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

Clarke, L.C.

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5. STATE RESPONSIBILITY

As global health public-private partnerships are outside the framework of responsibility under international law, due to a lack of legal personality under international law,[1] and are, in select states, immune from the jurisdiction of domestic courts,[2] other ways of allocating responsibility for the acts of these partnerships need to be considered. One other way might be to hold states, as partners, responsible under international law in relation to the acts of these partnerships. This might be possible by attributing the acts of partnerships to states and/or finding that states are under an obligation of due diligence with respect to the acts of partnerships.

State responsibility is the "paradigm form of responsibility on the international plane."[3] Further, states are integral partners in global health public-private partnerships. States often provide a significant portion of the funding of these partnerships and further, a certain degree of state approval is often needed before a decision of one of these partnerships is made. States are thereby enabling these partnerships to manage activities that normally fall within the realm of states. If something were to go wrong in these partnerships, could the states involved justifiably disassociate themselves from responsibility under international law?

The sources on the law of state responsibility include customary international law[4] and certain specialized treaties[5] but the leading source on the law of state responsibility is the Articles on State Responsibility.[6] The Articles on State Responsibility are not legally

[1] See Chapter 3
[2] See Chapter 4
[3] James Crawford and Simon Olleson, 'The Nature and Forms of International Responsibility' in Malcolm D. Evans (ed), *International Law* (OUP 2006) 451, 452
[4] See Robert McCorquodale and Penelope Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70(4) Modern Law Review 598, 601
[5] For example, the United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 art 235
[6] Articles on the Responsibility of States for Internationally Wrongful Acts, UNGA Res 56/83, Annex (28 Jan 2002) (Articles on State Responsibility or ASR)

binding however are accepted, for the most part, as reflective of customary international law.[7] It is then with reference to the Articles on State Responsibility that this chapter considers the responsibility of states in relation to the acts of global health public-private partnerships.

Article 1 of the Articles on State Responsibility sets out the general principle that "[e]very internationally wrongful act of a State entails the international responsibility of that State."[8] Article 2 then sets out the elements of an internationally wrongful act of a state which are attributably to the state and a breach of an international obligation of the state.[9]

This chapter explores these two elements more closely and in the context of states and global health public-private partnerships. It considers the attribution of acts of partnerships to integral partners in such partnerships – states – through application of the Articles on State Responsibility. Further, it considers attributing to states a failure to exercise due diligence in relation to the acts of partnerships. It then proceeds to explore the possibility of a breach of an obligation under international human rights law by states in relation to the acts of global health public-private partnerships. Finally, it contemplates the practicability of finding a plurality of states responsible with respect to the acts of global health public-private partnerships.

5.1. ATTRIBUTION TO STATES

[7] See Daniel Bodansky and John R. Crook, 'The ILC's State Responsibility Articles: Introduction and Overview' (2002) 96 American Journal of International Law 773, 782-783; Rüdiger Wolfrum, 'State Responsibility for Private Actors: An Old Problem of Renewed Relevance' in Maurizio Ragazzi (ed), *International Responsibiility Today - Essays in Memory of Oscar Schachter* (Martinus Nijhoff Publishers, 2005) 423, 424; *Noble Ventures, Inc. v Romania* (Award) ICSID Case No ARB/01/11 para 69 (12 October 2005); McCorquodale and Simons (n 4) 601, fn 15. cf David Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority' (2002) 96 American Journal of International Law 857, 873

[8] ASR (n 6) art 1

[9] ibid art 2

One of the two elements of an internationally wrongful act of a state is that it can be attributed to the state. In the context of global health public-private partnerships, this might occur by attributing the acts of these partnerships to states or by attributing to states a failure to exercise due diligence with respect to the acts of these partnerships.

5.1.1. Responsibility through the Acts of Partnerships

The acts of a person or a group of persons are generally not attributable to states under international law, however there are exceptions.[10] The exceptions which might apply in the instance of global health public-private partnerships, resulting in attribution of the acts of these partnerships to states, are found in Article 5 – conduct of persons or entities exercising elements of governmental authority,[11] Article 7 – excess of authority or contravention of instructions,[12] Article 8 – conduct directed or controlled by a State[13] and Article 9 – conduct carried out in the absence or default of the official authorities.[14]

5.1.1.1. Article 5

Article 5 states:

> The conduct of a person or *entity* which is not an organ of the State under article 4 but which is *empowered by the law of that State to exercise elements of the governmental authority* shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.[15]

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[10] James Crawford, *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries* (CUP 2002) 110; Wolfrum (n 7) 424; Olivier de Frouville, 'Attribution of Conduct to the State: Private Individuals' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 257, 260-264

[11] ASR (n 6) art 5. See Lisa Clarke, 'Global Health Public-Private Partnerships: Better Protecting Against Disease but Creating a Gap in Responsibility Under International Law' (2009) 20 Finnish Yearbook of International Law 349

[12] ASR (n 6) art 7

[13] ibid art 8. See Clarke (n 11)

[14] ASR (n 6) art 9

[15] ASR (n 6) art 5 (emphasis added)

James Crawford interprets the term entity in Article 5 as covering a variety of bodies, including, *inter alia*, public agencies and companies, semi-public entities and, possibly, private companies.[16] This interpretation seems to leave space for entities such as global health public-private partnerships. The examples often cited to illustrate the term entity in Article 5, however, include private security firms acting as prison guards, airlines exercising immigration controls and railway companies exerting police powers.[17] Hybrid entities, such as public-private partnerships, are not mentioned. Does this mean that the term entity in Article 5 cannot also include global health public-private partnerships? Or are the types of entities regularly cited as examples cited simply because at the time of drafting the Articles on State Responsibility these were the types of entities reasonably foreseen to be covered by Article 5?

Perhaps the understanding of the term entity could be broadened to include hybrid entities such as public-private partnerships. Such a broadening is not precluded on a plain reading of Article 5. Further, the "true common feature" among entities falling within Article 5 is that they are empowered to exercise elements of governmental authority.[18] If global health public-private partnerships are empowered to exercise elements of governmental authority then it is possible that they could be seen as falling within Article 5 as well.

The meaning of what constitutes governmental authority is not elaborated on in Article 5 since this varies in accordance with the circumstances of each state.[19] It is, however, reasonable to assume that global health issues are within the governmental authority of

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[16] Crawford (n 10) 100

[17] See ibid; John Cerone, 'Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations' (2006) 39 Vanderbilt Journal of Transnational Law 1447, 1458-1459; Malcolm N. Shaw, *International Law* (6th edn, CUP 2008) 787; Djamchid Momtaz, 'Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 237, 244

[18] Crawford (n 10) 100. See Momtaz (n 17) 244-245

[19] Crawford (n 10) 101. See Brigitte Stern, 'The Elements of an Internationally Wrongful Act' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 193, 203. See also Antenor Hallo de Wolf, *Reconciling Privatization with Human Rights* (Intersentia 2011) 217-221 for criteria that might assist in determining what constitutes government authority.

most states.[20] It could then be argued that states have empowered public-private partnerships to deal with global health issues that are normally within the governmental authority of states such as the governmental authority to provide access to preventative and treatment measures for certain diseases or to improve health infrastructure within the state to better manage the growing risk of disease.

Article 5 is, however, limited in its application to partnerships by the requirement that only exercises of governmental authority empowered by the law of the state shall be attributed to the state. It is, however, not enough that the law of the state authorizes an act as part of a general regulation; the law of the state must authorize the act specifically. This narrows the instances where Article 5 is applicable.[21]

Whether or not an act of a partnership fits within the parameters of Article 5 thus depends on whether or not the law of the state specifically authorized the act of the partnership. This is likely difficult to locate. The acts of partnerships are specifically authorized through the decision-making processes of the partnerships, to be described in more detail below in the context of Article 8, rather than specifically authorized by the law of the state.[22]

Consideration should be had to extending the term entity in Article 5 to reflect the changing nature of the relationships in which states participate, including global health public-private partnerships. However, the obstacle of locating laws of the state that specifically authorize the acts of partnerships, thereby empowering them to exercise elements of governmental authority, likely precludes application of Article 5 to partnerships.

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[20] See De Wolf (n 19) 212-213, 218, 220

[21] Crawford (n 10) 102

[22] See, by way of comparison, an article that argues that certain human rights violations by American Indian tribes can be attributed to the United States, relying on Article 5 (Klint A. Cowan, 'International Responsibility for Human Rights Violations by American Indian Tribes' (2006) 9 Yale Human Rights and Development Law Journal 1)

5.1.1.2. Article 7

Article 7 states:

> The conduct of an organ of a State or of a person or *entity empowered to exercise elements of the governmental authority* shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, *even if it exceeds its authority or contravenes instructions*.[23]

Article 7 comes into play, in this research, as it focuses, in part, on entities empowered to exercise elements of governmental authority. The possibility of global health public-private partnerships being empowered to exercise elements of governmental authority was explored in the previous section on Article 5 and bears no repeating. The conclusion will, however, be reiterated, but translated in terms of Article 7. Consideration should be had to extending the term entity in Article 7 to reflect the changing nature of the relationships in which states participate, including partnerships.[24] Article 7 further requires that an entity be empowered to exercise elements of governmental authority. It is reasonable to assume that, as with Article 5, such empowering must come from the law of the state. The challenge of finding laws of the state that specifically authorize the acts of partnerships, thereby empowering them to exercise elements of governmental authority, however, likely precludes application of Article 7 to partnerships.[25] In spite of this challenge and in order to give a complete picture of the possible attribution of acts of partnerships to states, a brief exploration into Article 7 is provided.

