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Diplomatic privileges and immunities for international non-governmental organizations (ingos): a step towards a new diplomatic law?

Contemporary international relations have resulted not only in the establishment of intergovernmental organizations (IGOs), but also in the emergence of certain private IGO-like entities which are entering into 'diplomatic-like' relations with States, characterized by privileges and immunities similar to those provided under classic diplomatic law. This paper analyses such diplomatic-like relations between States and organizations composed of formally non-State entities, but with an undoubtedly public purpose, such as the International Committee of the Red Cross (ICRC) or the International Federation of Red Cross and Red Crescent Societies (IFRC), as well as other so-called 'advanced' non-governmental organizations (NGOs).

Key words: Diplomatic privileges and immunities; non-governmental organizations (NGOs); diplomatic law; International Committee of the Red Cross (ICRC)

> 'We theorists have (...) to take heed to build our doctrines on tendencies rather than on "facts"; otherwise when we have finished constructing our systems, it may happen that the facts are no longer what they were when we began building, and the system is out of date before it is established.'[1]

Introduction

Even today, when talking about diplomatic law what is primarily borne in mind are the legally regulated diplomatic relations among States, i. e. the legal norms codified in the Vienna Convention on Diplomatic Relations of 1961 (hereinafter VCDR),[2] or in the Convention on Special Missions of 1969.[3] This understanding originates from the State-centric concept of international legal personality

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1 J. F. Williams, 'The Legal Character of the Bank for International Settlements', *American Journal of International Law,* Vol. 24, No. 4, 1930, p. 665.

2 *1961 Vienna Convention on Diplomatic Relations*, opened for signature 18 April 1961, *United Nations Treaty Series (UNTS)*, Vol. 500, 1964, p. 96 (entered into force 24 April 1964).

3 *1969 Convention on Special Missions*, opened for signature 16 December 1969, *UNTS*, Vol. 1400, 1985, p. 232 (entered into force 21 June 1985).

as developed in the traditional, post-Westphalian international legal order that considered States to be the only subjects of international law.[4] However, the appearance of the first modern intergovernmental organizations (IGOs) as early as in the second half of the 19th century brought about changes.[5] Thus, by the first half of the 20th century the development of the concept of international legal personality concerning IGOs was greatly accelerated due to both the functionalist approach towards international relations brought about by technological development that facilitated international co-operation and its institutionalization, and the growing number of such organizations. Consequently, the right of legation (*ius legationis*), both in its active and passive form i. e. as the right to send and to receive diplomatic envoys, as well as diplomatic relations in general, ceased to be the monopoly of States. Contemporary diplomatic law was faced with the necessity of also regulating diplomatic relations between States and IGOs. Thus, at least three important conventions on that matter were adopted after World War II: the Convention on the Privileges and Immunities of the United Nations of 1946,[6] the Convention on the Privileges and Immunities of the Specialized Agencies of 1947,[7] and the Vienna Convention on the Representation of States in their Relation with International Organizations of a Universal Character of 1975.[8]

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4 Thus, for example, in his Manual of International Law in 1902 Liszt began the chapter on subjects of international law with the following words: 'Only States are subjects of international law — holders of international rights and duties.' In German: 'Nur die Staaten sind Subjekte des Völkerrechts: Träger von völkerrechtlichen Rechten und Pflichten.' F. von Liszt, *Das Völkerrecht — systematisch dargestellt*, Verlag von O. Haering, Berlin, 1902, p. 34. A similar attitude was expressed by the Permanent Court of International Justice in the Case of the S. S. 'Lotus' in 1927: 'International law governs relations between independent States.' Judgment No. 9, 1927, *P. C. I. J. Series A*, No. 10, p. 18.

5 Although the first modern international organizations appeared in the second half of the 19th century (like the International Telegraphic Union — ITU in 1865, and the Universal Postal Union — UPU in 1874), the Advisory opinion of the ICJ in the 'Reparation Case' in 1949 has usually been considered a turning-point for the recognition of IGOs' legal personality in international law. The Court accepted the objective international legal personality of the United Nations based on the argument 'that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality (...).' *Reparation for injuries suffered in the service of the United Nations*, 11 April 1949, International Court of Justice, Advisory Opinion, *ICJ Reports 1949*, ('Reparation Case'), p. 185.

6 *1946 Convention on the Privileges and Immunities of the United Nations*, opened for signature 13 February 1946, *UNTS*, Vol. 1, 1946–1947, p. 16 (entered into force 17 September 1946).

7 *1947 Convention on the Privileges and Immunities of the Specialized Agencies,* opened for signature 21 November 1947, *UNTS*, Vol. 33, 1949, p. 262 (entered into force 2 December 1948).

8 1975 Vienna Convention on the Representation of States in their Relation with International Organizations of a Universal Character, opened for signature 14

However, such international co-operation resulted not only in the establishment of IGOs, but also in the emergence of various IGO-like entities including international non-governmental oranizations (INGOs) entering into some kind of diplomatic-like relations with States, characterized by privileges and immunities very similar to those provided for by these Conventions. This means that diplomatic relations (and consequently diplomatic law) have evolved beyond inter-State relations to encompass IGOs and sometimes even INGOs that, due to the functional necessity of international relations, have become participants in the international community.

The analogous regulation of such diplomatic-like relations between States and INGOs is still based on agreements of questionable legal nature as the international legal personality of these entities is uncertain. However, it should not be forgotten that law, its sources, and the very concept of legal personality have always been dynamic categories subject to social development.

