The Emergence of Objective Guidelines for Granting Immunity to International Non-Governmental Organizations

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Abstract

Out of thousands of international non-governmental organizations (INGOs), only five benefit from immunities from jurisdiction and execution: the International Committee of the Red Cross (ICRC), the International Union for Conservation of Nature (IUCN), the Global Fund to Fight AIDS, Tuberculosis, and Malaria; Gavi, the Vaccine Alliance (Gavi), and the World Anti-Doping Agency (WADA). Based on empirical research, this article argues that there is an emerging State practice in granting immunity only to INGOs that meet two cumulative criteria: a hybridity character and a mission of international interest, formally recognized in a source of international law. This article proposes a new approach based on both Functionalism and Institutionalism that addresses the specificities of INGOs and thus shows that international law provides guidance on the granting of immunities.

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I. Introduction

1. While in 2016 the American government denied immunity to the Internet Corporation for Assigned Names and Numbers (ICANN),¹ on 15 June 2018 the National Assembly of Quebec passed a law granting such protection to the World Anti-Doping Agency.² One might be tempted to ask what reason justifies such a difference in treatment between two international non-governmental organizations (INGOs). Although the sovereign prerogative has an indubitable role to play in the granting of immunities, an emerging practice seems to appear among States, aimed at conferring immunities on certain INGOs meeting certain conditions. Indeed, the aim of this study is to present the results of our empirical research that enable us to set out the rules for granting such treatment, allowing us not only to present a new State practice but also to explain the reasons for it.

2. Amongst hundreds of INGOs, only five benefit from immunities granted by several States. Usually, we observe that States are much more inclined to grant privileges to INGOs, especially exemption from tax, while only a few States grant them immunities. The most well-known exception is that accorded to the International Committee of the Red Cross (ICRC), which enjoys immunity in several States.³ Alongside the ICRC, four other INGOs—the International Union for Conservation of Nature (IUCN), the Global Fund to Fight AIDS, Tuberculosis, and Malaria (Global Fund), Gavi, The Vaccine Alliance (Gavi), and WADA—were granted immunities from jurisdiction and execution, implying they can neither be prosecuted nor have their property seized. This study focuses only on this aspect since there is no common practice with regard to the protection afforded to the organization’s staff.

¹ ICANN, Stewardship of IANA Functions Transitions to Global Internet Community as Contract with U.S. Government Ends (1 October 2016) (www.icann.org/news/announcement-2016-10-01-en).
² Bill no 238: An Act respecting the immunities granted to the World Anti-Doping Agency—National Assembly of Québec (http://assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-238-41-1.html). See also World Anti-Doping Agency, Quebec Assembly protects WADA’s mission to fight doping in sport (2018) (www.wada-ama.org/en/media/news/2018-06/quebec-assembly-protects-wadas-mission-to-fight-doping-in-sport).
³ International Committee of the Red Cross, Status update: The ICRC’s legal standing explained (12 March 2019) (www.icrc.org/en/document/status-update-icrcs-legal-standing-explained).
3. Initially, only the ICRC was granted immunity. This was mostly justified through its historic precedence, the international scope of its functions, the great importance it has for the international community as outlined in the Geneva Conventions, and its customary international legal personality. Hence, for a long time, the issue of immunities to INGOs was confined to the ICRC. However, in the last 30 years, the situation has begun to change.

4. Indeed, in the 1990s, Zambia, Kenya, and the United States granted immunities to IUCN. Later, in 2004, Switzerland and the United States granted immunities to the recently created Global Fund. Thereafter, in 2009, twelve States adopted an international treaty granting immunities to the Global Fund. Also in 2009, Switzerland and Gavi concluded a Headquarters Agreement granting immunities to Gavi. Then most recently, in 2018, the National Assembly of Quebec, Canada, passed a law granting immunities for WADA, a Swiss foundation launched in 1999.

5. An important question then arises: what justification is there for States to grant immunity to only five INGOs when several others carry out functions just as important for the international community? While it is undeniable that the attribution of immunities is left to the discretion of sovereign States,

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4 Prosecutor v. Blagoje Simic, Decision on the Prosecution Motion under Rule 73 for a Ruling concerning the Testimony of a Witness, No. IT-9-9:1747, 27 July 1999.

5 Zambia was the first to grant immunities to IUCN in 1993 under the Zambia, The Diplomatic Immunities and Privileges Act—the International union for the conservation of nature and natural resources order (1965), C.20, as amended by the order 29 of 1993, art. 9a).

6 Kenya, Privileges and Immunities Act—the international union for the conservation of nature and natural resources order (1999), C-179, art. 3 (b).

7 The United States, International Organizations Immunity Act [IOIA] (1994), 22 U.S. Code § 288f-4.

8 In 2004, Switzerland concluded with the Global Fund the Agreement between the Swiss Federal Council and the Global Fund to Fight AIDS, Tuberculosis, and Malaria to determine the legal status of the Global Fund in Switzerland [translated by the authors], RO 2005 2421, art. 13 (a).

9 The United States adopted the IOIA, above n.7, § 288f–6, which is aimed to grant immunities to the Global Fund.

10 Agreement on privileges and immunities of the Global Fund to Fight AIDS, Tuberculosis and Malaria (14 December 2009), UNTS No. 55785 (entered into force 17 April 2019), adopted and ratified by Eswatini, Ethiopia, Georgia, Liberia, Malawi, Moldova, Mozambique, Rwanda, Senegal, Togo, Uganda and Zimbabwe.

11 Agreement between the Swiss Federal Council and the GAVI Alliance to determine the legal status of the GAVI Alliance in Switzerland [translated by the authors], RO 2009 4567, art. 13 (a).
international law provides some guidance to explain the granting of immunities to entities not defined as subjects of public international law, such as INGOs.

6. Several approaches have been proposed in the doctrine in an attempt to explain the granting of immunities to INGOs.

7. The first aims at assimilating INGOs to international organizations (IOs). It is based on the situation of the ICRC, which is often considered a *sui generis* entity between the two types of organization.\(^\text{12}\) One author went even further and considered the ICRC to be an international organization.\(^\text{13}\) On the basis of this approach, it could reasonably be considered that international legal personality, as a fundamental feature of IOs,\(^\text{14}\) is necessary to obtain immunities. The literature that has adopted this explanatory approach is very limited, which approach, in fact, no longer seems to correspond to the state of the law. Indeed, although INGOs and IOs share certain similarities, such as the fulfilment of function and mission of international interest and independence from governments, some major differences cannot be ignored. As a matter of fact, the five INGOs that benefit from immunities were created under Swiss law, and since their constitutive acts are not international treaties and their memberships are not exclusively constituted of States, these INGOs differ significantly from IOs. Accordingly, States are not granting immunities to these INGOs by considering them as IOs.\(^\text{15}\) The diversity and number of INGOs certainly explain the difficulty of circumscribing their definition\(^\text{16}\) as

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\(^{12}\) International Committee of the Red Cross, Discover the ICRC (2005) (www.icrc.org/en/doc/assets/files/other/icrc_002_0790.pdf), 6.

