

Observer status  
for the International Committee  
of the Red Cross  
at the United Nations

A LEGAL VIEWPOINT

by Christian Koenig\*

In the early summer of 1990, the process to grant the International Committee of the Red Cross (ICRC) observer status at the United Nations was underway at UN headquarters in New York. While this initiative generally enjoyed unreserved support, there were many questions as to how it would be put into practice. These questions mainly concerned the unique role of the ICRC in international relations, and specifically its character as a particular type of non-governmental organization (NGO) that has a "functional international personality".

Discreet involvement of the ICRC in discussions among legal experts in the UN Secretariat and at the permanent missions in New York enabled these questions to be resolved very swiftly.

On 16 October 1990, the UN General Assembly adopted by consensus resolution 45/6 ("Observer status for the International Committee of the Red Cross, in consideration of the special role and mandates conferred upon it by the Geneva Conventions of 12 August 1949"). The resolution was based on the identical text of draft resolution A/45/191 of 17 August 1990.

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In its preambular paragraphs, the resolution first refers to the mandates conferred upon the ICRC by the Geneva Conventions of 12 August 1949 and its special role "in international humanitarian relations". It goes on to express the General Assembly's desire to promote co-operation between the United Nations and the ICRC.

In its operative paragraphs, the resolution invites the ICRC to "participate in the sessions and the work of the General Assembly in the capacity of observer". Finally, it asks the Secretary-General to take the necessary action to implement the resolution.

The present text deals with the legal and institutional considerations that resulted in resolution 45/6 and its draft A/45/191 as well as with the various forms that observer status can take.

## **I. A comparison between the ICRC's new observer status and its previous status**

Until 16 October 1990, the ICRC - unlike the specialized agencies,\*\* regional international organizations, non-member States and a number of national liberation movements - did not have observer status at the United Nations.

Like many NGOs, the ICRC has long had consultative status with the Economic and Social Council. This status is based on Article 71 of the UN Charter, which states that the Council "may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence".

Unlike formal observer status, consultative status does not entitle the holder regularly to attend the meetings and conferences of the main UN bodies. Moreover, those having observer status enjoy technical privileges not available to the NGOs with their consultative status. This will be explored more fully in section II below.

Like other NGOs having only consultative status with the Economic and Social Council, the ICRC was previously dependent on invitations to attend individual meetings - dealing with humanitarian issues - of the main UN bodies or had to rely on member States to voice its position on matters of concern to the Red Cross Movement. Consultative status does not entitle the holder to speak on its own initiative, either in the Economic and Social Council itself or in the

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\*\* The term "specialized agencies" as used in this text refers to specialized agencies brought into relationship with the United Nations; it also includes the International Atomic Energy Agency.

other major bodies. Only in a few of the Economic and Social Council's commissions such as the Commission on Human Rights and the Committee on Non-Governmental Organizations (NGO Committee) are some NGOs regularly granted participant status by the rules of procedure and, in the latter, the right to take the initiative in requesting consultation.

Having only consultative status, the ICRC thus previously had to engage in lengthy discussions with the representatives of individual States, asking them to launch a specific humanitarian initiative or move that the ICRC be invited to take part in a certain meeting. Its lack of entitlement to permanent representation – a privilege inherent in observer status – meant that ICRC delegates in New York and Geneva had to expend considerable resources that observer status will now enable them to direct elsewhere.

To dispel misgivings about the ICRC being granted observer status, especially the fear that other less universally recognized and even controversial NGOs – particularly those concerned with human rights – might follow suit and also seek observer status, it can be pointed out that unlike that of any other NGO, the ICRC's mandate, above all under the Third and Fourth Geneva Conventions of 1949 and Additional Protocol I of 1977, has vested it with a "functional international personality" deriving from international humanitarian law (for example as a humanitarian substitute for a Protecting Power in international armed conflicts).<sup>1</sup> And in non-international armed conflicts, the ICRC enjoys a special right of initiative under the second paragraph of Article 3 common to the Four Geneva Conventions: it can offer its humanitarian services to the parties to the conflict without being accused of interference in a State's "internal affairs".