Article 7 addresses attribution to states when entities empowered to exercise elements of governmental authority act *ultra vires*. It holds that the conduct of an entity empowered to exercise elements of governmental authority is to be considered an act of the state if

[23] ASR (n 6) art 7 (emphasis added)
[24] See Section 5.1.1.1
[25] ibid

the entity acts in that capacity, regardless of whether or not it exceeds its authority or contravenes instructions.[26]

The logic behind Article 7 is that states cannot evade responsibility for the acts of entities empowered by them to exercise elements of governmental authority by arguing that these acts exceeded internal laws or instructions given. This is the case even when the entity has openly committed acts that are unlawful or has plainly acted beyond its competence.[27] Otherwise, a state could rely on internal laws and instructions given in order to avoid attribution and thus, responsibility under international law.[28]

The caveat is that the entity in question must, in fact, be acting in an official capacity for Article 7 to be applicable. If the entity in question is, instead, acting in a private capacity then Article 7 is not applicable.[29] If a staff member of a global health public-private partnership, for example, distributes medication that is harmful instead of helpful to a group of people, this would fall within the official capacity of the staff member of the partnership and meet the requirements of Article 7. However, if a staff member of a global health public-private partnership, for example, is involved in a physical altercation at a pub after drinking too much alcohol and causes bodily harm to another person, this would fall within the private capacity of the staff member of the partnership and thus not meet the requirements of Article 7.

It is, nonetheless, not probable that Article 7 will be applicable in the context of global health public-private partnerships. Finding laws of the state that specifically authorize the acts of these partnerships is a challenge and as a result, these partnerships are not likely empowered to exercise elements of governmental authority, which is necessary in order to come within the ambit of Article 7.

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[26] ASR (n 6) art 7. See Crawford (n 10) 106; Antonio Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Jugdment on Genocide in Bosnia' (2007) 18(4) The European Journal of International Law 649, 654
[27] Crawford (n 10) 106
[28] ibid
[29] ibid 108; Stern (n 19) 203

5.1.1.3. Article 8

Article 8 states: "The conduct of a *person or group of persons* shall be considered an act of a State under international law if the person or group of persons is in fact *acting on the instructions of, or under the direction or control of,* that State in carrying out the conduct."[30]

The phrase – person or group of persons, on a plain reading, appears to be all-encompassing. The general consensus is that it includes all persons or groups of persons, even if lacking legal personality, although acting *de facto*.[31] It has been stated by Crawford that a state may authorize acts of a legal entity such as a company but a state may also authorize acts of individuals or groups that are not legal entities but nonetheless operate as a collective.[32] Formal partnerships or alliances, such as the Roll Back Malaria Partnership (RBM) and the Stop TB Partnership (Stop TB), and separate organizations, such as the GAVI Alliance (GAVI)[33] and the Global Fund to Fight AIDS, Tuberculosis and Malaria (the Global Fund),[34] seem to fall within the category of – person or group of persons – without much debate.

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[30] ASR (n 6) art 8 (emphasis added). Article 7 – excess of authority or contravention of instructions – does not apply to Article 8 (Crawford (n 10) 108-109). It is possible, however, that a situation of excess of authority or contravention of instructions could arise in the context of Article 8. See Crawford (n 10) 113); Cassese (n 26) 654-655. Cf De Frouville (n 10) 268, 271

[31] Crawford (n 10) 113

[32] ibid

[33] Article 26 of the Agreement between the GAVI Alliance (Global Alliance for Vaccines and Immunization) and the Swiss Federal Council in order to determine the legal status of the GAVI Alliance in Switzerland, 1 January 2009 (on file with author) states that "Switzerland shall not, on account of the GAVI Alliance's activities on its territory, assume any international responsibility for acts or omissions of the GAVI Alliance or for those of their officials." Switzerland cannot, however, opt out of its responsibility under international law and therefore this article cannot be considered determinative of the responsibility under international law of Switzerland in relation to the acts of GAVI.

[34] Article 26 of the Agreement between the Swiss Federal Council and the Global Fund to Fight AIDS, Tuberculosis and Malaria in view of determining the legal status of the Global Fund in Switzerland, 13 December 2004 <www.theglobalfund.org> accessed 2 June 2012 states that "Switzerland shall not incur, by reason of the activity of the Global Fund on its territory, any international responsibility for acts or omissions of the Global Fund or of its officials." Switzerland cannot, however, opt out of its responsibility under international law and therefore this article cannot be considered determinative of the responsibility under international law of Switzerland in relation to the acts of the Global Fund.

The phrase – acting on the instructions of, or under the direction or control of – is, however, more controversial. The phrase – acting on the instructions of – has not faced much scrutiny perhaps because once it is determined that a person or group of persons acted on the instructions of a state, a direct link between the person or group of persons and the state is established and attribution to the state follows. The phrase – under the direction or control of – has, however, been more heavily scrutinized. Much debate has taken place on the degree of direction or control required to invoke attribution to states. A couple of cases, decided before the completion of the Articles on State Responsibility, shed light on the degree of direction or control necessary to trigger attribution to states.

The leading case is *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*[35] (*Nicaragua*), coming from the International Court of Justice (ICJ) and concerning the alleged responsibility of the United States for the conduct of the *contras* (rebel military forces opposing the Frente Sandinista de Liberación Nacional).[36] At first glance, extrapolation of *Nicaragua*, dealing with a state directing or controlling military forces, to the situation here of states directing or controlling a global health public-private partnership might seem far-fetched but a second glance reveals otherwise.

Nicaragua is famously known for setting out the effective control test. It held that "[f]or … conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed."[37] Possible ways states could establish effective control over global health public-private partnerships might be through financing and/or decision-making.

States provide the lion's share of the funding of global health public-private partnerships. RBM, in 2010, received contributions of approximately US$10.89 million from states (in

[35] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14
[36] ibid paras 18-20
[37] ibid para 115 (emphasis added)

comparison to US$4.16 million from other donors).[38] Stop TB, in 2010, received contributions of approximately US$66.68 million from states (in comparison to US$27.22 million from other donors).[39] GAVI has been promised approximately US$13.37 billion from states (in comparison to US$2.66 billion from other donors).[40] And the Global Fund has been promised approximately US$29.07 billion from states (in comparison to US$1.70 billion from other donors).[41] These partnerships rely on states' funding for their operation. Financing alone may not, however, be enough for states to establish effective control over a partnership.

Decision-making by states, as partners in a partnership, may also need to be considered in order to establish effective control. States serve as board members with voting rights on the RBM Board, the Stop TB Board, the GAVI Board and the Global Fund Board.

The RBM Board has twenty-one voting members. Of these twenty-one voting members, eight seats are filled by malaria endemic countries and three seats are filled by donor countries.[42] A quorum of the Board is a majority of the members of the Board, including at least one representative from each of the constituencies of the Board.[43] An effort is made to take decisions by consensus but if this effort fails then a decision is taken by a majority of the members present and voting.[44]

The Stop TB Board has thirty-four members, including four representatives from high burden countries and six regional representatives (including from non-high burden

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[38] Roll Back Malaria, Financial Report – 31 October 2010, 19th RBM Board Meeting (5-8 December. 2010) 4 <http://www.rollbackmalaria.org/partnership/board/meetings/ppt/19pbm/19pbmDay3.pdf> accessed 3 June 2012

[39] Stop TB Partnership, Annual Report 2010, Annex I <http://www.stoptb.org/assets/documents/resources/publications/annualreports/Stop%20TB%20Annual%20Report%202010.pdf> accessed 3 June 2012

[40] Key figures: donor contributions & pledges, Donor contributions and Proceeds to GAVI (2000-2031) as at 31 May 2012 <http://www.gavialliance.org/funding/donor-contributions-pledges/> accessed 3 June 2012

[41] Donors and Contributions, Pledges and Contributions <http://www.theglobalfund.org/en/about/donors/> accessed 3 June 2012

[42] RBM Partnership By-Laws, November 2011, art 3.2 <http://www.rbm.who.int/partnership/secretariat/docs/rbm_bylaws.pdf> accessed 3 June 2012

[43] ibid art 6.2

[44] ibid art 6.3

countries).[45] States do not represent the majority on the Stop TB Board but are members and get a vote in decision-making.[46]

The GAVI Board has eighteen representative members that comprise two-thirds of the voting members. Of these eighteen representative members, ten seats are filled by states (five for representatives of developing country governments and five for representatives of donor country governments).[47] A quorum of the Board is a majority of all voting members. The Board strives for consensus in its decision-making but if consensus cannot be reached, a decision of the Board requires two-thirds majority of the members present and voting.[48]

The Global Fund Board has twenty voting members. Of these twenty voting members, fifteen seats are filled by states (seven for representatives of developing countries and eight for representatives of donors).[49] A quorum of the Board is a majority of members of each of the following two voting groups: (a) the group encompassing the eight donor seats, one private sector seat and one private foundation seat and (b) the group encompassing the seven developing country seats, the two non-governmental organization seats and the seat of a representative of a non-governmental organization who is a person living with HIV/AIDS or from a community living with tuberculosis or malaria. The Board strives for consensus in decision-making but if consensus cannot be reached, any voting member may call for a vote. In order for a motion to pass, two-thirds majority of those present of the two voting groups, described above, is required.[50]

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[45] Coordinating Board <http://www.stoptb.org/about/cb/> accessed 3 June 2012; Stop TB Partnership Secretariat, Basic Framework for the Global Partnership to Stop TB, Section II (2) <http://www.stoptb.org/assets/documents/about/STBBasicFramework.pdf> accessed 3 June 2012. Note: the Basic Framework indicates thirty-two members

[46] More detail on the voting procedures of the Stop TB Board is not available online and requests for access have not been answered.

