The Global Fund to Fight AIDS, Tuberculosis and Malaria: an Innovation in the Form of International Organization

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Abstract

As a partnership amongst governments, civil society, the private sector and communities, the Global Fund to Fight AIDS, Tuberculosis and Malaria (the “Global Fund”) represents an innovation in the mechanisms for international health financing. This article examines the innovative features of the Global Fund, set in a context involving shifting practices in the modes of international cooperation and evolving attitudes concerning the appropriate nature and role of international organizations in meeting global challenges. By virtue of the Global Fund’s nature as a product of contemporary understandings concerning the purpose, process and content of development aid, this paper describes the novel legal arrangement that was necessary for the establishment of the Global Fund, one which differed significantly from that used for the international organizations established in earlier eras. While the identity of the Global Fund as a public/private partnership demanded an expansion of the traditionally state-centric conception of the international organization, this paper concludes by noting that this expansion is indicative of a general movement within international law.

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1. Introduction

Over the past decade, the development community has witnessed an unprecedented growth of innovative mechanisms designed to fund international humanitarian initiatives, in particular, through partnerships among governments, intergovernmental organizations, and civil society. Amongst these partnership initiatives, the Global Fund to Fight AIDS, Tuberculosis and Malaria (the “Global Fund”) has taken a prominent role in a development sphere traditionally dominated by international organizations such as the United Nations (“UN”) and the World Bank. Since its founding in 2002, the Global Fund has approved grants worth US$ 22.1 billion, making it a principal financier in global health, channelling two-thirds of the international financing provided to fight TB and malaria, and a fifth of the international financing against AIDS.

As an organization founded upon the principles of cross-sectoral partnership, country ownership, performance-based funding, transparency and accountability, the Global Fund is reflective of the major political, economic and social trends of the last several decades. In particular, the partnership model of the Global Fund reflects the emergence of non-state actors as vital players in health and development. Through its organization as a public-private partnership, the Global Fund represents an innovation in the form of cooperation amongst governments, international development institutions (including UN agencies and the World Bank), civil society, philanthropists, the private sector and communities. This feature is exhibited in the governance of the Global Fund, whose Board of Directors includes as voting members representatives of donor and recipient country governments, the commercial sector, communities affected by the diseases, private foundations and non-governmental organizations (NGOs) from developed and developing countries.

By virtue of its nature as a product of contemporary understandings concerning the purpose, process and content of development aid, a novel legal arrangement was necessary for the establishment of the Global Fund, one which differed significantly from that used for the international organizations established in earlier eras. In particular, the nature of the Global Fund as a public/private partnership demanded an expansion of the traditionally state-centric conception of the international organization, typified by establishment through a multilateral treaty amongst States. In order to ensure the equal standing of public and private sectors in the governance of the organization, as well as to avoid unnecessary transaction costs and delays, the Global Fund was not conceived through treaty, but rather established as a nonprofit foundation under Swiss law. At the same time, the status of the Global Fund as an international organization has been established through a gradual process of legal recognition by national governments. As such, Switzerland has granted to the Global Fund privileges, exemptions and immunities and has formally recognized the Global Fund as an international organization. The United States has designated the Global Fund as a

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3 See, The Global Fund to Fight AIDS, Tuberculosis and Malaria, Agreement Between the
public international organization and, as of the writing of this paper, the Federal Democratic Republic of Ethiopia, Republic of Ghana, Republic of Moldova, Republic of Rwanda, Kingdom of Swaziland and Montenegro have also tacitly recognized the “juridical personality” of the Global Fund when they signed the Agreement on Privileges and Immunities of the Global Fund to Fight AIDS, Tuberculosis, and Malaria.

This legal arrangement, involving non-treaty based establishment and gradual recognition by individual states as an international organization, has provided the Global Fund with an architecture that facilitates full participation by both the public and private sectors in its governance and operation, while ensuring it is afforded appropriate rights as an international organization through a streamlined and gradual process. On a broader level, this arrangement, which has been recognized in academic literature as a “groundbreaking legal status that is unique to the international legal arena,” has also moved forward the traditional understanding of the international organization as a state-centered concept.

This paper describes the innovative features of the Global Fund, set in a context involving shifting practices in the modes of international cooperation and evolving attitudes concerning the appropriate nature and role of international organizations in meeting global challenges. Part 1 describes the history of the Global Fund, its operational and governance frameworks and sources of financing. Part 2 describes the unique legal status of the Global Fund and the considerations that led to the use of this legal arrangement. Finally, the paper concludes by noting that despite the innovative legal characteristics of the Global Fund, the organization’s legal identity, which represents an expansion of the traditional legal concept of international organization, is indicative of a general movement within international law.