The notion of ingos

In international law there is no universally agreed-upon definition of an INGO. Thus, for example, Article 1 of the 1986 European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations refers to non-governmental organizations as 'associations, foundations and other private institutions' which satisfy four conditions:

a) have a non-profit-making aim of international utility;
b) have been established by an instrument governed by the internal law of a Party;
c) carry on their activities with effect in at least two States; and
d) have their statutory office in the territory of a Party and central management and control in the territory of that Party or of another Party.'[9]

Some authors, however, focus on only one of these elements — the INGOs' non-governmental character. Thus, Rodley defines an NGO as 'any group of individuals who have come together voluntarily to work for a particular objective, other than by means of governmental action.'[10] The private, non-governmental element of INGOs is also

March 1975, UN Doc. A/CONF. 67/16. The Convention has not yet entered into force.

[9] 1986 European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations, opened for signature 24 April 1986, European Treaty Series (ETS), No. 124, 1986 (entered into force 1 January 1991).

[10] N. S. Rodley, 'Human Rights NGOs: Rights and Obligations (Present Status and Perspectives)', in Th. C. van Boven, C. Flinterman, F. Grünfeld, & R. Hut

stressed by Charlotte Ku, who defines them as 'voluntary organizations of individuals'.[11] Some authors require that such organizations 'are not established by a government or by intergovernmental agreement'.[12] A similar provision can be found in the UN ECOSOC Resolution 288 B (X) granting consultative status to certain NGOs with ECOSOC,[13] while the later ECOSOC resolutions on the same topic broaden the notion of the non-governmental character of an organization. These resolutions consider as non-governmental even those organizations 'which accept members designated by governmental authorities, provided that such membership does not interfere with the free expression of views of the organization'.[14]

Furthermore, there are many authors who, besides the non-governmental character of INGOs, emphasize their international character as well. However, although it may seem that there is a consensus in international law concerning this element, it is also sometimes understood in different ways. Some authors (possibly the majority) require that an organization, in order to be *international*, should gather

(eds.), *The Legitimacy of the United Nations: Towards an Enhanced Legal Status of Non-State Actors*, Netherlands Institute of Human Rights, Utrecht, 1997, p. 44. Similarly, Hart and Thetaz-Bergman determine the entire non-governmental sector in this way: 'The nongovernmental sector is best defined by exclusion; it includes all those persons, individually and collectively, who are not formally within the government.' S. N. Hart, L. Thetaz-Bergman, 'The Role of Nongovernmental Organizations in Implementing the Convention on the Rights of the Child', *Transnational Law and Contemporary Problems*, Vol. 6, No. 2, 1996, p. 376.

11 Ch. Ku, 'The Developing Role of Non-governmental Organizations in Global Policy and Law Making', *Chinese Yearbook of International Law and Affairs*, Vol. 13, 1994–95, p. 142.

12 H. H.-K. Rechenberg, 'Non-governmental Organizations', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 2, North-Holland Elsevier, Amsterdam, Lausanne, New York, Oxford, Shannon, Tokyo, 1995, p. 612. *Cf.* S. Hobe, 'Non-Governmental Organizations', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. VII, Oxford University Press, Oxford, 2012, pp. 716–725.

13 'Any international organization which is not established by inter-governmental agreement shall be considered as a non-governmental organization (...)' UN Doc. ECOSOC Res. 288 B (X), of 27 February 1950, Part I, para. 8. *Cf. also* L. C. White, *International Non-Governmental Organizations*, Rutgers University Press, New Brunswick, 1951, p. 3.

14 *See* UN Doc. ECOSOC Res. 1296 (XLIV), of 23 May 1968, Part I, para. 7, and UN Doc. ECOSOC Res. 1996/31, of 25 July 1996, Part I, para. 12. It is worth noting here the 'hybrid' or 'quasi non-governmental organizations' (QUANGOs) which include in their membership single-country NGOs, as well as individuals from various States together with governmental or intergovernmental entities such as States and IGOs. Therefore, QUANGOs should be understood as a kind of 'symbiosis' between the governmental and non-governmental sector where both categories of members accept one another as equal participants in the decision-making process within the organization. Such mixed participation is usually determined by the purpose of an organization whose functioning is dependent on such co-operation.

its members from two or more countries.[15] Similarly, Willetts determines an INGO as an 'organized group of individuals or organizations from more than one country.'[16] Sometimes, such requirements go even further and consider a non-governmental organization to be international if it has members from three countries,[17] six countries,[18] or even from different continents.[19]

In contrast, some other definitions of INGOs, which seem to us more appropriate to functionally-based contemporary international relations, do not necessarily require the international character of organization as regards to its membership, but in terms of its aims and activities. This definition of INGOs as 'international associations' was proposed by the *Institut de Droit International* in its Resolution of 1950 defining the international character of these associations by exercising the activities of general, and not exclusively national, interest.[20]

Finally, probably the least disputable element in defining the notion of INGOs is their non-profit-making character. Thus, for example, Lador-Lederer determines non-governmental organizations as non-profit-making.[21] The requirement for the INGOs' non-profit-making character is also emphasized by some authors like Willetts[22] and Stošić,[23] and equally can be found in the Resolution of the *Institut de Droit International*,[24] and the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations

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15 *See e. g.* White, *supra* note 13, p. 7. *See also* L. Cavaré, *Le droit international public positif*, Vol. 1, Éditions A. Pedone, Paris, 1951, pp. 488–489. *Cf.* R. Jennings, A. Watts (eds.), *Oppenheim's International Law* (9th ed.), Vol. 1, Longman, London, 1992, p. 21.

