personality of the International Federation is embodied in three standard clauses, which serve as the legal basis for the agreement. In the first, the government “recognizes the international legal personality” of the International Federation on the basis of its mandate set out in the statutes of the Movement.

Secondly, the government recognizes the right of the International Federation to operate in the country with the “full capacity to contract, to acquire and dispose of immovable and moveable property and to institute legal proceedings”. This provides the crucial national legal personality which permits the International Federation to bring in delegates, hire staff locally, rent and purchase property, and commence legal actions to defend its rights. Lastly, the government states that in the country, the International Federation will benefit from the “immunities, privileges, facilities and exemptions similar to those of intergovernmental organizations, as laid down in the Agreement”.

Recognition of the mandate of the International Federation and agreement to facilitate these functions

The second fundamental element of status agreements is the recognition by the government of the International Federation’s ability to carry out its mandate in the country, in accordance with its constitution and through or in agreement with the National Society. The government declares that the International Federation shall be free to carry out “such activities as may be necessary for the exercise of its humanitarian mission” and that “its office bearers shall be free to make use of...the emblem of the red cross and the red crescent”.

Furthermore the government agrees to “facilitate, to the maximum extent possible, the humanitarian activities of the International Federation” and to apply, as far as possible, the “Measures to Expedite International Relief” adopted by the 23rd International Conference of the Red Cross and Red Crescent, including the obligation to ease importation certifications and inspections, waive importation licenses, expedite the importation of

goods, waive requirements for transit, entry and exit visas for relief personnel, and authorize national airlines to accord free transportation for relief goods.

Fiscal, import/export and communications privileges

The government's obligation to facilitate the activities of the International Federation is given more precise meaning through the various fiscal, administrative and communications privileges set out in the remainder of the agreement. The organization is given the right to transfer and hold hard currency free of any financial controls, moratoriums and the like. The International Federation benefits from exemption from direct taxes, customs, harbour and landing duties and restrictions and is able to reclaim indirect taxes such as value added taxes.

Salaries paid to staff are tax free. Personnel are free from immigration restrictions, and can import their personal belongings duty free. In the area of communications, the International Federation can make use of the equivalent of diplomatic pouches and assure its communications remain uncensored. Furthermore the government agrees to facilitate the acquisition of housing and office space and assure that International Federation vehicles benefit from diplomatic licence plates.

Recognition of the immunity and inviolability of the International Federation, its assets, property and personnel carrying out their official functions

The International Federation and its personnel are deemed immune and inviolable. As asserted therein, "the International Federation, its property and assets, including its vehicles, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process (including search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial, or legislative action)" except as waived by the secretary general. Furthermore, the "premises and archives of the International Federation, and...all documents belonging to it or held by it shall be inviolable wherever located".

Likewise, personnel and officers or office bearers of the International Federation enjoy "personal inviolability" and "immunity from legal process in respect of all acts performed by them in their official capacity". Perhaps, the most crucial and certainly one of the most controversial of all the privileges, the immunity and inviolability of the organization assures that the functionality of the organization is not subject to the legal regime of any one state.

Personnel of the organization cannot be arrested, detained or tried for their acts (including spoken or printed word) or their omissions while conducting their official functions. The archives and premises of the International Federation cannot be searched, its assets or vehicles expropriated or impounded, nor can the agency be tried under the national legal system. Immunity does not mean, however, that the organization is exonerated from its liabilities including contractual or employee claims, or persons tortiously injured. The organization has a corresponding obligation to the government to make good any valid claims against it and provide for alternative dispute settlement mechanisms.

For the most part, the final text as agreed with the government assures the above-mentioned facilities and protections. However, in the interests of securing at least the basic protections and legalization of the International Federation's activities, the organization may be forced to accept certain compromises. The more difficult provisions to secure are often fiscal exemptions and immunity from jurisdiction. Some governments are hesitant to provide for the reimbursement of value added tax, or for constitutional reasons are not able to provide income tax exemptions or other privileges to local staff. Fiscal and communications privileges may be made subject to national law, rendering the privilege virtually useless.

Claims regarding rental agreements, traffic accidents and commercial agreements may be carved out of the immunity from jurisdiction. And the inviolability of the organization or its personnel may be subjected to requirements to cooperate with local authorities. A few countries eager to keep tight control over the activities of the organization may even mandate that the International Federation provide the government annual reports of their activities, or attempt to limit the number of vehicles or delegates the organization brings into the country.

Operations in the absence of a status agreement

For various reasons, the International Federation is often forced to operate without a valid status agreement in place. The process of negotiation or ratification of the agreement may still be ongoing. An agreement may never have been requested, either because the International Federation has not had a permanent presence in the country, or its request would not have been supported by the National Society. Finally, though rare, the government may simply have refused to grant such an agreement to the International Federation.

