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Responsibility of hybrid public-private bodies under international law: A case study of global health public-private partnerships

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3. LEGAL STATUS OF PARTNERSHIPS

Public-private partnerships are increasingly regulating global health issues and thereby impacting the rights of individuals, such as the right to life and/or the right to health. This impact is positive but possibly also negative. This possibly negative impact then raises concerns of responsibility under international law. In order to address these concerns, possession of legal personality under international law is imperative. This is because responsibility under international law depends on legal personality under international law: “[L]egal personality of an organization ... is a precondition of the international responsibility of that organization.”¹ Legal personality thus brings not only rights but also duties.²

As global health public-private partnerships are composed of states and international organizations (representing the public sector) and companies, non-governmental organizations, research institutes and philanthropic foundations (representing the private sector), these partnerships are neither purely public nor purely private. Placing them in

¹ ILC, Draft articles on the responsibility of international organizations, with commentaries 2011 (adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as part of the Commission’s report covering the work of that session (A/66/10). The report, which also contains commentaries to the draft articles (para 88), will appear in Yearbook of the International Law Commission, 2011, vol II, Part Two) 9 <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf> accessed 26 May 2012 (Commentaries). See Bimal N. Patel, ‘The Accountability of International Organizations: A Case Study of the Organisation for the Prohibition of Chemical Weapons’ (2000) 13 *Leiden Journal of International Law* 571, 577; Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 683-4; Philippe Sands and Pierre Klein, *Bowett’s Law of International Institutions* (Sweet and Maxwell 2009) 479; Roland Portmann, *Legal Personality in International Law* (CUP 2010) 275; Niels M. Blokker, ‘Preparing articles on responsibility of international organizations: Does the International Law Commission take international organizations seriously? A mid-term review’ in Jan Klabbers and Åsa Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011) 313, 316

² See *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 179; Giorgio Gaja, Special Rapporteur on the Responsibility of International Organizations, First report on the responsibility of international organizations, International Law Commission (26 March 2003) UN Doc A/CN.4/532, para 15; William E. Holder, ‘International Organizations: Accountability and Responsibility’ (2003) *American Society of International Law Proceedings* 231, 231; C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn, CUP 2005) 399; Robert McCorquodale, ‘International Organizations and International Human Rights Law: One Giant Leap for Humankind’ in Kaiyan Homi Kaikobad and Michael Bohlander (eds), *International Law and Power Perspectives on Legal Order and Justice* (Martinus Nijhoff Publishers 2009) 141, 151

the category of either public exclusively or private exclusively is therefore not possible. A consequence of this hybrid composition is that the legal status of public-private partnerships under international law is not clear. Partnerships involve public entities – states and international organizations – which have legal personality under international law but also involve private entities – companies, non-governmental organizations, research institutes and philanthropic foundations – which are not thought to have legal personality under international law. The legal personality of public-private partnerships under international law is, as a result, obscure.

In spite of this obscurity, the possession by global health public-private partnerships of legal personality under international law must be given thoughtful consideration in order to determine whether or not these partnerships can be held responsible under international law. The legal status of global health public-private partnerships under international law thus forms the focus of this chapter.

This chapter begins by setting out the concept of legal personality under international law. It then explores the approaches – the will of the member states approach, the recognition approach and the objective approach – used to determine the legal personality under international law and applies these approaches to global health public-private partnerships in order to determine whether or not these partnerships have legal personality under international law.

3.1. THE CONCEPT OF LEGAL PERSONALITY

The concept of legal personality under international law (or subjects of international law)³ has historically been framed in a strictly positivist lens⁴ with states as the sole

³ The phrases ‘legal personality under international law’ and ‘subjects of international law’ are often used interchangeably and will be used interchangeably throughout this research as well. See Georg Schwarzenberger and E.D. Brown, *A Manual of International Law* (6th edn, Professional Books Limited 1976) 42; Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (Routledge 1997) 91; Hermann Mosler, ‘Subjects of International Law’, *Encyclopedia of Public International Law Published under the Auspices of the Max Planck Institute for Comparative Public Law and International Law under*

possessors of legal personality under international law. This positivist model of international law traces its roots back to the Peace of Westphalia which is seen as the first attempt at world unity based on the sovereignty of states that are subordinate to none.⁵ It is this model which dominated for centuries and according to it, states were the exclusive subjects of international law.⁶ The only condition to be met in order to be regarded as a subject of international law was thus statehood; statehood and legal personality under international law were considered synonymous.⁷

Other select entities were considered subjects of international law however their rights and duties were limited to those that were similar to the rights and duties of states and, notably, their jurisdiction or function related to a particular territory. Indeed, entities besides states that were recognized as subjects of international law were either on their way to becoming states or had state-like qualities. For example, *de facto* regimes, insurgents recognized as belligerents, national liberation movements representing peoples struggling for self-determination, the Holy See and the Order of Malta were, and still are, considered to be subjects of international law.⁸ The question of whether entities besides states, that were not on their way to becoming states and did not have state-like qualities, could be subjects of international law was, for a long time, not given any real consideration.

In 1928, the legal personality under international law of the League of Nations, the international organization founded as a result of the Treaty of Versailles, was considered by Lassa Oppenheim. He wrote that “since now the Family of Nations is on the way to becoming an organized community under the name of the League of Nations with

the Direction of Rudolf Bernhardt (2000) 710, 711. cf Jan Klabbbers, *An Introduction to International Institutional Law* (CUP 2009) 39

⁴ See Chapter 1, Section 1.2

⁵ See Leo Gross, ‘The Peace of Westphalia, 1648-1948’ (1948) 42(1) *American Journal of International Law* 20

⁶ L. Oppenheim, *International Law A Treatise* (Longmans, Green, and Co. 1905) 99

⁷ Portmann (n 1) 13, 42

⁸ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 59. See Christian Walter, ‘Subjects of International Law’, in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP 2008- , online edition, article last updated May 2007) paras 2-3 <www.mpepil.com> accessed 26 May 2012; Klabbbers, *An Introduction* (n 3) 38

distinctive international rights and duties of its own, the League of Nations is an International Person *sui generis*.”⁹ Although stepping outside the usual list of entities determined to have legal personality under international law, Oppenheim continued to adhere to a positivist mindset as the legal personality of the League of Nations under international law was inextricably tied to its relationship with its member states. Oppenheim further contended that with the exception of the League of Nations, states are the exclusive subjects of international law.¹⁰

The League of Nations was generally considered a subject of international law on a *sui generis* basis. This label of *sui generis* left little leeway to draw analogies to the League of Nations in arguments for new subjects of international law, especially for those entities not comprised of or having characteristics similar to states.

As entities besides states began to play an increasing role in the international community, however, the positivist lens shifted focus and widened its scope to include these other entities, such as international organizations, as subjects of international law. This opening for international organizations is said to have been inspired by reasons of practicality. States set up international organizations in order to carry-out activities on their behalf. After the Second World War and with the desire of placing restraints on states and preventing a third world war, international organizations were increasingly given powers autonomous from states. International organizations were no longer seen as merely a collection of states. This meant that international organizations had gained or were gaining prominence in the international community and the usefulness of allocating them legal personality under international law, to enable them to sue and be sued under international law for example, provided a motivation for them to be considered subjects of international law.¹¹

⁹ L. Oppenheim, *International Law A Treatise* (Arnold D. McNair ed, 4th edn, Longmans, Green and Co. 1928) 133

¹⁰ *ibid* 133-134

¹¹ Antonio Cassese, *International Law in a Divided World* (Clarendon Press 1986) 74-75, 85; Antonio Cassese, *International Law* (OUP 2001) 69-72; Amerasinghe (n 2) 68-69; Sands and Klein (n 1) 473; Henry G. Schermers and Niels M. Blokker, *International Institutional Law – United within Diversity* (5th edn, Martinus Nijhoff Publishers 2011) 987

The international organization most often cited for its legal personality under international law is the United Nations, the successor to the League of Nations. The legal personality under international law of the United Nations was pronounced in an Advisory Opinion of the International Court of Justice (ICJ) – *Reparation for Injuries Suffered in the Service of the United Nations* – in 1949.¹² Other international organizations are now also generally accepted as having legal personality under international law.¹³ In 1980, in the Advisory Opinion *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, the ICJ stated that “[i]nternational organizations are subjects of international law”¹⁴ and later, in 1996, in the Advisory Opinion *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the ICJ stated that “[t]he Court need hardly point out that international organizations are subjects of international law.”¹⁵ These statements by the ICJ, although desirable in their simplicity, carry with them the unanswered, or confusingly answered, question as to how international organizations became (or become) subjects of international law. This question is explored in this chapter in the context of global health public-private partnerships.

Aside from international organizations, individuals are now also considered (limited) subjects of international law.¹⁶ Further, there are regular debates as to the status of companies and non-governmental organizations under international law. The consensus,

¹² *Reparation for Injuries* (n 2) 179

¹³ Commentaries (n 1) 9. See Catherine Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart 2007) 75; Portmann (n 1) 109; Schermers and Blokker (n 11) 991

¹⁴ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 73, 89-90

¹⁵ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66, 78

¹⁶ Later editions of Oppenheim’s text have been revised to reflect certain entities, such as international organizations, territorial or political units and individuals, as subjects (or partial subjects) of international law (L. Oppenheim, *Oppenheim’s International Law* (Robert Jennings and Arthur Watts eds, 9th edn, published 1992 and 1996, OUP 2008) 16-22). See Cassese, *International Law in a Divided World* (n 11) 99-103; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994) 48-55; Cassese, *International Law* (n 11) 77-85; *LaGrand Case (Germany v United States of America)* (Judgment) [2001] ICJ Rep 466; Walter (n 8) paras 15-18; Andrew Clapham, ‘The role of the individual in international law’ (2010) 21(1) *European Journal of International Law* 25

at the moment, is, however, that companies and non-governmental organizations are not subjects of international law.¹⁷

The next section of this chapter explores the approaches relied on to determine legal personality under international law – the will of the member states approach, the recognition approach and the objective approach – and then applies these approaches in the context of global health public-private partnerships in order to determine the legal status of these partnerships under international law.