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<sup>1</sup> See A. Verdross/B. Simma, *Universelles Völkerrecht*, 3rd edition, Berlin 1984, p. 254, para. 420; D. Bindschedler-Robert, "Red Cross", *Encyclopedia of Public International Law* 5 (1983), Bernhardt (publishers), p. 251; D.P. Forsythe, "The Red Cross as Transnational Movement", *International Organization*, Vol. 30 (1976), p. 607 ff.; Y. Sandoz, «Le droit d'initiative du Comité international de la Croix-Rouge», *German Yearbook of International Law*, Vol. 22 (1979), p. 352 ff. Only G. Barile expresses a different opinion, in «Caractère du Comité international de la Croix-Rouge», *Rivista di diritto internazionale* 62 (1979), p. 115. He casts doubt on the international personality of the ICRC with the argument that the ICRC is not in a position to assert its own rights under international law. This reveals a misunderstanding of the modern concept of "functional international personality", as Barile is applying an obsolete, overly narrow definition of international personality. Moreover, in denying that the ICRC has its own rights under international law, Barile disregards the international character of the many agreements concluded between the ICRC and both States and intergovernmental organizations.

In addition, the ICRC has signed many headquarters agreements with States, mostly in crisis-torn regions, enabling it to establish and maintain delegations there. In several States with which no such agreements have been concluded, the ICRC is nevertheless treated almost as an intergovernmental organization.

The ICRC also enjoys special consultative status in a number of international bodies such as the Non-Aligned Movement, the Organization of African Unity, the Organization of American States, the Council of Europe, the International Maritime Organization and the International Organization for Migration.

Another interesting indication of the ICRC's status in international relations is the fact that its budget is covered mostly by contributions from States. This in itself made it extremely unlikely that a parallel could be drawn, with a view to obtaining consultative status, between the ICRC and other NGOs in the human rights field. While the ICRC is admittedly a private Swiss institution subject to the Swiss Civil Code, for purposes of international humanitarian law it has, unlike other NGOs in the human rights field, a direct role to play in international relations by virtue of the Geneva Conventions and their Additional Protocols, the many aforesaid headquarters agreements and the special relationship it has with a number of international organizations.<sup>2</sup>

It has been argued that observer status would bring about a closer association between the ICRC and the United Nations and thus the risk that the institution's strict neutrality and discretion – a *sine qua non* for effective ICRC action, especially in non-international armed conflicts and internal disturbances – could be called into question in times of crisis. This argument can be countered as follows:

- Firstly, observer status will in no way affect the ICRC's strict policy of neutrality and discretion; the institution's confidentiality (for example when conducting visits to detainees under an agreement with a government involved in a non-international armed conflict) will remain as inviolate as ever.
- Secondly, confidential information concerning non-international armed conflicts or internal disturbances will never be divulged to third parties in or connected with the United Nations; such infor-

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<sup>2</sup> See also C. Dominicé, «La personnalité juridique internationale du CICR», *Studies and essays on international humanitarian law and Red Cross principles in honour of Jean Pictet*, Geneva 1984, p. 663 ff.; P. Reuter, «La personnalité juridique internationale du Comité international de la Croix-Rouge», *ibid.*, p. 783 ff.

mation is shared only with the State that has allowed the ICRC to carry out its humanitarian mission on its territory.

- Finally, ICRC humanitarian work and UN peacekeeping operations have completely different bases in law and are conducted under different mandates. Observer status for the ICRC will in no way alter that – there is no danger of their respective mandates becoming intermingled.

## **II. The legal basis for consultative and observer status at the United Nations**

### **1. Consultative status as provided for in Article 71 of the Charter and resolution 1296 (XLIV) of the Economic and Social Council**

Ever since the founding of the League of Nations, NGOs have been playing a greater role in the process of codifying and implementing international law. However, the Covenant of the League of Nations itself did not provide any legal basis for such participation;<sup>3</sup> it was not until the United Nations Charter was adopted that a statutory foundation was established for co-operation between international organizations and NGOs. On the basis of the provisions in Article 71 of the Charter, the Economic and Social Council adopted resolution 1296 (XLIV) on 23 May 1968 in which it identified three categories of NGO:

- Category I includes NGOs whose activities are covered by the purview of the Economic and Social Council itself and whose past work has shown that they are able to advance the goals of the United Nations in the economic and social spheres. To belong to category I, NGOs must also have a membership representing the major groups in the populations of a large number of countries.
- Category II concerns NGOs with special, internationally recognized functions in certain areas of the Economic and Social Council's purview. The human rights organizations registered under Category II must be international in scope and must not be confined to representing the interests of certain groups of people or to individual States.