During the negotiation of an agreement, the International Federation may be able to operate on the basis of the implicit recognition of its international legal personality and similarities to intergovernmental organizations. This situation however is less than ideal. There is a general lack of clarity as to what the rights and obligations of the International Federation are on the territory especially in regards to customs duties and fiscal exemptions. This implicit personality may not be recognized by relevant authorities causing administrative hassles in regards to securing visas, opening bank accounts and importing goods. The legal ability of the International Federation to act in-country and the privileges and immunities may not be upheld in a national court, depriving the International Federation of its immunity and making it difficult for the International Federation to enforce its rights.

Where the International Federation has not requested an agreement, its request has not yet been accepted, or the government has refused that the International Federation operate on an implicit recognition, the International Federation has three options, either register itself as an NGO, restrict its activities in the country such that they do not necessitate the establishment of an office, or act through the National Society.

Registration as an NGO is incompatible with the International Federation's legal identity. Acceptance of such a status subjects the International Federation to the national legal system,

making it virtually impossible for the International Federation to apply standardized internal regulations, policies and administrative procedures in regards to its delegates and operations. It may jeopardize the International Federation's ability to carry out its mandate in accordance with its constitution and the fundamental principles of the Movement.

Once registered as an NGO, unless such registration was done at the request of the ministry of foreign affairs as a temporary measure pending conclusion of a status agreement, it is more difficult to have the government recognize the international legal personality of the International Federation and its similarities to IGOs.

Legal registration in a country and the acquiring of a national legal personality is generally critical when the organization needs to establish a more permanent presence. This would include when it needs to hire staff, open a bank account, rent premises, register vehicles and the like.

In situations of disaster relief, in the immediate aftermath, the establishment of a permanent presence is not always necessary. Furthermore governments may facilitate entry of relief agency personnel and goods and waive registration requirements during the first three to four weeks of a crisis to assure that the immediate disaster relief needs can be met. In other cases, the International Federation is able to limit its activities to an advisory role in the country, necessitating only the temporary presence of a delegate for a few months at a time. This person can be hosted and allowed to work out of the offices of the National Society.

The final option is for the International Federation to operate through the National Society. The International Federation establishes a permanent presence in the country, but the delegates of the International Federation are considered the employees of the National Society. The International Federation uses the National Society's vehicles, and the National Society assures that the International Federation has the necessary housing and office space, communications lines and the like. The difficulty with this arrangement is that it places the full burden and liability of the International Federation's operations on the National Society and limits the privileges and immunities enjoyed by the International Federation in the country.

Conclusion

The International Federation is in a unique situation. It is not governmental but has been granted recognition as a subject under international law and the regime of privileges and immunities generally only reserved for intergovernmental organizations. This particular recognition in the majority of the countries in which the International Federation conducts disaster preparedness, relief and rehabilitation operations, has provided the agency with a relatively secure legal environment in regards to access and facilitation.

In the countries where the International Federation has not yet achieved this recognition through the conclusion of a status agreement, the operational environment is less sound, forcing the International Federation to adopt coping methods which place at risk its personnel, assets and ability to operate effectively and efficiently.

The experience of the International Federation clearly shows that governments are willing to recognize the international legal personality and apply the regime of privileges and immunities to organizations which are not governmental. However there must be a clear showing of the uniqueness of this organization in relation to NGOs, and some form of government sanction of their activities and mandate.

It further shows that there are inconveniences to a legal regime which is dependent on bilateral negotiations. The organization may not benefit from a uniform or complete coverage in the countries of operation; concluding agreements can be a very long process, without guaranteed success; and agreements can not be concluded on an emergency basis when needed to facilitate a disaster relief operation, but must be agreed in advance. Finally, where the International Federation has not been able to conclude a status agreement its operations are greatly impeded.

1. Constitution of the International Federation of Red Cross and Red Crescent Societies, as amended by the 12th Session of the General Assembly, Geneva (Switzerland), 23-28 October 1999, Article 3 "Functions". The specific functions include:
 - "to bring relief by all available means to all disaster victims;
 - to assist the National Societies in their disaster relief preparedness, in the organization of their relief actions and in the relief operations themselves;
 - to organize, coordinate and direct international relief actions ...
 - to be the official representative of the member Societies in the international field ..."
2. The core of the IDRL Project is defined as: "the laws, principles, and other instruments applicable to the access, facilitation, coordination, quality and accountability of international disaster response activities in time of non-conflict related disasters, which includes preparedness for imminent disaster and the conduct of rescue and humanitarian assistance activities." This paper limits its focus to the question of access and facilitation, where the International Federation has charted out a particular legal regime through the conclusion of status agreements. IDRL Project Report, 2002-2003 (Advance Copy), 20 August 2003, paper to be submitted by the International Federation of Red Cross and Red Crescent Societies to the 28th International Conference of the Red Cross and Red Crescent.
3. See the Restatement of the Foreign Relations Law of the United States 221 defining international organizations as "an organization created by an international agreement and has a membership consisting entirely or principally of states"; See among others Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity within Diversity*, Martinus Nijhoff Publishers (3rd ed, 1995) para.33, defining international organizations as "forms of cooperation founded on international agreement, creating at least one organ with a will of its own, established under international law".
4. The International Court of Justice, advisory opinion "Reparations for Injuries Suffered in the Service of the United Nations" of 11 April 1949, confirmed this recognition. For a summary of the distinction between IGOs and NGOs and the legal consequences of this distinction see Yves Beigbeder, "The Role and Status of International Humanitarian Volunteers and Organizations: The Right and Duty to Humanitarian Assistance", Martinus Nijhoff Publishers (1991).