[47] GAVI Alliance Statutes, 29-30 October 2008, art 9 <http://www.gavialliance.org/resources/GAVI_Alliance_Statutes.pdf> accessed 3 June 2012

[48] ibid art 15

[49] The Global Fund to Fight AIDS, Tuberculosis & Malaria By-Laws, 21 November 2011, art 7.1 <http://www.theglobalfund.org/en/about/structures/board/> accessed 3 June 2012

[50] ibid arts 7.6, 7.7

The Boards of RBM, Stop TB, GAVI and the Global Fund thus require a certain degree of state approval before a decision of the partnership is made. But is this, combined with financing, sufficient for states to be said to have effective control over these partnerships?

According to *Nicaragua*, neither participation of a state in financing, organizing, training, supplying and equipping nor general control by a state, in themselves, lead to the conclusion that the state has effective control.[51] Effective control was thus interpreted in *Nicaragua* to mean a high degree of control including not only overall control but further specific instructions. Financing and participating in the general decision-making of these partnerships, absent specific instructions, would likely fall short of meeting the effective control test, as set down by *Nicaragua*.

Another case which gives a perspective on the meaning of direction or control is a case of the International Criminal Tribunal for the former Yugoslavia (ICTY). In *Prosecutor v. Duško Tadić*[52] (*Tadić*), the Appeals Chamber of the ICTY was dealing with the question of whether the conflict in Bosnia and Herzegovina was still an international conflict or instead had become an internal conflict. The answer to this depended on whether the Bosnian Serb Forces were considered under the control of the Federal Republic of Yugoslavia.[53] Although this case dealt with individual criminal responsibility, the Appeals Chamber held that recourse to general international rules on state responsibility was necessary.[54]

The Appeals Chamber held that a high threshold of control is not necessary in each and every case and that the requisite degree of control varies in accordance with the factual situation.[55] It then proceeded to distinguish between two types of groups – individuals or

[51] *Nicaragua* (n 35) para 115. A critique of this judgment can be found in Cassese (n 26) 653-655
[52] *Prosecutor v Duško Tadić* (Judgment) Case no. IT-94-1-A, ICTY Appeals Chamber (15 July 1999)
[53] ibid paras 83-87
[54] ibid paras 98, 103-104
[55] ibid para 117. Judge Shahabuddeen, in a separate opinion, held that it was not necessary to challenge *Nicaragua* on the matter of state responsibility. State responsibility did not arise in *Tadić*. *Tadić* was dealing with the issue of whether the Federal Republic of Yugoslavia was using force through the Bosnian Serb Forces against Bosnia and Herzegovina not whether the Federal Republic of Yugoslavia was responsible for breaches of international law committed by Bosnian Serb Forces. *Nicaragua* supports the

groups that are not militarily organized and organized military groups. To the former, i.e. individuals or groups that are not militarily organized, the Appeals Chamber kept consistent with the high degree of control required by *Nicaragua*. It stated that for individuals or groups that are not militarily organized, it is necessary to determine not only that the state exercised control over the individual or group but further "whether specific instructions concerning the commission of that particular act had been issued by that State to the individual or group in question."[56] To the latter, i.e. organized military groups, however, the Appeals Chamber required a lesser degree of control. It stated that "[b]y contrast, control by a State over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training)."[57] It continued stating that "[t]his requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation."[58] The Appeals Chamber highlighted the differences between the two groups as follows. A member of an organized group, as opposed to an individual, does not act independently but instead conforms to the standards existing in the group and further must follow the leader of the group, in accordance with a structure, chain of command and set of rules.[59] The level of organization and hierarchical structure of the group is, according to *Tadić*, decisive in lessening the degree of control necessary to attribute acts to states.

Applying *Tadić* in the context of global health public-private partnerships leaves these partnerships in essentially the same position as applying *Nicaragua*. Although *Tadić* downgrades the high degree of control necessary to attribute acts to states, it does so only in the context of organized military groups. By focusing on organized military groups, however, it is not clear whether a group that, although not military, is organized and

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finding that there was an armed conflict between the Federal Republic of Yugoslavia, acting through the Bosnian Serb Forces, and Bosnia and Herzegovina, without needing to challenge the holdings of *Nicaragua* in relation to state responsibility. Judge Shahabuddeen thus reserved his position on the new test proposed by the Appeals Chamber (*Prosecutor v Duško Tadić* (Judgment) Case no. IT-94-1-A, ICTY Appeals Chamber (15 July 1999) Separate Opinion of Judge Shahabuddeen, paras 5, 7-14, 17-21)

[56] *Tadić* (n 52) para 137

[57] ibid (emphasis removed)

[58] ibid. See Cassese (n 26) 657-661

[59] *Tadić* (n 52) para 120

hierarchically structured could also be subject to this lesser degree of control. Could partnerships be subject to this lesser degree of control if organized and hierarchically structured? Or should partnerships be treated akin to individuals or groups that are not militarily organized whereby a high degree of control, including specific instructions, is required to attribute acts to states? As with *Nicaragua*, *Tadić* leaves global health public-private partnerships in a dubious position in terms of attributing the acts of these partnerships to states.

A few years after *Tadić*, the Articles on State Responsibility were completed and consensus grew on interpreting Article 8 consonant with *Nicaragua*, rather than *Tadić*.[60] A more recent case of the ICJ – *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*[61] (the *Bosnian Genocide case*) – considered *Nicaragua*, *Tadić* and the meaning of Article 8. The ICJ in the *Bosnian Genocide case* held that effective control must be "in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations."[62] The ICJ further noted that the overall control test, as suggested by *Tadić*, is troublesome because it widens the scope of state responsibility and nearly eliminates the connection that must exist between the conduct of a state and its responsibility under international law.[63]

Any door opened by *Tadić* seems to have been closed by the *Bosnian Genocide case*. The repercussions for global health public-private partnerships of this recent decision of the ICJ is that acts of partnerships will likely only be attributed to states where effective control by the state over the partnership, in the form of specific instructions from the state to the partnership, is found. This is assuming, of course, that the attribution rules of state

[60] Crawford and Olleson (n 3) 462-463. A critique of the ILC's commentary on Article 8 can be found in Cassese (n 26) 663-665
[61] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43
[62] ibid para 400
[63] ibid para 406. A critique of this judgment can be found in Cassese (n 26)

responsibility are interpreted to cover not only military forces but also other entities, such as global health public-private partnerships.

The *Bosnian Genocide case* does not, however, mention the either-or phrasing of Article 8. Article 8 holds that the person or group of persons must be "acting on the instructions of, *or* under the direction or control"[64] of a state in order to attribute the acts of the person or group of persons to that state. A plain reading of this article thus indicates that *either* the person or group of persons is acting on the instructions of the state *or* the person or group of persons is acting under the direction or control of the state. If 'direction or control' is equated with 'instructions' then use of the conjunction 'or' in Article 8 serves no purpose. Perhaps following the varying interpretations of direction or control in *Nicaragua* and *Tadić*, there was a desire by the drafters of Article 8 to leave open the possibility of an either-or understanding of 'direction or control' and 'instructions'. Such a desire is, however, not explicated in the commentaries on the Articles on State Responsibility. Further, subsequent to the completion of the Articles on State Responsibility, the ICJ in the *Bosnian Genocide case* ignored the either-or option and continued to equate 'direction or control' with 'instructions'.