3.2. APPROACHES TO DETERMINING LEGAL PERSONALITY

To begin, states are, of course, subjects of international law. Often coined the natural or primary subjects of international law, states were an essential pre-condition for the creation of international law¹⁸ and have long since dominated the notion of legal personality under international law.¹⁹

The legal status under international law of entities besides states is, however, not as easily discerned.²⁰ The international legal order has no central authoritative system capable of granting legal personality under international law.²¹ Further, the process whereby legal personality under international law is determined for entities besides states is subject to

¹⁷ See Jonathan I. Charney, 'Transnational Corporations and Developing Public International Law' (1983) *Duke Law Journal* 748, 762-773; Cassese, *International Law in a Divided World* (n 11) 103; Karsten Nowrot, 'Legal Consequences of Globalization: The Status of Non-Governmental Organizations under International Law' (1998-1999) 6 *Indiana Journal of Global Legal Studies* 579; Rainer Hofmann and Nils Geissler (eds), *Non-State Actors as New Subjects of International Law* (Duncker & Humblot 1999); Anna-Karin Lindblom, *Non-Governmental Organisations in International Law* (CUP 2005) 53-78; August Reinisch, 'The Changing International Legal Framework for Dealing with Non-State Actors' in Philip Alston (ed), *Non-State Actors and Human Rights* (OUP 2005) 37, 69-72; Steve Charnovitz, 'Nongovernmental Organizations and International Law' (2006) 100(2) *American Journal of International Law* 348, 355-357; Clapham, *Human Rights Obligations* (n 8); Walter (n 8) paras 8, 19-20; Brownlie (n 1) 66; M. Noortmann and C. Ryngaert (eds), *Non State Actors Dynamics in International Law. From Law-Takers to Law-Makers* (Aldershot, Ashgate 2010)

¹⁸ Mosler (n 3) 712. See Cassese, *International Law in a Divided World* (n 11) 74, 77; Walter (n 8) para 26

¹⁹ Schermers and Blokker (n 11) 986-988

²⁰ See Portmann (n 1) 1

²¹ Compare this to the central authoritative systems in domestic legal orders which prescribe how entities obtain legal personality under domestic law. See Brownlie (n 1) 676; Portmann (n 1) 9; Schermers and Blokker (n 11) 987

debate. There is nothing that prevents the makers of international law from establishing a rule that upon meeting certain requirements, entities besides states obtain legal personality under international law.²² Such a rule has, however, not yet been devised.

As a matter of course, several approaches are advocated in order to determine legal personality under international law. The approaches that will be discussed in this chapter are those that are evidenced in practice and expounded by academics and further that will provide insight into the status of global health public-private partnerships under international law. These approaches include the will of the member states approach, the recognition approach and the objective approach. These approaches will be explored and applied in the following sections with a view to determining the status of global health public-private partnerships under international law.

3.2.1. The Will of the Member States Approach

The will of the member states approach views the legal status of international organizations under international law through a positivist lens and as deriving solely from the member states of international organizations. International organizations are then derived subjects of international law or secondary subjects of international law.²³

The key consideration for this approach is the intention of the member states of an international organization to grant (or not) legal personality under international law to the international organization. In other words, the legal personality of an international organization under international law only exists, according to this approach, if member states intend to grant them such status.

²² Bin Cheng, 'Introduction to Subjects of International Law' in Mohammed Bedjaoui (ed), *International Law: Achievements and Prospects* (Martinus Nijhoff Publishers 1991) 23, 35. See The American Law Institute, *Restatement of the Law, The Foreign Relations Law of the United States*, Volume 1 §§1-488 (American Law Institute Publishers 1987) 70

²³ Cassese, *International Law in a Divided World* (n 11) 76-77; Mosler (n 3) 717-718; Cassese, *International Law* (n 11) 71; Walter (n 8) para 26; Sands and Klein (n 1) 473-474; Schermers and Blokker (n 11) 989

This approach has, however, variations with such intention being determined explicitly or implicitly.²⁴ The tendency is, however, for the will of the member states approach relying on explicit intention to give way to the will of the member states approach relying on implicit intention, for reasons to be subsequently explained.²⁵

The will of the member states approach normally surfaces in the context of determining the legal personality under international law of international organizations. The extent to which this approach can be translated to the context of determining the legal personality under international law of global health public-private partnerships is, at first glance, questionable. This is because global health public-private partnerships have not only states as members but also other entities, including international organizations, companies, non-governmental organizations, research institutes and philanthropic foundations, as members. The will of the member states approach requires a connection to be made to the intention of the member states. As global health public-private partnerships contain not only states as members but also other entities as members then the premise of this approach – member ‘state’ intention – cannot be completely adhered to in the context of these partnerships. However, international organizations are, according to the definition provided by the International Law Commission (ILC) in the Articles on the Responsibility of International Organizations²⁶ and the definition relied on in this research,²⁷ able to have as members, in addition to states, other entities.²⁸ Membership comprised exclusively of states is thus not necessary for international organizations. Making comparisons between international organizations and partnerships and applying the will of the member states approach, which is applied to international organizations, to partnerships is therefore a reasonable starting position.

²⁴ See Sections 3.2.1.1 and 3.2.1.2

²⁵ The will of the member states approach relying on implicit intention is often labeled the prevailing view. See Schermers and Blokker (n 11) 989

²⁶ Articles on the Responsibility of International Organizations, UNGA Res 66/100, Annex (27 Feb 2012) (Articles on the Responsibility of International Organizations or ARIO)

²⁷ See Chapter 1, Section 1.1.2

²⁸ ARIO (n 26) art 2(a)

3.2.1.1. Explicit Intention

The variation of the will of the member states approach relying on explicit intention considers a literal reading of the provisions of the constituent treaty of the international organization in order to determine whether or not the international organization has legal personality under international law. Only if legal personality under international law is explicitly set out in the constituent treaty can an international organization be said to have such status.

Explicitly providing for legal personality under international law in the constituent treaty was, however, not very common.²⁹ The reason for this has been traced back to the political climate after the Second World War when many international organizations were being established. There was a concern that expressly granting legal personality under international law to international organizations might lead to the development of supranational organizations,³⁰ which was not desired. The constituent treaties of international organizations, at this time, tended to expressly grant legal personality under the domestic law of member states, rather than under international law.³¹ For example, the United Nations – now, universally, accepted as having legal personality under international law – does not explicitly provide for legal personality under international law in its constituent treaty, the Charter of the United Nations. It does, however, “enjoy in the territory of each of its Members such legal capacity as may be necessary for the

²⁹ Nigel White, *The Law of International Organisations* (2nd edn, Manchester University Press 2005) 33; Klabbers, *An Introduction* (n 3) 48; Sands and Klein (n 1) 474-475; Schermers and Blokker (n 11) 987-8. A couple of examples, however, include: the African Development Bank (Agreement Establishing the African Development Bank, art 50 “the Bank shall possess full international personality”) and the International Fund for Agricultural Development (Agreement Establishing the International Fund for Agricultural Development, art 10, s 1 “The Fund shall possess international legal personality”). See Sands and Klein (n 1) 474-475 and Schermers and Blokker (n 11) 987-8 for a longer list.

³⁰ Supranational organizations are “organizations [that] have independent powers, and should be able to exercise these powers against all members” (Schermers and Blokker (n 11) 124). The European Union is the most commonly cited example of a supranational organization. See White (n 29) 60-68; Klabbers, *An Introduction* (n 3) 24-25; Achilles Skordas, ‘Supranational Law’, in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP 2008- , online edition, article last updated March 2011) <www.mpepil.com> accessed 26 May 2012

³¹ White (n 29) 33

exercise of its functions and the fulfilment of its purposes,”³² or, in other words, legal personality under the domestic law of its member states.

This tendency towards not explicitly providing for legal personality under international law in the constituent treaty did, however, change. It became more common to explicitly set out the legal personality under international law of an international organization in its constituent treaty.³³ A couple of recent examples of international organizations whose constituent treaties explicitly provide for legal personality under international law include the International Criminal Court and the European Union. The Rome Statute of the International Criminal Court states: “The Court shall have international legal personality”³⁴ while The Treaty on European Union states: “The Union shall have legal personality,”³⁵ which is understood to cover legal personality under both domestic law and international law.³⁶

The silence of most constituent treaties in relation to legal personality under international law means, however, that as a tool for determining legal personality under international law, constituent treaties generally do not provide reliable guidance.³⁷ If legal personality is explicitly set out in the constituent treaty, as in the examples cited above, it is useful because it obliges member states to acknowledge legal personality and may also help in determining legal personality in relation to non-member states.³⁸ If, however, legal personality is not explicitly set out in the constituent treaty this does not preclude a determination of legal personality; the international organization, in such a circumstance,

³² The Charter of the United Nations, 24 October 1945, art 104

³³ Sands and Klein (n 1) 474-5; Niels M. Blokker, ‘International Organisations as Independent Actors: Sweet Memory or Functionally Necessary?’ in Jan Wouters, Eva Brems, Stefaan Smis and Pierre Schmitt (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia 2010) 37, 44; Schermers and Blokker (n 11) 987-988

³⁴ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 4(1)

³⁵ Treaty of Lisbon (adopted 13 December 2007, entry into force 1 December 2009) (2008) OJ C 115/13, art 47. See Sands and Klein (n 1) 474-5 and Schermers and Blokker (n 11) 988 for a longer list.