16 P. Willetts (ed.), 'The Conscience of the World' — The Influence of Non-Governmental Organizations in the UN System, The Brookings Institution, Washington D. C., 1996, p. 5.

17 *See* N. Sybesma-Knol, 'Non-State Actors in International Organizations: An Attempt at Classification', in van Boven et al. (eds.), *supra* note 10, p. 29.

18 *See* Draft Convention aiming at facilitating the work of international non-governmental organizations, submitted to UNESCO by the Union of International Associations (UIA). For the text, *see* Union of International Associations (ed.), *International Association Statutes Series*, Vol. 1, K. G. Saur, München, New York, London, Paris, 1988, Appendix 4.10.

19 See B. Stošić, Les organisations non gouvernementales et les Nations Unies, Librairie Droz, Genève, 1964, p. 77.

20 In French: 'Les associations internationales (...) sont des groupements de personnes ou de collectivités (...) qui exercent (...) une activité internationale d'intérêt général, en dehors de toute préoccupation d'ordre exclusivement national.' Les conditions d'attribution d'un statut international à des associations d'initiative privée, Projet de Convention, Art. 2, Session de Bath — 1950, *Annuaire de l'Institut de Droit International*, Vol. XLIII (II), 1950, p. 384.

21 See J. J. Lador-Lederer, International Non-governmental Organizations and Economic Entities, A. W. Sythoff, Leiden, 1963, p. 60.

22 *See* Willetts (ed.), *supra* note 16, p. 5.

23 *See* Stošić, *supra* note 19, pp. 77 and 311.

24 *See supra* note 20, p. 384.

of 1986,[25] as well as in the UIA Draft Convention aiming at facilitating the work of international non-governmental organizations.[26] Of course, this non-profit-making characteristic should not be understood as barring INGOs from making any profit at all in their activities. It means only that profit-making should not be their primary purpose.[27]

Having discussed the above definitions, for the purposes of this paper we can determine INGOs as being organizations which are international in their aims and activities, non-governmental in their membership and non-profit-making in their objectives.

Diplomatic privileges and immunities for 'advanced' ingos

The functional ground of international relations followed by the technological development in the previous centuries has not only considerably facilitated co-operation across States' borders, but has also led to the appearance of numerous private, non-governmental organizations and their active participation in more and more legally regulated relations in contemporary international community. Among some of the new actors who have appeared on the international law-making stage, INGOs started to play a significant role in many fields of international law participating in the work of diplomatic conferences.

Thus, for example, INGOs had the important role in the development of international environmental law almost from its beginning. What is more, it would be possible to follow the history of international environmental law through the activities of some of the most influential INGOs. However, the turning point happened in the beginning of the 1970s, in the moment when INGOs started to play a more visible role in environmental matters on the global stage. Some of today's most influential environmental INGOs such as Greenpeace, World Watch Institute (WWI), World Wide Fund for Nature (WWF), Friends of the Earth, International Institute for Environment and Development (IIED), etc. started their activities at that time. During that period INGOs began to organize INGOs conferences, usually taking place along-side the official, governmental environmental conferences. The following decades witnessed the proliferation of global environmental concerns in many fields: the creation of treaties, conferences, the increasing interest of the media and NGO activities. One of the best known soft-law instruments from that period is the Report of the World Commission on

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[25] *See supra* note 9.

[26] *See supra* note 18.

[27] Understood in this way, even 'business INGOs' (BINGOs) should not be excluded from the definition of INGOs. *Cf.* C. Archer, *International Organizations* (3rd ed.), Routledge, London, New York, 2001, pp. 38–40.

Environment and Development (WCED) of 1987: Our Common Future (so-called 'Brundtland Report'). It is interesting to compare the number of 400 NGOs that attended the Stockholm Conference in 1972 to some 10000 NGOs participating in the UN Conference on Environment and Development (Rio Conference) in 1992, where many of these organizations have already been organized within large NGOs networks.[28]

Some authors see the period of the 1980s and 1990s as an era of populist approaches to environmental problems but at the same time they remark on the significant progress in certain environmental fields.[29] The activities of environmental INGOs continued in the beginning of 2000s, although in a different atmosphere and circumstances compared to those which prevailed at the time of the Rio Conference. Some of the environmental INGOs today enjoy very broad public support and significant financial resources. In 2010, Greenpeace raised over 226 million EUR and had more than 2.8 million donors.[30] The income of the WWF was 525 million EUR,[31] and Friends of the Earth gathered more than 2 million members and supporters.[32] These numbers are important by themselves but if we compare them to the same categories in 2000, a very significant increase will be visible in all of them.[33] This being so, one can conclude that some important conditions for the increasing participation of

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[28] As the examples of such networks Yamin mentions the Climate Action Network (CAN), Pesticide Action Network (PAN), Regional Environmental Centre for Central and Eastern Europe (REC), Global Legislators for a Balanced Environment (GLOBE); *see* F. Yamin, 'NGOs and International Environmental Law: A Critical Evaluation of their Roles and Responsibilities', *Review of European Community and International Environmental Law*, Vol. 10, No. 2, 2001, p. 152.