\(^{13}\) See Els Debuf, Tools to do the job: The ICRC’s legal status, privileges and immunities, 97 IR Red Cross (2015), 319.

\(^{14}\) See e.g. PR Menon, The Legal Personality of International Organizations, 4 Sri Lanka JIL 79 (1992); James D. Fry, Rights, Functions, and International Legal Personality of International Organizations, 36 Boston University JIL 221 (2018).

\(^{15}\) It is important to clarify that while some States ensure the same treatment of IOs to INGOs, these provisions should not be interpreted as a recognition of an INGO’s IO status. It is simply a question of transposing the application of the provisions concerning IOs to INGOs. See e.g.: IOIA, above n.7, § 288f-4 and § 288f-6. See also Kenya, Privileges and immunities Act—IUCN, above n.6, art. 2.

\(^{16}\) There is no universal INGO definition. See e.g., Stephan Hobe, Global Challenges to Statehood: The Increasingly Important Role of Nongovernmental Organizations, 5 Indiana JGLS 191 (1997), 194-195. Nevertheless, the definitions in the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations (1986) (art. 1), the Directives concerning UNESCO’s partnership with non-governmental organizations (2011) (art. 1) and
well as the difficulties encountered by the international community in defining their legal regime.\(^{17}\)

8. Two other theories seek to explain the granting of immunity to INGOs. First, the Theory of Functionalism justifies the granting of immunity to institutions whose functions and mission of international interest justify it. Hence, immunities guarantee the independence of an international institution which is necessary to effectively allow it to carry out its functions and mission of public interest.\(^{18}\) According to this theory, one could conclude

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17 For a summary of the various efforts to clarify the legal status of INGOs, see Steve Charnovitz, Nongovernmental Organizations and International Law, 100:2 AJIL 348 (2006).

18 The Theory of Functionalism was initially developed to justify the immunities granted to international organizations. See e.g., Jan Klabbers, The EJIL Foreword: The Transformation of International Organizations Law, 26:1 European JIL 9 (2015); Douglas M. Johnston, Functionalism in the Theory of International Law, 26 Canadian YIL 3 (1989). This theory has also been applied to explain the granting of immunity to INGOs. See Davinia Abdul Aziz, Privileges and Immunities of Global Public-Private Partnerships: A Case Study of the Global Fund to Fight AIDS, Tuberculosis, and Malaria, 2 International Organizations LR 383 (2009), 364: “One clear recurring theme in the legal status reviews of both organizations was that IO-type privileges and immunities were required in order to mitigate legal risk to a level that was acceptable in order for Gavi and the Global Fund to fulfil their mandates effectively. In that connection, some key practical motivating factors were evident: 1. the need to ensure the personal safety of representatives of the organization on official travel outside Switzerland (requiring immunity from legal process); 2. the need to secure legal protection for the organization (requiring immunity from legal process and organizational privileges including inviolability of premises...
that the immunities granted to the ICRC, IUCN, the Global Fund, Gavi, and WADA are justified by the fact that they all carry out a great mission of international interest. \(^{19}\) However, as Steve Charnovitz explains, this theory remains subjective, since it is “not always easy to distinguish a public interest from a special interest or a public benefit from a mutual benefit”. \(^{20}\)

9. **Second**, the Theory of Institutionalism proposes that only institutions with a hybrid composition, governance, or financing—i.e., a mix of public and private actors—may benefit from immunities. Again, one could conclude that these five INGOs are all hybrid in one respect, which justifies that States grant them immunity. Nevertheless, we cannot reach a conclusion based on this theory as to why States do not grant immunity to other INGOs of which they are members, such as the Global Alliance for Improved Nutrition or the World Economic Forum. \(^{21}\)

10. Therefore, this article proposes a new approach based on both Functionalism and Institutionalism that considers the specificities of INGOs. This argument is based on our empirical research conducted on a sample of 105 States selected with consideration of geographical distribution and including developing and developed countries where legal sources relating to immunities of INGOs were accessible online. \(^{22}\) Thereafter, national laws,
orders, and headquarters agreements concluded between these States and an INGO were examined. The objective was to identify the existence of a rule, or a practice, making it possible to objectively guide the granting of immunities to INGOs. The outcomes show that these five INGOs—the ICRC, IUCN, the Global Fund, Gavi, and WADA—have three main characteristics in common: (1) a hybridity in at least one respect, (2) a public interest mission, which is (3) formally recognized in either a widely ratified multilateral convention, or a series of unanimous resolutions adopted by an IO. These should be the necessary conditions for granting immunity to an INGO.

11. Therefore, the emerging practice of States shows that international law provides guidance on the granting of immunities which is not necessarily correlated to the attribute of international legal personality and rejects the approach of assimilating INGOs to IOs (Part I), but rather correlates with two cumulative aspects: the recognition of a mission of public interest in a source of international law (Part II) and the hybrid character of the INGO (Part III). Thus, this study shows that immunities are granted on the basis of an approach mixing functionalism and institutionalism. Most importantly, the empirical approach allows us to adopt these approaches cumulatively and base them on objective guidelines.

II. The theory of international legal personality: an unsatisfying proposition

12. As international legal personality and immunities of IOs generally go hand in hand, it is tempting to attempt to justify the immunity of INGOs through the existence of an implicit international legal personality. For instance, one could consider the situation of the ICRC, which possesses such personality with greater certainty than others.

Liberia, Malawi, Moldova, Morocco, Mozambique, Paraguay, Peru, Poland, Rwanda, Senegal, South Africa, Sweden, Switzerland, Tunisia, Togo, Uganda, United Kingdom, United States, Uruguay, Zambia, and Zimbabwe. China, Italy and Japan are the three States which do not grant immunity to INGOs.

23 International organizations enjoy international legal personality according to their constitutive status or, if not, to customary law. See Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, ICJ Reports 1949, 179. See also Competence of the International Labour Organization to regulate, incidentally, the personal work of the employer, Advisory Opinion, PCIJ 1926 (Ser B) No 13, 18; Jurisdiction of the European Commission of the Danube between Galatz and Braila, Advisory Opinion, PCIJ 1927 (Ser B) No 14, 64; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, 78.
13. The particular status of the ICRC is due to its international mandate, combined with its recognition in the Geneva Conventions and Additional Protocols, and other treaties delegating functions to the ICRC for the protection of vulnerable persons and objects. Thus, the worldwide recognition of its international legal personality is at the root of the customary development of the ICRC’s legal status,24 which was confirmed by the International Criminal Tribunal for the former Yugoslavia in the Simic case in 1999: “It is generally acknowledged that the ICRC, although a private organization under Swiss law, has an international legal personality”.25 Portmann summarizes the situation as such:

The main source of concern when dealing with the ICRC’s international personality is that it is not an international organization created by states. [...] Faced with an essentially private entity, which nevertheless plays an important role in armed conflict and is vested with certain responsibilities in international treaties, legal doctrine, though skeptical in the beginning, has come to regard the ICRC as an international person [...]. The quotation indicates that in order to arrive at this conclusion, implicit recognition of the ICRC’s personality by states was significant. The argument in legal doctrine therefore is that the ICRC possesses international personality because states have tacitly recognized it as an international person.26

Accordingly, there is a consistent State practice in granting attributes of international legal personality to the ICRC: the agreements concluded by the ICRC are akin to international treaties and the ICRC conducts diplomatic

24 See, e.g., Paul Reuter, La personnalité juridique internationale du Comité international de la Croix-Rouge in : Christophe Swinarsk (ed.) Études et Essais sur le Droit International Humanitaire et sur les principes de la Croix-Rouge en l’Honneur de Jean Pictet (Geneva and The Hague: Martinus Nijhoff, 1984), 784 and 786-787.