A consequence of the ICJ's interpretation of Article 8, suggested by Rüdiger Wolfrum, is that states then have an incentive to outsource its functions; that incentive being the circumvention of the rules on state responsibility under international law.[65] He asserts that states should not be able to evade the rules on state responsibility under international law by transferring its functions to or by being acquiescence in the subsumption of its functions by other entities and then later claiming that these entities acted, or were supposed to act, independently. He then argues that Article 8 be interpreted based on states entrusting entities with certain functions and then exercising general control over them.[66]

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[64] ASR (n 6) art 8 (emphasis added)
[65] Wolfrum (n 7) 429. See Mark Gibney, Katarina Tomaševski and Jens Vedsted-Hansen, 'Transnational State Responsibility for Violations of Human Rights' (1999) 12 Harvard Human Rights Journal 267, 284-5
[66] Wolfrum (n 7) 431. See also Cassese (n 26)

Nonetheless, there appears to be a reluctance to interpret Article 8 in this way. But should 'direction or control' only trigger attribution to states where specific instructions are involved? Perhaps the degree of direction or control should be 'overall' direction or control,[67] including, although not necessarily, specific instructions. This would reflect, more realistically, the changing nature of the relationships in which states participate, including global health public-private partnerships.

5.1.1.4. Article 9

Article 9 states:

> The conduct of a person or a group of persons shall be considered an act of a State under international law if the person or group of persons is *in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority*.[68]

A person or group of persons may, in certain circumstances, exercise elements of governmental authority in the absence or default of official authorities but this does not circumvent the responsibility of the state under international law. A state cannot avoid responsibility under international law because it failed to exercise the governmental authority it was supposed to and left this task to others.[69]

Instances where Article 9 can be invoked, however, occur rarely. Such rare instances, cited by Crawford, include "during revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative [or] where lawful authority is being gradually restored, e.g., after foreign occupation."[70]

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[67] *Tadić* (n 52) paras 117, 120, 137
[68] ASR (n 6) art 9 (emphasis added)
[69] Wolfrum (n 7) 425
[70] Crawford (n 10) 114. See *Yeager v Iran* (1987) 17 Iran-USCTR 92 paras 43, 45

Three conditions need to be established in order for Article 9 to be applicable. First, the person or group of persons acting must perform governmental functions, even though authority to do so is wanting. The nature of the function itself is more important than the link of authority between the person or group of persons acting and the state.[71] The person or group of persons is not empowered by the law of the state to exercise elements of governmental authority, as with Article 5 and Article 7, nor is the person or group of persons acting on the instructions of, or under the direction or control of, the state, as with Article 8. Instead, with Article 9, the person or group of persons performs governmental functions on its own accord.[72] Second, the phrase – in the absence or default of – covers situations of a total collapse of the state or situations where the official authorities of the state are not exercising their functions due to a partial collapse of the state or loss of control by the state over a certain area. Third, the phrase – in circumstances such as to call for the exercise of those elements of the government authority – means that circumstances must have justified the attempt by the person or group of persons to exercise elements of governmental authority.[73]

Do global health public-private partnerships meet these three conditions thereby enabling invocation of Article 9? First, global health public-private partnerships may be seen as exercising governmental functions, such as providing access to preventative and treatment measures for certain diseases or improving health infrastructure within the state to better manage the growing risk of disease. Second, in relation to diseases such as AIDS, tuberculosis and malaria, the official authorities of certain states are not exercising their functions. It is unclear whether this can be traced to a partial collapse of these states or loss of control by these states over a certain area, but it is clear that certain states are not adequately dealing with the prevention or treatment of these diseases. Third, the circumstance that millions of people continue to suffer and die from diseases such as AIDS, tuberculosis and malaria is a circumstance that calls for the exercise of governmental authority.

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[71] Crawford (n 10) 114-115
[72] ibid 115. See De Frouville (n 10) 272
[73] Crawford (n 10) 115. See De Frouville (n 10) 272

The three conditions of Article 9 thus appear to be loosely met. It is, however, unlikely that Article 9 was drafted with the intention to cover situations of public-private partnerships exercising the governmental authority of states in relation to matters of global health. But if this is the situation that exists then perhaps it is time to interpret Article 9 in light of this reality.

5.1.2. Responsibility through the Omission of States

Responsibility is attributed to states in relation to not only their actions but also their omissions.[74] An omission includes, by definition, a failure to exercise due diligence.

5.1.2.1. Due Diligence

Another possibility to invoke state responsibility in relation to the acts of global health public-private partnerships is by arguing that states have failed to exercise due diligence with respect to the acts of these partnerships. The failure of a state to exercise due diligence with respect to the acts of a partnership is a delict separate from attributing an act of a partnership to a state. In other words, if a state fails to exercise due diligence, it is not, as a result, responsible for the conduct of the partnership, rather it is responsible for its own lack of due diligence in relation to the conduct of the partnership.[75] The suggestion that states have failed to exercise due diligence with respect to the acts of a partnership can therefore be made in addition to the suggestion to attribute the acts of partnerships to states.

The Articles on State Responsibility do not expressly make reference to the possibility of a state failing to exercise due diligence. Article 2 indicates such a possibility by stating

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[74] ASR (n 6) art 2. See Franck Latty, 'Actions and Omissions' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 355, 358

[75] Wolfrum (n 7) 425. See *Zimbabwe Human Rights NGO Forum v Zimbabwe* Comm 245/2002 (African Commission on Human and Peoples' Rights, 15 May 2006) para 143; Stern (n 19) 209; De Frouville (n 10) 278

that an internationally wrongful act of a state may consist of an action or *omission*.[76] Further, Article 14(3) mentions the obligation of a state to "prevent a given event" however this is only discussed in the context of determining when a breach of an obligation occurs and the period of time over which it extends.[77] It is necessary, therefore, to look beyond the Articles on State Responsibility in order to gain a better understanding of what is meant by due diligence.

In the *Corfu Channel Case (UK v. Albania)*,[78] the ICJ held that the obligations incumbent on Albania, in relation to the explosions in Albanian waters causing damage and loss of life to the United Kingdom, were based, in part, on the following well-established general principle: "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."[79] The Inter-American Court of Human Rights (IACtHR) in the *Velásquez Rodríguez Case*[80] further elaborated on what is meant by the principle of due diligence. *Velásquez Rodríguez* was a case involving the kidnap and disappearance of a man in Honduras and the responsibility of Honduras in regard thereto. It held that an act of a private person or entity, and thus not an act of a state, which violates human rights can nonetheless result in the state being held responsible under international law "because of the lack of due diligence [on the part of the state] to prevent the violation or to respond to it."[81]

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[76] ASR (n 6) art 2. See Crawford (n 10) 82
[77] ASR (n 6) art 14(3)
[78] *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4
[79] ibid 22. Other illustrative ICJ cases and advisory opinions include: *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgment) [1980] ICJ Rep 3 para 63; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 para 31; *Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 para 141; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168 para 248; *Bosnian Genocide case* (n 61) para 430
[80] *Velásquez Rodríguez Case* (Judgment) Inter-American Court of Human Rights Series C No 4 (29 July 1988)
[81] ibid para 172. Other illustrative cases from regional courts include: *Case of Marckx v Belgium* App no 6833/74 (ECtHR, 13 June 1979) para 31; *Case of Plattform "Ärzte Für Das Leben" v Austria* App no 10126/82 (ECtHR, 21 June 1988) para 32; *Case of Osman v The United Kingdom* 87/1997/871/1083 (ECtHR, 28 October 1998) para 115; *Case of Kiliç v Turkey* App no 22492/93 (ECtHR, 28 March 2000) para 55; *The Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v Nigeria* Comm 155/96 (African Commission on Human and Peoples' Rights, 27 October 2001) (*SERAC case*) para 57; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay* (Judgment) Inter-American Court of Human Rights (29 March 2006) paras 151-153

But what does it mean to act with due diligence? What measures are necessary to meet the obligation of due diligence? The measures necessary to meet the obligation of due diligence vary depending on the circumstances, such as, for example, the rights and duties in issue.[82] Is it, nonetheless, possible to discern measures that would result in a state meeting its due diligence obligation?