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<sup>3</sup> Erik Suy, "The Status of Observers in International Organizations", *Recueil des cours de l'Académie de droit international* 160 (1978/II), pp. 83 ff., 102.

— Category III consists of organizations placed on a roster to be consulted should special circumstances arise. These are organizations that do not qualify for the aforesaid two categories but that the Economic and Social Council or the Secretary-General, after consulting with the Council or its NGO Committee, deems to be in a position to make a significant contribution to the work of the United Nations.<sup>4</sup>

In spite of its unique functional international personality, the ICRC was previously registered as an NGO in Category II and, like other organizations active in the human rights field, could take part in certain meetings of the Economic and Social Council and its subsidiary bodies on humanitarian matters after having consulted with the NGO Committee. At the invitation of the Economic and Social Council (under Rules 83 and 84 of the Council's Rules of Procedure) NGOs in Categories I and II may make statements to the Council on subjects in their field of interest. If an NGO from Categories I or II itself applies for consultation by the Council or one of its subsidiary bodies, Rule 83 requires it to submit its request to the Secretary-General not later than five days after the adoption of the Council's agenda. The Council then decides whether to accept the NGO's application. Only the Rules of Procedure (Rule 75) of the Council's "functional commissions" (such as the Commission on Human Rights) contain provisions enabling NGOs from Categories I and II to take part on a permanent basis as observers in public meetings of those commissions and their subsidiary bodies.

Until now, the ICRC's consultative status did not allow it to take direct part in meetings of the United Nations, other main bodies such as the General Assembly or the Security Council. When, for example, the General Assembly or Security Council met in special session to discuss the escalation of violence in the Israeli-occupied territories, the ICRC – the very organization whose strictly impartial and neutral activities have enabled it to acquire considerable humanitarian experience in caring for the victims of the Israeli-Palestinian conflict – was regularly excluded from participation in the meetings.

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<sup>4</sup> See ECOSOC resolution 1296 (XLIV) of 23 May 1968, paras. 16-19; ECOSOC Doc. E/1989/INF/11 of 24 October 1989 contains a list of the NGOs currently registered in the three categories.

## 2. Observer status as a basis for regular presence

Erik Suy feels that the most important feature of observer status is that it allows unlimited access to virtually all United Nations fora<sup>5</sup> without first having to go through the involved process described above for NGOs with consultative status, a process which in any case provides access only to the Economic and Social Council. Unlimited access to UN meetings and to the UN's communications facilities affords much greater influence in the decision-making processes than mere consultative status, even though observers have no vote.

While NGOs in Categories I and II must apply to the Secretary-General or the NGO Committee for a special invitation to take part in meetings of the Economic and Social Council (and can take the initiative of requesting consultations only vis-à-vis the NGO Committee)<sup>6</sup>, observers have constant and direct access to many of the main fora in the UN system. However, the degree of access depends on the nature and functions of the individual observer:

- a) among observers, States that are members of the United Nations but not of particular fora have in principle the most extensive right of participation in all meetings, with the exception of the those of the Security Council, whose prior invitation is required (Article 32 of the Charter).
- b) States not members of the United Nations, for example Switzerland, North and South Korea and the Holy See, each have a permanent observer delegation to the UN. Such observer States have a right to be present in practically all UN bodies, subsidiary bodies and conferences. In practice, they are usually not granted the right to address plenary meetings of the General Assembly. However, they can take active part in the discussions of the General Assembly's main Committees.<sup>7</sup> The important thing is that the General Assembly's Rules of Procedure are applied with flexibility in these matters. Regarding the Security Council, Article 32 of the Charter contains the very clear rule that "any State which is not a Member of the United Nations, if it is a party to a dispute under consideration by the Security Council, shall be invited to participate, without vote, in the discussion relating to the

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<sup>5</sup> E. Suy *loc. cit.*, p. 103.

<sup>6</sup> R.G. Sybesma-Knol, *The Status of Observers in the UN*, Vrije Universiteit Brussel, Brussels, 1981, p. 302.