25 Prosecutor v Blagoje Simic, above n.4, 46 and footnote 9: “It is widely acknowledged that the ICRC, an independent humanitarian organization, enjoys a special status in international law, based on the mandate conferred upon it by the international community. The Trial Chamber notes that the functions and tasks of the ICRC are directly derived from international law, that is, the Geneva Conventions and Additional Protocols. Another task of the ICRC, under its Statute, is to promote the development, implementation, dissemination and application of international humanitarian law.”

26 Roland Portmann, Legal Personality in International Law (Cambridge: Cambridge University Press, 2019), 110-12.
relations with States. While there is limited precedent for the ICRC’s ability to claim its rights before international jurisdiction, this ability is not denied.

14. By analogy, as no treaty provision provides INGOs international legal personality, one could try to infer an implicit international legal personality for other INGOs through the granting of certain capacities. However, at the opposite of the ICRC, other INGOs do not necessarily enjoy such capacities akin to the attributes of international legal personality with as many certainties. Indeed, the most common capacities granted to INGOs are to enter into contracts, to acquire and dispose of property, and to institute legal proceedings. However, States do not recognize the capacity of INGOs to conclude international treaties or to bring international claims. Moreover, although some of them maintain diplomatic relations arising from their representation abroad and the treatment of their staff, there is no consistency from one INGO to another. Hence, INGOs, not being subjects of international law, have only the internal capacities explicitly attributed by States, either

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27 See e.g. Gabor Rona, The ICRC’s privilege not to testify: Confidentiality in action. An explanatory memorandum, 845 IR Red Cross 201, (2002).

28 The attitude of the United Nations in administering compensation for the death of an ICRC delegate in the Katanga Case is an indication of the recognition of the ICRC’s ability to claim its rights under international law. See e. g. Christian Dominice, La Personnaliété Juridique Internationale du CICR in : Christophe Swinarski (ed.), Études et Essais sur le Droit International Humanitaire et sur les principes de la Croix-Rouge en l’Honneur de Jean Pictet (Geneva and The Hague: Martinus Nijhoff, 1984), 671-672.

29 See e.g. Rephael Harel Ben-Ari, The Normative Position of International Non-Governmental Organizations under International Law (Leiden/Boston: Martinus Nijhoff Publishers, 2012), 98: “Recalling the logic of the ICJ in the Reparation for Injuries case, which considers personality to be an evolving concept based first and foremost on the identification of the requirements of international life, together with the reaffirmation of the doctrine of limited or relative personality based on a functional approach, the question is more one of recognizing INGOs’ personality, than actually creating it. This logic is based on the assumption that the function INGOs fulfill in international affairs and international law-making is already, at least de facto, essential enough to merit the status.”

30 See Lisa Clarke, Responsibility of hybrid public-private bodies under international law: A case study of global health public-private partnerships (Abingdon: Routledge, 2014), 59-60.

31 For example, in Switzerland, the Executive Director of Gavi and the Global Fund enjoy diplomatic immunity. See Agreement between Switzerland and Gavi, above n.11, art. 14; Agreement between Switzerland and the Global Fund, above n.8, art. 14.
through domestic law, a headquarters agreement, or through an international treaty (as is the case for the Global Fund).32

15. Furthermore, while the status of public-private partnerships may seem ambiguous due to the participation of States as members, the hybridity of these INGOs is not in itself sufficient to justify the recognition of an international legal personality. As Lisa Clark stated:

The legal status of public-private partnerships under international law is, as a result, unclear. Partnerships involve public entities, i.e. states and international organizations, which have legal personality under international law, but also involve private entities, i.e. companies, NGOs, research institutes, and philanthropic foundations, which are not thought to have legal personality under international law.33

It remains that the mixed composition of these INGOs reflects the lack of States’ will to consider such institutions as subjects of public international law with international legal personality, or, at the very least, that this intention has not yet been expressed by States.34

16. Hence, from one INGO to another, the attributes of internal legal personality vary.35 A distinction is then drawn between international legal personality and internal legal personality, the latter being unrelated to public international law. In this sense, the conclusion of Steve Charnovitz in 2006 is

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32 See Agreement on privileges and immunities of the Global Fund to Fight AIDS, Tuberculosis and Malaria, above n.10.
33 See Lisa Clarke, Responsibility of International Organizations under International Law for the Acts of Global Health Public-Private Partnerships 12:1 Chicago JIL 55 (2011), 68.
34 See e.g. Rephael Harel Ben-Ari, above n.29, 98; Anna-Karin Lindblom, Non-Governmental Organisations in International Law (Cambridge: Cambridge University Press, 2005), 62-63.
35 For example, Switzerland recognizes Gavi, the Global Fund and the ICRC as having the legal capacity in Switzerland under art. 1 of their respective headquarters agreements. Zambia and Kenya also attribute the legal capacity of IUCN by reference to the capacities granted to corporate bodies. See Kenya, the Privileges and Immunities Act–IUCN, above n.6, art. 3 and Zambia, The Diplomatic Immunities and Privileges Act–UICN, above n.5, art 3. The United States, under the IOIA (§ 288a), grants specific capacities for the Global Fund (§ 288f-6) and IUCN (288f-4) that include contracting, acquiring and disposing of property and instituting legal proceeding. Also, art. 1 of the Agreement on the Privileges and Immunities of the Global Fund to Fight AIDS, Tuberculosis, and Malaria, above n.10 grants the same capacities to the Global Fund which can then be exercised in the twelve States Parties to the treaty.
still valid today: “Legal personality is a key factor in determining the rights and immunities of an NGO and its standing before courts. In general, an NGO enjoys legal personality only in municipal law, not in international law.”36 In brief, it is therefore not conceivable to explain the attribution of immunities to INGOs based on the recognition of international legal personality, since, except for the ICRC, INGOs have none.

III. An objectivized functionalist approach: recognition of the mission of public interest of INGOs in instruments of international law

17. Since we have rejected international legal personality, we consider that an objectivization based on an empirical approach of the Theory of Functionalism and the Theory of Institutionalism offers a more satisfactory justification as a justification for the immunities of INGOs. As previously explained, this new objective approach leads to the following conclusion: States only grant immunities to INGOs that meet two cumulative criteria—their mission of public interest is recognized in an instrument of public international law, and a mix of public and private actors participate in their governance, membership, or funding (see Part III). Part II addresses the first criterion that derives from functionalism.

