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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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1. INTRODUCTION

People in developing countries are susceptible to diseases that are preventable and/or treatable in most other parts of the world and one of the main reasons behind this susceptibility is that the means to prevent and/or treat these diseases are not reaching them. In the past ten years, however, concrete steps have been made toward ameliorating this situation and much of the credit can be given to the establishment of global health public-private partnerships. In the shadow of the success of these partnerships lies however the possibility of something going wrong and it is to this shadow that this research sheds light.

Partnerships, comprised of states and international organizations (representing the public sector) and companies, non-governmental organizations, research institutes and philanthropic foundations (representing the private sector), are forming in an attempt to respond to pressing global health issues, particularly in developing countries. It is through the work of these partnerships, and other partnerships like them, that a shift is taking place which moves (at least partly) regulation over global health matters from the hands of states and international organizations into the hands of public-private partnerships. These partnerships are managing activities that are normally regarded as in the domain of states and international organizations, such as providing access to preventative and treatment measures for certain diseases or improving health infrastructure within certain states to better manage the growing risk of disease. States and international organizations are, thus, no longer the sole regulators of health issues affecting people on the international plane as this role is now also being performed by entities such as public-private partnerships.

In the beginning days of partnering in relation to global health, collaboration between the public and private sectors did not seem to raise concern. Perhaps this was due to the novelty of partnerships or perhaps, at first, the impact of partnerships was seen as useful but still peripheral. This perception has, however, been changing. Collaboration between

the public and private sectors is becoming a popular means to deal with global health issues and the impact can no longer be seen as novel or peripheral. Partnerships are becoming increasingly capable of affecting the lives and health of individuals and the favorable and potentially adverse impact on the rights of individuals, especially the right to life and the right to health, cannot be ignored.

This potentially adverse impact of the increasing power exercised by global health public-private partnerships, in turn, leads to concerns of responsibility under international law. Indeed, power and responsibility under international law go hand in hand; responsibility under international law is the “logical corollary” of power.¹ Clyde Eagleton, writing on the responsibility of states under international law in 1928, argued that “power breeds responsibility” and that a state is more willing to accept responsibility for an act when it has authority over the act.² The rules on the responsibility of states under international law, set out by the International Law Commission (ILC) in the Articles on State Responsibility,³ in fact stem from the need to hold states responsible for an abuse of power resulting in an act that was wrongful under international law. State responsibility is, and always has been, intricately tied to the power of states.

The underlying logic of ‘power breeds responsibility’ in relation to states naturally made its way into the world of international organizations.⁴ The responsibility of international organizations, like state responsibility, is tied to power. Power over global issues is now being governed by international organizations, in addition to, or instead of, states.⁵ This shift in power means that international organizations are capable of acting in ways which

¹ Philippe Sands and Pierre Klein, *Bowett’s Law of International Institutions* (Sweet and Maxwell 2009) 518. See International Law Association, Berlin Conference (2004), ‘Accountability of International Organizations’ (2004) 1 *International Organizations Law Review* 221, 225

² Clyde Eagleton, *The Responsibility of States in International Law* (The New York University Press 1928) 206

³ Articles on the Responsibility of States for Internationally Wrongful Acts, UNGA Res 56/83, Annex (28 Jan 2002) art 1 (Articles on State Responsibility or ASR)

⁴ E. Paasivirta and P.J. Kuijper, ‘Does One Size Fit All?: The European Community and the Responsibility of International Organizations’ (2005) XXXVI *Netherlands Yearbook of International Law* 169, 173

⁵ See Christoph H. Schreuer, ‘The Waning of the Sovereign State: Towards a New Paradigm for International Law?’ (1993) 4 *The European Journal of International Law* 447

impact the social, political, economic and legal situation of individuals.⁶ This impact was not, in the beginning, recognized as troubling as international organizations were seen in a positive light. International organizations were thought to have “a great role to play in the salvation of mankind”⁷ and to be incapable of doing harm. However, it was precisely this shift in power which opened up the possibility of rights violations by international organizations and led to the question – *quis custodiet opsos custodes?* (who guards the guardians?).⁸