The Human Rights Committee (HRC), in General Comment 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, stated that there is a positive obligation on states to protect individuals against harmful acts committed by private persons or entities. States may violate this positive obligation if they "fail[ ] … to exercise due diligence to *prevent, punish, investigate or redress* the harm caused by such acts by private persons or entities."[83] A state is thus obligated to prevent breaches of human rights under international law and if not prevented then to investigate such breaches and, if necessary, punish the wrongdoers and compensate the victims. If the state meets these obligations then it is considered to have acted in a duly diligent manner.[84] The measures used by states, in order to meet these obligations, are legal,

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<http://www.corteidh.or.cr/docs/casos/articulos/seriec_146_ing.pdf> accessed 3 June 2012; *Case of Ximenes-Lopes v Brazil* (Judgment) Inter-Amercian Court of Human Rights (4 July 2006) para 90 <http://www.corteidh.or.cr/docs/casos/articulos/seriec_149_ing.pdf> accessed 3 June 2012; *Zimbabwe Human Rights NGO Forum* (n 75) paras 142-143, 147

[82] *Velásquez Rodríguez* (n 80) para 175; Crawford (n 10) 81-82; Robert P. Barnidge, 'The Due Diligence Principle Under International Law' (2006) 8 International Community Law Review 81, 87; *Zimbabwe Human Rights NGO Forum* (n 75) para 155; Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 455; De Frouville (n 10) 277

[83] UN Human Rights Committee 'General Comment No. 31 The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) UN Doc CCPR/C/21/Rev.1/Add.13 para 8 (emphasis added). See UN Human Rights Committee, 'General Comment No. 3 Implementation at the national level (Art. 2)' (1981) para 1

[84] See *Velásquez Rodríguez* (n 80) para 166, 174; Clyde Eagleton, *The Responsibility of States in International Law* (The New York University Press 1928) 213; Riccardo Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States' (1992) 35 German Yearbook of International Law 9, 22, 26, 44-45; Danwood Mzikenge Chirwa, 'The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights' (2004) Melbourne Journal of International Law 1, 11; Alexis P. Kontos, '"Private" security guards: Privatized force and State Responsibility under international human rights law' (2004) 4 Non-State Actors and International Law 199, 227-228; *Zimbabwe Human Rights NGO Forum* (n 75) paras 143, 146; Daniel Thürer and Malcolm MacLaren, 'Military Outsourcing as a Case Study in the Accountability and Responsibility of Power' in August Reinisch and Ursula Kriebaum (eds), *The Law of International Relations - Liber Amicorum Hanspeter Neuhold* (Eleven International Publishing 2007) 391, 404; Vassilis P. Tzevelekos, 'In Search of Alternative Solutions: Can the State or Origin be Held Internationally Responsible for Investors' Human

political, administrative, educational and/or cultural in nature.[85] Examples of appropriate measures include, *inter alia*, ratifying international human rights treaties and incorporating or transforming them into domestic law; implementing recommendations of international human rights bodies; training law enforcement staff on how to deal with human rights violations; investigating violations of human rights; supporting victims of human rights violations; promoting remedies for violations of human rights under domestic and international law; raising awareness, educating, researching and publishing reports on human rights issues; and providing financial and other support to human rights organizations.[86]

Caution is, however, warranted in holding a state responsible for all the activities of persons or entities within its territory or jurisdiction. The European Court of Human Rights (ECtHR) in *Case of Osman v. The United Kingdom*[87] held that in order not to impose an inordinate or impossible burden on the state, consideration must be had to obstacles in policing, the difficulties in predicting the actions of persons or entities and the choices to be made in terms of resources and priorities.[88] It further held that to hold a state responsible for a failure to exercise due diligence, the state must have known or should have known that there was a real and immediate risk of violation of human rights and failed to take appropriate measures[89] which might have been expected to avoid this risk.[90] Consideration of the circumstances, especially knowledge (or not) on the part of

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Rights Abuses that at not Attributable to it?' (2010) 35 Brooklyn Journal of International Law 155, 175-177; Stern (n 19) 209; Luigi Condorelli and Claus Kress, 'The Rules of Attribution: General Considerations' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 221, 232; De Frouville (n 10) 277-278; Susan Marks and Fiorentina Azizi, 'International Mechanisms' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 725, 730

[85] *Velásquez Rodríguez* (n 80) para 175. See General Comment 31 (n 83) para 7

[86] See John Cerone, 'The Human Rights Framework Applicable to Trafficking in Persons and Its Incorporation into UNMIL Regulation 2001/4' (22 July 2010) 42, 65-67 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1647216> accessed 3 June 2012; *Zimbabwe Human Rights NGO Forum* (n 75) para 159

[87] *Osman* (n 81)

[88] ibid para 116

[89] Text to n 86

[90] *Osman* (n 81) para 116. See *Corfu Channel case* (n 78) 18; Ian Brownlie, *System of the Law of Nations: State Responsibility Part 1* (Clarendon Press 1983) 45; Dinah Shelton, 'Private Violence, Public Wrongs, and the Responsibilities of States' (1989) 13(1) Fordham International Law Journal 1, 22-23; *Sawhoyamaxa* (n 81) para 155; *Bosnian Genocide case* (n 61) para 461

the state, is salient in deciding whether a state has breached its obligation of due diligence.

The concern in the context of global health public-private partnerships is, in particular, with the right to life and the right to health. As an example, if a partnership promotes the trial of a drug that results in damage to a person's health or loss of a person's life then the right to life and/or the right to health may be breached by the state who failed to protect this person from the acts of this partnership.[91] States must prevent these acts of partnerships and if not prevented then investigate and, if necessary, punish the wrongdoers and compensate the victims. The measures used by states, in order to meet these obligations, are legal, political, administrative, educational and/or cultural in nature and include any or all of the appropriate measures listed above as examples.[92] It is also important to keep in mind that a state, under an obligation of due diligence, is not responsible for all acts of partnerships within its territory or jurisdiction. Due regard must be had to the circumstances in each particular case. Further, the state must have known or should have known that there was a real and immediate risk of breaches of human rights and failed to take appropriate measures[93] which might be expected to avoid this risk.

Another matter to note when deciding on the responsibility of a state for a failure to exercise due diligence relates to causality. Causality, between the wrongful act and the damage incurred, is not a consideration for attribution of an act to a state under the Articles on State Responsibility. Attribution of an act to a state under the Articles on State Responsibility is instead based on criteria set by international law. There are, however, instances in case law of causality having arisen in relation to the matter of due diligence.[94]

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[91] Obligations of due diligence in relation to the right to life and the right to health will be described in more detail below in Section 5.2.1 on the obligations of states under international human rights law.
[92] Text to n 86
[93] ibid
[94] Crawford (n 10) 91-92

In the *Lighthouses Arbitration between France and Greece*,[95] from the Permanent Court of Arbitration (PCA), Greece evicted the French firm – Collas & Michel – from its offices in Salonika and it then moved to temporary premises. It was later allowed to return to its offices but before doing so, the temporary premises and its contents were destroyed in a fire. A claim was brought against Greece by the firm for the loss it incurred due to the fire. The PCA held that this claim could not succeed because there was no causality between the eviction and the damage. It stated that "[t]he damage was neither a foreseeable nor a normal consequence of the evacuation, nor attributable to any want of care on the part of Greece. All causal connection is lacking, and in those circumstances [the claim] must be rejected."[96] In *Case of L.C.B. v. The United Kingdom*,[97] the applicant was diagnosed with leukemia that was possibly caused by the father having been exposed to radiation while working for the Royal Air Force years before the birth of the applicant.[98] It was complained that the United Kingdom had breached its obligations under the European Convention on Human Rights (ECHR) by failing to warn of the effects of the father's exposure to radiation which prevented pre-natal and post-natal monitoring that would have led to earlier diagnosis and treatment of the applicant.[99] The ECtHR examined causality and held that it was not established that there is a causal link between the father's exposure to radiation and his child's, i.e. the applicant's, leukemia.[100] It therefore could not hold that the United Kingdom could or should have taken action in these circumstances.[101]

More recently, however, the ECtHR has tended to focus less on causality in the context of due diligence. In *Case of E. and Others v. The United Kingdom*,[102] it was alleged that

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[95] *Lighthouses Arbitration between France and Greece* (Permanent Court of Arbitration) (1956) 23 ILR 352
[96] ibid 352-353. See Brownlie, State Responsibility (n 90) 45
[97] *Case of L.C.B. v The United Kingdom* 14/1997/798/1001 (ECtHR, 9 June 1998)
[98] ibid paras 12-13
[99] ibid para 21
[100] ibid para 39
[101] ibid para 39. See *Tugar v Italy* App no 22869/93 (European Commission on Human Rights, 18 October 1995)
[102] *Case of E. and Others v The United Kingdom* App no 33218/96 (ECtHR, 26 November 2002)

the state had failed to protect the applicants from abuse by their stepfather.[103] The ECtHR held that it need not be proved that but for the omissions of the state, the abuse would not have occurred. It need only be proved that the state failed to take reasonable measures which might have, although not necessarily, prevented or mitigated the abuse, in order to hold the state responsible.[104] The ICJ also did not rely on causality in the *Bosnian Genocide case*[105] when it found Serbia and Montenegro responsible for failing to prevent the genocide in Srebrenica. It held that it does not follow from finding a state has breached its obligation to prevent genocide that the genocide would not have occurred had the breach not occurred.[106] As recent case law demonstrates, causality is no longer a necessary consideration in relation to the matter of due diligence.[107]

As the first element of an internationally wrongful act of a state – attribution – has been met, in one form or another, the second element of an internationally wrongful act of a state – a breach – will now be discussed.