18. Functionalism was initially developed to justify the capacities and immunities of IOs based on the functions that are necessary to achieve their mission.37 The rationale behind this theory is the importance of the fulfilment of their functions for the international community, referred to as “public service”—by analogy with the concept from French public law38 or “mission of

36 See Steve Charnovitz, above n.17, 355.
37 See e.g. Christian Dominicé, L’immunité de juridiction et d’exécution des organisations internationales, 187 Recueil des cours 145 (1984), 164; Laurence Boisson de Chazournes, Immunités, responsabilisation des organisations internationales et protection des droits individuels, in: Anne Peters et al (eds.), Immunity in the Age of Global Constitutionalism (Leiden: Brill Nijhoff, 2015), 298; Jan Klabbers, above n.18, 27: “Functionalism also helps explain the granting of privileges and immunities to international organizations. In theory, after all, the organization should not be interfered with and, in order to prevent such interference, should enjoy privileges and immunities.”
38 See C. Chaumont, Perspectives d’une théorie du service public à l’usage du droit international contemporain, in Les techniques du droit international—Études en l’honneur de Georges Scelle (LGDJ, 1950), 120 and 123; Evelyne Lagrange, above n.19,
international interest”. The qualification of functions as falling within the scope of such a mission is eminently subjective.

19. As mentioned above, the Theory of Functionalism justifies the immunities granted to INGOs, but only partially. Indeed, many INGOs, such as the International Olympic Committee (IOC), fulfil functions that are critically important for the international community, without benefiting from any immunity.

20. Although we are not arguing against functionalism, we are proposing an approach that is more suited to INGOs based on empirical evidence. The premise is twofold: first, the results indicate that States grant immunities only to INGOs that carry out a mission of great importance to the international community; second, this mission of international interest is explicitly recognized in a source of international law, either in a widely ratified multilateral convention or in several unanimously adopted resolutions of an IO, or both in most cases. This is precisely one of the two major characteristics—alongside hybridity—that distinguishes the ICRC, IUCN, the Global Fund, Gavi, and WADA from other INGOs and indicates an emerging practice in international law.

21. The results of our research show that States have recognized in a source of public international law the mission of these five INGOs relatively shortly after their creation (B). One could explain this by the importance of their missions in the achievement of certain global objectives, but also by the significant implication of States in the creation of these five INGOs (A).

III.A. State participation in the creation of INGOs: The drawing up of their mission by and for States

22. States had participated actively in the creation of the five INGOs benefiting from immunities, even years before their establishment. Indeed, by raising concerns about a particular issue at previous international conferences or intergovernmental meetings, they gradually built up the idea of institutionalizing independent entities to deal with these issues. For instance, sixteen States took part in the International Conference in Geneva in 1863, alongside philanthropic foundations, which led to the formal creation of the ICRC and

42 : “[A public service is a] perception of a collective interest that goes beyond the sphere of interests of a single State or company” (our translation).

39 See e.g. Jan Klabbers, above n.18, 18.
defined its functions. Likewise, for IUCN, States recognized the importance to establish an independent institution to ensure international cooperation for the conservation of nature during the international conference held in Fontainebleau in 1948.

23. This practice remains: in 1988, at the International Conference of Ministers and Senior Officials Responsible for Physical Education and Sport (MINEPS II), States recognized the issue of doping in sport and the importance of setting up an international commission to control anti-doping, which became, ten years later, WADA.

24. Similarly, the drafting of Gavi’s mission is the result of continued work from States started as early as 1989 with successive resolutions adopted by the World Health Assembly (WHA) aimed at increasing access to immunization worldwide. Then, its creation was the result of a series of inter-State meetings held between 1998 and 1999.

25. Likewise, the mission States were going to delegate to the Global Fund was elaborated at the G8 Okinawa Summit in 2000, when the very idea of the creation of an independent fund was launched. Indeed, governments recognized the seriousness of the HIV/AIDS epidemic and that it represented a critical obstacle to the economic welfare of developing countries. To address this challenge, they agreed to “implement an ambitious plan on infectious diseases, notably HIV/AIDS, malaria and tuberculosis” and to strengthen the partnership with the World Health Organization in order to reduce the

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40 Resolutions of the International Conference of Geneva [our translation] (26-29 October 1863).

41 Physical education and sport in the cause of humanism; final report, 22 August 1988, ED/MD/87, Recommendation No. 5 (3): “Recommends that national and international non-governmental sporting and other interested organizations, each taking within its respective field of competence, play an active role in the fight against doping in sport and the establishment of an effective system of international doping control outside the competition context, to include the establishment of a permanent international commission on doping control.”

42 By unanimously adopting the vaccination program, the WHO Member States recognized the need for increased access to vaccination worldwide and agreed to take consistent actions. See Expanded program on immunization, WHA42.32 (19 May 1989). In this view, between 1989 and the establishment of Gavi in 2000, the WHA adopted a series of resolutions to promote vaccination. See e.g. Research and development in the field of children’s vaccines, WHA44.4 (13 May 1991); Immunization and vaccine quality, WHA45.17 (13 May 1992).

43 See Global Alliance for Vaccines and Immunization, Report by the Secretariat, EB105/43, EBWHOO, 105th Sess., WHO Doc EB105/43 (2000), para.3.
number of people infected with HIV/AIDS by 25 percent by 2010. Above all, States within the UN General Assembly (the Assembly) established the main functions of the future Global Fund in the Declaration of Commitment on HIV/AIDS at the extraordinary session on 27 June 2001.

26. Thus, the creation of the ICRC, IUCN, the Global Fund, Gavi, and WADA is closely tied to the initiatives of States. In all cases, States had previously expressed their concerns in having an independent international entity carry out specific missions of great interest. Hence, shortly after their foundation under private law, States recognized the importance of the international mission of these INGOs in a multilateral convention or a series of resolutions adopted by relevant international organizations.

III.B. The formal recognition of an INGO’s mission of international interest in an instrument of international law

27. The evidence from our empirical research shows that States have not recognized the international interest of the mission of INGOs as an isolated act or in response to certain circumstances. In fact, the work of INGOs is repeatedly outlined in some important conventions (1), but also in a series of resolutions of the Assembly or other bodies (2).

III.B.1. The recognition of the mission of international interest in multilateral conventions

28. Consider first the ICRC. The existence of the movement was addressed in the Covenant of the League of Nations (1919) but only to the extent of the national Red Cross associations. It was in 1929 that the importance of ICRC’s mission to the international community was first recognized through the adoption of Article 88 of the Convention relative to the Treatment of Prisoners of War: “The foregoing provisions do not constitute any obstacle to the humanitarian work which the International Red Cross Committee may

44 G8 Communiqué Okinawa 2000, paras. 19 and 29.
45 Declaration of Commitment on HIV/AIDS, GA Res S-26/2 (27 June 2001), 14.
46 Covenant of the League of Nations, 28 June 1919, 225 CTS 195. Before that, States had recognized in the 1899 Hague Convention (art. 15) the importance of the duties carried out by charitable organisations aimed at assisting prisoners of war, although no express reference was made to the ICRC’s work.
perform for the protection of prisoners of war with the consent of the belligerents concerned”. 47

29. Then, at the time of the Diplomatic Conference in Geneva in 1949, the ICRC had already acquired credibility within the international community and States adopted without any debate on the provisions included in the four Geneva Conventions which explicitly reiterate the role carried out by the ICRC. 48 Based on the preparatory work that had preceded the adoption of the Conventions, it appears that the willingness of States to explicitly name the ICRC was unanimous. The interventions of States in the discussions reflect their broad support for the ICRC’s mission. 49 Additionally, the recalling of the ICRC’s functions in the 1977 Additional Protocols unambiguously confirms the interest of the international community in the ICRC’s mission.

