GRANTING IMMUNITY TO THE GLOBAL PUBLIC-PRIVATE PARTNERSHIPS AND THE RIGHT TO FAIR TRIAL UNDER ARTICLE 6 OF ECHR AND ARTICLE 14 OF THE ICCPR
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Abstract
The Global Public Private Partnerships are being awarded with major operational leverage in acts which are normally the duty of a state. This leverage comes with granting immunities to such organisations. The immunities are granted in order to make the actions of these organisations as swift as possible. However, the immunities are not without unlocking debates about some legal questions. Some possible violations of laws during the operations of these organisations will go unchecked; hence challenging the legality of the “Right to a Fair Trial” under article 6 of ECHR and Article 14 of ICCPR. This anomaly is followed by the questions of granting immunities to these organisations as immunities under international law may only be granted to the International Organisations under some circumstances.

Keywords: Global Public Private Partnership, International Organisations, Right to Fair Trial, Immunities.

Introduction
The emerging role of Global Public Private Partnerships (GPPPs) in global administrative operations is a growing phenomenon. The GPPPs indulge in acts that are normally regarded as the sphere of states and international organisations, for instance, providing access to prevention and treatment measures for certain diseases or improving health infrastructure in certain states. The Global Fund to Fight Aids, Tuberculosis and Malaria (hereinafter Global Fund), for instance, has devoted US$27.6 billion in 140 countries to support large scale prevention, treatment and care programs against AIDS, Tuberculosis and Malaria.¹There are numerous GPPPs actively working worldwide in

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different fields, such as, health, environment, education, fisheries etc. Such a large scale cross border operations by entities which are neither a state nor an international organisation (IO) opens up new forms of legal debates.

Defining a GPPP is not an easy task; thereby no legally acceptable definition is yet adopted. However, a review of the political science literature reveals some consensus around the following proposition, a “global public-private partnership” is a transnational collaborative relationship, at varying degrees of permanence and institutionalization, involving states and a diverse range of non-state actors, constituted to achieve a shared set of public purpose goals (Davinia, A., 2012). These partnerships straddle the conventional divide between state and non-state actors. They often involve partners from government, business, and civil society. These GPPPs go beyond mere contracting across actor lines. They typically demand some joint decision-making and sharing of responsibilities, opportunities, and risks.

The structural existence of GPPPs is diversified in nature. Some exist as a part of an International Organisation and some exist as an independent partnership. They constitute a mixture of governance by non-state actors - such as transnational corporations (TNCs) and non-governmental organizations (NGOs) - along with state actors and international organisations to carry out administrative functions that have formerly been the sole authority of sovereign states (Schäferhoff, M., Campe, S., & Kaan, C., 2009). The legal standing of these partnerships under international law is hysterical in nature. The partnerships contain both legal personalities and non-legal personalities under international law. In order to make an entity responsible under international law its legal personality is of utmost importance. As Patel argues that, “[Legal personality] provides a means by which an actor can be held responsible and/or liable under applicable laws, based on its power, competence and functions. Only legal personality can have a legal authority to exist in law and the means to remain accountable” (Patel, B. N., 2000). The entity having a legal personality under international law is a subject of international law and hence comes under the jurisdiction of international law, and according to the ICJ “possess international rights and duties”. However, the legal responsibility under international law for Global PPP is incomprehensible because it is an amalgamation of both legal
and non-legal entities under international law. The question of the legal personality gives rise to multiple questions of providing immunities to the Global PPPs. This article gives an overview of the immunities provided to the Global PPPs and its compliance with the “right to fair trial” under international law.

