ICRC AND ITS SHIPS: LEGAL STATUS, IMMUNITIES AND PRIVILEGES FROM THE PERSPECTIVE OF INTERNATIONAL LAW

(ICRC dan Kapal ICRC: Status Hukum, Kekebalan dan Keistimewaan Ditinjau dari Perspektif Hukum Internasional)

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Abstract

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

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

Abstrak

Kata kunci: ICRC, Keistimewaan dan Kekebalan, Personalitas Hukum Internasional, Status Hukum, Status Kapal

Introduction

The Preamble of Statutes\(^1\) of the International Committee of the Red Cross (ICRC) highlights the organization’s impartiality, neutrality, and independency. The document also remarks the organization’s exclusive humanitarian mission in the protection of the lives and dignity of armed conflict victims and other situations of violence. Humanitarian aids often need to be transported by ships. In 2009, ICRC evacuated wounded civilian from conflict areas in Sri Lanka by ships.\(^2\) The organization also transported released prisoners back to their homes and separated family members during a conflict in Libya by ships.\(^3\) Moreover, humanitarian aids supplies were carried and distributed by ships during 2015 conflict in Yemen.\(^4\)

Operating a ship – particularly on the high seas – needs to comply with certain regulations in International Law, i.e. the Law of the Sea. The United Nations Convention on the Law of the Sea (UNCLOS) 1982 require a ships to possess a nationality and fly the flag of her State. Furthermore, according to the convention, ships are categorized whether they are public or private ships. To distinguish both ships (vessels), it is important to note about the use of these vessels. If a ship is chartered by the government for non-commercial purposes, the status of the ship during hire is a public ship. Whereas if a

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

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

**Method**

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

**Research Approach**

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

**Legal Material**

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

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

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

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

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

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

**International Legal Personality**

Legal personality is an important concept in international law. This is to distinguish between entities that are relevant to the international legal system and those that are not.\(^10\) With the existence of international legal personality, or international legal person (*persona jure gentium*) as first used by German scholar Wilhelm Leibniz in his *Codex juris gentium diplomaticus*,\(^11\) an international organization has the ability to exercise rights and obligations under international law.

**Immunities and Privileges**

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

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

Immunities and privileges are not only given to their organizations, but also to their employees. Juridical status of international organization employees in the territory of member countries comes from the status of international organizations where they work. Privileges and immunities given to employees have the same reasons as those given to international organizations.

According to Debuf, the purpose of the ICRC’s privileges and immunities are to ensure and facilitate efficient, speedy and independent operational capacity to fulfil its mandate; to guarantee ICRC’s capacity to act as a neutral, independent and impartial humanitarian actor; to protect confidential nature of the ICRC’s work; and to facilitate smooth financial, administrative and human resources management.¹⁴

**ICRC**

The ICRC has a unique place in the history of international law. David P. Forsythe precisely describes ICRC as an organization with multifaceted activity present a complex picture full of paradoxes: it is a Swiss private association but recognized in public international law; championing the worth of the individual but working on the basis of state consent; claim as non-political but inherently part of humanitarian politics; promotes international humanitarian law but issues public legal judgments as a last resort; a product of western (judeo-Christian) values, but present itself as a secular and global Good Samaritan; promote universal humanitarianism but characterized historically by nationalism; and emphasizes a limited mandate but has expanded its activities broadly.¹⁵

This organization limited legal personality existed through the development of the law. ICRC’s activities are based on fundamental principles which include: humanity, impartiality, neutrality, independence, voluntary service, unity and universality. These fundamental principles are proclaimed in Vienna at the

¹⁴ E. Debuf, op.cit.,334.

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

Ships Nationality

Ships are distinguished between public and private ones. The UNCLOS 1982 requires that a ship must only have one nationality. In studying the nationality of ships and genuine links between ships and nationalities,\(^\text{16}\) it is first needs to be distinguished between public and private ships.

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

Exclusive Jurisdiction over a Vessel

All vessels accessing the international waters must possess a national character and every state that has exclusive jurisdiction and control over their national vessels.\(^\text{17}\) In the high seas, all ships are fully subject to the rules and regulations of the flag state.\(^\text{18}\)

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

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

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

Regarding the absolute authority of the flag state against its ships sailing on the high seas, it can also be added that this authority was carried out because there was no international power in the open sea. Due to the absence of international authority, each vessel will use and comply with the laws of its flag state. In this matter, the international law of the sea is applicable, both in the open sea and also for the matters of interaction between the ships and other ships with different flag and between the ship with the environment.

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

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

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

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

The existence of these genuine link requirements began in the past where certain state practices, especially the United States which provided easy conditions for ships registered in their countries. By other countries, especially European countries, this practice is considered to be unfair competition, it is also considered to be unfavourable in terms of labour and the conditions of ship safety and crew. So in essence, an intense debate between European countries on the one hand and the United States on the other, is actually a struggle between two competing commercial shipping interests. In its resistance to the "genuine link" the United States was assisted by, among others, Liberia and Panama.\(^{20}\)

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

**Legal Status of the ICRC**
Currently there are 95 states which equate ICRC with a public international

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

In principle, the ICRC is not a public inter-governmental organization. The ICRC is not established by treaties. Although the ICRC is an organization formally recognized by international law based on the Geneva Conventions 1949, Additional Protocols 1977 and the 1986 Statutes of International Red Cross and Red Crescent Movement, the establishment of the ICRC is not shaped by these treaties. The establishment of the ICRC is based on Swiss national law (Swiss Civil Code, Art. 60). The fact that the ICRC was firstly established as a Swiss private organization does not decrease its character as a public international organization, because the service provided by the ICRC is for public with international scope. In addition, the ICRC was not established by states and its members are not States. Under Article 7 of the ICRC Statute, it is said that ICRC members consist of 15 to 25 people, all of whom are Swiss citizens. Thus, the ICRC is not an inter-governmental organization.

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

importantly – to be perceived as such; ..., protect the confidential nature of the ICRC’s work; and facilitate smooth financial, administrative and human resources management”.

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

**Status of ICRC’s Ships**

During an interview, Rina Rusman – Legal Advisor of ICRC Delegation in Jakarta – stated that the Ship used by the ICRC is a private ship and does not have immunity from the jurisdiction of any country. More often, the ICRC rents a ship. However, the ICRC ships are protected under international law, specifically the 1949 Geneva Convention. Accordingly, the ICRC ships must be protected from attack, as long as not participating in the military operation of the warring parties. That protection is not only during armed conflicts, but also in all situations, as stated by Drapper that the Geneva Convention must be respected both in times of peace and armed conflict.

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

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

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23 Ibid.

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

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

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

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