30. A similar situation applies to IUCN. In 1959, barely 10 years after its creation, IUCN stands out from the other NGOs with similar aims, when the UN Economic and Social Council specially mentioned it in a resolution concerning the creation of a list of national parks. 50 Hence, the international community already recognized the international interest of its functions, when more formally, the Convention on Wetlands of International Importance Especially as Waterfowl Habitat 51 entrusted IUCN to perform the continuing bureau duties under this Convention adopted in 1971 and

47 Convention relative to the Treatment of Prisoners of War, 27 July 1929, 118 LNTS 344, art. 88.
48 Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field, 12 August 1949, 75 UNTS 31, art. 9; Geneva Convention for the amelioration of the condition of the wounded, sick and shipwrecked members of the armed forces at sea, 12 August 1949, 75 UNTS 85, art. 9; Geneva Convention relative to the treatment of prisoners of war, 12 August 1949, 75 UNTS 135, art. 9; Geneva Convention relative to the protection of civilian persons in time of war, 12 August 1949, 75 UNTS 287, art. 10. To date, there are 196 State parties to the Geneva Conventions.
49 See Final Record of the Diplomatique Conference of Geneva of 1949, Vol II. B, 21, 60 and 111.
50 See Establishment by the Secretary-General of the United Nations of a list of national parks and equivalent reserves, ECOSOC Res 713 (XXVII) (24 April 1959): “The Economic and Social Council [...] invites the International Union for the Conservation of Nature and Natural Resources [...] to assist the Secretary-General, upon his request, in the preparation of the proposed list”.
51 Convention on Wetlands of International Importance Especially as Waterfowl Habitat, 2 February 1971, 966 UNTS 245, art. 8 (1): “The International Union for the Conservation of Nature and Natural Resources shall perform the continuing bureau duties under this Convention”. 
since ratified by 171 States. Furthermore, the recognition of the IUCN’s international role was consolidated in 1972 with the adoption of the Convention for the Protection of the World Cultural and Natural Heritage, assigning the IUCN an advisory seat on the Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage and outlining the importance of consolidated cooperation between the international community and the IUCN. Therefore, it is beyond question that this convention, ratified by 193 States, is an indicator of the strong approval of States for the international functions carried out by this INGO.

31. The WADA’s mission of international interest has also been formally recognized by States in the UNESCO International Convention against Doping in Sport adopted in 2005. Article 14 of the convention states that “States Parties undertake to support the important mission of the World Anti-Doping Agency in the international fight against doping”. To date, 189 States have joined the Convention with no reservation regarding WADA, further confirming their support for the WADA’s public interest mission.

32. While conventional recognition of the role of an INGO is important in affirming the interest of the international community, it is not the only source of international law containing such recognition. Indeed, the role of the five

52 Convention for the Protection of the World Cultural and Natural Heritage, 16 November 1972, 1037 UNTS 151, arts 8, 13 and 14: “An Intergovernmental Committee for the Protection of the Cultural and Natural Heritage of Outstanding Universal Value, called “the World Heritage Committee”, is hereby established within the United Nations Educational, Scientific and Cultural Organization. […] and a representative of the [IUCN] […] may attend the meetings of the Committee in an advisory capacity” (art. 8); “The Committee shall co-operate with international and national governmental and non-governmental organizations having objectives similar to those of this Convention. For the implementation of its programs and projects, the Committee may call on such organizations, particularly […] the [IUCN]” (art. 13); “The Director-General of the United Nations Educational, Scientific and Cultural Organization, utilizing to the fullest extent possible the services of the International Centre for the Study of the Preservation and the Restoration of Cultural Property (the Rome Centre), the International Council of Monuments and Sites (ICOMOS) and the [IUCN] in their respective areas of competence and capability, shall prepare the Committee’s documentation and the agenda of its meetings and shall have the responsibility for the implementation of its decisions” (art. 14).

53 International Convention against doping in sport, 19 October 2005, 2419 UNTS 201. The Convention was adopted at the 33rd General Conference of UNESCO, where representatives of more than 100 States were present. Under the Convention, State Parties agreed to cooperate with WADA at many levels (arts. 3, 14, 16 and 26) and to fund WADA in equal shares with the IOC (art 15).
INGOs benefitting from immunities is also recalled in a significant number of resolutions adopted without a vote.

III.B.2. The recognition of the mission of international interest in a series of resolutions adopted by IOs

33. Although the Assembly resolutions do not usually have binding force, they can be used, if they are recurrent, to demonstrate *opinio juris* as part of the customary process.\(^54\) Our purpose here is not to demonstrate that there is an international custom with regard to the granting of immunities to certain INGOs. However, the multiplicity of resolutions in which their role is mentioned and the broad adherence to them is an objective marker that must be added to international conventions in order to demonstrate, in an objective manner, that they carry out a mission of international interest.

34. Indeed, as early as 1962, the Assembly recognized the IUCN’s mission by adopting Resolution 1831, recommending to the international community to take “measures directed toward […] assisting the [IUCN]” in order to preserve natural resources, flora, and fauna, which are of “considerable importance to the further economic development of countries and of benefit to their population”.\(^55\) Thereafter, the Assembly continued to refer to its work\(^56\) and, in 1980, mandated the Secretary-General, in cooperation with the IUCN and the UNEP, “to formulate appropriate recommendation with a view to the adoption of a world charter for nature”.\(^57\) Then, in a subsequent resolution adopted in 1981, the Assembly asked IUCN and UNEP to review the draft of the World Charter for Nature.\(^58\)

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\(^{54}\) In the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), ICJ Reports 1986, para.188 (27 June), the ICJ expressly mentioned that the *opinio juris* could be inferred from adherence to certain resolutions.

\(^{55}\) Economic development and the conservation of nature, GA Res 1831 (XVII) (18 December 1962).

\(^{56}\) International cooperation in the field of the environment, GA Res 34/188 (18 December 1979).

\(^{57}\) Draft World Charter for Nature, GA Res 35/7 (30 October 1980).