A decision of the World Health Organization (WHO) to issue a travel ban to a state where the outbreak of an infectious disease has occurred; a decision of the United Nations Security Council to blacklist an individual suspected of terrorist activities and subject him/her to sanctions or a decision of the United Nations High Commissioner for Refugees as to a determination of refugee status are just a few examples of situations where the decisions of international organizations are capable of having an adverse impact on the rights of individuals.⁹ The work of international organizations is now seen also in a negative light and it is in this negative light that a call came for the responsibility of international organizations. The power exercised by international organizations necessitated a counterbalance to responsibility and this counterbalance is seen in the ILC’s Articles on the Responsibility of International Organizations.¹⁰

Over time, governance over global issues has further shifted from states and international organizations to other entities, including public-private partnerships. Partnerships are stepping in and filling, or partially filling, the shoes of states and international

⁶ Gerhard Hafner, ‘Accountability of International Organizations – A Critical View’ in Ronald St. John MacDonald and Douglas M. Johnston (eds), *Towards World Constitutionalism* (Koninklijke Brill NV 2005) 585, 592-593, 629

⁷ Nagendra Singh, *Termination of Membership of International Organisations* (Stevens & Sons Limited 1958) vii

⁸ August Reinisch, ‘Securing the Accountability of International Organizations’ (2001) 7 *Global Governance* 131, 132. See 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, 142; Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (CUP 2011)

⁹ See Ellen Hey, ‘The High-level Summit, International Institutional Reform and International Law’ (2005-2006) 2(1) *Journal of International Law & International Relations* 5, 21-22 for other examples.

¹⁰ Articles on the Responsibility of International Organizations, UNGA Res 66/100, Annex (27 Feb 2012) (Articles on the Responsibility of International Organizations or ARIO)

organizations and, as a result, are regulating global issues in addition to, or instead of, states and international organizations. This power, like the power of states and international organizations, is capable of having an adverse impact on the rights of individuals and thus needs to be subject to legal restraints such as responsibility under international law.

The overarching purpose of this research is thus to explore responsibility under international law in relation to the acts of public-private partnerships, using select public-private partnerships in the area of global health as case studies. A foreseeable scenario is, for example, a public-private partnership providing (or assisting in providing) medication to a population that is damaging to the life and health of the population because it is unsafe, not properly tested and/or expired. The inquiry made in this research, in relation to this and other similar scenarios, is who can be held responsible under international law? Can the partnership be held responsible? And/or can the partners and/or hosts of the partnership be held responsible? To address this inquiry, this research contemplates the legal status of global health public-private partnerships under international law in order to determine whether or not these partnerships have legal personality under international law, resulting in them being subject to rules of responsibility under international law.¹¹ The absence of legal personality under international law, and in turn the failure to fall within the framework of responsibility under international law, leads to consideration of the possibility of holding global health public-private partnerships responsible in domestic legal systems and the immunity these partnerships have from the jurisdiction of domestic courts in certain states.¹² The obstacles to holding global health public-private partnerships themselves responsible leads finally to an investigation into the possibility of holding states and/or international organizations, as partners and/or hosts of these partnerships, responsible under international law in relation to the acts of these partnerships.¹³

¹¹ See Section 1.5 and Chapter 3

¹² See Section 1.5 and Chapter 4

¹³ See Section 1.5 and Chapters 5 and 6

This introductory chapter, in the subsequent sections, sets out the definitions relied on throughout this research, the methodology employed, the reason for choice of case study, the contribution this research makes to scholarship and, finally, the organization of the chapters.

1.1. DEFINITIONS

A couple of definitions of terms relied on throughout this research need to be provided in this introductory chapter as they are capable of varying connotations. The terms defined herein are public-private partnership (including networks, programs with external participation, formal partnerships or alliances and separate organizations) and international organization.

1.1.1. Public-Private Partnership

The term public-private partnership is often used flexibly to describe collaborations between the public and private sectors. The inconsistency in the use of the term makes generalizations with respect to the definition of public-private partnership difficult to make or, at least, very broad. Such inconsistency arises from the range of scope of activities of each partnership, the diverse composition of partners of each partnership and the differing structure of each partnership.¹⁴

Definitions of public-private partnership therefore tend to be all-encompassing. A report of the Secretary-General of the United Nations defines public-private partnerships as “voluntary and collaborative relationships between various parties, both State and non-State, in which all participants agree to work together to achieve a common purpose or

¹⁴ See Michael R. Reich, et al, ‘Workshop on Public Health Law and Ethics I & II: The Challenge of Public/Private Partnerships (PPPs)’ (2003) 31 *Journal of Law, Medicine and Ethics* 90, 91

undertake a specific task and to share risks and responsibilities, resources and benefits.”¹⁵