[29] Thus, Palassis has remarked the following achievements in that period: '1) the significant reduction of vessel-source environmental pollution; 2) the international regulation of the trade in hazardous waste; and 3) the successful avoidance of the narrowly-averted disaster of irreversible ozone depletion.' Also, the same author mentions the 'greening of the European Union (EU) treaty-system' as an environmental success of the time. *See* S. N. Palassis, 'Beyond the Global Summits: Reflecting on the Environmental Principles of Sustainable Development', *Colorado Journal of International Environmental Law and Policy*, Vol. 22, No. 1, 2011, p. 46.

[30] The dana is available at: http://www.greenpeace.org/international/Global/international/publications/greenpeace/2011/GPI_Annual_Report_2010.pdf (accessed on 6 September 2018).

[31] The data is from WWF Annual Review 2010; available at: http://wwf.panda.org/ (accessed on 6 September 2018).

[32] Available at: http://www.foei.org/en/who-we-are (accessed on 7 November 2017).

[33] F. Yamin quoted the following data for the year 2000: The World Wide Fund for Nature had around 5 million supporters and income of around SFr 470 million; Greenpeace International had more than 2.5 million members in 158 countries with an annual budget in the region of 30 million USD and Friends of the Earth had over 1 million members in 58 countries. *See* Yamin, supra note 28, p. 151.

INGOs in the environmental field have been improved, as well as the support of the public for their work.

The influence of the INGOs rose further at conferences and in documents created after the UN Framework Convention on Climate Change (UNFCCC) and particularly in the most important document related to it — the Kyoto Protocol.[34] At the same time, the attendance of representatives of civil society at key environmental conferences has gradually become more visible. Thus, some 533 INGOs attended the second official meeting of the Conference of the Parties (COP) of the UNFCCC in Berlin in 1995.[35] In 2009, more than 1300 INGOs were admitted to the Copenhagen meeting including representatives from all the three major groups of INGOs (activist, scientific and business INGOs).[36] At the COP meeting in Durban in December 2011, almost 1400 INGOs were registered as observers.[37] However, it is worth noting that a huge majority of the INGOs attending the Conference were Western hemisphere INGOs.[38]

Furthermore, INGOs that had observer status with the UN Committee on the Peaceful Uses of Outer Space (COPUOS) were invited by the UNISPACE III Conference Preparatory Committee to submit their statements in writing to the plenary and their papers to the executive secretariat. They were also invited to identify agenda items and conference activities, including workshops, through which they could participate in the work of the Conference. In particular, pursuant to the request by the Preparatory Committee, the executive secretariat of the Conference invited the International Society for Photogrammetry and Remote Sensing (ISPRS), the International Astronomical Union (IAU), the Committee on Space Research (COSPAR) and the International Institute of Space Law (IISL) to participate at the Conference which dealt with various topics: the environment and remote sensing (ISPRS), science and education including astronomy, the preservation of the space environment (IAU), the contribution of space techniques in exploring the

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[34] For the text of the Kyoto Protocol, *see* http://unfccc.int/resource/docs/convkp/kpeng.pdf (accessed on 11 September 2018).

[35] Data quoted from: A. Spain, 'Who is going to Copenhagen — The Rise of Civil Society in International Treaty Making', *American Society of International Law Insights*, Vol. 23, No. 35, 2009, pp. 1–2.

[36] Ibid.

[37] Data quoted from: M. Müller, 'The Myth of a Global Civil Society', available at: http://www.dandc.eu/articles/197598/index.en.shtml (accessed on 11 September 2018).

[38] Müller states, for example, that from populous and ecologically threatened Bangladesh only 8 civil society organizations were presented in comparison to some 120 German or 50 French. Other interesting data she states is that some large western INGOs as Oxfam or Germanwatch endeavoured to represent the voices of NGOs from developing countries. *Ibid.*

universe, recent progress in future plans for the exploration of the solar system (COSPAR), and space law (IISL).[39]

Equally, INGOs participate in the international law-making process in many other fields of international law, i. e. human rights law, humanitarian law, and even international sport law, such as the International Committee of the Red Cross (ICRC) or the International Federation of Red Cross and Red Crescent Societies (IFRC), the International Olympic Committee (IOC), as well as some other so-called 'advanced' non-governmental organizations (NGOs).

Although such organizations, unlike IGOs, still wait for a place among the universally accepted subjects of international law, some of them already participate in international legal relations with States and IGOs (e. g. the UN), sometimes obtaining some diplomatic-like privileges and immunities. Thus, for example, currently, more than 4500 NGOs enjoy consultative status with ECOSOC.[40] As Tomuschat correctly remarked: '...[S]ome NGOs have been given a status that is modeled on régimes normally granted only to States or international organizations.'[41] Thus, on 1 November 2000 the International Olympic Committee (IOC) concluded the Agreement with the Swiss Federal Council regarding the IOC's status in Switzerland, providing the IOC with some of the diplomatic privileges usually granted to States and IGOs, i. e. independence and freedom of action of the IOC on Swiss territory (Art. 2), or the exemption from direct federal taxes (Art. 3). In addition, Article 9 of the Agreement provides that 'the Swiss authorities shall take all necessary measures to facilitate entry into Swiss territory, exit from this territory and stay of all members of the IOC as well as, as far as possible, all persons,