\(^{58}\) Draft World Charter for Nature, GA Res 36/6 (27 October 1981). Later on, in December 1999, the General Assembly granted to IUCN an Observer Status (See Observer status for the International Union for the Conservation of Nature and Natural Resources in the General Assembly, GA Res 54/195 (17 December 1999)). According to the minutes of the meeting, IUCN’s mission and work receive a strong endorsement and support from States (See Doc. A/54/PV.84).
35. Additionally, at the third Conference of Ministers and Senior Officials Responsible for Physical Education and Sport held in 1999, sixty-seven States adopted the Declaration of Punta Del Este, a political declaration without binding effect, paragraph 7 of which confirms States’ endorsement of the WADA’s mission of international interest:

The Ministers emphasize the ethical values of sport and urge all countries, both developed and developing, to work together to combat unethical behavior, including doping in sport. They appreciate the initiative of the International Olympic Committee (IOC) in establishing the World Anti-Doping Agency (WADA) and emphasize the important role of all governments in WADA and in eliminating doping in sport in general. They further encourage this Agency to assist developing countries in their efforts to fight against doping in sport. UNESCO’s role in this field should concentrate on information and education in particular.59

Afterwards, in 2002, the Assembly formally recognized WADA in a resolution: “[The General Assembly] [w]elcoming the setting up by the [IOC], with the adherence of Member States and intergovernmental organizations, of a World Anti-Doping Agency”.60 Following the adoption of the International Convention against Doping in Sport in 2005, the Assembly adopted a series of resolutions calling on States to ratify it and underlined the relevance of the WADA’s World Anti-Doping Code.61

36. Similarly, just a few months after the creation of Gavi in 2002, the 53rd WHA recognized its existence in the resolution WHA53.12, endorsing its objectives and calling on States to support its work.62 Since then, the WHA has adopted several resolutions reiterating its support for Gavi’s mission and highlighting its work.63 Additionally, every year since 2008, the Assembly has

59 Declaration of Punta Del Este (1999), para.7.
60 Building a peaceful and better world through sport and the Olympic ideal, GA Res 56/75 (10 January 2002).
61 See e.g. Sport as an enabler of sustainable development, GA Res 73/24 (6 December 2018). See also A/Res/63/135 (3 March 2009); A/Res/65/4 (23 November 2010); A/Res/69/6 (10 November 2014); A/Res/71/160 (19 January 2017) (all adopted without vote).
62 Global Alliance for Vaccines and Immunization, WHA 53.12 (20 May 2000) (without vote).
63 See e.g. Global immunization strategy, WHA 58.15 (25 May 2005) (without vote); WHA 61.15 (24 May 2008); WHA 65.17 (26 May 2012); WHA 68.6 (26 May 2015); WHA 70.14 (31 May 2017) (all adopted without vote).
unanimously adopted a resolution acknowledging the work of Gavi in the fight against malaria, thus further consolidating the global recognition of the mission of public interest pursued by this INGO.64

37. Likewise for the Global Fund, a few months after its creation, the Assembly has also formally recognized its mission in a resolution adopted in 2002:

[The General Assembly] [a]ppeals to the international community, United Nations bodies, international and regional organizations, and non-governmental organizations to allocate substantial new resources, including through the Global Fund to Fight the Acquired Immunodeficiency Syndrome, Tuberculosis and Malaria, for developing countries, particularly in Africa.65

Since then, a series of resolutions were adopted, recalling each year the role of the Global Fund in the fight against HIV/AIDS, tuberculosis, and malaria, and encouraging States to increase their financial support to the Global Fund.66

38. In sum, the results of our empirical study firstly show that States only grant immunities to INGOs whose mission of international interest is repeatedly and consistently recognized through instruments of international law. This finding is consistent with the Theory of Functionalism since INGOs are granted immunities to ensure their effective functioning and preserve their

64 See 2001–2010: Decade to Roll Back Malaria in Developing Countries, Particularly in Africa, GA Res 63/234 (7 March 2008). Following this resolution, each year the UN General Assembly adopts a similar resolution, recalling the role played by Gavi in the achievement of the objectives pursued by the General Assembly. See e.g. A/Res/64/79 (7 December 2009); A/Res/65/273 (18 April 2011); A/Res/66/289 (10 September 2012); A/Res/67/299 (16 September 2013); A/Res/68/308 (10 September 2014); A/Res/69/325 (11 September 2015); A/Res/70/300 (9 September 2016); A/Res/71/325 (11 September 2017); A/Res/72/309 (10 September 2018); A/Res/73/337 (12 September 2019).

65 2001–2010: Decade to Roll Back Malaria in Developing Countries, Particularly in Africa, GA Res 57/294 (20 December 2002), 7.

66 See e.g., Access to medication in the context of pandemics such as HIV/AIDS, tuberculosis and malaria, GA Res 58/179 (17 March 2004). See also A/Res/58/237 (27 February 2004); A/Res/59/256 (4 March 2005); A/RES/61/228 (22 December 2006); A/RES/62/180 (19 December 2007); A/RES/63/234 (22 December 2008); A/RES/64/79 (7 December 2009); A/RES/66/289 (10 September 2012); A/RES/67/299 (16 September 2013); A/RES/68/308 (10 September 2014); A/RES/69/325 (Sept. 11 2015); A/RES/70/300 (9 September 2016); A/RES/71/325 (11 September 2017); A/Res/72/309 (10 September 2018).
independence, which is necessary for the fulfilment of their mission of international interest. This is at least what the emerging practice of States has demonstrated over the last thirty years.

IV. High level of State participation in INGOs: when hybridity justifies immunities

39. Alongside the first indicator, whereby States only grant immunities to INGOs whose mission of international interest is recognized in an instrument of international law, the outcome of our empirical research reveals a second indicator linked to the emerging practice of States in the granting of immunities: Only INGOs with a hybrid character reflected either in the mix of private and public actors in their membership, governance or funding are granted immunities.

40. This is precisely what distinguishes the International Olympic Committee from the five INGOs benefiting from immunities. Indeed, the International Olympic Committee does not have a hybrid character, as it is composed solely of private actors and solely financed by private donations. Therefore, although it indubitably carries out a mission of international interest that was recognized by the Assembly in 2009 when it was granted observer status with the UNGA through the adoption of Resolution 64/3, the International Olympic Committee does not benefit from immunities in any States.

41. In contrast, States have actively contributed to the creation of the ICRC, IUCN, the Global Fund, Gavi, and WADA from the very beginning in the elaboration of their missions and functions, and then in their governance (B) or financing (A). Hence, these five INGOs stand out from the typical INGOs by their hybridity, which thus consolidates the conclusion whereby INGOs must meet two cumulative criteria.

IV.A. The substantial financial contribution of States to the INGO budget

42. As mentioned above, the second criterion in the granting of immunities to an INGO is its hybridity, which can be reflected in the mix of public and

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67 Observer status for the International Olympic Committee in the General Assembly, GA Res 64/3 (22 October 2009).

68 See Agreement between the Swiss Federal Council and the International Olympic Committee on the Status of the International Olympic Committee in Switzerland [translated by the authors], RO 2001 845.
private financial contributors to its budget. Looking at the five INGOs that benefit from immunities, we observe that a majority of their financing comes from States or, for WADA, equally from States and private donors. Indeed, as agreed in the Copenhagen Declaration on Anti-Doping in Sport adopted in 2003 by all WADA’s States parties, WADA’s funding is provided equally by the International Olympic Committee\textsuperscript{69} and States.\textsuperscript{70} It is noteworthy that both States and the International Olympic Committee have fulfilled their commitment over the years, confirming the States’ involvement in WADA’s activities and support for its mission.\textsuperscript{71}

43. With respect to the IUCN, its budget is also financed by contributions from both States and private actors, with States being the primary providers. Indeed, although governments have contributed to 50 percent of the IUCN’s annual funding in 2018, their actual contributions exceeded the one they directly disbursed to IUCN. Indeed, the remaining 50 percent was split between multiple actors from both the public and the private sectors, such as IOs, private foundations, NGOs, and corporations.\textsuperscript{72} Additionally, in contrast to WADA, the distribution of funding sources between States and private contributors is not consistent. The direct contribution of States has fluctuated between 45 and 60 percent over the last ten years.\textsuperscript{73} It is also worth noting that membership fees enable IUCN to gain some level of financial autonomy, being able to self-finance its activities to the extent of about 10

\textsuperscript{69} It is worth recalling that the IOC is itself funded solely by private donors. See ICO, Funding (www.olympic.org/funding).