The WHO, in its glossary of globalization, trade and health terms, indicates that

[t]he term public-private partnership[] covers a wide variety of ventures involving a diversity of arrangements, varying with regard to participants, legal status, governance, management, policy-setting prerogatives, contributions and operational roles. They range from small, single-product collaborations with industry to large entities hosted in United Nations agencies or private not-for-profit organizations.¹⁶

Gian Luca Burci describes public-private partnerships, in the global health context, as

long-term collaborative arrangements among a group of diverse stakeholders, some of which of a public nature (e.g. governmental agencies and intergovernmental organizations) and others of a private nature (e.g. non-governmental organizations, private commercial companies, research institutes, professional associations etc.) to jointly pursue a discreet public health goal.¹⁷

Any of the preceding definitions are suitable to rely on in this research.

In addition to defining public-private partnership, it is further useful for the purposes of this research to place public-private partnerships into categories based on structure. Creating categories of public-private partnerships, based on structure, permits generalizations about such partnerships to be made, depending on which category a partnership belongs to. It also opens up the possibility of extending the reach of the conclusions made in this research to other public-private partnerships, including those outside the sphere of global health, if they fit within a certain category.

¹⁵ Report of the Secretary-General, ‘Enhanced cooperation between the United Nations and all relevant partners, in particular the private sector’ (10 August 2005) UN Doc A/60/214 para 8

¹⁶ World Health Organization, Glossary of globalization, trade and health terms, Public-Private Partnerships for Health <<http://www.who.int/trade/glossary/story077/en/index.html>> accessed 25 May 2012

¹⁷ Gian Luca Burci, ‘Public/Private Partnerships in the Public Health Sector’ (2009) 6 *International Organizations Law Review* 359, 361. Other definitions of public-private partnership in the global health context can be found in K. Buse and G. Walt, ‘Global public-private partnerships: part I – a new development in health’ (2000) 78(4) *Bulletin of the World Health Organization* 549, 550; Reich (n 14) 91

Instead of designing a new system of categorization, this research adopts and relies on the system of categorization used by Burci as it aptly describes the variety of existing global health public-private partnerships. Burci divides public-private partnerships governing global health into the following categories: networks, programs with external participation, formal partnerships or alliances and separate organizations.¹⁸

1.1.1.1. Networks

Networks are defined as loosely structured groups where participants meet regularly to exchange information, strategize, facilitate advocacy and/or provide advice. Although a network is convened and supported by an international organization, activities of the network are carried out by each participant of the network in its own capacity.¹⁹ The Global Outbreak Alert and Response Network²⁰ (GOARN) and the Global Noncommunicable Disease Network²¹ (NCDnet) are examples of networks.

1.1.1.2. Programs with External Participation

Programs with external participation are generally long-term, structured programs created by an international organization however also involving other entities from the public and private sectors. They are often based on documents such as terms of reference, strategic frameworks or guiding principles. These documents, although agreed to among the public and private sector participants, are considered working documents of the creating international organization. Further, the creating international organization is responsible for carrying out the activities of these programs with external participation.²² The

¹⁸ Burci (n 17) 336-369

¹⁹ *ibid* 366

²⁰ Global Outbreak Alert & Response Network <<http://www.who.int/csr/outbreaknetwork/en/>> accessed 25 May 2012

²¹ Global Noncommunicable Disease Network <<http://www.who.int/ncdnet/en/>> accessed 25 May 2012

²² Burci (n 17) 367

Tobacco Free Initiative²³ (TFI) and the Global School Health Initiative²⁴ are examples of programs with external participation.

1.1.1.3. Formal Partnerships or Alliances

Formal partnerships or alliances are highly structured and function as recognizable entities. A secretariat is hosted by an international organization and a board is set up to take decisions. Formal partnerships or alliances are often established and operate in accordance with a memorandum of understanding, or other similar document. A key characteristic here, and the distinguishing feature from separate organizations, is that formal partnerships or alliances are not separate legal entities and instead work through the legal entity of the host international organization.²⁵ The Roll Back Malaria Partnership²⁶ (RBM) and the Stop TB Partnership²⁷ (Stop TB) are examples of formal partnerships or alliances.