<sup>7</sup> *ibid.*, p. 72.

dispute". In accordance with Rule 72, para. 1, of its Rules of Procedure, the Economic and Social Council has, on some occasions, invited observer States to make statements to the Council on matters of particular concern to them.<sup>8</sup> Non-member States are also regularly invited, out of respect for the principle of universality, to take part on an equal footing with other participants in special conferences held under the aegis of the General Assembly or the Economic and Social Council.

- c) National liberation movements in Africa and the Palestine Liberation Organization (PLO) enjoy ongoing privileges in their legal status at the United Nations: as "States *in statu nascendi*" they are considered to be in a separate new category of subjects of international law;<sup>9</sup> the usual criterion of control of a defined territory is not applied. In this connection it is interesting to note the well-established co-operation between the United Nations and regional organizations such as the Organization of African Unity (OAU) and the League of Arab States in granting observer status to national liberation movements. The General Assembly has adopted several resolutions relating to this co-operation: resolution 3280 (XXIX) of 10 December 1974 on "Co-operation between the United Nations and the Organization of African Unity;" resolution 35/167 of 15 December 1980; and resolution 37/104 of 16 December 1982 on "Observer status of national liberation movements recognized by the Organization of African Unity and/or by the League of Arab States".<sup>10</sup>

In keeping with UN practice, the PLO also has been granted the observer's privilege of circulating documents between member States on matters relating to the Palestinian issue. In resolution 3237 (XXIX), the General Assembly invited the PLO to "participate in the sessions and the work of the General Assembly ... (and) of all international conferences convened under the auspices of the General Assembly in the capacity of observer". In the same resolution, it was further recommended that the PLO be entitled to "participate as an observer in the sessions and the work of all international conferences convened under the auspices of

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<sup>8</sup> *ibid.*, p. 75.

<sup>9</sup> K. Ginther, «Die völkerrechtliche Stellung nationaler Befreiungsbewegungen im südlichen Afrika», *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht*, 32 (1982), p. 144.

<sup>10</sup> See C. Koenig, *Der nationale Befreiungskrieg im modernen humanitären Völkerrecht*, Frankfurt/Bern/New York/Paris 1988, p. 82.

other organs of the United Nations".<sup>11</sup> The Economic and Social Council has complied with this rather insistently worded recommendation in that Rule 73 of its Rules of Procedure now stipulates that "The Council may invite any national liberation movement recognized by or in accordance with resolutions of the General Assembly to participate, without the right to vote, in its deliberations on any matter of particular concern to that movement". A similar provision is contained in Rule 70 of the Rules of Procedure for the Council's functional commissions (e.g. the Human Rights Commission).

- d) Regional international organizations, such as the Organization of African Unity and the Organization of American States, and specialized agencies such as the World Health Organization and the International Atomic Energy Agency, have permanent observer status in those of the main UN bodies that deal with their field of work. The Charter itself contains several provisions governing relations between the United Nations and both regional international organizations ("regional arrangements") and specialized agencies. Article 52 approves "the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security". Article 57 stipulates that "the various specialized agencies, established by intergovernmental agreement and having wide international responsibilities as defined in their basic instruments, in economic, social, cultural, educational, health and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63".

Under Article 63 of the Charter, the Economic and Social Council and specialized agencies may enter into agreements which define "the terms on which the agency concerned shall be brought into relationship with the United Nations". Such agreements are subject to approval by the General Assembly.

Rule 75 of the Economic and Social Council's Rules of Procedure and Rule 71 of the Rules of Procedure for its functional commissions stipulate that, once these agreements have been concluded, the specialized agencies are entitled

"(a) to be represented at meetings of the Council, its committees and sessional bodies; and

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<sup>11</sup> See the Secretary-General's guidelines on observer status for national liberation movements in the *UN Juridical Yearbook* 1975, p. 166.

- (b) to participate, without the right to vote, through their representatives, in deliberations with respect to items of concern to them and to submit proposals regarding such items, which may be put to the vote at the request of any member of the Council or of the Committee or sessional body concerned”.

In addition, Article 70 of the Charter provides the Economic and Social Council and the specialized agencies with the possibility of attending each other's meetings at all times: "The Economic and Social Council may make arrangements for representatives of the specialized agencies to participate, without vote, in its deliberations and in those of the Commissions established by it, and for its representatives to participate in the deliberations of the specialized agencies". Under Article 91 of the Charter, the Trusteeship Council also has the possibility, on the basis of Rule 13 of its Rules of Procedure, of inviting representatives of the specialized agencies to take part in its meetings much as the Economic and Social Council does under Article 63 of the Charter.