2. The Emergence of the Global Fund in the International Arena

a. Context and Rationale Leading to Establishment

By the end of the 1990s, the escalating HIV/AIDS crisis had yielded a tremendous increase in international awareness of the pressing public health needs in the developing world. The HIV/AIDS epidemic had already infected 40 million people. By 2010, life expectancy in South Africa was projected to drop

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to 30 years. This appreciation of the potential devastation resulting from an HIV/AIDS epidemic fuelled global momentum to create a fund to channel resources into public health initiatives. The Group of 8 nations (G8) subsequently acknowledged this need in their 2000 meeting in Okinawa, and in April 2001 Secretary General Kofi Annan called for the creation of a global fund “dedicated to the battle against HIV/AIDS and other infectious diseases.”

In June 2001, the UN General Assembly called for the creation of “a global HIV/AIDS health fund to finance an urgent and expanded response to the epidemic” mobilizing contributions “from public and private sources, with a special appeal to donor countries, foundations, the business community, including pharmaceutical companies, the private sector, philanthropists and wealthy individuals.” The G8 resolved to “make the Fund operational before the end of the year” and provided US$ 1.3 billion to the new organization. As a reflection of the understanding that the global public health, as a public good, demanded engagement of a wide cross-section of stakeholders, not just governments, the negotiations that led to the creation of the organization involved participation by representatives of developing countries, donor countries, NGOs, the private sector, and the UN system. In January 2002 a Secretariat was established to be the Global Fund’s permanent standing body and to communicate the board’s decisions and manage the day-to-day operation of the fund. Just three months later, The Global Fund approved its first round of grants to 36 countries.

Despite its catalysis by UN resolution and the substantial role of national governments in its planning and formation, there was a consensus that the Global Fund should be distinct from the UN, such that it should differ from and operate more efficiently than existing bilateral and multilateral aid mechanisms. However, from its inception the Global Fund maintained a close relationship with

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9 See, About, supra note 1.
10 Supra note 1.
15 Id.
16 See, Press Release, supra note 7.
17 About, Supra note 1.
18 Resolution, supra note 8 at ¶ 90.
19 “While the Global Fund’s purpose was driven by the imperative of fighting the three diseases, its particular structure resulted from the strong belief held by some of its founders that it should differ from and operate more effectively than existing bilateral and multilateral aid mechanisms.” Steven Radelet, The Global Fund to Fight AIDS, Tuberculosis and Malaria: Progress, Potential, and Challenges for the Future, Center for Global Development, June 2004, available at http://portal.unesco.org/education/es/file_download.php/689078c299513623b161bf53d5a14eb9GF ATM+full+report.pdf.
the UN system, which included engagement of the World Health Organization (WHO) to act as the organization’s “host” during its early stages. This host relationship was created through an administrative services agreement between the Global Fund and the WHO, which conferred to Global Fund staff the status of WHO employees, and therefore extended WHO’s privileges, immunities and exemptions to staff members of the Global Fund.\footnote{Anna Triponel, Global Fund to Fight AIDS, Tuberculosis and Malaria: A New Legal and Conceptual Framework for Providing International Development Aid, 35 N.C.J. Int’l L. & Com. Reg. 173, 185 (2009).} On January 1, 2009, the Global Fund terminated its administrative service agreement with the WHO, becoming an autonomous international financing institution.\footnote{The Global Fund To Fight AIDS, Tuberculosis And Malaria, Nineteenth Board Meeting: Executive Director’s Report To The Board, 27 (2009), available at http://www.theglobalfund.org/documents/board/19/GF-B19-03_EDReport.pdf.}

b. Operational and Governance Arrangements

The financing model of the Global Fund is founded upon the principles of efficiency and effectiveness. This performance-based model links the provision of funding to the achievement of clear, measurable and sustainable results. An independent Technical Review Panel reviews each application for funding on the basis of technical soundness and potential to save lives, and recommends successful proposals to the Global Fund Board for approval. Financial support may be given to public, private, and non-governmental programs\footnote{See id. at 3.} based on the perceived effectiveness of the program. All grants are periodically reviewed, and funding withheld if progress has not been made.\footnote{The Global Fund to Fight AIDS, Tuberculosis and Malaria: Performance-based Funding, http://www.theglobalfund.org/en/performancebasedfunding/?lang=en, (last visited Jan. 25, 2011).}