\textsuperscript{70} See Copenhagen Declaration on Anti-Doping in Sport (2003), adopted at the World Conference on Doping in Sport held in Copenhagen [193 States signatories], art. 3.3: “Each Participant [. . . ] Supports to co-funding of WADA by public authorities and the Olympic movement as follows: Public authorities contribute collectively 50% of the approved WADA annual core budget”.

\textsuperscript{71} States have contributed slightly above their pledges over the last decade, which explains they financed for 52% in 2019. All the contribution to funding annual report can be found here: WADA, Contribution (www.wada-ama.org/en/resources/finance/contributions-funding).

\textsuperscript{72} See UICN, Annual Report 2018 (2019) (portals.iucn.org/library/sites/library/files/documents/2019-007-En.pdf), 48.

\textsuperscript{73} In 2010, the State contribution reached 60%—2% more than in 2009—and between 2013 and 2016, the share of State funding gradually decreased to 45% in 2016 and then to 50% in 2018. The annual report for 2019 has not yet been published. All annual reports can be found here: IUCN, Annual reports (www.iucn.org/about/programme-work-and-reporting/annual-reports).
percent every year, alleviating its dependence on States’ funding compared to other INGOs.

44. In this specific regard, concerning the ICRC, the Global Fund, and Gavi, States contribute to a large majority of their annual budget, and the remaining is provided by private contributors. One could conclude that States maintain a predominant position in their functioning owing to their large share of the budgetary contribution. Indeed, although the ICRC is exclusively governed by private actors—i.e., individuals of Swiss nationality—the ICRC remains almost completely dependent on States’ financial contributions, as they funded 87 percent of its activities in 2019, maintaining a gradual increase over the past decade. Similarly, States provided 82 percent of Gavi’s budget last year, an increase of 12 percent since its creation in 2002. The Global Fund is even more dependent on the financial contribution of States as they funded 93 percent of its activities in 2019. The States’ preoccupation with the well-functioning of the Global Fund is further reflecting on the fulfillment of their pledges every year.

45. Therefore, two observations can be marked. First, the five INGOs benefiting from immunities are hybrid in their financing: States, alongside private actors, provide their budget. Second, the significant participation of States in the financing of INGOs contributes to strengthening their involvement in these five INGOs. Accordingly, as stated by Lisa Clarke with regard

74 See ICRC, Annual Report 2019 (library.icrc.org/library/docs/DOC/icrc-annual-report-2019-2.pdf), 70. It is worth precising that contribution of States by 87% corresponds to a “direct funding”. We use the term “direct funding” to refer to the contribution of States specifically earmarked for the ICRC, excluding the contribution of States in IOs or other institutions that also fund ICRC activities. With regard to the dependence of the ICRC to the States’ financing, see Anna-Karin Lindblom, above n.58, 20.

75 Over the past 20 years, States have contributed an average of 82% to the ICRC’s budget. All the ICRC’s Annual report can be found here: ICRC, The Annual Reports of the ICRC in one place (19 June 2020), (blogs.icrc.org/cross-files/annual-reports/annual-report/).

76 See Gavi, The Vaccine Alliance, Funding, (www.gavi.org/investing-gavi/funding). The increase of States’ financing contribution can be found here: Gavi, the Vaccine Alliance, Annual Contributions and Proceeds, 30 September 2019 (www.gavi.org/news/document-library/annual-contributions-and-proceeds-30-september-2019).

77 The Global Fund, Financials (www.theglobalfund.org/en/financials/).

78 The pledges are published every two years. An analysis of the results since 2002 shows that States have collectively met their commitments, or at least the negative margin is between 1% and 3%. For more detail, see The Global Fund, Pledge and Contribution, (www.theglobalfund.org/en/financials/).
to Gavi and the Global Funds in particular, but just as relevant for the other INGOs: “States might be found to have effective control over global health public-private partnerships through financing and/or decision-making. States often provide a significant portion of the funding of these partnerships. Further, the boards of these partnerships often require a certain degree of state approval before a decision is made”.79 Hence, since the States are the majority donors of these INGOs, it confirms their interest in the achievement of the public missions they delegated to them but also enables them to consolidate their involvement in its execution or, at least, influence its directives.

IV.B. The presence of State representatives in the INGO’s governance structures

46. The participation of States in the activities of IUCN, the Global Fund, Gavi, and WADA exceed their funding. Indeed, since States also participate alongside private actors in their governance, these four INGOs thus present double hybridity. Consequently, these four INGOs are generally known as “public-private partnerships”, which Finn Seyersted defined as follows: “International public-private partnership may be referred to as a system in which a governmental service or private business venture is funded and operated through a partnership of government and one or more private sector entity”.80

47. It is worth underlining that States have maintained a predominant position in the decision-making of the Global Fund, IUCN, and Gavi from the very beginning of their activities by occupying the majority of the seats in the governing body.

48. With respect to the Global Fund, States hold 75 percent of the decision-making power, and the remaining 25 percent is held by private actors.

79 Lisa Clarke, The Exercise of Public Power over Global Health through Public-Private Partnerships and the Question of Responsibility under International Law, 105 ASIL 96 (2011), 98.

80 See Finn Seyersted, above n.16, 7-8 and 18-19. See also Evelyne Lagrange, above n.16, at 52-54; Jan Klabbers, Institutional Ambivalence by Design: Soft Organizations in International Law 70: 3 Nordic JIL 403 (2001); Jan Klabbers, Unity, Diversity, Accountability: The Ambivalent Concept of International Organisation, 14:1 Melbourne JIL 149 (2013), 152 and 156-157; Lisa Clarke, above n.30 41-42; Lisa Clarke, above n.33 at 84; William Thomas Worster, Relative International Legal Personality of Non-State Actors, 42:1 BROOK JIL 207 (2016), 245-248; Lorenzo Casini, Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA), 2 International Organizations LR 421 (2009).
Indeed, pursuing its by-laws, the Board, which is the “supreme governing body of the Global Fund”, is composed of twenty voting members, of which fifteen are States representatives and five are from the private sector, and eight *ex-officio* non-voting members. Similarly, States hold a large majority of seats at the IUCN Council, the body responsible for the “oversight and general control of all the affairs of IUCN”, including setting the strategic direction and guidance of its work and approving its annual budget, besides private actors in the minority. Indeed, as stated under the IUCN Statutes, the Council is composed of thirty State or regional representatives out of thirty-eight members, the remaining being independent experts or high-level position members of the Secretariat. Thus, States also hold significant decision-making power within the IUCN, although they are in the minority at the World Conservation Congress where the 1400 IUCN members are reunited once every four years to sets the general direction for the IUCN’s work.