1.1.1.4. Separate Organizations

Separate organizations are distinguishable from formal partnerships or alliances in that they are separate legal entities under domestic law. Normally, they have the structure of a non-profit company or trust under domestic law with founding documents varying in accordance with the legal requisites of the state of incorporation. The structure of separate organizations is highly developed and includes a board comprised of representatives from both the public and private sectors, or other governing body, that has the authority to take decisions binding the partnership.²⁸ The GAVI Alliance²⁹ (GAVI)

²³ Tobacco Free Initiative <<http://www.who.int/tobacco/en/>> accessed 25 May 2012

²⁴ Global School Health Initiative <http://www.who.int/school_youth_health/gshi/en/> accessed 25 May 2012

²⁵ Burci (n 17) 367

²⁶ Roll Back Malaria Partnership <<http://www.rbm.who.int/>> accessed 25 May 2012

²⁷ Stop TB Partnership <<http://www.stoptb.org/>> accessed 25 May 2012

²⁸ Burci (n 17) 367-368

²⁹ GAVI Alliance <<http://www.gavialliance.org/>> accessed 25 May 2012

and the Global Fund to Fight AIDS, Tuberculosis and Malaria³⁰ (the Global Fund) are examples of separate organizations.

The focus of this research is on the categories of formal partnerships or alliances and separate organizations, rather than the categories of networks and programs with external participation. The reason is because formal partnerships or alliances and separate organizations act as recognizable entities whereas networks and programs with external participation do not act as recognizable entities. Acts of networks are carried out by each participant of the network in its own capacity and acts of programs with external participation are carried out by the creating international organization. The allocation of responsibility under international law is thus to the participants and creating international organization, respectively. Acts of formal partnerships or alliances and separate organizations, on the other hand, are carried out by the partnerships themselves. The allocation of responsibility under international law, i.e. to the partnership itself and/or to the partners and/or hosts of the partnership, is not obvious and therefore deserving of scholarly attention. The focus throughout this research is thus on the categories of formal partnerships or alliances and separate organizations. The term ‘partnership’ will, however, be used throughout when discussing both these categories.

1.1.2. International Organization

The definition of international organization relied on in this research is the definition provided in the Articles on the Responsibility of International Organizations. It defines an international organization as “an organization established by a treaty or other instrument governed by international law and possessing its own international legal

³⁰ The Global Fund to Fight AIDS, Tuberculosis and Malaria <<http://www.theglobalfund.org/en/>> accessed 25 May 2012

personality.”³¹ It further holds that “[i]nternational organizations may include as members, in addition to States, other entities.”³²

This definition is relied on since it has been adopted by the ILC and thereby reflects the general acceptance of states and international organizations through their collaborative effort to reach consensus on the Articles on the Responsibility of International Organizations. Further, it is useful to congrue with the terminology of the Articles on the Responsibility of International Organizations as this will be discussed in a later chapter exploring the responsibility of international organizations under international law in relation to the acts of public-private partnerships.³³

The inclusion of the phrase – international organizations may include as members, in addition to states, other entities – in the definition of international organization may instigate an argument that public-private partnerships could themselves be considered to be international organizations. A public-private partnership has as members both states and other entities. Such an argument is further supported by the fact that partnerships have been described, in certain circumstances, as international organizations, or other equivalent terms. GAVI, for example, is labeled an international institution in Switzerland³⁴ and the Global Fund, for example, is designated a public international

³¹ ARIO (n 10) art 2(a)

³² *ibid.* The term *international* organization is used rather than the term *intergovernmental* organization. Intergovernmental connotes an organization comprised solely of states as members. International, on the other hand, indicates that the organization may have not only states as members but also other entities, besides states, as members. See 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) 7 <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf> accessed 25 May 2012 (Commentaries)

³³ See Chapter 6

³⁴ 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 25 May 2012; 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 25 May 2012

organization in the United States.³⁵ Public-private partnerships are not, however, international organizations, according to the definition set out in the Articles on the Responsibility of International Organizations. Partnerships are not established by a treaty or other instrument governed by international law.³⁶ RBM and Stop TB were created on the initiative of international organizations³⁷ and not by a treaty or other instrument governed by international law.³⁸ Also, GAVI and the Global Fund are foundations created under the municipal law of Switzerland³⁹ and the commentary on the Articles on the Responsibility of International Organizations expressly states that its definition of international organization does not cover organizations established through municipal law.⁴⁰ Further, partnerships do not possess international legal personality,⁴¹ an issue which will be explored in a later chapter of this research.⁴² It therefore cannot be said that public-private partnerships fall within the definition of international organization relied on herein.