³⁶ Schermers and Blokker (n 11) 992

³⁷ See Brölmann (n 13) 84; Schermers and Blokker (n 11) 988-9

³⁸ Schermers and Blokker (n 11) 988

may still be found, implicitly,³⁹ to have legal personality.⁴⁰ A well-known international organization serving as an example in this regard is the United Nations.⁴¹

The will of the member states approach relying on explicit intention nonetheless remains an approach that can be used to determine legal personality under international law and therefore it will be applied first in the context of formal partnerships or alliances – Roll Back Malaria Partnership (RBM) and the Stop TB Partnership (Stop TB) – and second in the context of separate organizations – GAVI Alliance (GAVI) and the Global Fund to Fight AIDS, Tuberculosis and Malaria (the Global Fund).

Formal partnerships or alliances, such as RBM and Stop TB, do not have constituent treaties. RBM has By-Laws⁴² and an Operating Framework⁴³ and Stop TB has a Basic Framework,⁴⁴ which may be seen as the constituting documents of these partnerships since they set out the purpose, institutional framework or operating structure and other matters of these partnerships. These documents were, however, created by the partnerships themselves and therefore are not constituent treaties drafted and signed by states. Further, it is expressly stated that these partnerships are not separate legal entities and that a hosting organization – the World Health Organization (WHO) – acts in legal matters on their behalf.⁴⁵ It is not specified whether this absence of legal status is in relation to domestic law or international law but it is reasonable to assume that it is in relation to both domestic law and international law since the WHO acts both domestically and internationally on its behalf. Formal partnerships or alliances, such as RBM and Stop

³⁹ See Section 3.2.1.2

⁴⁰ José E. Alvarez, *International Organizations as Law-Makers* (OUP 2005) 131; Walter (n 8) para 5

⁴¹ See *Reparation for Injuries* (n 2) 178-179

⁴² RBM Partnership By-Laws, November 2011
<http://www.rbm.who.int/partnership/secretariat/docs/rbm_bylaws.pdf> assessed 26 May 2012

⁴³ RBM Partnership Operating Framework, November 2011
<<http://www.rbm.who.int/partnership/secretariat/docs/RBMoperatingFramework.pdf>> assessed 26 May 2012

⁴⁴ Stop TB Partnership Secretariat, Basic Framework for the Global Partnership to Stop TB
<<http://www.stoptb.org/assets/documents/about/STBBasicFramework.pdf>> assessed 26 May 2012. Note: there is no memorandum of understanding or other official document setting out the relationship between Stop TB and the WHO (E-mail from Anant Vijay, Stop TB Partnership to author (11 April 2010))

⁴⁵ Memorandum of Understanding between the Roll Back Malaria Partnership and the World Health Organization Concerning Hosting, Secretariat and Administrative Services, 15 December 2006, art 2.1
<<http://www.rollbackmalaria.org/docs/MoU.pdf>> assessed 26 May 2012 (RBM MoU); Stop TB Basic Framework (n 44) Section III

TB, thus do not have legal personality under international law applying the will of the member states approach relying on explicit intention.

Separate organizations, such as GAVI and the Global Fund, also do not have constituent treaties. GAVI has Statutes⁴⁶ and By-Laws⁴⁷ and the Global Fund has By-Laws.⁴⁸ These are the constituting documents of these partnerships since they set out the domestic legal structure; purpose; headquarters location; the governing, administrative and advisory bodies; and other matters of these partnerships. These documents, like those of RBM and Stop TB, were, however, created by the partnerships themselves and thus are not constituent treaties drafted and signed by states. Further, these documents set out that the domestic legal structure of these partnerships is a foundation and make no mention of whether or not these partnerships have legal personality under international law.⁴⁹ Separate organizations, such as GAVI and the Global Fund, are therefore not subjects of international law applying the will of the member states approach relying on explicit intention.

The debate as to the legal personality under international law of global health public-private partnerships is thus not resolved by applying the will of the member states approach relying on explicit intention. The next step is then to consider the will of the member states approach relying on implicit intention and whether this variation of the approach leads to global health public-private partnerships being subjects of international law. The will of the member states approach relying on implicit intention will now be described and subsequently applied to formal partnerships or alliances – RBM and Stop TB – and to separate organizations – GAVI and the Global Fund.

⁴⁶ GAVI Alliance Statutes, 29-30 October 2008
<http://www.gavialliance.org/resources/GAVI_Alliance_Statutes.pdf> assessed 26 May 2012

⁴⁷ GAVI Alliance By-Laws, 29-30 October 2008, Revised 19 March, 16-17 June and 1 December 2010
<<http://www.gavialliance.org/about/governance/gavi-board/composition/>> assessed 26 May 2012

⁴⁸ The Global Fund to Fight AIDS, Tuberculosis & Malaria By-Laws, 21 November 2011
<<http://www.theglobalfund.org/en/about/structures/board/>> assessed 26 May 2012

⁴⁹ GAVI Statutes (n 46) art 1; The Global Fund By-Laws (n 48) art 1

3.2.1.2. Implicit Intention

The variation of the will of the member states approach relying on implicit intention looks beyond the express desire of member states to grant legal personality as set out in the constituent treaty of an international organization. Instead, it focuses on the implied intention of member states to allocate legal personality by looking to the capability of the international organization to possess rights and duties and the separate will of the international organization from its member states, as evidenced in the provisions of the constituent treaty and demonstrated in practice.⁵⁰

Capability to possess rights and duties under international law is a necessary criterion for any subject of international law, enabling such subject to exercise its rights and duties on the international plane. A separate will from its member states is, further, of particular importance for international organizations because it is only when an international organization has a separate will from its member states that it has the ability to have legal personality in its own right.

Persuasive evidence of the need to be capable of possessing rights and duties under international law can be found in *Reparation for Injuries Suffered in the Service of the United Nations*. As the Charter of the United Nations, the constituent treaty of the United Nations, does not explicitly grant the United Nations legal personality under international law, the ICJ relied on an implicit reasoning to determine the legal personality of the United Nations under international law. It held that the United Nations had legal personality and this meant that “it is a subject of international law and *capable* of possessing international rights and duties.”⁵¹ In describing a legal person under international law, Ian Brownlie also emphasized capability: “[A]n entity of a type recognized by customary law as *capable* of possessing rights and duties ... and having these capacities conferred upon it, is a legal person.”⁵²

⁵⁰ See *Reparation for Injuries* (n 2) 178-179; Amerasinghe (n 2) 78, 82-83; Alvarez (n 40) 131; Brownlie (n 1) 677

⁵¹ *Reparation for Injuries* (n 2) 179 (emphasis added)

⁵² Brownlie (n 1) 57. See Cheng (n 22) 23; Walter (n 8) para 1; Schermers and Blokker (n 11) 93

A circularity in reasoning is trying to be avoided by use of the word capable. Simply stating that legal personality arises from having rights and duties and that rights and duties arise from having legal personality tenders an obvious circularity.⁵³ The use of the word capable attempts to evade this circularity.⁵⁴ But then how does one judge capability? It is most often judged by observing what the international organization is in fact doing. If an international organization is exercising (certain) rights and duties on the international plane, it is seen as having legal personality under international law but of course, if an international organization has legal personality under international law, it is seen as able to exercise (certain) rights and duties on the international plane. The circularity remains.

The circularity inherent in the will of the member states approach relying on implicit intention is thus acknowledged. This approach will nevertheless be considered and applied because the premises forming the two halves of the circle, standing alone, are true and in the absence of a central authoritative system able to grant legal personality under international law, the rights and duties international organizations exercise on the international plane do provide evidence of legal personality under international law.