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[39] *See* UN Doc. A/AC. 105/685, of 6 January 1998, pp. 6–8 and 10. The standard-setting role is sometimes provided by the statutes of these organizations. Thus, for example, provision IV of the ISPRS Statutes includes the development of standards in photogrammetry, remote sensing and spatial information sciences in the activities of the organization. Similarly, the preparation of scientific and technical standards related to space research is one of the most important COSPAR activities; *see* the ISPRS Statutes, July 2016, available at: http://www.isprs.org/documents/statutes16.aspx (accessed on 12 September 2018). *See also* Art. I of the COSPAR Charter. The text of the COSPAR Charter is available at: https://cosparhq.cnes.fr/about/charter (accessed on 12 September 2018). There is no doubt that these scientific standards are going to become legal standards as well, serving as a basis for the international legal regulation of these activities. On the INGOs' role in international standard-setting *see also* I. Rossi, *Legal Status of Non-governmental Organizations in International Law*, Intersentia, Antwerp, Oxford, Portland, 2010, pp. 16–21.

[40] Currently, there are 149 organizations in general consultative status, 3389 in special consultative status and 975 on the Roster. For the List, *see* E/2016/INF/5. Available at: http://undocs.org/E/2016/INF/5 (accessed on 1 September 2018).

[41] Ch. Tomuschat, 'General Course of Public International Law', *Recueil des cours de l'Académie de droit international de La Haye*, Vol. 281, 1999, p. 159.

whatever their nationality, who are called upon to work with the IOC in an official capacity."[42]

According to Tomuschat, some other NGOs, like the International Federation of Red Cross and Red Crescent Societies (IFRC), went even further here. Based on the Status Agreement with the Berne authorities, the Federation was granted freedom of action, inviolability of premises and archives, immunity from jurisdiction and execution, tax exemption, preferential custom treatment similar to IGOs, privileges and immunities for the President of the Federation and the top management of its Secretariat similar to diplomatic agents, etc.[43] Equally, on the basis of the Headquarters agreement between the International Committee of the Red Cross (ICRC) and the Swiss Federal Council relating to the legal status of the Committee in Switzerland of 19 March 1993,[44] the ICRC was granted similar privileges and immunities. The Federal Council recognized the ICRC's international legal personality (Art. 1) together with inviolability of its premises, i. e. buildings or parts of buildings and adjoining ground used for the purposes of the ICRC, as well as the inviolability of the ICRC's archives and all documents 'at all times, wherever they may be' (Art. 3 and 4).[45] Also, according to Article 9 of the Agreement the ICRC shall enjoy for its official communications treatment 'not less favorable than that accorded to the international organizations in Switzerland.' This includes the same privileges and immunities for its diplomatic bags and couriers.[46]

In addition, according to Article 5 of the Agreement the ICRC shall enjoy immunity from legal process and execution except, for example, 'in respect of civil liability proceedings brought against the ICRC for damage caused by the vehicle belonging to it or circulating on its behalf'. Thus, the exception to immunity from legal process and execution includes the proceedings for damage caused by any vehicle belonging to or driven by the persons serving the ICRC in an official capacity (Art. 13). Such provision can be compared to Article 31, para. 2(d) of the Convention on Special Missions, and even to Article 43, para. 2(b) of the Vienna Convention on Consular

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[42] For the text, *see* https://archive.icann.org/en/psc/annex6.pdf (accessed on 12 September 2018). For more details, *see also* J.-P. Chappelet, B. Kübler-Mabbott, *The International Olympic Committee and the Olympic System — The Governance of World Sport*, Routledge, London, New York, 2008, p. 107.

[43] *See* Tomuschat, *supra* note 41, p. 159.

[44] For the text, *see* Agreement between the International Committee of the Red Cross and the Swiss Federal Council, International Review of the Red Cross, No. 293, 1993, pp. 152–160.

[45] *Cf.* Art. 22, and esp. Art. 24 of the VCDR which use almost the same wording: 'The archives and documents of the mission shall be inviolable at any time and wherever they may be.' *See also* Article II, Section 4 of the Convention on the Privileges and Immunities of the United Nations and Article III, Section 6 of the Convention on the Privileges and Immunities of the Specialized Agencies, *see supra* notes 2, 6 and 7.

[46] *Cf.* Art. 27 of the VCDR, *see supra* note 2.

Relations (hereinafter VCCR).[47] Furthermore, the ICRC is also exempt from direct federal, cantonal and communal taxation in Switzerland (Art. 6).

Finally, Article 15 of the Agreement determines that the privileges and immunities provided for in the Agreement 'are not designed to confer any personal benefits on those concerned', but are 'established solely to ensure the free functioning of the ICRC and the complete independence of the persons concerned in discharging their duties'. This provision obviously corresponds to the Preamble to the VCDR, as well as to the Conventions on the Privileges and Immunities of the United Nations, and Specialized Agencies.[48] However, it is worth mentioning that, according to Article 15, para. 2, the President of the ICRC '*must* waive the immunity of a staff member or expert in any case where he considers that such immunity would impede the course of justice and could be waived without prejudice to the interests of the ICRC' (emphasis added). Moreover, according to the same provision the Assembly of the ICRC has the power to waive the immunity of the President or of the ICRC members. Similarly, it is worth pointing out here that the previously mentioned Section 20 of the Convention on the Privileges and Immunities of the United Nations, and Section 22 of the Convention on the Privileges and Immunities of the Specialized Agencies also provide not only the right, but the duty 'of the UN Secretary-General', and 'of each specialized agency' to waive the immunity of any official in any case where such immunity would impede the course of justice. What is more, the former Convention in Section 20 provides that in the case of the Secretary-General, the UN Security Council shall have the right to waive his immunity.[49]