1.2. METHODOLOGY

The methodology employed in this research is based on a theory of positivism. There are varying strains of positivism⁴³ but here, the focus will be on a modern version of positivism as opposed to a classic version of positivism.

³⁵ 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 25 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 25 May 2012

³⁶ ARIO (n 10) art 2(a)

³⁷ RBM Mandate <<http://www.rbm.who.int/rbmmandate.html>> accessed 25 May 2012; Our History <<http://www.stoptb.org/about/history.asp>> accessed 25 May 2012

³⁸ Commentaries (n 32) 7-8

³⁹ GAVI Alliance Statutes, 29-30 October 2008, art 1 <http://www.gavialliance.org/resources/GAVI_Alliance_Statutes.pdf> accessed 25 May 2012; The Global Fund to Fight AIDS, Tuberculosis & Malaria By-Laws, 21 November 2011, art 1 <<http://www.theglobalfund.org/en/about/structures/board/>> accessed 25 May 2012

⁴⁰ Commentaries (n 32) 8

⁴¹ ARIO (n 10) art 2(a)

⁴² See Chapter 3

⁴³ See Ulrich Fastenrath, 'Relative Normativity in International Law' (1993) 4 European Journal of International Law 305, 307

Classic positivism considers so-called extra-legal arguments, such as moral or ethical arguments for example, as irrelevant to the law.⁴⁴ This provokes the common criticism of positivism that it separates law from normative context.⁴⁵

A premise of positivism is, indeed, that it distinguishes *lex lata* (what the law is) and *lex ferenda* (what the law ought to be).⁴⁶ But this does not mean that positivism entirely closes its eyes to normative context. H.L.A. Hart, when commenting on Jeremy Bentham's and John Austin's insistence on distinguishing between law as it is from law as it ought to be, explained what is not meant by a separation of law and morals. It is not meant that law and morals do not intersect at all. It is not denied that legal systems are influenced by morals and that morals are influenced by legal systems.⁴⁷ Positivism is capable of recognizing that law is not independent of its normative context and it is this understanding, termed modern positivism, which is relied on throughout this research.

Lex lata and *lex ferenda* will both be considered throughout this research. Partnerships are a relatively new phenomenon and the framework for governing partnerships under international law has not yet been clearly identified. *Lex lata* is, therefore, important to identify. *Lex ferenda* is also important to consider as the international legal system, thus far, does not provide a method for governing partnerships. It is insightful, therefore, to consider *lex ferenda* arguments in order to suggest how the law governing partnerships could or should develop in the future.

⁴⁴ See Hans Kelsen, *Pure Theory of Law* (University of California Press 1967); Bruno Simma and Andreas L. Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93(2) *American Journal of International Law* 302, 304; Steven Ratner and Anne-Marie Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers' (1999) 93(2) *American Journal of International Law* 291, 293

⁴⁵ See Hans J. Morgenthau, 'Positivism, Functionalism, and International Law' (1940) 34 *American Journal of International Law* 260, 267; Alain Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making' (1988-1989) 12 *Australian Year Book of International Law* 22, 24

⁴⁶ See H.L.A. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) *Harvard Law Review* 593, 600; Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *American Journal of International Law* 413, 421

⁴⁷ Hart (n 46) 595, 598-599. See Ronald Dworkin, 'A Reply by Ronald Dworkin' in Marshall Cohen (ed), *Ronald Dworkin and Contemporary Jurisprudence* (Rowman & Allanheld 1983) 249, 254; Benedict Kingsbury, 'Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law' (2002) 13(2) *European Journal of International Law* 401, 402-403

This research will therefore be taking on tasks that Lassa Oppenheim has stated the science of international law must devote itself to – the exposition and criticism of the existing rules of law.⁴⁸ In exposing the existing rules of law, the focus will be on the rules of responsibility under international law and whether or not global health public-private partnerships fit within the purview of these rules. In criticizing the existing rules of law, the gap in responsibility under international law in relation to the acts of global health public-private partnerships will be revealed and other avenues of dealing with responsibility under international law in relation to the acts of these partnerships will be suggested. The standard relied on is the tenet of international law that an internationally wrongful act entails international responsibility. The suggestions made are *lex ferenda* but are nonetheless vital to consider given the paucity of avenues for dealing with the responsibility of global health public-private partnerships under international law.