A Legal Personality?
The legal personality of a GPPP under international law is debatable and currently incurs no responsibilities under international law. However, the operations of GPPPs are transnational; having no international legal responsibilities the transnational nature of operations raises questions regarding the accountability and liabilities of these partnerships. Adding more to this responsibility enigma “the Global Fund” has been given international organisation (IO) type immunities by the Swiss government albeit not being an IO. The usual “IO type immunities” include immunity for the IO from “every form of legal process” effectively, immunity from jurisdiction and immunity from execution, with immunity from execution not ordinarily subject to waiver, as well as immunity for IO personnel and representatives of IO Member States from “legal process” in respect of official speech and acts (Davinia, A. Z. I. Z., 2012). The United States government have also followed the footsteps by granting IO type immunities to the Global Fund in 2006. The grant of immunities to a GPPP despite the fact that it is not an IO raises the question of its legality under international law. Moreover, the question of accountability is then left unanswered in cases where non-legal practises are reported, for instance, in 2004, an article in The Lancet alleged that Global Fund malaria grant policy in Senegal and Kenya amounted to “medical malpractice”, and contravened World Health Organization “WHO” guidelines (Attaran, A., et.al., 2004). In 2008, poor supply chain management in India put Global Fund financed drugs and health supplies at risk of compromised efficacy. As pointed out above, the GPPPs are engaged in practises which deals with public at large and which originally was the state responsibility. Thus, there is a strong possibility that the IO type immunities granted to GPPPs might infringe the “right to fair trial” as bestowed by the Article 6 of the European Convention on Human Rights (ECHR) and the Article 14 of International Covenant on Civil and Political Rights (ICCPR). Thereby, it is important to provide a legal justification of the IO type immunities granted to the GPPPs. Moreover, it is also important to find a
legal way of granting responsibilities to the GPPPs under international law.

**Considering the “right to fair trial”, can the GPPPs be awarded an IO type privileges and immunities under international law?**

In order to ascertain the importance of the privileges and immunities for the functioning of the GPPPs we must consider its importance for the IOs. The ECtHR in *Waite and Kennedy* stated that privileges and immunities are essential means of ensuring the proper functioning of the IOs i.e. letting them free from state interference. For instance, the immunity of IOs for its administrative work allows them to appoint the appropriate personnel without any state interference. However, the recent case law shows that the immunities are not absolute but restricted where access to justice issues are engaged.

In *Waite and Kennedy vs. Germany* the European Space Agency (ESA) claimed its immunity from legal proceedings under the ESA convention (Attaran, A., et.al., 2004). The immunity was granted by all the municipal courts; the ECtHR however mentioned the importance of the right to fair trial. The immunity was granted because the applicants had a reasonable alternative way of remedy available to them to protect their rights under article 6 of the ECHR (Attaran, A., et.al., 2004). Hence, the right to a fair trial may be invoked in a domestic court in cases where an alternate remedy is not available to the claimant. If an alternate remedy is not available and the domestic courts also refuse to entertain the case where an IO is involved, than the state involved will be allegedly refraining from its responsibilities under art. 6 of the ECHR and article 14 of ICCPR. In order to enjoy immunity from legal proceedings the treaties or other international law documents giving birth to an IO shall contain dispute resolution mechanism, if not than the international tribunals or courts shall stress on providing such means or the domestic courts and human rights bodies should stress upon such requirement (Reinisch, A., & Weber, U. A., 2004). Moreover, in the absence of any alternate dispute resolution mechanism the domestic courts might disregard the immunities granted for the furtherance of the right to fair trial.
The essence of the ECrtHR decision has been extended to the different European jurisdictions. In *UNESCO vs Boulois*, a French appellate court rejected a plea of immunity by directly invoking the ECHR. The court said that granting immunity “would inevitably lead to preventing (Mr. Boulois) from bringing his case to a court. This situation should be contrary to public policy as constitutes a denial of justice and a violation of the provisions of Art. 6(1) of the ECHR.” (Reinisch, A., & Weber, U. A., 2004 p. 84) In more recent case of *Western European Union v. Siedler* dealing with the employment issue, the Belgian Labour Appeals Court rejected the immunity plea to safeguard the right of access to justice. The Belgian courts applied the same principle in cases of *Lutchmaya* and *B.D.* as well. The issue in question for both these cases was that of employment. Besides invoking the ECrtHR decision in *Waite and Kennedy*, the Belgian courts in addition stated that the alternate means of remedies must also meet some qualitative due process criteria before an organisation can rely on it to justify invoking its immunity. The domestic courts might invoke the *Waite and Kennedy* decision for ascertaining the quality of the alternate dispute settlement mechanism of an IO in order to protect the responsibility of the state under article 6 of ECHR and article 14 of the ICCPR. However, in cases of non-satisfactory dispute settlement mechanisms within the IO, the court has to settle the case itself. In such situation, the court may apply the domestic laws related with the issue or the IOs law. In *Siedler* the relevant law of the IO was applied in order to maintain the international status of the organisation.