Of course, Switzerland is not the only State that has regulated the legal status of the ICRC on its territory. Many countries in which the ICRC acts through its missions and offices concluded similar agreements providing for it the same diplomatic-like privileges and immunities. Thus, for example, the ICRC signed similar headquarters agreements with Australia, Bangladesh, Croatia, Gabon, Mexico, Morocco, Nepal, Russian Federation, Sudan, Ukraine, the United States, and many other countries. These agreements provide, among other things, similar diplomatic-like immunities from legal process except in the case of express waiver. However, some of them contain very detailed provisions on the ICRC's privileges and immunities. Thus, the ICRC's Headquarters Agreement with Nepal[50] in Article

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47 *1963 Vienna Convention on Consular Relations*, opened for signature 24 April 1963, *UNTS*, Vol. 596, 1967, p. 262 (entered into force 19 March 1967).

48 *Cf. supra* notes 6 and 7.

49 See ibid.

50 Headquarters Agreement between His Majesty's Government of Nepal and the International Committee of the Red Cross on the Establishment of Delegation in Kathmandu, Nepal. The Agreement was signed in Kathmandu on 20 January 2003. The text is available at: http://nepalconflictreport. ohchr. org/files/

III recognizes the legal personality of the ICRC, thus enabling its delegation 'to contract obligations, institute legal proceedings, acquire rights and to acquire and dispose of movable and immovable property, in accordance with the laws and regulations.' In addition, in Article VII the Agreement provides the inviolability of the premises, property, assets and archives of the Delegation, i. e. the ICRC office in Nepal. Furthermore, the assets, premises and other property of the Delegation are exempt from all direct taxes, but also from all indirect taxes including value-added taxes for which the Government shall make appropriate arrangements for the remission or reimbursement 'equivalent to facilities provided to intergovernmental organisations working in Nepal' (Art. IX). Similarly, according to Article X of the Agreement, the Delegation shall enjoy for its official communications the same treatment as accorded to intergovernmental organizations, being 'free to use the means of communications it deems most appropriate for its contacts, in particular with ICRC headquarters in Geneva, with other related international agencies and organisations, with government departments, and with bodies corporate or private individuals.' This privilege includes the right to dispatch and receive correspondence by courier or in sealed bags, which shall have the same immunities and privileges as diplomatic courier and bags (Art. X, para. 4). Moreover, the same paragraph explicitly provides that 'the ICRC official mail should in any case not be read.' Finally, the Agreement provides that the 'members of the Delegation, their spouses and dependent children shall have the same status as that accorded to the members of international inter-governmental organisations' (Art. XII, para. 1). They enjoy immunity, even after they have left the service of the Delegation, from any form of legal or administrative process, including personal arrest or detention, seizure of their personal baggage and from being called as a witness in respect of all acts performed in their official capacity. Equally, their private residences, vehicles, documents, manuscripts and all other personal effects shall be inviolable. They shall also be exempt from all immigration fees and restrictions as well as from all taxes on salaries and other emoluments (Art. XII).

Similar provisions on the privileges and immunities of the ICRC can be found in the Arrangement between the Government of Australia and the ICRC of 2005.[51] Its Article 1 provides that 'the status of the ICRC in Australia will be comparable to that of an intergovernmental organization.' Furthermore, according to Article 3 the

docs/2003–01–20_document_govt-of-nepal-and-icrc_eng.pdf (accessed on 12 September 2018).

[51] Arrangement between the Government of Australia and the International Committee of the Red Cross ('ICRC') on a Regional Headquarters in Australia. The Arrangement was signed at Canberra on 24 November 2005. For the status of the ICRC in the Australian legal order *see also* the Regulation No. 237 of 8 November 2013. The text is available at: https://www.legislation.gov.au/Details/F2013L01916 (accessed on 10 September 2018).

ICRC, its property and assets, wherever located and by whomsoever held, will enjoy immunity from every form of legal process, except insofar as in any particular case the ICRC has expressly waived its immunity. However, this immunity does not extend to a suit or other legal process for the recovery of damages in respect of any damage, injury or death resulting from an accident in which a motor vehicle owned by, or operated on behalf of the ICRC was involved, as well as to any contract entered into by the ICRC for supply of goods or services, any loan or other transaction or any contract of guarantee or indemnity to which the ICRC is a party. Equally, the immunity does not extend to a counter-claim made against the ICRC by a party to proceedings instituted by the ICRC, or to remuneration by the ICRC to its employees and experts, in accordance with a final order of an Australian court (Art. 3, para. 2). In addition, Article 4 of the Arrangement provides the inviolability of the ICRC's premises, property and assets including the immunity from search, requisition, confiscation, or expropriation. According to the same Article, no authorities of Australia will enter the premises of the ICRC without the consent of the ICRC. However, such consent will be deemed to have been provided 'in the case of fire or other emergency requiring immediate protective action' (para. 2). This provision on the inviolability of the ICRC's premises can be compared to the analogous provision of Article 25 of the Convention on Special Missions. Furthermore, Article 5 of the Arrangement guarantees the inviolability of the ICRC's archives and, in general, all documents belonging to it or held by it, wherever located. This provision is comparable to provisions of the VCDR, and the Conventions on the Privileges and Immunities of the United Nations and of Specialized Agencies. Moreover, Article 6 provides that 'the ICRC will enjoy in Australia for its official communications treatment not less favourable than accorded by the Government to any other international organisation or diplomatic mission.' In addition, according to Article 8 of the Arrangement the ICRC is exempt from customs duties or any equivalent charge, restrictions and prohibitions on the import, export or transit through Australia of articles for official use or intended for ICRC assistance programs within Australia or in another country.