The next logical inquiry is what rights and duties must this international organization be capable of possessing? The rights and duties which an international organization is generally required to be capable of possessing in order to be determined a subject of international law include, *inter alia*, capability to conclude treaties, capability to bring claims under international law, capability to be held responsible under international law and capability to be granted immunity from the jurisdiction of domestic courts.⁵⁵

⁵³ See Brölmann (n 13) 78-79; Sands and Klein (n 1) 476; Brownlie (n 1) 57; Tarcisio Gazzini, 'Personality of international organizations' in Jan Klabbers and Åsa Wallendahl (eds), *Research Handbook On The Law Of International Organizations* (Edward Elgar 2011) 33, 34

⁵⁴ Brownlie (n 1) 57

⁵⁵ These capabilities are focused on as these are the most relevant capabilities to discuss in the context of global health public-private partnerships. A list of other possible capabilities discussed in the context of international organizations can be found in Pieter J. Kuijper, 'The Netherlands and International Organizations' in H.F. van Panhuys, W.P. Heere, J.W. Josephus Jitta Ko Swan Sik and A.M. Stuyt, *International Law in the Netherlands* (Oceana 1979) 3, 18-19; Cassese, *International Law in a Divided World* (n 11) 86-87; Cheng (n 22) 38; Henry G. Schermers, 'The International Organizations' in

These rights and duties overlap with the rights and duties states are capable of possessing. This is not surprising given the state-centric atmosphere in which subjects of international law, including international organizations, have generally been determined. But states and international organizations do not necessarily have the same rights and duties under international law. Indeed, as the ICJ in *Reparation for Injuries Suffered in the Service of the United Nations* stated: “[Saying the United Nations has legal personality] is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State.”⁵⁶ Later, in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the ICJ stated that: “The Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence.”⁵⁷

Further, international organizations themselves do not necessarily have the same rights and duties under international law.⁵⁸ The rights and duties of international organizations vary depending on the international organization in question and its allotted functions as

Mohammed Bedjaoui (ed) *International Law: Achievements and Prospects* (Martinus Nijhoff Publishers 1991) 67, 74-75; Cassese, *International Law* (n 11) 73-74; Gaja, First report (n 2) para.15; Maurice Mendelson, ‘The Definition of ‘International Organization’ in the International Law Commission’s Current Project on the Responsibility of International Organizations’ in Maurizio Ragazzi (ed) *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff 2005) 371, 383; Lindblom (n 17) 75-76; White (n 29) 43; Gerhard Hafner, ‘The Legal Personality of International Organizations: The Political Context of International Law’ in August Reinisch and Ursula Kriebaum (eds), *The Law of International Relations - Liber Amicorum Hanspeter Neuhold* (Eleven International Publishing 2007) 81, 84-85; Brownlie (n 1) 57-58, 683-685; Klabbers, *An Introduction* (n 3) 40-41; Tarcisio Gazzini, ‘The relationship between international legal personality and the autonomy of international organizations’ in Richard Collins and Nigel D. White (eds) *International Organizations and the Idea of Autonomy* (Routledge 2011) 196, 198-199; Gazzini, *Personality of international organizations* (n 53) 33. Further, whether or not the capability to be granted immunity from the jurisdiction of domestic courts is a reliable indicator of legal personality under international law is discussed in Gazzini, *Personality of international organizations* (n 53) 41-3; Gazzini, *The relationship between international legal personality and the autonomy of international organizations* (n 55) 198-199

⁵⁶ *Reparation for Injuries* (n 2) 179

⁵⁷ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (n 15) 78. See Malanczuk (n 3) 91-92; White (n 29) 34; Brölmann (n 13) 73; Walter (n 8) para 23; Gazzini, *The relationship between international legal personality and the autonomy of international organizations* (n 55) 199; Gazzini, *Personality of international organizations* (n 53) 43; Schermers and Blokker (n 11) 993

⁵⁸ *Reparation for Injuries* (n 2) 178; D.P. O’Connell, *International Law, Volume One* (2nd edn, Stevens & Sons 1970) 81-82; Klabbers, *An Introduction* (n 3) 39; Sands and Klein (n 1) 476

expressly or impliedly set out in the constituent treaty or developed in practice.⁵⁹ In *Reparation for Injuries Suffered in the Service of the United Nations*, the ICJ stated: “[T]he rights and duties of an entity such as the [United Nations] must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.”⁶⁰ This reasoning was later extended to international organizations more generally in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*. The ICJ stated in this case that: “International organizations are governed by the ‘principle of specialty’, that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.”⁶¹

The general consensus is, however, that the rights and duties listed above – capability to conclude treaties, capability to bring claims under international law, capability to be held responsible under international law and capability to be granted immunity from the jurisdiction of domestic courts – are those an international organization must be capable of possessing to be considered a subject of international law. But they are not strict requirements. All, several or one of these rights and duties may be relevant and lead to a determination of legal personality under international law.⁶²

The other criterion to be met in order to determine whether or not to grant an international organization legal personality under international law is a separate will from its member states. Acts performed by an international organization must be able to be imputed to the international organization itself and not merely to its member states.⁶³ States create international organizations but once created, international organizations must have a *volenté distincte*, otherwise they may be viewed as a collection of states acting together rather than a separate entity established by them.

⁵⁹ See Cassese, *International Law in a Divided World* (n 11) 86; Malanczuk (n 3) 91-92; Cassese, *International Law* (n 11) 73; Alvarez (n 40) 137; Walter (n 8) para 23; Schermers and Blokker (n 11) 993

⁶⁰ *Reparation for Injuries* (n 2) 180

⁶¹ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (n 15) 78. See Alvarez (n 40) 134-5

⁶² Cheng (n 22) 38; Lindblom (n 17) 75; Klabbbers, *An Introduction* (n 3) 40; Commentaries (n 1) 8-9

⁶³ *Reparation for Injuries* (n 2) 179; Mosler (n 3) 722; Amerasinghe (n 2) 78; Alvarez (n 40) 6; White (n 29) 43; Sands and Klein (n 1) 478; Commentaries (n 1) 9

The criterion of a separate will from its member states is intrinsically connected to the previously discussed criterion of capability to possess rights and duties under international law. To be considered a subject of international law, an international organization must be capable of possessing rights and duties under international law which is only possible if the international organization has a separate will from its member states. At the same time, to be considered a subject of international law, an international organization must have a separate will from its member states which is only possible if the international organization is capable of possessing rights and duties under international law. These two criteria are symbiotic. Indicators of a separate will from its member states are thus seen in the rights and duties under international law, described above, that an international organization must be capable of possessing. Other indicators often cited as showing a separate will from its member states include, *inter alia*, permanency, separate functions and purposes, organs, membership and decision-making by majority, rather than unanimous, vote.⁶⁴

The will of the member states approach relying on implicit intention will now be applied to formal partnerships or alliances, such as RBM and Stop TB, and to separate organizations, such as GAVI and the Global Fund, in order to decide on the legal status of these partnerships under international law.

Are formal partnerships or alliances, such as RBM and Stop TB, capable of possessing rights and duties and do these partnerships have a separate will thereby leading to legal personality under international law, according to the will of the member states approach relying on implicit intention?

First, are RBM and Stop TB capable of concluding treaties, bringing claims under international law, being held responsible under international law or being granted immunity from the jurisdiction of domestic courts? A review of the Memorandum of Understanding between the Roll Back Malaria Partnership and the World Health

⁶⁴ Cassese, *International Law* (n 11) 72; White (n 29) 30-31

Organization Concerning Hosting, Secretariat and Administrative Service⁶⁵ and the Basic Framework for the Global Partnership to Stop TB⁶⁶ indicates that both RBM and Stop TB are only able to engage in the aforementioned activities through the hosting international organization – the WHO. The WHO enters into legal agreements and institutes or defends legal proceedings on behalf of these partnerships.⁶⁷ Further, the staff, funds, property and assets of these partnerships have immunity from the jurisdiction of domestic courts via the WHO.⁶⁸ Also, practice, in this regard, is absent. There is no evidence of RBM or Stop TB concluding treaties. Also, there are no recorded instances of claims being brought by or against RBM or Stop TB under international law and consequently no invocations of immunity from the jurisdiction of domestic courts.

Second, do RBM and Stop TB have a separate will? If the foregoing capabilities are seen as indicators of a separate will then the absence of these capabilities probably signals the absence of a separate will. Further, RBM and Stop TB operate within the auspices of a hosting organization – the WHO.⁶⁹ The rules and regulations of the WHO apply to RBM and Stop TB, subject to adaptations to meet the specific needs of these partnerships.⁷⁰ The acts performed by RBM and Stop TB are thus not imputable to these partnerships in their own right but rather to the hosting international organization – the WHO – who acts on their behalf.⁷¹ Other indicators, such as permanency, separate functions and purposes, organs, membership and decision-making by majority, rather than unanimous, vote, need not be further considered since regardless of whether or not RBM and Stop TB exhibit these indicators, these partnerships are only able to operate through the WHO. RBM and Stop TB do not have a separate will.

⁶⁵ RBM MoU (n 45)

⁶⁶ Stop TB Basic Framework (n 44)

⁶⁷ RBM MoU (n 45) art 2.1; Stop TB Basic Framework (n 44) Section III

⁶⁸ RBM MoU (n 45) arts 3.2, 3.8; Stop TB Partnership, Request for Proposals, Independent Evaluation of the Global Stop TB Partnership, 20 March 2007, 15 <<http://www.stoptb.org/assets/documents/news/announcements/RFP20Mar.pdf>> accessed 26 May 2012

⁶⁹ RBM MoU (n 45) art 2.1; About Us, <<http://www.stoptb.org/about/>> accessed 26 May 2012

⁷⁰ RBM MoU (n 45) arts 2.2, 7; About Us (n 69)

⁷¹ RBM MoU (n 45) art 2.1; Stop TB Basic Framework (n 44) Section III

Formal partnerships or alliances, such as RBM and Stop TB, are not capable of possessing rights and duties and do not have a separate will. Thus, they do not have legal personality under international law according to the will of the member states approach relying on implicit intention.

Are separate organizations, such as GAVI and Global Fund, capable of possessing rights and duties and do these partnerships have a separate will thereby leading to legal personality under international law, according to the will of the member states approach relying on implicit intention?

First, are GAVI and the Global Fund capable of concluding treaties, bringing claims under international law, being held responsible under international law or being granted immunity from the jurisdiction of domestic courts? The Statutes⁷² and By-Laws⁷³ of GAVI and the By-Laws⁷⁴ of the Global Fund make no mention of these capabilities. In practice, however, there seems to be, to a limited extent, evidence of such capabilities. This evidence requires, however, further investigation before drawing any conclusions.