5.2. A BREACH OF AN OBLIGATION

The other one of the two elements of an internationally wrongful act of a state is that it constitutes a breach of an international obligation of that state. A breach of an international obligation occurs, according to Article 12 of the Articles on State Responsibility, "when an act of that state is not in conformity with what is required of it by that obligation, regardless of its origin and character."[108] The occurrence of such a breach depends on the terms of the obligation, especially its interpretation, object and purpose and application, and also on the factual situation.[109] The phrase – what is required of it by that obligation – is interpreted to include both acts and/or omissions.[110]

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[103] ibid paras 79-82
[104] ibid para 99
[105] *Bosnian Genocide case* (n 61)
[106] ibid para 461
[107] It nonetheless remains relevant in deciding on reparation. (See Crawford (n 10) 203-205)
[108] ASR (n 6) art 12
[109] Crawford (n 10) 125
[110] ibid

Further, the phrase – regardless of its origin – is interpreted to include all obligations of states whether established by, *inter alia*, treaties, customary international law or general principles of international law.[111] Article 12, in its description of the existence of a breach of an international obligation, is thus intended to be "comprehensive in scope, general in character and flexible in its application."[112]

The following discussion focuses on the obligations of states under international human rights law, in particular the right to life and right to health, and explores the possibility of a breach of such obligations through the acts of global health public-private partnerships.

5.2.1. Obligations of States under International Human Rights Law

Generally, the obligations of states under international law are found by looking to the sources of international law set out in Article 38 of the Statute of the International Court of Justice.[113] States are, according to this article, obliged to comply with treaties to which they are a party, customary international law, general principles of law and judicial decisions where they are a party to the dispute.[114]

This, of course, includes any obligations under international human rights law arising from these sources of international law. Of particular concern in the context of global health public-private partnerships are the obligations of states arising in relation to the right to life and the right to health. Other human rights may also need to be considered when trying to determine the ambit of the obligations of states, as partners of global health public-private partnerships, including, among others, the right to non-discrimination, right to equality, right to be free from inhuman and degrading treatment, right to privacy, right to access to information, right to freedom of association, assembly

[111] ibid 126-127
[112] ibid 127
[113] Statute of the International Court of Justice, 18 April 1946, art 38
[114] ibid

and movement, right to food, right to housing, right to work and right to education.[115] The right to life and the right to health are, however, the focus of this chapter because these human rights are central to the work of global health public-private partnerships.

5.2.1.1. Right to Life

The right to life is generally considered one of the most fundamental of all human rights. It is essential for the exercise of all other human rights; if it is not realized then all other human rights lack meaning.[116] Further, no derogation is permitted from the right to life in times of public emergency.[117] It is not, however, an absolute right in that deprivation of life may be legitimate in the case of the death penalty, death caused by national security forces and death during armed conflict.[118]

5.2.1.1.1. Treaty Law

The right to life is set out in international and regional human rights treaties. Article 6 of the International Covenant on Civil and Political Rights (ICCPR), with 167 state

[115] Committee on Economic, Social and Cultural Rights 'General Comment No. 14 The right to the highest attainable standard of health' (2000) UN Doc E/C.12/2000/4 para 3; Aart Hendriks, 'The Close Connection Between Classical Rights and the Right to Health, with Special Reference to the Right to Sexual and Reproductive Health' (1999) 18 Medicine and Law 225, 225-226, 232-233, 237

[116] Yoram Dinstein, 'The Right to Life, Physical Integrity, and Liberty' in Louis Henkin (ed), *The International Bill of Rights, the covenant on civil and political rights* (Columbia University Press 1981) 114; F. Menghistu, 'The Satisfaction of Survival Requirements' in B.G. Ramcharan (ed), *The Right to Life in International Law* (Martinus Nijhoff Publishers 1985) 63; Halûk A. Kabaalioğlu, 'The Obligations to 'Respect' and to 'Ensure' the Right to Life' in B.G. Ramcharan (ed), *The Right to Life in International Law* (Martinus Nijhoff Publishers 1985) 160; Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (CUP 2002) 243; Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, N.P. Engel 2005) 121; *Case of the Yakye Aka Indigenous Community v Paraguay* (Judgment) Inter-American Court of Human Rights (17 June 2005) para 161 <http://www.elaw.org/system/files/seriec_125_ing.pdf> accessed 4 June 2012; *Sawhoyamaxa* (n 81) para 150; Rhona K.M. Smith, *International Human Rights* (OUP 2007) 194

[117] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 4; UN Human Rights Committee 'General Comment No 6 The right to life' (1982) para 1

[118] Smith (n 116) 197

parties,[119] holds that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[120] The right to life is also set out in regional human rights treaties including the African Charter on Human and Peoples' Rights,[121] the American Convention on Human Rights[122] and the European Convention on Human Rights.[123]

The right to life was, at one time, interpreted as solely protecting against arbitrary killing.[124] The interpretation of the right to life is, however, expanding to include more than just protection against arbitrary killing. The right to life is no longer seen in a restrictive light.[125] It requires that states adopt not only negative measures but also positive measures.[126] Positive measures of interest in this research include, for example, measures to reduce infant mortality and to increase life expectancy, especially in relation to malnutrition and epidemics.[127] The right to life is then seen in a socio-economic light.[128]

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[119] United Nations Treaty Collection <http://treaties.un.org/pages/ViewDetails.aspx?src=UNTSONLINE&tabid=1&mtdsg_no=IV-4&chapter=4&lang=en> accessed 4 June 2012

[120] ICCPR (n 117) art 6

[121] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 218 (African Charter) art 4

[122] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 144 art 4

[123] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 (European Convention on Human Rights or ECHR) art 2

[124] Dinstein (n 116) 115-116; Jayawickrama (n 116) 256-257

[125] General Comment 6 (n 117) para 5. See Menghistu (n 116) 64

[126] General Comment 6 (n 117) para 5; B.G. Ramcharan, 'The Concept and Dimensions of the Right to Life' in B.G. Ramcharan (ed), *The Right to Life in International Law* (Martinus Nijhoff Publishers 1985) 1, 8-10; Menghistu (n 116) 64, 80-81; A.R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004) 22; Jayawickrama (n 116) 260; Alicia Ely Yamin, 'Not Just a Tragedy: Access to Medications as a Right under International Law' (2003) 21 Boston University International Law Journal 325, 330-331; Nowak (n 116) 122; Bertrand Mathieu, *The Right to Life* (Council of Europe Publishing 2006) 95, 98; Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2nd edn, OUP 2004) 155. Cf Dinstein (n 116) 115-116. The language used to describe obligations under the right to life is 'negative and positive' whereas the language used to describe obligations under the right to health is 'respect, protect and fulfill'. There seems to be a reluctance to use the 'respect, protect and fulfill' language in the context of civil and political rights; the 'respect, protect and fulfill' language continues to be associated with economic, social and cultural rights. There is nonetheless an overlap in the nature of these obligations.

[127] General Comment 6 (n 117) para 5

[128] Joseph, Schultz and Castan (n 126) 184

Several cases provide support for this "evolutionary interpretation of the right to life."[129] In *Association X v. the United Kingdom*,[130] a group of parents brought a claim to the European Commission of Human Rights on behalf of their children who suffered severe and lasting damage or died from vaccinations administered by the government. It was alleged that the government organized campaigns for vaccination without informing of the associated risks. The European Commission of Human Rights stated that the phrase – everyone's right to life shall be protected by law – means that states must not only refrain from taking a life but must also take steps to safeguard life.[131] In this case, however, no such breach of the right to life was found as the government's system of control and supervision was determined to be sufficient. This system of control and supervision included: a Joint Committee on Vaccination and Immunization consisting of experts who advise Health Ministers before a particular program is introduced; directions that all doctors administering a vaccination or immunization assess the position of each patient, check for contra-indications and report adverse reactions; distribution of literature to doctors involved in vaccination or immunization programs informing them of medical risks and contra-indications; review of schemes in operation; control over the manufacture and distribution of vaccinations or immunizations through licensing; and the establishment by the Committee on Safety of Medicines of an Adverse Reasons Sub-Committee in order to advise on the collection and evaluation of reports on adverse reasons.[132]

In *Case of the Yakye Aka Indigenous Community v. Paraguay*,[133] the state denying property rights to the members of the Yakye Aka Indigenous Community resulted in them living in destitute conditions in terms of food, water, housing and health care.[134] The IACtHR stated that the right to life includes the right not to be arbitrarily deprived of

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[129] *Yakye Aka* (n 116) Judge Fogel Pedroso, partly concurring/partly dissenting para 33
[130] *Association X v the United Kingdom* App no 7154/75 (European Commission of Human Rights, 12 July 1978). See *Case of Cyprus v Turkey*, App no 25781/94 (ECtHR, 10 May 2001) paras 216-221
[131] ibid 31-32
[132] ibid 33-34
[133] *Yakye Aka* (n 116)
[134] ibid paras 2, 164-175

life but also the right that conditions providing access to a "decent existence" not be impeded or obstructed.[135] The poor living situation of the Yakye Axa Indigenous Community was recognized by the President of the Republic of Paraguay who declared a state of emergency and ordered that food, medical care and educational materials be provided to the families of this community.[136] The state provided these items but it was not considered a sufficient or adequate response.[137] The IACtHR thus found a breach of the right to life of the members of the Yakye Axa Indigenous Community by the state for failing to take necessary measures regarding conditions that influenced the possibility of having a "decent life".[138]