Another feature of classic positivism is that it describes law as a system of rules emanating solely from the will of states.⁴⁹ State will is thus the centerpiece of classic positivism. Support for this assertion is found in the *Lotus* case of the Permanent Court of International Justice: “The rules of law binding upon States [] emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law.”⁵⁰ The sources of the rules of international law are, according to this view, either treaty or custom, through which explicit or implicit state will is found.⁵¹

⁴⁸ L. Oppenheim, ‘The Science of International Law: Its Task and Method’ (1908) 2(2) *American Journal of International Law* 313, 314-315, 318. Robert Cryer, Tamara Hervey and Bal Sokhi-Bulley refer to this as “expository” and “evaluable” scholarship, respectively (Robert Cryer, Tamara Hervey and Bal Sokhi-Bulley, *Research Methodologies in EU and International Law* (Hart Publishing 2011) 9-10). Oppenheim was, however, cautious when it came to criticizing existing law: “the international jurist must not walk in the clouds; he must remain on the ground of which is realizable and tangible. It is better for international law to remain stationary than to fall in the hands of the impetuous and hot-headed reformer.” (Oppenheim (n 48) 318)

⁴⁹ Simma and Paulus (n 44) 304; Ratner and Slaughter (n 44) 293

⁵⁰ *The Case of the S.S. “Lotus”* (Judgment) PCIJ Rep Series A No 10, 7 September 1927, 2, 18

⁵¹ Oppenheim (n 48) 327, 333-334

It follows that soft law has no place in classic positivism.⁵² Modern positivism, on the other hand, sees an opening for soft law. Soft law is said to play a role in creating, identifying and interpreting rules.⁵³ Positivism, like other theories, is a “living method”⁵⁴ and has thus evolved over the years in line with developments in the international community.

This research considers the sources of law set out in Article 38(1) of the Statute of the International Court of Justice: treaties, custom, jurisprudence and academic writings.⁵⁵ Particular reliance is further placed on the ILC’s work on both state responsibility⁵⁶ and the responsibility of international organizations.⁵⁷ The ILC began its work on state responsibility in 1955 and, finally, in 2001, through the work of James Crawford as the then Special Rapporteur, the Articles on State Responsibility were adopted by the ILC and later taken note of and annexed to General Assembly Resolution 56/83.⁵⁸ The ILC began its work on the responsibility of international organizations in 2002 and assigned Giorgio Gaja as the Special Rapporteur. In 2011, the Articles on the Responsibility of International Organizations were adopted by the ILC and later taken note of and annexed to General Assembly Resolution 66/100.⁵⁹ It is with specific reference to the Articles on State Responsibility and the Articles on Responsibility of International organizations that this research considers the responsibility of states and international organizations in relation to the acts of global health public-private partnerships.

The work of the ILC on state responsibility and the responsibility of international organizations might be seen as reflecting (in part) “international custom, as evidence of a

⁵² Simma and Paulus (n 44) 304

⁵³ *ibid* 307-308; Fastenrath (n 43) 324

⁵⁴ Ratner and Slaughter (n 44) 295

⁵⁵ Statute of the International Court of Justice, 18 April 1946, art 38(1)

⁵⁶ ILC, State Responsibility – Summary <http://untreaty.un.org/ilc/summaries/9_6.htm> accessed 25 May 2012

⁵⁷ ILC, Responsibility of international organizations – Summary <http://untreaty.un.org/ilc/summaries/9_11.htm> accessed 25 May 2012

⁵⁸ State Responsibility – Summary (n 56)

⁵⁹ ILC, Responsibility of international organizations – Analytical Guide <http://untreaty.un.org/ilc/guide/9_11.htm> accessed 25 May 2012

general practice accepted as law”⁶⁰ or as representing “teachings of the most highly qualified publicists of the various nations.”⁶¹ But if this work of the ILC is not seen as falling within the ambit of these sources of law, it is submitted that to the extent it provides understandings on the creation, identification and interpretation of rules, it fits within a positivistic perception of international law.⁶²

1.3. CHOICE OF CASE STUDY

A choice of case study had to be made because it would be impracticable to cover all the myriad of public-private partnerships acting worldwide. Public-private partnerships in the area of global health were chosen as the case study because they are proliferating and are directly (and indirectly) affecting the lives and health of millions of people. These affects and the possibly adverse consequences arising therefrom precipitate concerns of responsibility under international law and, for this reason, global health public-private partnerships are the case study chosen in this research. Global health public-private partnerships, and the issues arising under international law in relation to them, are, nonetheless, illustrative of public-private partnerships more generally. The hope is that the legal reasoning applied to global health public-private partnerships in this research will be applied by analogy, to the extent possible, to public-private partnerships outside the area of global health as well.⁶³