GAVI and the Global Fund regularly enter into legal agreements with states. GAVI signs grant agreements with states who donate funds supporting the International Finance Facility for Immunisation (IFFIm).⁷⁵ The Global Fund signs grant agreements with the Principal Recipient of a certain state relating to the receiving of funds.⁷⁶ Are these agreements treaties? These are bilateral agreements between a foundation, i.e. GAVI or the Global Fund, and a state. Agreements between a private entity incorporated in domestic law and a state are not seen as constituting treaties.⁷⁷ Also, these agreements

⁷² GAVI Statutes (n 46)

⁷³ GAVI By-Laws (n 47)

⁷⁴ The Global Fund By-Laws (n 48)

⁷⁵ How GAVI is funded <<http://www.gavialliance.org/funding/how-gavi-is-funded/>> accessed 26 May 2012; Innovative finance <<http://www.gavialliance.org/funding/how-gavi-is-funded/innovative-finance/>> accessed 26 May 2012. See Chapter 2, Section 2.2.2.1

⁷⁶ Principal and Sub-Recipients <<http://www.theglobalfund.org/en/about/structures/pr/>> accessed 26 May 2012; Core Structures <<http://www.theglobalfund.org/en/about/structures/>> accessed 26 May 2012. See Chapter 2, Section 2.2.2.2

⁷⁷ Anthony Aust, *Modern Treaty Law and Practice* (CUP 2000) 15

are governed by domestic law rather than international law which further leads one to the conclusion that these agreements are not treaties.⁷⁸

GAVI and the Global Fund have also signed headquarters agreements with Switzerland – the Agreement between the GAVI Alliance and the Swiss Federal Council in order to determine the legal status of the GAVI Alliance in Switzerland⁷⁹ and the Agreement between the Swiss Federal Council and the Global Fund to Fight AIDS, Tuberculosis and Malaria in view of determining the legal status of the Global Fund in Switzerland,⁸⁰ respectively. These agreements are bilateral in nature between a foundation, i.e. GAVI or the Global Fund, and a state, i.e. Switzerland, and thus are not seen as constituting treaties.⁸¹ Also, the governing law of these agreements is not specified but is presumed to be the domestic law of Switzerland rather than international law thus further supporting the conclusion that these agreements are not treaties.

As to bringing claims and being held responsible under international law, there are no recorded instances of such happenings with respect to either GAVI or the Global Fund. Resultantly, there are no instances of GAVI or the Global Fund invoking immunity from the jurisdiction of domestic courts. There are, however, rules in place giving GAVI and the Global Fund immunity from the jurisdiction of domestic courts in certain states, as needed.

⁷⁸ See, for example, the Grant Agreement created by Her Britannic Majesty's Secretary of State Acting Through the Department for International Development as the Grantor in favor of The GAVI Fund Affiliate as the initial Beneficiary, 28 September 2006, art 11.1 (on file with author). The GAVI Fund Affiliate is established as a charity under the laws of England and Wales and is intended to be the recipient of funds raised in international capital markets by IFFIm. This Grant Agreement is, according to Article 11.1, governed by the laws of England and Wales. See the template for a Program Grant Agreement between the Global Fund and a Principal Recipient, art 36 <www.theglobalfund.org/documents/lfa/LFA_StandardGrantAgreement_Form_en/> accessed 26 May 2012. A Program Grant Agreement is, according to Article 36, governed by the UNIDROIT Principles (2004) (UNIDROIT Principles of International Commercial Contracts <<http://www.unidroit.org/english/principles/contracts/main.htm>> accessed 26 May 2012) which invokes rules of private international law.

⁷⁹ Agreement between the GAVI Alliance (Global Alliance for Vaccines and Immunization) and the Swiss Federal Council in order to determine the legal status of the GAVI Alliance in Switzerland, 1 January 2009 (on file with author)

⁸⁰ Agreement between the Swiss Federal Council and the Global Fund to Fight AIDS, Tuberculosis and Malaria in view of determining the legal status of the Global Fund in Switzerland, 13 December 2004 <<http://www.theglobalfund.org/en/>> accessed 26 May 2012

⁸¹ Aust (n 77) 15

GAVI has immunity from the jurisdiction of domestic courts in Switzerland in accordance with a headquarters agreement with Switzerland – the Agreement between the GAVI Alliance and the Swiss Federal Council in order to determine the legal status of the GAVI Alliance in Switzerland⁸² – and the Federal Act on the Privileges, Immunities and Facilities and the Financial Subsidies granted by Switzerland as a Host State (Host State Act).⁸³ The Global Fund has immunity from the jurisdiction of domestic courts in Switzerland based on a headquarters agreement with Switzerland – the Agreement between the Swiss Federal Council and the Global Fund to Fight AIDS, Tuberculosis and Malaria in view of determining the legal status of the Global Fund in Switzerland.⁸⁴ It also has immunity from the jurisdiction of domestic courts in the United States, as provided in the International Organizations Immunities Act.⁸⁵ Finally, the Global Fund has immunity from the jurisdiction of domestic courts in Moldova, Montenegro, Rwanda, Swaziland, Ghana, Ethiopia and Georgia through the Agreement on Privileges and Immunities of the Global Fund to Fight AIDS, Tuberculosis, and Malaria.⁸⁶ It must be

⁸² Agreement between the GAVI Alliance and the Swiss Federal Council (n 79)

⁸³ The Federal Act on the Privileges, Immunities and Facilities and the Financial Subsidies granted by Switzerland as a Host State (Host State Act), 22 June 2007 <<http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/dipl/diplin.Par.0009.File.tmp/Host%20State%20Act.pdf>> accessed 26 May 2012; Host State Act website <<http://www.eda.admin.ch/eda/en/home/topics/intorg/chres/reslaw.html>> accessed 26 May 2012; GAVI Press releases, GAVI recognized as an international institution, 23 June 2009 <<http://www.gavialliance.org/library/news/press-releases/2009/gavi-recognised-as-international-institution/>> accessed 26 May 2012

⁸⁴ Agreement between the Swiss Federal Council and the Global Fund (n 80)

⁸⁵ An act to extend certain privileges, exemptions, and immunities to international organizations and to the officers and employees thereof, and for other purposes, 59 Stat. 669, 79th Congress, Dec. 29. 1945 <<http://www.ipu.org/finance-e/PL79-291.pdf>> accessed 26 May 2012 (International Organizations Immunities Act or IOIA)

⁸⁶ The template of this agreement can be found at The Global Fund, Twentieth Board Meeting, 9-11 November 2009, GF/B20/4 Attachment 1, Annex A: Agreement on Privileges and Immunities of the Global Fund to Fight AIDS, Tuberculosis, and Malaria <<http://www.theglobalfund.org/en/board/meetings/twentieth/documents/>> accessed 26 May 2012. A copy of the actual agreement is not available to the public. This agreement has not yet entered into force but will do so two weeks after the date of deposit of the tenth instrument of ratification (art 8). To date, Moldova has signed and ratified and Montenegro, Rwanda, Swaziland, Ghana, Ethiopia and Georgia have signed. (Global Fund Press Release, Moldova Signs Agreement to Grant Privileges and Immunities to the Global Fund, 28 September 2010 <http://www.theglobalfund.org/en/mediacenter/pressreleases/Moldova_signs_agreement_to_grant_privileges_and_immunities_to_the_Global_Fund/> accessed 26 May 2012; E-mail from Joseph Chiu, Legal Officer, the Global Fund to Fight AIDS, Tuberculosis and Malaria to author (27, 29 July and 2 August 2011 and 29 May 2012))

highlighted that it is only in the aforementioned states that these partnerships have immunity from the jurisdiction of domestic courts. These partnerships do not have immunity from the jurisdiction of domestic courts of states that have not so agreed. These partnerships are thus capable of being granted immunity from the jurisdiction of domestic courts but only in certain states and therefore this capability cannot be viewed as one leading to legal personality under international law in all states.

Second, do GAVI and the Global Fund have a separate will? If the aforementioned capabilities are seen as indicators of a separate will then the lack of these capabilities probably reveals the lack of a separate will. Separate will is however further determined by considering, for example, permanency, separate functions and purposes, organs, membership and decision-making by majority, rather than unanimous, vote. GAVI and the Global Fund are both permanent entities with separate functions and purposes set out in their constituting documents;⁸⁷ organs, including a board and a secretariat⁸⁸ and members from the public and private sectors.⁸⁹ Also, both of these partnerships make decisions by majority vote; meaning that decisions are taken by the partnership as a whole, rather than each partner separately, thereby evidencing a separate will.⁹⁰ GAVI and the Global Fund are thus organized in such a way that they have a separate will from the constituting members and, therefore, have the ability to have legal personality in their own right.

Separate organizations, such as GAVI and the Global Fund, thus seem to have a separate will but there is no unwavering evidence that they are capable of possessing rights and duties under international law. If these partnerships are not capable of possessing rights and duties under international law then it would seem that the separate will of these partnerships exists on the domestic plane alone rather than the international plane as well. The conclusion drawn is that separate organizations, such as GAVI and the Global Fund,

⁸⁷ GAVI Statutes (n 46); GAVI By-Laws (n 47); The Global Fund By-Laws (n 48)

⁸⁸ GAVI Statutes (n 46) art 8; Core Structures (n 76)

⁸⁹ GAVI Statutes (n 46) art 9; Board composition <<http://www.gavialliance.org/about/governance/gavi-board/composition/>> accessed 26 May 2012; The Global Fund By-Laws (n 48) art 7.1

⁹⁰ GAVI By-Laws (n 47) art 2; GAVI Statutes (n 46) art 15; The Global Fund By-Laws (n 48) art 7. See Klabbers, *An Introduction* (n 3) 49

do not have legal personality under international law according to the will of the member states approach relying on implicit intention.