Later, in *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*,[139] based on facts similar to the preceding case, the IACtHR held that states must enable access to conditions that guarantee a "decent life".[140] In this case, the IACtHR found the state had breached the right to life of the members of the Sawhoyamaxa Indigenous Community because it had not adopted the positive measures that could, reasonably, be expected to protect the right to life.[141] The state, in order to protect the right to life, had to adopt measures to move the members of this community from the roadside and, in the meantime, adopt measures to reduce the risk to life the members of this community were facing.[142] The IACtHR held that the state had not adopted the necessary measures. The IACtHR further held that even though legislation in Paraguay gives indigenous peoples the right to receive free medical care in public health centers, legislation alone is not enough. Further governmental conduct that ensures the free and full exercise of human rights is needed. The President of the Republic of Paraguay declared a state of emergency and ordered that food, medical care and educational materials be distributed but the compliance with this order was considered neither sufficient nor adequate.[143]

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[135] ibid paras 161-162
[136] ibid para 50.100
[137] ibid paras 50.105, 169
[138] ibid 176
[139] *Sawhoyamaxa* (n 81)
[140] ibid para 153
[141] ibid para 178
[142] ibid para 163
[143] ibid paras 166-167, 170

In *E.H.P. v. Canada*,[144] a communication was submitted to the HRC arguing that the disposal of nuclear waste in dump sites in Port Hope threatened the life of present and future generations of Port Hope. This was argued to be due to the exposure to radio-activity which is known to cause cancer and genetic defects.[145] The communication was held to be inadmissible as domestic remedies were not exhausted[146] but the HRC did observe that the communication "raise[d] serious issues, with regard to the obligation of States parties to protect human life (article 6(1))."[147]

The above case law and communication provide support for the evolutionary interpretation of the right to life under treaty law. It shows that the right to life is able to extend not only to protecting against arbitrary killing but further to providing positive measures that safeguard life. It is conceded that finding a breach of this understanding of the right to life may be a challenge[148] but as the case law and communication indicate, this may one day change. Thus, if a state fails to take sufficient or adequate measures, including not only the enactment of legislation but also further action on the part of the government, in order to protect the right to life as herein described then a breach of the right to life by the state may be found.

5.2.1.1.2. Customary International Law

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[144] *E.H.P. v Canada*, Communication No 67/1980, 27 October 1982 <http://www.bayefsky.com/pdf/114_canada67_1980.pdf> accessed 4 June 2012

[145] ibid paras 1.2, 1.3

[146] ibid para 8, 9

[147] ibid para 8. See also Concluding observations of the Human Rights Committee: Canada CCPR/C/79/Add.105, 7 April 1999, para 12 ("The Committee is concerned that homelessness has led to serious health problems and even to death. The Committee recommends that the State party take positive measures required by article 6 to address this serious problem.")

[148] Nowak (n 116) 124 fn 17 ("By using the word "desirable" [in General Comment 6], the Committee has made it known that while assuming that the scope of the right to life is broad, it would not necessarily hold Art. 6(1) to be violated when legislation does not achieve a sufficient reduction in the infant mortality rate."); Joseph, Schultz and Castan (n 126) 186 citing *Plotnikov v Russian Federation*, Communication No 784/1997, U.N. Doc. CCPR/C/65/D/784/1997, 5 May 1999 as an example of the difficulty in proving that a breach of Article 6 entails socio-economic deprivation; Erika de Wet and Anél du Plessis, 'The meaning of certain substantive obligations distilled from international human rights instruments for constitutional environmental rights in South Africa' (2010) 10 African Human Rights Law Journal 345, 352, referring to the "high threshold" to be met in finding a breach of the right to life

Another possible source of obligations, in relation to the right to life, is customary international law. In order for this source to hold sway, it must be determined whether the right to life is, in fact, a norm of customary international law. This is determined by locating consistent state practice and *opinio juris*.[149] Proof of state practice and *opinio juris*, in relation to human rights, may be found by looking to diplomatic correspondence; opinions and policy statements of governments; press releases; statements made by governments at international conferences and meetings of international organizations; resolutions of the General Assembly of the United Nations; the acceptance of and adherence to human rights treaties and the Universal Declaration of Human Rights;[150] domestic legislation; judicial decisions of domestic courts; states' reports to treaty bodies of the United Nations; the Human Rights Council Universal Periodic Review process and the work of domestic human rights organizations.[151] It is, not surprisingly, difficult to discern when, precisely, a norm has crystallized into customary international law.[152] A thorough inquiry into the customary international law status of the right to life is therefore not feasible to include here however a few short remarks must be made.

The right to life is often said to have customary status under international law.[153] This, however, tends to be where the right to life is interpreted as protecting against arbitrary

[149] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Judgment) [1969] ICJ Rep 3 para 77

[150] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III)

[151] Brownlie, Principles (n 82) 6-7; Christine Chinkin, 'Sources' in Daniel Moeckli, Sangeeta Shah and David Harris (eds), *International Human Rights Law* (OUP 2010) 103, 111; Olivier de Schutter, *International Human Rights Law Cases materials, commentary* (CUP 2010) 50-51

[152] Christian Tomuschat, *Human Rights Between Idealism and Realism* (OUP 2008) 37-38; Chinkin (n 151) 111-112. See De Schutter (n 151) 52-53 (providing a summary of some of the different approaches to discerning customary international law)

[153] See Dinstein (n 116) 115; Ramcharan (n 126) 3; Kabaalioğlu (n 116) 161; Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995/1996) 25 Georgia Journal of International and Comparative Law 287, 343; *Las Palmeras Case* (Preliminary Objections) Inter-American Court of Human Rights Series C No 67 (4 February 2000) para 15 (separate opinion of Judge A.A. Cançado Trindade); Hansje Plagman, 'The Status of the Right to Life and the Prohibition of Torture Under International: Its Implications for the United States' (2003) Journal of the Institute of Justice and International Studies 172, 177; Tomuschat (n 152) 37; Nigel S. Rodley, 'Integrity of the Person' in Daniel Moeckli, Sangeeta Shah and David Harris (eds) *International Human Rights Law* (OUP 2010) 209, 221-222; *Nuhanović v Netherlands*, Court of Appeal in the Hague, Case number 200.020.174/01, 5 July 2011 (an English translation of the judgment can be found at Nuhanović v Netherlands, Appeal judgment,

killing. There is a growing consensus, however, that the right to life protects against more than arbitrary killing. It has been stated that too often the right to life has received a narrow interpretation and that it not only requires that states adopt negative measures but also requires that states adopt positive measures, for example to reduce infant mortality and to increase life expectancy, especially in relation to malnutrition and epidemics.[154] Arguing that this interpretation of the right to life has status under customary international law, however, has its challenges. Interpreting the right to life as including positive measures means that the door is likely left open for states to decide how to implement these positive measures.[155] If states are given such leeway then it may become difficult to locate the consistent state practice and *opinio juris* needed for the formation of customary international law. This is not to say that customary international law will not move, or is not already moving, in this direction. However, given that the right to life is relatively recently being interpreted as extending to positive measures, the requisite state practice and *opinio juris* do not yet exist.

5.2.1.2. Right to Health

The right to health is considered a fundamental right that is to be enjoyed without distinction in relation to race, religion, political belief or economic or social condition.[156] It is also often seen as indispensable to the exercise of other human rights.[157]

LJN:BR5388; ILDC 1742 (NL 2011) 5 July 2011 <www.oxfordlawreports.com> accessed 4 June 2012) para 6.3

[154] General Comment 6 (n 117) para 5; Ramcharan (n 126) 8-10; Menghistu (n 116) 64, 80-81; Mowbray (n 126) 22; Jayawickrama (n 116) 260; Yamin (n 126) 330-331; Nowak (n 116) 122; Mathieu (n 126) 95, 98; Joseph, Schultz and Castan (n 126) 155. Cf Dinstein (n 116) 115-116

[155] See Mowbray (n 126) 26 discussing *Cyprus v Turkey* (n 130); Nowak (n 116) 123

[156] General Comment 14 (n 115) para 1; Constitution of the World Health Organization (adopted 22 July 1946, entered into force 7 April 1948). (Amendments adopted by the Twenty-sixth, Twenty-ninth, Thirty-ninth and Fifty-first World Health Assemblies (Resolutions WHA26.37, WHA29.38, WHA39.6 and WHA51.23) entered into force 3 February 1977, 20 January 1984, 11 July 1994 and 15 September 2005 respectively and are incorporated in the present text.) Basic Documents, Forty-fifth edition, Supplement, October 2006, preamble <http://www.who.int/governance/eb/who_constitution_en.pdf> accessed 4 June 2012

[157] General Comment 14 (n 115) para 1. See Steven D. Jamar, 'The International Human Right to Health' (1994) 22 Southern University Law Review 1, 2 citing UN Doc A/CONF 32/8; Hendriks (n 115) 225-226