5. For an analysis of the meaning and consequences of the international legal personality and its relationship with the regime of privileges and immunities see Peter Bekker, "The Legal Position of Intergovernmental Organizations: A functional Necessity Analysis of their Legal Status and Immunities", TMC Asser Institute, Martinus Nijhoff Publishers (1994).
6. Convention on the Privileges and Immunities of the Specialized Agencies,, 21 November 1947, 33 UNTS 261 (entered into force 1948) .
7. See Charter of the United Nations, United Nations Conference on International Organisation, 26 June 1945, San Francisco, Article 105 (1), (entered into force 24 October 1945) states: "The organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes" and in 105 (2) "Representatives ... and officials ... shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the organization". The content of these privileges are further detailed in two general interstate conventions adopted at the first and second session of the United Nations General Assembly in 1947, the Convention on Privileges and Immunities of the United Nations, signed on 13 February 1946, 1 UNTS 15 (entered into force 17 September 1946) and the Convention on Privileges and Immunities of the Specialized Agencies, 21 November 1947, 33 UNTS 261.
8. Given the growth of civil society and "globalization" there is a growing demand by some academics for the recognition of the international legal personality of NGOs. See, Nowrot, Karsten et al, "Symposium: The Rules of Law in the Era of Globalization: Legal Consequences of Globalization; The Status of non-governmental organizations under international law;" 6 Ind. J. Glob. Leg. Studies 579; Peter J Spiro,, "New Players on the International Stage" 1997 Hofstra L. & Pol'y Symp. 19. Jost Delbruck, "Prospects for a World (Internal) Law?: Legal Developments in a Changing International System." 9 Ind. J. Glob. Leg. Studies, 401. For an overall presentation of the issue see James Hickey Jr, "The Source of International Legal Personality in the 21st Century" 1997 Hofstra L. and Pol'y Symp, 1. There are also similar arguments being made on behalf of multinational companies, see for example Jonathan Charney, "Transnational Corporations and Developing Public International Law" 1983 Duke LJ, 748.
9. There have been several initiatives to try and standardize the various recognition processes for NGOs. See in this regard the work of the Council of Europe, European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations, opened for signature by the member States of the Council of Europe on 24 April 1986 (entered into force 1 January 1991) (convention 124); Resolution (93)38 on relation between the Council of Europe and the International Non-Governmental Organizations, adopted by the Committee of Ministers on the 18 October 1993.
10. See in this regard the study of Chris McIvor, "Applying humanitarian principles in disaster relief: a case study from Zimbabwe", Chapter 9 in this publication. See also the study of the Council of Europe tracing the common elements found in the various agreements concluded between NGOs and their host states.
11. The International Federation was founded on 5 May 1919 by the American, British, French, Italian and Japanese National Societies. See Eric David, "International legal personality of the International Federation of Red Cross and Red Crescent Societies", Legal opinion provided to the International Federation in support of its request for a status agreement with Switzerland (1995).
12. Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross at Geneva in October 1986, Article 6 para.2.
13. As set out in article 1 of the Statutes of the International Red Cross and Red Crescent Movement, the components include the International Federation, the International Committee of the Red Cross and the 178 National Societies.
14. Fundamental Principles of the International Red Cross and Red Crescent Movement were proclaimed by the 20th International Conference of the Red Cross, Vienna, 1965 (revised version in 1986).
15. Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross at Geneva in October 1986, Article 3 and 4.
16. For summaries on the unique nature of the International Federation see Eric David, "International legal personality of the International Federation of Red Cross and Red Crescent Societies", Legal opinion provided to the International Federation in support of its request for a status agreement with Switzerland (1995); W. Remans, "The granting of observer status by the General Assembly of the United Nations to the International Federation of Red Cross and Red Crescent Societies" in K.Wellens (ed), "International Law: Theory and Practice", (1998) pp 347-362.; P.Gautier, "O.N.G et personnalité internationale: à propos de l'accord conclu le 29 novembre 1996 entre la Suisse et la Fédération Internationale des Sociétés de la Croix Rouge et du Croissant Rouge", Revue belge de droit international, 1997/1, Editions Bruylant ,pp 172-189.
17. Suisse en vue de déterminer le statu juridique de la Fédération internationale en Suisse, 29 November 1996, Switzerland-International Federation of Red Cross and Red Crescent Societies.
18. United Nations General Assembly Resolution, Observer status for the International Federation of the Red Cross and Red Crescent Societies in the General Assembly, A/RES/49/2 (1994).