⁶⁰ Statute of the ICJ (n 55) art 38(1)(b). See James Crawford, *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries* (CUP 2002) 74; David Caron, ‘The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority’ (2002) 96 *American Journal of International Law* 857, 872; Commentaries (n 32) 2-3

⁶¹ Statute of the ICJ (n 55) art 38(1)(d). See Membership <<http://www.un.org/law/ilc/>> accessed 25 May 2012

⁶² See n 53

⁶³ Other possible areas include water (eg. Global Water Partnership <<http://www.gwp.org/>> accessed 25 May 2012), climate change (eg. Clean Development Mechanism <<http://cdm.unfccc.int/about/index.html>> accessed 25 May 2012), pharmaceuticals (eg. International Conference on Harmonization of Technical Requirements for the Registration of Pharmaceuticals for Human Use (ICH) <<http://www.ich.org/>> accessed 25 May 2012), food (eg. Codex Alimentarius Commission <http://www.codexalimentarius.net/web/index_en.jsp> accessed 25 May 2012), anti-doping in sports (eg. World Anti-Doping Agency <<http://www.wada-ama.org/>> accessed 25 May 2012) and the internet (eg. the Internet Corporation for Assigned Names and Numbers (ICANN) <<http://www.icann.org/>> accessed 25 May 2012), to name just a few examples

The open definition of public-private partnership provided above coupled with the growing popularity of public-private partnerships involving global health means, however, that full coverage of all global health public-private partnerships is not manageable. This research, therefore, draws on RBM, Stop TB, GAVI and the Global Fund as illustrations. These particular partnerships are chosen because they are well-established and further are representative of formal partnerships or alliances and separate organizations, which are the categories of partnerships that form the focus of this research, for reasons explained above.⁶⁴

1.4. CONTRIBUTION TO SCHOLARSHIP

This research is of both theoretical and practical importance. Theoretically, a better understanding is needed of how global health public-private partnerships fit within the framework of international law, especially in terms of responsibility under international law in relation to the acts of these partnerships. Practically, exploring responsibility under international law is imperative given the potentially adverse impact of global health public-private partnerships on the lives and health of individuals and the absence of obvious avenues to hold these partnerships responsible under international law. These issues are of practical concern for all states whether they are contributors to, participants in or recipients of the work of partnerships; for the international organizations, companies, non-governmental organizations, research institutes and philanthropic foundations participating in partnerships; and also for those individuals directly affected by the work of partnerships. This research thus provides doctrinal clarification and practical guidance in a seemingly unexplored field of international law.

1.5. ORGANIZATION OF CHAPTERS

⁶⁴ See Section 1.1.1

This research is divided into seven chapters. The first chapter is introductory. It sets out the background and purpose of the research, definitions, methodology, choice of case study, contribution to scholarship and organization of the chapters. The second chapter provides an overview of global health public-private partnerships. It describes the evolution of public-private partnerships in the area of global health generally and then proceeds to describe the particular partnerships under scrutiny in this research: formal partnerships or alliances – RBM and Stop TB – and separate organizations – GAVI and the Global Fund. These two chapters set the scene for the analysis in the subsequent chapters.

The legal status of global health public-private partnerships under international law is the focus of the third chapter as responsibility under international law depends on legal personality under international law. This chapter examines the basis by which legal personality under international law is determined and discusses whether or not global health public-private partnerships possess legal personality under international law. The uncertain status of hybrid entities under international law means that global health public-private partnerships do not, at present, have legal personality under international law and, as a result, reside outside the framework of responsibility under international law. As the regulation of global health issues shifts from states and international organizations to public-private partnerships, responsibility under international law does not follow. A gap is thereby created between the regulation of global health issues by public-private partnerships and responsibility under international law.