The smooth and effective operations of the IOs require certain privileges and immunities. The operations of the GPPPs are also transnational and thus will in some cases require the same kind of immunities granted to the IOs despite the fact that they are not international personalities. However, the outcome of its application within the domestic courts might be different. In the furtherance of state responsibility under article 6 of ECHR and article 14 of ICCPR, the state courts will have to apply the availability of alternate dispute settlement mechanism (as discussed above) more profoundly. The state law, for instance, might be given more preference than the organisations law as the international personality of state is more acceptable. Moreover, the IOs invoke their immunities from the customary international law, treaties and other international law documents. The GPPPs can only rely on their
agreements with the states while invoking their immunities. However, in these cases a state is already involved in an agreement with an organisation, thereby it accepts the repercussions of the agreement; thus, it should sign an agreement if it is sure that the agreement is not against any of their international obligation (e.g. obligation under the ECHR or ICCPR). In cases where a wrong (under international norms) is attributed to a GPPP the question of a state not complying with its international responsibility might always be raised; as it is a state who have responsibilities under international law and not a non state actor. Moreover, it will be difficult in law for a domestic court to negate an agreement made by its state with a private organisation; if it happens then the agreement will be null and void ab initio. As identified earlier the GPPPs are involved in activities that could formerly be attributed to states only; then in performing such duties there is a likelihood of violations of basic rights of people, the responsibility in such cases will lie on the state or the organisation is also unknown. A deep insight into these problems is thus required.

How can responsibility be bestowed upon the GPPPs for their actions under international law?