The analogy of these privileges and immunities to those provided for in the VCDR, the Convention on Special Missions, or in the Convention on the Privileges and Immunities of the United Nations and in the Convention on the Privileges and Immunities of the Specialized Agencies, could go on. Unfortunately, in some countries such agreements with the ICRC are classified,[52] or are just not published

[52] Thus, for example, VanLandingham points out that '[T]he U. S. — ICRC headquarters agreement is treated as a classified document and is not available for review or citation.' R. E. VanLandingham, 'U. S. Modern Military Operation and the International Committee of the Red Cross — The Department of Defense's Unique Relationship with the Guardian of International Humanitarian

in the official gazettes. Thus, for example, the Republic of Croatia concluded such an Agreement on 20 April 1994, providing for the ICRC, among other things, immunities from legal process except in the case of an express waiver. However, the Agreement has never been ratified and published in the Official Gazette of the Republic of Croatia since the Croatian Parliament, bearing in mind the disputed international legal personality of the ICRC, does not consider the Agreement an 'international treaty'.[53] In spite of that, Article 19 of the Agreement provided for its provisional application pending its entry into force.[54]

On the other hand, sometimes similar diplomatic-like privileges and immunities are recognized by States even for foreign single-country NGOs, based on bilateral agreements with the States of their registration. Thus, for example, according to Article 3D of the Agreement between the Government of the Republic of Croatia and the Government of the United States of America concerning Economic, Technical and Related Assistance of 6 May 1994, 'private organizations under contract with or financed by the Government of the United States of America and their employees, who are present in the Republic of Croatia to perform work in connection with this Agreement, shall be immune from all civil liability directly related to the performance of such work.'[55] In addition, Article 3 E of that Agreement provides that the persons who are present in the Republic of Croatia to perform work in connection with this Agreement and who are not members of the US diplomatic mission, except nationals or permanent residents of Croatia, 'shall be exempt from income and social security taxes levied under the laws of the Republic of Croatia and from taxes on purchase, ownership, use or disposition of personal movable property intended for their own use.' According to the same provision, 'such personnel (and their families) shall be exempt from customs, import, and export duties on all personal effects, equipment and supplies (including food, beverages and tobacco), imported into the Republic of Croatia for their own use, and

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Law', in G. S. Corn, R. E. VanLandingham, Sh. R. Reeves (eds.), *U. S. Military Operations — Law, Policy, and Practice*, Oxford University Press, Oxford, 2016, p. 393.

53 According to Article 141 of the Constitution of the Republic of Croatia, only 'international treaties which have been concluded and ratified in accordance with the Constitution, published and which have entered into force shall be a component of the domestic legal order of the Republic of Croatia and shall have primacy over domestic law.' Constitution of the Republic of Croatia, *Narodne novine — međunarodni ugovori*, (Official Gazette of the Republic of Croatia), No. 85, 2010. The English version is available at: http://www.sabor.hr/Default. aspx?art=2405 (accessed on 29 August 2018).

54 Unpublished Agreement on file with author. *Cf. 1969 Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, *UNTS*, Vol. 1155, 1980 p. 332 (entered into force 27 January 1980), Art. 25.

55 For the text of Agreement, *see Narodne novine — međunarodni ugovori* (Official Gazette of the Republic of Croatia), No. 3, 1995.

from all other duties and fees with respect to such personal effects. Such personnel (and their families) shall be immune from criminal and civil liability to the same extent as comparable personnel of the (US) diplomatic mission.'

Based on these provisions, a municipal court and a county court in Croatia declared lack of jurisdiction in a case where such a 'private organization' (the International Rescue Committee, Inc. from New York), was a party.[56] Moreover, the Supreme Court of the Republic of Croatia confirmed these decisions.[57]

As a final point, the decision of the Constitutional Court of Croatia in this case, although contrary to the decisions of the other courts, is relevant to the subject of this paper. The Constitutional Court found that the 'private organization' in question stipulated the jurisdiction of the Croatian Municipal Court in its employment contract and in spite of the previous decisions made by the municipal and county courts and the Supreme Court, correctly interpreted this provision as an expressed waiver of immunity in accordance with the analogous provision in Article 32, para. 2 of the VCDR.[58]

Concluding remarks: Emerging new diplomatic law?

Diplomatic relations, and accordingly their legal regulation, are probably as old as the participants in them given that they have never been an end in themselves. For centuries, diplomatic relations have developed alongside the development of the international community, i. e. international relations and their participants. For that reason, the history of diplomatic law cannot be understood in isolation from the concept of international legal personality. Although State-centric in the beginning, diplomatic law gradually incorporated the emergence of other, non-territorially but functionally determined participants in international legal relations, and as such new subjects of international law, extending its norms to IGOs in the second half of the 20th century. The diplomatic privileges and immunities present for centuries in inter-State diplomatic relations in the form of customary international law and codified in the VCDR and the Convention on Special Missions,[59] were significantly extended to embrace IGOs, confirming the functional *ratio* of contemporary diplomatic law. It is no surprise that the most significant universal IGOs (like

[56] *See* Pr-355/01–7; 18 March 2002, and Gž 732/02–3; 18 April 2002. The International Rescue Committee, Inc. as a NGO enjoys special consultative status with the UN ECOSOC. *See supra* note 40.