In sum, formal partnerships or alliances, such as RBM and Stop TB, and separate organizations, such as GAVI and the Global Fund, do not have legal personality under international law applying the will of the member states approach, relying on explicit or implicit intention.

One inherent problem with the will of the member states approach, whether relying on explicit or implicit intention, is that it does not properly address the status under international law of an international organization in non-member states. Approaches that address the relationship of an international organization with both member and non-member states, and might lead to a better understanding of an analogous situation with global health public-private partnerships, are the recognition approach and the objective approach.

3.2.2. Recognition Approach

The recognition approach argues that legal personality under international law only exists in relation to those states that have recognized an entity, explicitly or implicitly, as having legal personality under international law.⁹¹ It is then possible that an entity may have legal personality under international law in relation to one state but not have legal personality under international law in relation to another state.⁹²

This approach is most often invoked in order to explain how entities that are not subjects of international law in the traditional sense nevertheless are seen as subjects of international law.⁹³ The Holy See and the Order of Malta are often cited as examples in

⁹¹ Schwarzenberger and Brown (n 3) 55-58, 63; Mendelson (n 55) 384; Walter (n 8) paras 14, 24; Brownlie (n 1) 57; Portmann (n 1) 80-1

⁹² Portmann (n 1) 23, 80-81, 83-84

⁹³ Brownlie (n 1) 58. See Schwarzenberger and Brown (n 3) 64

this regard.⁹⁴ The recognition approach thus provides a means to bring entities that would not otherwise be considered legal persons under international law within the category of legal persons under international law. It further does so without having to step outside the positivistic perspective of international law since states are considered the sole recognizers of legal personality under international law.⁹⁵

The reasoning is simple enough but then how does it work in practice? How does one determine whether a state has recognized (or not) an entity as having legal personality under international law? Such a determination can only be made by looking at what states say and what states do. This is reminiscent of the will of the member states approach which relies on what states explicitly say in the constituent treaty or implicitly say in the provisions of the constituent treaty and/or do in practice.⁹⁶ A difference between the approaches is, however, that the will of the member states approach considers the intention of only member states and together as a whole while the recognition approach considers the intention of not only member states but also non-member states and does so, on a state by state basis. The benchmarks for determining intention to grant (or not) legal personality under international law are nonetheless generally the same in both approaches. Is the intention to allocate legal personality under international law to the entity explicitly indicated by states, whether in writing or orally? Or is the intention to allocate legal personality under international law to the entity implicitly indicated through the engagement of states in legal relations under international law with the entity?⁹⁷ If any of these intentions are found then a state can be interpreted as recognizing the entity as a subject of international law.

As the benchmarks for applying the recognition approach are the same as the benchmarks for applying the will of the member states approach, these benchmarks need not be explored again in detail. Instead, a cross-reference here to the earlier discussion will

⁹⁴ See Schwarzenberger and Brown (n 3) 62-63; Brownlie (n 1) 64; Portmann (n 1) 115-119

⁹⁵ United Nations Juridical Yearbook 1991 296-301; Portmann (n 1) 80-81, 83-84; Schermers and Blokker (n 11) 994

⁹⁶ See Section 3.2.1

⁹⁷ *ibid*

suffice.⁹⁸ This logic extends as well to the analysis of these approaches in the context of global health public-private partnerships.⁹⁹ One caveat to merely providing a cross-reference here to the earlier discussion, however, relates to the documents granting global health public-private partnerships immunity from the jurisdiction of domestic courts. The will of the member states approach considered these documents but it did so only for the purpose of determining whether these partnerships had the capability to be granted immunity from the jurisdiction of domestic courts, thereby evidencing the capability to possess rights and duties under international law. It did not consider whether in these documents a state had recognized a partnership has having legal personality under international law. Such a consideration is more aptly undertaken within the recognition approach.

The recognition approach will now be explored in the context of global health public-private partnerships. To begin, there are no signs of recognition by states of the legal personality under international law of formal partnerships or alliances, such as RBM and Stop TB. There are, however, signs of recognition by states of the legal personality under international law of separate organizations, such as GAVI and the Global Fund, and therefore these partnerships will be the focus of analysis of the recognition approach applied to global health public-private partnerships.

GAVI signed a headquarters agreement with Switzerland – the Agreement between the GAVI Alliance and the Swiss Federal Council in order to determine the legal status of the GAVI Alliance in Switzerland (Headquarters Agreement).¹⁰⁰ In the opening article of the Headquarters Agreement, “[t]he Swiss Federal Council acknowledges, for the purpose of the present Agreement, the international legal personality and capacity of the GAVI Alliance within Switzerland.”¹⁰¹ The Headquarters Agreement thus explicitly sets out the

⁹⁸ *ibid*

⁹⁹ *ibid*

¹⁰⁰ Agreement between the GAVI Alliance and the Swiss Federal Council (n 79)

¹⁰¹ *ibid* art 1

legal personality under international law of GAVI in Switzerland. Switzerland recognizes GAVI as a subject of international law.¹⁰²

The Global Fund also signed a headquarters agreement with Switzerland – Agreement between the Swiss Federal Council and the Global Fund to Fight AIDS, Tuberculosis and Malaria in view of determining the legal status of the Global Fund in Switzerland (Headquarters Agreement).¹⁰³ In the opening article of the Headquarters Agreement, “[t]he Swiss Federal Council recognizes for the purposes of this Agreement the international juridical personality and legal capacity in Switzerland of the Global Fund.”¹⁰⁴ The Headquarters Agreement therefore expressly sets out the legal personality under international law of the Global Fund in Switzerland. Switzerland also recognizes the Global Fund as a subject of international law.

The Global Fund also enjoys privileges and immunities in the United States through the International Organizations Immunities Act (IOIA).¹⁰⁵ Congress designated the Global Fund as an international organization for the purposes of the IOIA in May 2003.¹⁰⁶ International organization, under the IOIA, means an international organization in which the United States participates and which has been designated through an Executive Order

¹⁰² The government of Switzerland, in a message to Parliament, however stated that intergovernmental organizations possess legal personality under international law but international institutions (i.e. GAVI) do not possess legal personality under international law and instead occupy a place in international relations. (“[l]’organisation intergouvernementale dispose toujours de la personnalité juridique internationale, qui lui est conférée par le traité international qui le crée. Tel n’est pas le cas de l’institution internationale qui jouit toutefois d’une place particulière dans les relations internationales. Nous pouvons citer comme exemples des institutions telles que l’Organisation pour la sécurité et la coopération en Europe (OSCE)” (Message relatif à la loi fédérale sur les privilèges, les immunités et les facilités, ainsi que sur les aides financiers accordés par la Suisse en tant qu’Etat hôte (Loi sur l’Etat hôte, LEH, 2006: 7617) cited in Gazzini, *Personality of international organizations* (n 53) 43)). This contradicts the Headquarters Agreement and is possibly explained as a statement in relation to legal personality under international law in all states rather than a statement in relation to legal personality under international law in Switzerland alone.

¹⁰³ Agreement between the Swiss Federal Council and the Global Fund (n 80)

¹⁰⁴ *ibid* art 1

¹⁰⁵ IOIA (n 85)

¹⁰⁶ 22 USC §7622: Participation in the Global Fund to Fight AIDS, Tuberculosis and Malaria, §7622 (b)(2) <<http://www.gpo.gov/fdsys/pkg/USCODE-2006-title22/pdf/USCODE-2006-title22-chap83-subchapII-sec7622.pdf>> accessed 26 May 2012; ‘International Organizations: The United States Extends the International Organizations Immunities Act to the Global Fund to Fight Aids, Tuberculosis and Malaria’ (22 January 2006) Juscogens.net, Recent Developments in International Law <http://www.juscogens.net/orgs/global_fund_to_fight_aids_tuberculosis_and_malaria/> accessed 26 May 2012

of the President of the United States as being entitled to enjoy the privileges and immunities set out in the IOIA.¹⁰⁷ In May 2003, Congress authorized the United States to participate in the Global Fund¹⁰⁸ and in January 2006, an Executive Order was made designating the Global Fund a public international organization entitled to enjoy the privileges and immunities provided in the IOIA.¹⁰⁹ The IOIA does not make explicit reference to legal personality under international law. However, labeling the Global Fund as an international organization and permitting it to fall within the ambit of the IOIA is implicit evidence that the United States recognizes the Global Fund as having legal personality under international law.

The Global Fund, finally, has privileges and immunities in Moldova, Montenegro, Rwanda, Swaziland, Ghana, Ethiopia and Georgia via the Agreement on Privileges and Immunities of the Global Fund to Fight AIDS, Tuberculosis, and Malaria (Agreement).¹¹⁰ The opening article of the Agreement states that the Global Fund has “juridical [i.e. legal] personality” and the capacity to contract, acquire and dispose of immovable and movable property and institute legal proceedings.¹¹¹ The mention of personality does not specify whether this personality is in relation to domestic law or in relation to international law. It is possible the personality is domestic only; nothing clearly indicates the personality is international as well. But, if one compares to how the Global Fund is perceived in Switzerland and the United States, an argument can be made that Moldova, Montenegro, Rwanda, Swaziland, Ghana, Ethiopia and Georgia also intend to recognize the Global Fund as a subject of international law.