The Global Fund Board features participation by a broad array of stakeholders in the fight against the diseases, such as donor and recipient governments, NGOs, businesses and people affected by the diseases.\footnote{See, The Global Fund to Fight AIDS, Tuberculosis and Malaria: Bylaws, 4 (2011).} The Global Fund Board consists of twenty voting members, designated as follows:

i. Seven representatives from developing countries, as grouped by region, and one additional representative from Africa;

ii. Eight representatives from donors; and

iii. Five representatives from civil society and the private sector (one representative of an NGO from a developing country, one representative of an NGO from a developed country, one representative of the private sector, one representative of a private foundations, and one representative of an NGO who is a person living with HIV/AIDS or from a community living with tuberculosis or malaria).
In addition, international organizations such as the WHO, UNAIDS, and the World Bank play a role in the governance of the Global Fund through representation on the Board as ex officio, non-voting members. In addition, international organizations play a significant role in the administration and implementation of Global Fund programs. The World Bank acts as the Trustee for the Global Fund, receiving, holding and disbursing donor contributions on behalf of the Global Fund. Moreover, the United Nations Development Programme and UNICEF have undertaken the implementation of a number of programs financed by the Global Fund, particularly in countries with relatively limited public health infrastructure and capacity.

**c. Mobilizing Resources to Fight the Diseases**

The great majority of financing made available to the Global Fund is provided by the public sector. From the establishment of the organization in 2002 up to 2015, 54 donor governments have pledged US$ 28.3 billion and paid in US$ 17.2 billion. Of all public sector contributions in 2009, 97.5 percent was paid in by 19 OECD Development Assistance Committee members. The remaining 2.5 percent was provided collectively by ten additional donor governments. Three countries also contribute to the Global Fund through the debt swaps agreed with donor governments under the Debt2Health initiative. Because it is a financing institution, the Global Fund is able to mobilize resources rapidly in response to the needs of its focused mandate, and has proven innovative in harnessing non-traditional funding channels whilst securing multi-party collaboration. The success of this model has so far allowed the Global Fund to approve US$ 22.1 billion for 903 grants in over 150 countries.

**3. The Legal Status of the Global Fund**

As part of the planning process for the establishment of the Global Fund, a Transitional Working Group (TWG) consisting of representatives of donor and developing countries, civil society, the private sector and the UN system was formed to develop the basic features of the organization. In this regard, a significant element of the work of the TWG related to identifying the optimal legal design for the organization, given its unique mandate, operational model and nature as a public-private partnership. In considering appropriate legal options, the TWG was guided by the urgent need to establish the Global Fund and initiate large-scale financial disbursements to fight the diseases, while at the same introducing a legal framework reflective of

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26 Id.
28 Id.
the organization’s independence and multilateral support. In order to accommodate these needs, a novel, dual-track approach was identified, involving expeditious formation as an independent Swiss foundation with the concomitant understanding that the organization would enjoy the rights and benefits afforded to international organizations through (i) its interim host relationship with the WHO and (ii) the commitment of the Swiss Government that the legal status of the Global Fund would be clarified over time through some form of official designation (contemplated at the time as possibly entailing ‘quasi-intergovernmental status’).31

Through this innovative approach, the Global Fund was established in January 2002, only six months after the initial resolution of the General Assembly calling for its establishment, approving its first round of grants just three months later. At the same, the Global Fund initiated discussions with the Swiss Government to identify legal options for granting to the Global Fund privileges, exemptions and immunities characteristic of international organizations. Based on these discussions, along with consultation with legal experts, three options were presented to the Global Fund Board: (i) status quo (i.e., retention of WHO hosting relationship); (ii) ‘quasi-intergovernmental’ status; and (iii) intergovernmental status.32

Based on the finding that the then-current administrative arrangement with the WHO was neither effective nor efficient, the status quo option was determined to be unacceptable, particularly as a long-term solution. With respect to ‘quasi-intergovernmental’ status, this designation was described by the Swiss authorities as requiring five elements: (i) government members; (ii) performance of public tasks or status as public law institution; (iii) structure similar to an intergovernmental organization (including a Secretariat, an Executive Board and a General Assembly); (iv) acquisition of most financing from public sources; and (v) function in the domain of intergovernmental relations.33