[57] *See* Revr. 589/02; 26 November 2002.

[58] For the text of the Decision of the Croatian Constitutional Court, *see* U-III-1150/2003; *Narodne novine* (Official Gazette of the Republic of Croatia), No. 147, 2005.

[59] *See supra* notes 2 and 3.

the UN and its specialized agencies) 'broke the ice' here. Moreover, according to Amerasinghe 'the argument may be made that particularly since the end of the Second World War the acceptance of the conventional law, especially the UN Convention and the Convention on the Privileges and Immunities of the Specialized Agencies, has given rise to practice which has resulted in the creation of customary international law.'[60] However, the social process in the international community and international law, including diplomatic law, did not stop here.

In fact, the functional logic of international relations and the accelerated technological development of the previous two centuries went further leaving States faced with the necessity of delegating some of their competencies in international relations even to non-governmental entities, capable, due to their knowledge, experience and influence, of making international co-operation more successful. Hence, the increasing number of INGOs has necessarily led to the appearance of diplomatic-like relations, and consequently to the necessity of their legal regulation commencing a new stage in the development of diplomatic law.

This paper focused on some of the most advanced or most illustrative INGOs which seem to be at the forefront today. Attention was drawn to the legal solutions concerning their privileges and immunities which are analogous to those contained in classic diplomatic law, i. e. in the VCDR and the Convention on Special Missions, as well as in multilateral diplomacy, i. e. in the Convention on the Privileges and Immunities of the United Nations, the Convention on the Privileges and Immunities of the Specialized Agencies, and the Vienna Convention on the Representation of States in their Relation with International Organizations of a Universal Character. Such analogous legal solutions regulating diplomatic-like relations between States and these new participants in international relations are currently mostly contained in bilateral agreements. However, not only the analogy, but also the growing number of such agreements with numerous States raises the question of the emergence of a new customary law due to the uniformity of States' practice and its acceptance as law (*opinio iuris*).[61] Even if there is doubt about the

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[60] C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd ed.), Cambridge, Cambridge University Press, 2005, pp. 344–345.

[61] Thus, for example, the International Law Commission in its Report of 2016 on identification of customary international law confirmed that the treaty rule can give rise 'to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law.' *See* 'Identification of customary international law', Report of the International Law Commission, Sixty-eighth session (2 May — 10 June and 4 July — 12 August 2016), General Assembly Official Records Seventy-first session Supplement No. 10 (A/71/10), Chapter V, Conclusion 11, pp. 78 and 105–106. After all, as Jennings and Watts pointed out: 'No fixed time can be set for the evolution of such treaty rules into rules of customary international law. The process whereby a treaty's provisions may

legal nature of such agreements as sources of international law, this should not be the decisive criterion in the process of the creation of customary law. Thus, Degan points out: 'In a larger sense, any national legislation or administrative ruling can also be embraced under the notion of the State practice.'[62] What is more, the same author continues: 'On the other hand, all normative acts of a State are of importance in customary process, because the State in question cannot later on deny their existence.'[63] Besides, not only State participation in these agreements and their rising number, but also the implementation of agreements could have a probative value in identification of *opinio iuris*.

However, such development seems to us more like proof of the functional *ratio* of diplomatic law than a revolutionary stage in its long history. Like international law in general, diplomatic law has always been characterized much more by evolution than revolution, following the meta-juridical logic of functionality in international relations and the co-operation of their participants. Therefore, we believe that the earlier-mentioned 'advanced' INGOs entering into diplomatic-like relations could influence the development of diplomatic law through the process of the creation of customary law, perhaps in the not-so-distant future leading towards its new codification.

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Diplomatske privilegije i imuniteti međunarodnih nevladinih organizacija (INGO): korak naprijed ka novom diplomatskom pravu?

Suvremeni međunarodni odnosi potaknuti uvelike tehnološkim razvojem u posljednja dva stoljeća rezultirali su ne samo slabljenjem državocentrične strukture međunarodne zajednice i formiranjem funkcionalno utemeljenih, neteritorijalnih subjekata međunarodnog prava poput međuvladinih organizacija, već i nastankom privatnih, nevladinih organizacija i njihovim povezivanjem preko državnih granica. Premda još u doktrini sporne kao subjekti međunarodnog prava, te su organizacije aktivni sudionici međunarodnih odnosa kako s državama, tako i s međuvladinim organizacijama, što međunarodno, posebice diplomatsko pravo sve manje može ignorirati. Nastaju tako u novije doba na međunarodnoj razini pravne norme koje uređuju status nevladinih organizacija kako na diplomatskim konferencijama i pri međuvladinim organizacijama, tako i u odnosu s državama, dajući im neke privilegije i imunitete analogne onima u klasičnom diplomatskom pravu. U tom smislu ovaj rad obrađuje takve pojave u kontekstu razvoja diplomatskog prava, usredotočujući se na tzv. „napredne" nevladine organizacije čiji je pravni položaj u međunarodnim odnosima detaljnije uređen.

Ključne riječi: Diplomatske privilegije i imuniteti; nevladine organizacije (NVO); diplomatsko pravo; Međunarodni komitet Crvenog krsta