As for meetings of the Security Council, neither the Charter nor the Security Council's own Rules of Procedure expressly provide for regular participation by the specialized agencies, though Rule 39 does state that the Security Council may invite members of the Secretariat, organizations and even individuals "whom it considers competent for the purpose, to supply it with information or to give other assistance in examining matters within its competence". On the other hand, the Security Council has on several occasions taken a very controversial decision, in a manner for which there is no express provision in the Rules of Procedure, to allow the PLO access to its deliberations and grant its representative the right to address it. Participation in Security Council meetings by representatives of the specialized agencies has a firmer institutional basis under Rule 39. In several cases, there are already provisions in agreements (concluded in accordance with Article 63) between the United Nations and the specialized agencies allowing for access to the Security Council. For example, Article VII (2) of the relationship agreement between the United Nations and the International Atomic Energy Agency (IAEA) states that the Agency's Director-General may take part in Security Council meetings to supply information on matters within the IAEA's competence.<sup>12</sup>

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<sup>12</sup> See E. Suy *loc. cit.*, p. 110.

### **III. Different ways in which observer status can be achieved and the various forms it can take**

This review of the various categories of observers has shown that the extent of access and participation depends on the nature and functions of the observer.

With regard to the specialized agencies, the Charter itself and especially the rules of procedure of the main UN bodies contain provisions that, together with the agreements between the Economic and Social Council and the above-mentioned agencies concluded under Article 63 of the Charter, can be interpreted with flexibility (for example, the possibility for the IAEA to take part in Security Council meetings).

The ICRC is not, of course, an intergovernmental organization like those described in Article 57 of the Charter. It has a distinctive duality: while a private association subject to the Swiss Civil Code, it is simultaneously – and this is something unique in the law of international organizations – vested with a “functional personality” in the area of international humanitarian law.<sup>13</sup> Yet the rules governing observer status for the specialized agencies cannot be applied to the ICRC as they stand, because the International Committee’s rigorous policy of confidentiality in its work precludes any granting of access on a reciprocal basis such as that provided for between the Economic and Social Council and the specialized agencies under Article 70 of the Charter.

The special role and expertise of the ICRC in undertaking humanitarian action in armed conflicts and many types of internal disturbances require a special kind of observer status. It is therefore conceivable that an agreement could be concluded between the ICRC and the United Nations taking into account the particular consultation needs existing between the two organizations. The situation bears a distinct resemblance to that which prompted the provision, in Article 63 of the Charter, for agreements to be concluded between the Economic and Social Council and the specialized agencies. Just as Article VII (2) of the agreement with the IAEA allows the Agency’s Director-General to take part in meetings of the Security Council dealing with nuclear matters, the ICRC should be allowed to take direct part in meetings of the Security Council dealing with situations in which international humanitarian law is of specific relevance (for example the situation in the territories occupied by Israel).

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<sup>13</sup> See footnotes 1 and 2.

A cautious analogy with Article 63 (this provision is not directly applicable as the ICRC is not an intergovernmental organization) could serve as the basis for a corresponding agreement between the ICRC and the Council, to be approved by the General Assembly. The rules of procedure of the main UN bodies would then have to be amended to accommodate the special terms for ICRC participation. In the meantime, however, another solution has been found. On 16 October 1990, the General Assembly adopted a resolution granting the ICRC observer status and calling on the Secretary-General to take the action necessary to implement this decision.

As the UN's main decision-maker, the General Assembly would have been able to go further and 'recommend' that the ICRC be admitted as an observer to the other bodies.<sup>14</sup> Those bodies would have been obliged to comply with such a recommendation by amending their own rules of procedure. However, each one of the main bodies must itself decide the terms for admittance to and participation in its meetings.

#### IV. Summary

In many respects, observer status for the ICRC will place the practical co-operation that already existed between the institution and the United Nations on a stronger legal basis. It will also spare the ICRC the considerable drain on its resources that was necessary, when it had only consultative status, to bring its pragmatic *inter arma caritas* proposals before the United Nations.

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<sup>14</sup> See E. Suy *loc. cit.*, p. 156.