While the Swiss authorities indicated that the Global Fund would qualify for quasi-intergovernmental status, several deficiencies with respect to this legal characterization were identified. Namely, while this status would allow the Global Fund to maintain certain direct and indirect tax exemptions, its protections were incomplete in relation to the rights afforded to international organizations. For example, it was noted that quasi-intergovernmental status would result in a loss of certain immunities and protections for the Global Fund and Secretariat within and outside of Switzerland, as well as a loss of diplomatic status for certain Secretariat members.34

By comparison, the option of intergovernmental status was identified as clearly superior. The Global Fund Board was advised that this status would provide, amongst other things, the best platform for building robust collaborations

32 Id.
33 Id.
34 Id.
with UN and other development partners. In addition, it was noted that
tergovernmental status would provide Secretariat staff with equivalent
individual immunities from suits in Switzerland as the hosting arrangement with
WHO.\textsuperscript{35}

However, with the benefits of intergovernmental status came a number of
limitations, which largely arose from the traditional understanding of the
international organization as a construct created solely by states. This traditional
understanding of the international organization as an intergovernmental one, as
reflected in the 1969 Vienna Convention on the Law of Treaties, excludes the
private sector from the constituting act of an international organization: treaty
adoption.\textsuperscript{36} In this regard, the Global Fund was advised by legal experts that as a
general matter, only the states that are party to the constituting treaty of an
international organization can benefit from the status as members of the
organization. While member states could afford to non-members (e.g., private
sector entities) the full rights of members, it was noted that “[m]ost often, the
states wish to maintain control of the organization which they founded and thus hesitate to treat associate members on an equal footing in giving them, for example, the right to vote in the principle organ of the organization.”\textsuperscript{37} As
such, the Global Fund was advised that treaty formation would “most likely lead
to a readjustment of the respective roles of the private and public sectors.”\textsuperscript{38}

Therefore, the issue confronting the Global Fund was whether the traditional,
state-centric conception of the international organization directly conflicted with
its nature as an inclusive public-private partnership. In addition to these equity-
related issues, questions arose regarding the transaction costs associated with
treaty formation, given the lengthy and complex process for developing the legal
framework and negotiating the terms of the treaty amongst all member nations.

After confronted with the limitations inherent in all three options, an
entirely unique approach was undertaken by the Global Fund to clarify its legal
status. This approach followed from a proposal from the Swiss authorities, which
offered the possibility of a grant to the Global Fund of privileges, exemptions and
immunities equal to those granted to international organizations through a
bilateral agreement between the Global Fund and Switzerland. With this legal
status, the first of its kind in Switzerland, the Global Fund was granted the
opportunity to obtain the rights and benefits of an international organization while
avoiding a treaty process that could threaten its partnership model and absorb
significant costs.\textsuperscript{39} Accordingly, this legal status was conveyed to the Global Fund
through a Headquarters Agreement between Switzerland and the Global Fund,

\textsuperscript{35} \textit{Id.}

\textsuperscript{36} \textit{Vienna Convention on the Law of Treaties}, 1155 U.N.T.S. 311 (May 23, 1969), art. 2 (a),

\textsuperscript{37} See The Global Fund to Fight AIDS, Tuberculosis and Malaria, Fifth Board Meeting,

\textsuperscript{38} See The Global Fund to Fight AIDS, Tuberculosis and Malaria, Fifth Board Meeting,

\textsuperscript{39} The Global Fund to Fight AIDS, Tuberculosis and Malaria, Fourth Board Meeting,
Report on Legal Status Options for the Global Fund (2003),
executed in December 2004.

Following the clarification of the Global Fund’s legal status by the Swiss authorities, a second, equally novel process was set in motion through which additional states have granted to the Global Fund status of an international organization outside of the traditional rubric of the constituting treaty. In 2006, the United States designated the Global Fund as a public international organization through Executive Order 13395, which entitled it to “enjoy the privileges, exemptions and immunities provided by the International Organizations Immunities Act.” In addition, further to a formal resolution by the Global Fund Board that encouraged states to grant to the Global Fund the privileges, exemptions and immunities of an international organization, a growing number of countries have undertaken this action. As of the writing of this paper, the Federal Democratic Republic of Ethiopia, Republic of Ghana, Republic of Moldova, Republic of Rwanda, Kingdom of Swaziland and Montenegro have also tacitly recognized the “juridical personality” of the Global Fund when they signed the Agreement on Privileges and Immunities of the Global Fund to Fight AIDS, Tuberculosis, and Malaria. Finally, the Global Fund has also been recognized as an international organization by certain of its peer institutions, such as the United Nations Economic and Social Council and the International Labour Organization.