¹⁰⁷ IOIA (n 85) s 1

¹⁰⁸ 22 USC §7622 (n 106) §7622 (b)(1); International Organizations: The United States Extends the International Organizations Immunities Act to the Global Fund (n 106)

¹⁰⁹ Executive Order 13395 of January 13, 2006 Designating the Global Fund To Fight AIDS, Tuberculosis and Malaria as a Public International Organization Entitled To Enjoy Certain Privileges, Exemptions, and Immunities, 13 January 2006 , s 1 <<http://www.gpo.gov/fdsys/pkg/FR-2006-01-19/pdf/06-554.pdf>> accessed 26 May 2012; 22 USC §288f-6: Global Fund to Fight AIDS, Tuberculosis and Malaria; extension of privileges, exemptions, and immunities <<http://www.gpo.gov/fdsys/pkg/USCODE-2009-title22/pdf/USCODE-2009-title22-chap7-subchapXVIII-sec288f-6.pdf>> accessed 26 May 2012

¹¹⁰ n 86

¹¹¹ Agreement on Privileges and Immunities of the Global Fund (n 86) art 1

GAVI and the Global Fund are thus being recognized by certain states as having legal personality under international law. Such status must be acknowledged however these situations are, at present, *sui generis* and limited to select states. If, however, these states are open to recognizing the legal personality under international law of these partnerships, perhaps it is only a matter of time before other partnerships and other states follow suit.

Applying the recognition approach does not lead to a materially different result than applying the will of the member states approach, in the context of global health public-private partnerships. The exceptions being GAVI and its legal personality under international law recognized in Switzerland and the Global Fund and its legal personality under international law recognized in Switzerland and the United States and, possibly also, in Moldova, Montenegro, Rwanda, Swaziland, Ghana, Ethiopia and Georgia. RBM and Stop TB could also, in theory, be recognized as legal persons under international law. But these partnerships have not yet been recognized as such and therefore do not have legal personality under international law applying the recognition approach.

Naysayers of the recognition approach argue that it is not necessary to consider whether or not the legal personality of an international organization has been recognized since international organizations exist as an objective fact.¹¹² It is to the objective approach that this chapter now turns.

3.2.3. The Objective Approach

The objective approach holds that legal personality under international law for an international organization is based on general international law rather than tied to the will of the member states or to recognition by member states or non-member states.¹¹³ Such legal personality is then original, as opposed to derived from states.

¹¹² G.G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice: International Organizations and Tribunals' (1952) 29 *British Yearbook of International Law* 1, 4-5; Higgins (n 16) 47-48; Commentaries (n 1) 9 discussing *Reparation for Injuries* (n 2) 185

¹¹³ See Schermers and Blokker (n 11) 989

Finn Seyersted, the most notable proponent of the objective approach,¹¹⁴ argues that there is no basis for maintaining that the legal personality of an international organization under international law depends on the provisions of the constituent treaty of the organization or on the intentions of the drafters of the constituent treaty of the organization, i.e. member states.¹¹⁵ It also does not depend on recognition by member states or non-member states. The objective approach nevertheless addresses the relationship of an international organization with both member states and non-member states since legal personality under international law is, according to this approach, based on general international law and thus conclusive for all states, regardless of intention or recognition.¹¹⁶

It is asserted by Seyersted that international organizations in practice perform sovereign¹¹⁷ and international acts whether or not authorized to do so and lists such sovereign and international acts as including, *inter alia*, exercising sovereign jurisdiction over organs and territory, concluding treaties and sending and receiving legations.¹¹⁸ Further, according to Seyersted, if an international organization does not perform all the sovereign and international acts which a state does, it is not because of an incapability to do so but because a practical need for such acts does not exist. According to the objective approach, international organizations, like states, have an inherent capability to perform any sovereign and international acts which they have a practical need to perform.¹¹⁹

¹¹⁴ Finn Seyersted, *Objective International Personality of Intergovernmental Organizations, Do Their Capacities Really Depend upon the Conventions Establishing Them?* (Copenhagen 1963). See Finn Seyersted, *Common Law of International Organizations* (Martinus Nijhoff 2008). See also Brölmann (n 13) 82, 84, 86

¹¹⁵ Seyersted, *Objective International Personality* (n 114) 45

¹¹⁶ See Cassese, *International Law in a Divided World* (n 11) 86-87; Cassese, *International Law* (n 11) 73-74; Alvarez (n 40) 138; Commentaries (n 1) 9 discussing *Reparation for Injuries* (n 2) 185

¹¹⁷ The term 'sovereign' used by Seyersted is not intended to be used in a "restrictive territorial sense, but broadly as meaning legally independent (i.e. not subject to the jurisdiction) of any other organized community except the participating physical or legal persons acting jointly through the organs of the Organization, State or other organized community concerned." (Seyersted, *Objective International Personality* (n 114) fn 112)

¹¹⁸ *ibid* 21

¹¹⁹ *ibid* 28, 100. See Peter Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status* (Martinus Nijhoff 1994) 42, 56-57

Such inherent capability is said to vest in an international organization as soon as the international organization exists.¹²⁰ Once an international organization has been established, regardless of how, it is a subject of international law. The only requirement is that it possesses the “objective characteristics” of an international organization.¹²¹

What then are the objective characteristics of an international organization? Seyersted lists the objective characteristics of an international organization as including being established by two or more states; not being subject to the authority of any one state or other organized community but instead being subject to the authority of the participating states; performing sovereign and/or international acts in its own name and not being authorized to assume obligations merely on behalf of the participating states.¹²² He continues however to set out what he considers to be the “crucial and only” characteristic needed to allocate legal personality under international law: organs that are sovereign or self-governing or not subject to the jurisdiction of another organized community.¹²³ Or, in other words, a separate will.

This requirement of a separate will in the objective approach overlaps with the separate will criterion in the will of the member states approach relying on implicit intention.¹²⁴ These approaches do not overlap in the underlying reasoning. The will of the member states approach relying on implicit intention considers the intention of member states to allocate legal personality, as evidenced in the provisions of the constituent treaty and demonstrated in practice.¹²⁵ The objective approach is not concerned with the intention of member states and instead focuses on the grant of legal personality by general

¹²⁰ Seyersted, *Objective International Personality* (n 114) 28-29

¹²¹ *ibid* 46-47

¹²² *ibid*

¹²³ *ibid* 48. Seyersted refers to “sovereign communities”, and not merely to states and international organizations, when speaking about subjects of international law. He suggests that the practice of sovereign communities other than states and international organizations may support a general proposition that all sovereign communities are subjects of international law, and that partly sovereign communities are subjects of international law to the extent they are sovereign. See Seyersted, *Objective International Personality* (n 114) 91-92

¹²⁴ See Section 3.2.1.2

¹²⁵ See *Reparation for Injuries* (n 2) 178-179; Amerasinghe (n 2) 78, 82-83; Alvarez (n 40) 131; Brownlie (n 1) 677

international law. The overlap of these approaches exists in their application. Separate will is a key consideration in both approaches, used to determine whether or not an entity has legal personality under international law. A separate will is determined by observing the rights and duties an entity exercises on the international plane, for instance, *inter alia*, concluding treaties, bringing claims under international law, being held responsible under international law or being granted immunity from the jurisdiction of domestic courts. It is also determined by considering, *inter alia*, permanency, separate functions and purposes, organs, membership and decision-making by majority, rather than unanimous, vote.¹²⁶

A discussion of the separate will of global health public-private partnerships has already been undertaken in the section on the will of the member states approach relying on implicit intention and thus it will suffice here to merely cross-reference¹²⁷ and reiterate the conclusions previously drawn. Formal partnerships or alliances, such as RBM and Stop TB, operate within the auspices of a hosting organization – the WHO - and not in their own right. These partnerships thus do not have the capability to conclude treaties, bring claims under international law, be held responsible under international law or be granted immunity from the jurisdiction of domestic courts. The WHO engages in these activities on behalf of these partnerships, if necessary. A separate will is therefore not indicated through these capabilities. Other indicators, such as permanency, separate functions and purposes, organs, membership and decision-making by majority, rather than unanimous, vote, do not merit further consideration because RBM and Stop TB are only able to operate through the WHO, regardless of whether or not these partnerships exhibit these indicators.

Separate organizations, such as GAVI and the Global Fund, also do not have the capability to conclude treaties, bring claims under international law, be held responsible under international law or be granted immunity from the jurisdiction of domestic courts and thus a separate will is also not indicated through these capabilities. GAVI and the

¹²⁶ Cassese, *International Law* (n 11) 72; White (n 29) 30-31

¹²⁷ See Section 3.2.1.2

Global Fund do however exhibit the other indicators of a separate will – permanency, separate functions and purposes, organs, membership and decision-making by majority, rather than unanimous, vote – and therefore have the ability to have legal personality in their own right. But since GAVI and the Global Fund are not capable of possessing rights and duties under international law, the separate will of these partnerships is interpreted as existing only on the domestic plane rather than also on the international plane.

Formal partnerships or alliances, such as RBM and Stop TB, and separate organizations, such as GAVI and the Global Fund, do not have a separate will on the international plane and cannot be considered as having legal personality under international law, according to the objective approach.