This gap in responsibility under international law might leave one wondering whether global health public-private partnerships are better positioned to be held responsible in domestic legal systems. These partnerships, however, have immunity from the jurisdiction of domestic courts in certain states. The fourth chapter explores the immunity global health public-private partnerships have from the jurisdiction of domestic courts in certain states and makes comparisons between the immunity of these partnerships and the immunity of international organizations, in terms of sources of immunity, the rationale of functional necessity and the need for access to a court or

alternative means of dispute resolution. It finally considers how to deal with the immunity of global health public-private partnerships from the jurisdiction of domestic courts, keeping in mind the gap in responsibility under international law in relation to the acts of these partnerships.

The limitations on finding global health public-private partnerships responsible instigates an inquiry, in the fifth and sixth chapters, into whether partners and/or hosts of partnerships – states and/or international organizations – could or should be held responsible under international law in relation to the acts of these partnerships. Suggestions might be made to hold other partners, such as companies and non-governmental organizations, responsible under international law in relation to the acts of partnerships or to draw analogies between the responsibility under international law of companies and non-governmental organizations and the responsibility under international law of partnerships. These avenues will not, however, be explored in this research because there are, at present, no rules governing the responsibility of companies or non-governmental organizations under international law.⁶⁵ A more reasonable avenue, at this time, is to consider the responsibility under international law of states and/or international organizations, as partners and/or hosts, in relation to the acts of partnerships.

⁶⁵ See Philip Alston (ed), *Non-State Actors and Human Rights* (OUP 2005); Jutta Brunnée, ‘International Legal Accountability Through the Lens of the Law of State Responsibility’ (2005) XXXVI *Netherlands Yearbook of International Law* 21, 41-42, 48; Anna-Karin Lindblom, ‘The Responsibility of Other Entities: Non-Governmental Organizations’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 343. It is noted, however, that in relation to companies, the United Nations Human Rights Council endorsed, in June 2011, the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (the Guiding Principles). The Guiding Principles cover the state duty to protect against abuses of human rights by third parties, the corporate responsibility to respect human rights and the access to effective remedies. Extensive consultation with stakeholders led to the positive reception of the Guiding Principles and high hopes lie in the Guiding Principles to prevent and remedy business-related human rights abuses. The Guiding Principles do not, however, create new obligations under international law but rather elaborate on existing standards and practices. The goal is that the Guiding Principles will be implemented and adhered to and to the extent this happens, the better for human rights. But as these Guiding Principles are not binding law, they fall outside the ambit of this research which focuses on fitting global health public-private partnerships within a legal framework. See Human Rights Council, ‘Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (21 Mar 2011) UN Doc A/HRC/17/31; Human Rights Council, Res 17/4 Human rights and transnational corporations and other business enterprises (6 July 2011) UN Doc A/HRC/RES/17/4

The fifth chapter focuses on the responsibility of partnerships through the lens of state responsibility. It explores the two elements of an internationally wrongful act of a state – attribution to the state and a breach of an international obligation of the state – in the context of acts of global health public-private partnerships. First, it considers attributing the acts of partnerships to states through Article 5 (conduct of persons or entities exercising elements of governmental authority), Article 7 (excess of authority or contravention of instructions), Article 8 (conduct directed or controlled by a State) and Article 9 (conduct carried out in the absence or default of the official authorities) of the Articles on State Responsibility. It also considers attributing to states a failure to exercise due diligence in relation to the acts of partnerships. Second, it considers the possibility of a breach of an obligation under international human rights law by states with respect to the acts of global health public-private partnerships. Finally, it concludes with a discussion on the possibility of a plurality of responsible states in relation to the acts of global health public-private partnerships.

The sixth chapter focuses on the responsibility of partnerships through the lens of the responsibility of international organizations. In line with the chapter on state responsibility, it examines the two elements of an internationally wrongful act of an international organization – attribution to the international organization and a breach of an international obligation of the international organization – in the context of acts of global health public-private partnerships. It first discusses attributing the acts of partnerships to international organizations through Article 6 (conduct of organs or agents of an international organization) and Article 8 (excess of authority or contravention of instructions) of the Articles on the Responsibility of International Organizations. It further discusses attributing to international organizations a failure to exercise due diligence with respect to the acts of partnerships. It discusses second the possibility of a breach of an obligation under international human rights law by international organizations in relation to the acts of global health public-private partnerships. It finally closes with a consideration of the possibility of a plurality of responsible international organizations and states with respect to the acts of global health public-private partnerships.

The seventh chapter then provides a synopsis of the preceding chapters and, finally, reaches a conclusion on the best option(s), in the framework of international law, to bridge the gap in responsibility under international law in relation to the acts of global health public-private partnerships.