Taken as a whole, the approach undertaken by the Global Fund to establish its legal status represents a new pathway in the design of international organizations, one which ensures multi-sectoral participation, efficiency and flexibility. This enlargement of the traditionally state-centric conception of the international organization to encompass a broader array of stakeholders has been

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41 GF/B20/EDP4.
42 The Agreement on Privileges and Immunities of the Global Fund to Fight AIDS, Tuberculosis, and Malaria is a multilateral instrument under the terms of which signatories to the Agreement confer special privileges, immunities and exemptions on the Global Fund. The Agreement seeks privileges, immunities and exemptions in respect of the following: Global Fund property, namely protection for funds against attachment, freeze, seizure and taxation (Article 2); protection of its staff against legal process in the discharge of their duties in countries around the world, for words spoken or expressed in writing, and while travelling (Article 3); members of its Board and Technical Review Panel in discharge of their duties in the countries (Article 5); and protection of its data and documents from seizure and confiscation (Article 2(3)). The Agreement will enter into force 30 days after the Executive Director of the Global Fund receives the tenth instrument of ratification of accession to the Agreement (Article 8).
43 Pursuant to United Nations General Assembly Resolution A/RES/64/122, the Global Fund began participating as an Observer to the UN General Assembly, a right generally only afforded to international organizations. This status effectively upgraded the Global Fund in the eyes not only of the GA, but also ECOSOC which then recognized the Fund as an international organization and able to “participate, without the right to vote, in the deliberations of the Council on questions within the scope of activities of the organizations.” The International Labour Organization’s Administrative Tribunal (ILOAT) is competent to hear complaints “alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any other international organization . . .” In accordance with its internal statutes, the ILOAT has recognized the Global Fund as an IO and accepted jurisdiction over Global Fund employment appeals.
acknowledged by Switzerland, which noted in formal communication with the Global Fund as follows:

“Switzerland fully considers the Global Fund to Fight AIDS, Tuberculosis, and Malaria an inter-governmental organization, even though the Global Fund is constituted through the statutes of a foundation and not a multilateral treaty. Today, a large international organization can no longer be created without the participation of private entities, be it large international foundations, international corporations or non-governmental organizations.”

On a similar note, the design of the Global Fund has been recognized in academic literature as one which “expands the traditional definition of a public international organization to include such entities that are not considered intergovernmental entities but are granted privileges and immunities by a sovereign government.”

4. Conclusion

At around the time of the establishment of the UN system, the conception of the international organization was solidly focused on the state. For example, an early attempt at differentiation between international organizations and NGOs under a 1950 resolution of the UN Economic and Social Council stated that “[a]ny international organization which is not established by intergovernmental agreement shall be considered as a non-governmental organization for the purpose of these arrangements.”

With the emergence of non-state actors as vital and powerful players on the global stage, it is understood that engagement of civil society and the private sector is essential to meet global challenges. As such, while the fundamental subject matter of many international organizations has not changed, whether it be poverty, nuclear proliferation or disease, a need has arisen for enlargement of the legal form that prevailed in the mid-20th century. The changing conception of the legal characteristics of the international organization is reflected in a 2009 statement of the International Law Commission (ILC), as follows:

«First, it is questionable whether by defining an international organization as an intergovernmental organization one provides much information: it is not even clear whether the term ‘intergovernmental organization’ refers to the constituent instrument or to actual membership. Second, the term ‘intergovernmental’ is in any case inappropriate to a certain extent, because several important international organizations have been established by State organs other than governments or by other organs together with governments, nor are States always represented by governments within the

44 Correspondence of Evelyne Gerber, Director of the Swiss Office of Public International Law, with Michel Kazatchkine, Executive Director of the Global Fund, May 5, 2009, copy on file with author.
organization. Third, an increasing number of international organizations include among their members entities other than States as well as States; the term ‘intergovernmental organization’ might be thought to exclude these organizations, although with regard to international responsibility it is difficult to see why one should reach solutions that differ from those applying to organizations of which only States are members.”

In reaching towards an expanded conception of the international organization, which permits cross-sectoral collaboration and innovation, the approach undertaken by the Global Fund represents an example of the use of creative and flexible legal strategies by the international community to meet an urgent, global crisis.