The operations of GPPPs are transnational but they have no international personality. The legitimacy or the status of the GPPPs under the international law must be elucidated in order to restrict them accordingly for their actions or inactions. The organisations operating transnational with an international personality are IOs. International organization is defined as “an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.”16 The GPPPs are not established by treaties and nor any instrument governed by international law; they are rather in large cases a product of national laws. The international law is specific about such entities and it is stated that, the organisations which are a product of national laws are not IOs under international law.17 Thereby, the GPPPs cannot claim to be international personalities, thus they lack a status of “legitimate” international organisation. As Sonja Bartsch argues that, when “legitimacy is invoked as a basis of critique for global public-private partnerships, the specific nature of the charge is the lack of input legitimacy, and more specifically, democratic legitimacy. The argument is that global public-private partnerships lack
such legitimacy because they differ from formal intergovernmental organizations in at least two ways; they are not constituted by a multilateral treaty based on state consent, and they permit the equal participation of non-state actors in decision-making processes”. However, the operation of GPPPs on a wide level is a reality and should be accepted. The status of the GPPPs is of a non-state actor under the current international norms. The operations of GPPPs are transnational affecting people globally. Under the current state of affairs these partnerships cannot be accepted as IOs thus they will have no legal personality. Thereby, the states and IOs as the legal subjects under international law shall be responsible for the acts of partnerships; or the partnerships might be granted a legal personality under international law. It is important to gauge the input and outputs of the partnerships for assessing a possibility of giving them a status of legal personality. The output of these partnerships has been rated diversely. The impact of these partnerships has been termed as negative for the IOs with respect to finances. The narrow approach of the partnerships is also allegedly narrowing the global approach towards specific sectors; for instance, the approach of GPPPs towards the elimination of specific diseases has narrowed the world health priorities from a broader approach. Thus, the global funding is disbursed through the partnerships outside the traditional organisations (Delcour, L., & Vellutini, C., 2005). However, the outcome of every partnership is different from the other and assessing the output of these partnerships requires conclusive research efforts. The matter of legal importance is hence its input competency. As elucidated earlier the GPPPs exist as a combination of legal and non-legal personalities under international law. The role of the non-legal personalities, especially the transnational corporations is instrumental because of their financial contribution, whereas the voice of NGOs and states is merely side-lined (Brühl, T., 2007). This creates an imbalance in the structure of the organisation and is unlikely to be accepted internationally. However, the legitimacy of the non-state actors might be strengthened by “inclusiveness, accountability and deliberation” (Dingwerth, K., 2007 p. 38) i.e. equal participation, accountability within the organisation and access to justice for the people affected from its operations and finally parity in decision making and non-domination of one partner. The possibility of such parity seems to be bleak in cases of the GPPPs. This is because of the existence of partnership is based upon funding from the TNCs, the partnerships will collapse in case of
stoppage of funding from such corporations (Buse, K., & Harmer, A. M., 2007, p. 267). For instance, the Bill and Melinda Gates Foundation is a major donor of nine GPPPs operating in health sector (Buse, K., & Harmer, A. M., 2007). Moreover, as pointed above the GPPPs operates for a purpose which comes under the umbrella of an IO. Thus, granting a status of an international personality to entities which are involved in a work already devoted to an IO will be a weakening rather than strengthening of organisations.

**Conclusion**

It is obvious from the above discussion that granting a status of legal personality to GPPPs is unlikely. The international responsibility for the acts of these partnerships thereby rests upon the states and IOs. Some partnerships operate as an organ or agent of an IO. Organ of an IO is “any person or entity which has that status in accordance with the rules of the organisation”:19 Whereas agent of an IO, “means an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts”.20 The responsibility for the actions of such organs lies upon the respected IOs. Thus in cases where the partnership exists as an organ of an IO, the IO shall bear a responsibility for its actions. The states on the other hand shall be responsible for the regulation of partnerships which are a product of their domestic law. The effective accountability methods and access to justice matters in cases where these partnerships are involved thus needs a thorough research. The means through which a state can keep these partnerships accountable to fulfil its international obligation and at the same time abstain from the interfering in the administrative measures of the partnership is a contentious matter. However, one matter is clear that “administrative action” can no longer be effectively addressed through “traditional domestic and international law mechanisms to ensure that regulatory decision makers are accountable and responsive to those who are affected by their decisions” (Kingsbury, B., & Stewart, R. B., 2008, p. 1). The domestic laws need to evolve as well as the role of the judiciary also needs to be strengthened, as evident in the cases mentioned above.
References:


Notes


2 The common examples are The Global Environment Facility (GEF), The GAVI alliance for children’s access to vaccines, The Education for All – Fast Track Initiative (EFA-FTI), The Global Fund, Global Program on Fisheries and many more partnerships working in different fields.


4 The Global PPPs such as “Stop TB” and “Roll Back Malaria (RBM)” partnerships are integral part of an International Organisation.


On January 13, 2006, U.S. President Bush signed Executive Order 13395, designating the Global Fund as a public international organization, thereby entitling it to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act. See Exec. Order No. 13,395, 71 Fed. Reg. 3203 (Jan. 13, 2006). The decision of terming the GPPP as an IO is contentious as the partnership does not fit into the definition of an IO.


On art 6 of ECHR and Article 14 of ICCPR.


Ibid, at para. 6 of commentary on art. 2.


Fn. 25, art 2(c).

Id, art. 2(d).