The objective approach does, however, face objections. It was stated by the ICJ in *Reparation for Injuries Suffered in the Service of the United Nations*, in relation to the legal personality under international law of the United Nations, that “fifty states, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone.”¹²⁸ It is not clear, however, whether this reasoning extends to international organizations more broadly.¹²⁹ Further, it is argued that this reasoning is contradictory to the consensual nature of international law. If states intended to grant legal personality under international law to an international organization, whether explicitly or implicitly, then this personality should only bind those states that have so intended and should not bind those states that have not so intended.¹³⁰

¹²⁸ *Reparation for Injuries* (n 2) 185

¹²⁹ Alvarez (n 40) 137; Mendelson (n 55) 384-385; Sands and Klein (n 1) 479-80; Schermers and Blokker (n 11) 990-1

¹³⁰ Walter (n 8) para 25; Sands and Klein (n 1) 479-80; Klabbers, *An Introduction* (n 3) 49. See Jan Klabbbers, ‘On Seyersted and his *Common Law of International Organizations*’ (2008) 5 *International Organizations Law Review* 381 for a further critique of the objective approach.

3.3. CONCLUDING REMARKS

Global health public-private partnerships – including formal partnerships or alliances, such as RBM and Stop TB, and separate organizations, such as GAVI and the Global Fund – do not have legal personality under international law, whether the will of the member states approach, the recognition approach or the objective approach is applied. The only exceptions are that GAVI is recognized as having legal personality under international law in Switzerland and the Global Fund is recognized as having legal personality under international law in Switzerland and the United States and, possibly also, in Moldova, Montenegro, Rwanda, Swaziland, Ghana, Ethiopia and Georgia.

Part of the reason for this semblance in result is that these approaches, although trying to differentiate themselves, overlap to a significant degree. The overlap is not in the underlying reasoning of each approach but instead the application of each approach. All three approaches eventually come back to the relationship a proposed subject of international law has with states. The will of the member states approach considers the explicit intention of states as set out in the constituent treaty and the implicit intention of states as evidenced in the provisions of the constituent treaty and demonstrated in practice. In this latter variation of the will of the member states approach, the focus is on the capability to possess rights and duties and a separate will and in order to explore these, regard must be had to whether the entity in question is concluding treaties, bringing claims under international law, being held responsible under international law or being granted immunity from the jurisdiction of domestic courts. The recognition approach holds that an entity is a subject of international law if a state recognizes it as such. This is shown by considering what states say and what states do. Again, regard must be had to whether the entity in question concludes treaties, brings claims under international law, is held responsible under international law or is granted immunity from the jurisdiction of domestic courts. Finally, the objective approach focuses on separate will. It attempts to disassociate from states by focusing instead on general international law. But it cannot do so completely since the separate will of an entity is often indicated through interactions with states, such as for example by concluding treaties, bringing claims under

international law, being held responsible under international law or being granted immunity from the jurisdiction of domestic courts. States, specifically interactions with them, thus remain at the centrifugal point of determinations of legal personality under international law.

There are, however, critiques on the above-described approaches and a commonality of these critiques is often the inability of these approaches to account for the increasing variety of actors on the international plane.¹³¹ An alternative approach suggested is to use the term ‘participant’¹³² rather than the term ‘legal person’ and focus on those persons or entities that exercise power in decision-making processes on the international plane.¹³³ This approach is often suggested in lieu of the will of the member states approach, the recognition approach and the objective approach because it takes account of persons or entities that exercise power in decision-making processes on the international plane yet fall outside the ambit of subjects of international law as normally understood. Participants then possibly include states, international organizations, non-governmental organizations, companies, individuals¹³⁴ and, possibly also, global health public-private partnerships.

But, to be clear, this approach is of a different nature than the other approaches. It does not see international law as a set of rules; instead, it sees international law as an authoritative decision-making process.¹³⁵ It is more than a political decision-making process but is also not restricted to being a legal decision-making process. It is a process of decision-making that includes, *inter alia*, courts, arbitral tribunals and/or formal diplomatic negotiations and is authoritative because the person or entity making the

¹³¹ Bengt Broms, ‘Subjects: Entitlement in the International Legal System’ in R. St. J. Macdonald and Douglas M. Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (Martinus Nijhoff Publishers 1983) 383, 383; Ruth Wedgwood (discussant), Daniel Thürer, ‘The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State’ in Rainer Hofmann and Nils Geissler (eds), *Non-State Actors as New Subjects of International Law* (Duncker & Humblot 1999) 93, 93; Clapham, *Human Rights Obligations* (n 8) 80; Brownlie (n 1) 64

¹³² Higgins (n 16) 50. See José E. Alvarez, ‘Are Corporations “Subjects” of International Law?’ (2011) 9 *Santa Clara Journal of International Law* 1. The term ‘actor’ is also used. See Portmann (n 1) 14, 208-242

¹³³ Higgins (n 16) 50; Portmann (n 1) 208

¹³⁴ Higgins (n 16) 50; Portmann (n 1) 210-211

¹³⁵ *ibid*

decision is seen as having control, the participants consider compliance with the decision as mandatory and/or past decisions are relied on.¹³⁶ Any person or entity involved in the process, and accepted by others involved in the process as part of the process, is then a ‘participant’.¹³⁷

This approach, by focusing on participants in an authoritative decision-making process rather than on legal persons under rules of international law, is thus not limited to the legal realm and is not able to affect allocations of legal personality under international law.¹³⁸ It is for this reason that this approach is not explored further in this chapter. The purpose of this research is to determine how global health public-private partnerships fit within the framework of international law and, in turn, within the framework of responsibility under international law. If this approach does not lead to relevance under international law then further pursuit of this approach does not serve a useful purpose in this discussion.

The *lex lata* situation is that global health public-private partnerships do not have legal personality under international law. This could change over time. Maybe partnerships will begin to conclude treaties, bring claims under international law, be held responsible under international law or be granted immunity from the jurisdiction of domestic courts. And maybe partnerships will begin to show a separate will on the international plane. Or maybe the status of global health public-private partnerships under international law will remain unchanged.

Also, partnerships may be reluctant to acquire legal personality under international law. There are upsides to partnerships not having legal personality under international law – they can more easily develop creative approaches to deal with issues since they are not subject to the constraints of international law.¹³⁹ An analogous situation is that of the

¹³⁶ Rosalyn Higgins, ‘Conceptual Thinking about the Individual in International Law’ (1978) 4(1) *British Journal of International Studies* 1, 3-4; Higgins (n 16) 50; Portmann (n 1) 211-212

¹³⁷ Higgins (n 16) 50; Portmann (n 1) 212-213

¹³⁸ Walter (n 8) para 28; Portmann (n 1) 2-3, 269, 282-283

¹³⁹ See Kent Buse and Amalia Waxman, ‘Public-private health partnerships: a strategy for WHO’ (2001) 79(8) *Bulletin of the World Health Organization* 748, 752. See also, by way of analogy, Charney (n 17)

Organization for Security and Co-operation in Europe (OSCE). The OSCE began as an international conference and eventually developed into an international organization. There was no agreement, however, among the member states as to whether it should have legal personality under international law. One concern was that such status would take away its flexibility and give it the rigidity of a traditional international organization. The legal personality under international law of the OSCE remains a topic of debate.¹⁴⁰ There are, however, also downsides to partnerships not having legal personality under international law. These include, *inter alia*, the inability to sign treaties, as necessary; to bring claims under international law; or to protect its staff on the ground in those states that have not granted the partnership privileges and immunities.¹⁴¹ Regardless of what partnerships are reluctant or not to agree to, the matter, in the end, rests with states and states do not, at present, give partnerships legal personality under international law.

This absence of legal personality under international law has not, however, hindered the ability of these partnerships to impact the rights of individuals in positive and possibly also negative ways. But absent legal personality under international law, responsibility under international law is difficult, if not impossible, to allocate. A question that might be asked is whether the domestic legal system is a better avenue for finding responsibility for the acts of these partnerships. In certain instances, however, these partnerships enjoy immunity from the jurisdiction of domestic courts. The next chapter brings to light the immunity of global health public-private partnerships from the jurisdiction of domestic courts in the context of responsibility for the acts of these partnerships.

765-767; Jan Klabbbers, 'Institutional Ambivalence by Design: Soft Organizations in International Law' (2001) 70 *Nordic Journal of International Law* 403, 408; Charnovitz (n 17) 357

¹⁴⁰ Sonya Brander, 'Making a credible case for a legal personality for the OSCE' (March-April 2009) *OSCE Magazine* 18; Blokker, *International Organisations as Independent Actors* (n 33) 44-46; Giorgio Gaja, Special Rapporteur on the Responsibility of International Organizations, Eighth report on responsibility of international organizations, International Law Commission (14 March 2011) UN Doc A/CN.4/640, 8; Schermers and Blokker (n 11) 991-992. A Draft Convention on the International Legal Personality, Legal Capacity, and Privileges and Immunities of the OSCE, proposed in the Fifteenth Meeting of the Ministerial Council, Madrid, 29 and 30 November 2007, would have given the OSCE international legal personality and privileges and immunities under international law but it has not yet been adopted. (See Brander (n 140) 20-22; Schermers and Blokker (n 11) 992)

¹⁴¹ See Blokker, *International Organisations as Independent Actors* (n 33) 45 and Schermers and Blokker (n 11) 991 discussing the analogous situation of the OSCE.