49. With regard to WADA, States also hold an important share of the decision-making power, but its governance is divided more equally between public and private actors. Indeed, within WADA’s two decision-making bodies,

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81 See Bylaws of the Global Fund to Fight AIDS, Tuberculosis and Malaria [as amended on 14 November 2017], art. 7.4. The Board held the functions to elaborate the strategy development, review and approve funding proposal and annual budget, establish the framework for the monitoring and periodic performance and accountability assessment of activities, and mobilize donors to support the mission of the Global Fund, among others.

82 Ibid., art. 7.1. The by-laws distributes the voting-members seats as follows: seven representatives from developing countries (all government representatives), eight representatives from donors (all government representatives) and five representatives from civil society and private sector. See The Global Fund, Constituencies of the Board (www.theglobalfund.org/en/board/constituencies/).

83 Ibid. The remaining eight Board’s members are non-voting members, representatives of the WHO, the World Bank, the UNAIDS, Additional public donors and partners alongside with Board Chair, the Board Vice Chair and the Executive Director.

84 IUCN Statutes, including Rules of Procedures of the World Conservation Congress and Regulation [IUCN Statutes] (5 October 1948) [as amended on 27 September 2016], art. 37 and 46.

85 Ibid., art. 38 and 39. See also UICN, Council (www.iucn.org/about/union/council).

86 Ibid., arts. 18 and 20. The IUCN members include 90 State Members and 118 government agencies—representing 15% of the membership, and NGOs, INGOs, and private associations—sharing the remaining 85%. See UICN, Members (www.iucn.org/about/union/members).
the States and the Olympic Movement hold an equal number of seats, as provided by WADA’s Statutes of 1999. In fact, the thirty-eight seats of the Foundation Board, the highest decision-making body, are equally divided between representatives from governments and the Olympic Movement (fourteen seats each). Additionally, the two remaining seats are held by the President and Vice-President of the Foundation Board, positions that have historically been held in alternance between representatives of the Olympic Movement and governments, thus consolidating the parity structure. Furthermore, the Executive Committee, the ultimate policy-making body of WADA, is composed of twelve members: five from governments and five from the Olympic Movement (plus the President and the Vice-President of the Foundation Board). Hence, WADA is considered as an “equal partnership between the Olympic Movement and public authorities”, reflected by the structure of the Foundation Board and the Executive Committee, but also in its source of funding.

50. Similarly, as in 2020, States and IOs share 48 percent of the votes at the Gavi Alliance Board, the “supreme governing body of the Gavi Alliance”. However, this parity was not expressed by the founders of Gavi, it was the case when WADA was created. Indeed, under Article 9 of Gavi’s Statutes, the Board’s composition is as follows: ten representatives of governments, equally shared between developing countries and donor countries; three representatives of OIs—the WHO, the UNICEF, and the World Bank; one representative of the Bill & Melinda Gates Foundation; two representatives of the vaccine industry; one representative of the civil society; and one of

87 Constitutive Instrument of Foundation of the World Anti-Doping Agency [as revised on 18 December 2017] [Statutes of WADA], art 6.
88 Ibid., art. 7.
89 Ibid., art. 10: “The Foundation Board delegates to an Executive Committee of twelve members, the majority chosen from amongst the Foundation Board members, the actual management and running of the Foundation, the performance of all its activities and the actual administration of its assets”.
90 World Anti-Doping Agency, Executive Committee, (www.wada-ama.org/en/who-we-are/governance/executive-committee).
91 Gavi, The Vaccine Alliance, Governance (www.gavi.org/our-alliance/governance).
92 See Gavi Alliance Statutes (29 October 2008), art. 13. The Board held the functions to set policies and strategies, operational guidelines, work plans as well as financial and business planning, make major funding decisions, including the approval of the annual accounts and mobilization of resources, among others.
the research institutes.\textsuperscript{93} Hence, according to Article 9, out of eighteen members, States and IOs share thirteen seats, 72 percent, thereby dominating the decision-making process. However, since 2007,\textsuperscript{94} as allowed by the Statutes, nine independent individuals with technical expertise have been appointed to the Board.\textsuperscript{95} As a result, it brought the total number to twenty-seven members of the Board, thus attenuating the predominance of public actors.\textsuperscript{96}

51. Therefore, based on an empirical approach, it appears that States are granting immunities only to INGOs in which they are actively involved, either as full members or as donors. This finding helps to explain why the International Olympic Committee does not benefit from immunity in any country. The same applies to the International Organization for Standardization which is solely composed of the national standards agencies which finance its activities by paying a membership fee.\textsuperscript{97}

V. Conclusion

52. Traditionally, immunities were granted only to States and IOs, but so far, five INGOs—the ICRC, IUCN, the Global Fund, Gavi, and WADA—also enjoy immunities from jurisdiction and execution in several countries.

53. While some authors were able to identify certain criteria or trends, these were not amenable to systematic empirical analysis as proposed in this article. Indeed, our approach leads to the conclusion that immunities are granted to INGOs whose mission is in the international interest and which are hybrid in their financing and governance. Some authors had already reached this conclusion, but we add new objective criteria on an empirical basis making it possible to mark out and justify the granting of immunities to INGOs. These two conditions are cumulative and objectify functionalist and institutionalist theories. The new criteria we identify are: (1) the formal recognition of the

\textsuperscript{93} Ibid., art 9.
\textsuperscript{94} Gavi, The Vaccine Alliance, Gavi Alliance Progress Report 2007 (www.gavi.org/sites/default/files/publications/progress-reports/Gavi-Progress-Report-2017.pdf), 64.
\textsuperscript{95} Statutes of WADA, above n.87.
\textsuperscript{96} The Gavi CEO is an ex-officio non-voting Board member and is not taken into account in the distribution of seats on the Board as is the case in the Statutes. For more detail on the 2020 Board composition, see Gavi, The Vaccine Alliance, Board members (www.gavi.org/governance/gavi-board/members).
\textsuperscript{97} International Standardization Organization, Structure and Governance (www.iso.org/structure.html).
INGO’s mission in several instruments of international law and (2) the mixed participation of private and public actors in the functioning of the INGO.

54. Our article also demonstrates that there is no need to discuss the customary international legal personality of organizations, although the assertion of such personality could assist such grants, as the ICRC case shows. However, this question could be the subject of further study.

55. Notwithstanding this last remark, our study makes it possible to provide guidelines for the granting of immunity to INGOs and should enable both INGOs and States to clarify the possibilities of preventing some INGOs, such as the International Olympic Committee, from requesting protection when they do not meet these criteria.

56. In practice, the INGOs identified in this study do not necessarily have received immunity in all countries where they operate. As a result, they are forced to do innovative work to protect their assets, especially financial assets, and sometimes repatriate them to protect them from the risk of seizure. It would therefore be desirable for the emerging practice to become uniform among States in order to protect the INGOs in which they participate and to which they delegate functions that could be devolved to international intergovernmental organizations. Perhaps then we could see the emergence of a customary norm.