5.2.1.2.1. Treaty Law

The right to health has been iterated in varying forms in international and regional human rights treaties. In the International Covenant on Economic, Social and Cultural Rights (ICESCR), with 160 state parties,[158] Article 12 "recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[159] Other international human rights treaties referencing the right to health include: the International Convention on the Elimination of All Forms of Racial Discrimination;[160] the Convention on the Elimination of Discrimination Against Women;[161] the Convention on the Rights of the Child;[162] the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;[163] and the Convention on the Rights of Persons with Disabilities.[164] Regional human rights treaties also contain provisions focusing on the right to health, among them are the African Charter on Human and Peoples' Rights,[165] the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador)[166] and the European Social Charter.[167]

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[158] United Nations Treaty Collection <http://treaties.un.org/pages/ViewDetails.aspx?src=UNTSONLINE&tabid=1&mtdsg_no=IV-3&chapter=4&lang=en> accessed 4 June 2012

[159] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 12

[160] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 art 5(e)(iv)

[161] Convention on the Elimination of All Forms of Discrimination Against Women (adopted 1 March 1980, entered into force 3 September 1981) 1249 UNTS 13 arts 11(1)(f) and 12

[162] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 art 24

[163] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 art 28

[164] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 art 25

[165] African Charter (n 121) art 16

[166] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (entered into force 16 November 1999) OAS Treaty Series No 69 (1988) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 67 (1992) art 10

[167] European Social Charter (adopted 18 October 1961, entered into force 26 February 1961) 529 UNTS 90 art 11

The scope of and obligations arising from the right to health were explicated, in 2000, by the Committee on Economic, Social and Cultural Rights (the Committee) in its General Comment 14 (GC 14).[168] GC 14 is the authoritative interpretation on the right to health,[169] as set out in Article 12 of the ICESCR, and is the focus of the following discussion on the scope of and obligations arising from the right to health.

The ICESCR did not adopt the definition of health set out in the Constitution of the World Health Organization – "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."[170] This definition is seen as overly broad and, consequently, makes the meaning of the right to health ambiguous.[171] Instead, the ICESCR recognizes the right to "the enjoyment of the *highest attainable standard* of physical and mental health."[172] The right to health, in the words of the Committee, must be understood as the right to enjoy the facilities, goods, services and conditions needed to realize the highest attainable standard of health.[173] It further includes the "underlying determinants" of health,[174] or in other words, the range of factors that promote conditions to lead a healthy life, such as safe and potable water, sanitation, food, housing, healthy occupational and environmental conditions, health-related education and information and participation in health-related decision-making at the community, national and international levels.[175] The ICESCR also expressly mentions goals of reducing stillbirth-rate and infant mortality and providing for the healthy development of children; improving environmental and industrial hygiene; preventing, treating and controlling epidemic, endemic, occupational and other diseases; and creating conditions in order to ensure the sick receive medical attention.[176]

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[168] General Comment 14 (n 115)
[169] General Comments, although authoritative, are not binding on states. See Conway Blake, 'Normative Instruments in International Human Rights Law: Locating the General Comment' (2008) Center for Human Rights and Global Justice Working Paper, Number 17 <http://www.chrgj.org/publications/wp.html> accessed 4 June 2012
[170] Constitution of the WHO (n 156) preamble
[171] See Audrey R. Chapman, 'Conceptualizing the Right to Health: A Violations Approach' (1998) 65 Tennessee Law Review 389, 391
[172] ICESCR (n 159) art 12(1) (emphasis added). See Jayawickrama (n 116) 884-885
[173] General Comment 14 (n 115) para 9
[174] ibid paras 4, 11
[175] ibid
[176] ICESCR (n 159) art 12(2)

The obligation to implement the right to health is to be achieved progressively in light of available resources. Article 2(1) of the ICESCR sets out that states are to "undertake[ ] to take steps … to the maximum of its *available resources*, with a view to *achieving progressively* the full realization of the rights recognized in the present Covenant."[177] 'Available resources' is a yardstick used to help in distinguishing between unwilling states and unable states. A state that is unwilling to use its available resources to realize the right to health is in breach of its obligations. A state that is unable to use its available resources to realize the right to health must prove that even though it has not met its obligations, it has made every effort to use the resources at its disposal to meet its obligations.[178] 'Achieving progressively' has been interpreted to mean an obligation to move fervently and productively towards full realization of the rights.[179] The ICESCR, however, also imposes obligations that are of immediate effect. Examples of obligations that are of immediate effect are the obligation to exercise the right to health without discrimination,[180] the obligation to take deliberate, concrete and targeted steps towards the full realization of the right to health[181] and the obligation to comply with certain core obligations of the right to health.[182]

Obligations are separated into three general categories: the obligation to respect, the obligation to protect and the obligation to fulfill.[183] Firstly, the obligation to respect

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[177] ibid art 2(1) (emphasis added)
[178] General Comment 14 (n 115) para 47
[179] ibid para 31. See *The Government of the Republic of South Africa and Ors v Irene Grootboom and Ors*, Case CCT 11/00, 4 October 2000 para 94; *Minister of Health v Treatment Action Campaign*, Case CCT 8/02, 5 July 2002 paras 34-36, 94; *Soobramoney v Minister of Health (Kwazulu-Natal)*, Case CCT 32/97, 27 November 1997 paras 11, 22-23
[180] General Comment 14 (n 115) para 30. See ICESCR (n 159) arts 2(2), 3; Susan Marks and Andrew Clapham, *International Human Rights Lexicon* (OUP 2005) 201 (Discrimination "assumes particular importance [with respect to the right to health] against the background of a strong correlation between poor health status and asymmetries in health and health-determining systems that favour privileged sections of society.")
[181] General Comment 14 (n 115) para 30. See ICESCR (n 159) art 2(1)
[182] Brigit C.A. Toebes, *The Right to Health as a Human Right in International Law* (Intersentia – Hart 1999) 276. Cf *Treatment Action Campaign* (n 179) paras 26-39
[183] Paul Hunt, *Reclaiming Social Rights: International and Comparative Perspectives* (Dartmouth Publishing Company 1996) 31-4; Asbjørn Eide, 'Economic, Social and Cultural Rights as Human Rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd edn, Kluwer Law International 2001) 9, 23; Yvonne M. Donders, *Towards a Right to Cultural Identity?* (Intersentia 2002) 87-90; *SERAC case* (n 81) paras 44-47; De Wet and Du Plessis (n 148) 349

requires states to avoid interfering directly or indirectly with the realization of the right to health.[184] This obligation to respect is breached if a state, through its actions, policies or laws, contravenes the standards set out in relation to the right to health resulting in injury or death.[185] Secondly, the obligation to protect requires states to take measures that prevent third parties from interfering with the right to health.[186] This obligation to protect is breached if a state fails to take the necessary measures in order to safeguard persons within its jurisdiction from infringements of the right to health by third parties.[187] Finally, the obligation to fulfill requires states to adopt legal, administrative, budgetary, promotional and other appropriate measures in order to realize the right to health.[188] This obligation to fulfill is breached if a state fails to take the steps needed to ensure the realization of the right to health.[189]

In addition, states have an obligation to the international community more generally. It is recommended that states cooperate on a global scale in order to fully realize the right to

[184] General Comment 14 (n 115) para 33. For example, by not marketing unsafe drugs (General Comment 14 (n 115) para 34)

[185] ibid para 50. A couple of examples of breaches of the obligation to respect include: "the deliberate withholding or misrepresentation of information vital to health protection or treatment" and "the failure of the State to take into account its legal obligations regarding the right to health when entering into bilateral or multilateral agreements with other States, international organizations and other entities, such as multinational corporations." (ibid para 50)

[186] ibid para 33. For example, by adopting legislation ensuring equal access to health services offered by third parties; ensuring that privatization does not threaten access to or quality of health services; controlling the marketing of health products by third parties; or ensuring that health professionals meet certain standards (ibid para 35). See *SERAC case* (n 81) paras 50, 53-54. See also Section 5.1.2.1 on due diligence.

[187] General Comment 14 (n 115) para 51. A couple of examples of breaches of the obligation to protect include: "the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others" and "the failure to protect consumers and workers from practices detrimental to health, e.g. by employers and manufacturers of medicines or food" (General Comment 14 (n 115) para 51). See *SERAC case* (n 81) paras 57-58

[188] General Comment 14 (n 115) para 33. For example, by ensuring health care is provided, including immunization programs, and ensuring there is equal access to the underlying determinants of health, including promoting medical research and health education (General Comment 14 (n 115) para 36) The obligation to fulfill is further broken down into the obligations to facilitate, provide and promote (General Comment 14 (n 115) paras 33, 37)

[189] ibid para 52. An example of a breach of the obligation to fulfill includes: "the failure to reduce infant and maternal mortality rates" (ibid para 52)

health.[190] Further, developed states are seen as having an onus to assist developing states in this regard.[191]

States must also comply with certain core obligations. Core obligations of a right are those obligations which are essential to the right. It constitutes the minimal level of obligations of the right that must be observed, otherwise a breach will be found.[192] In GC 14, the Committee set out the core obligations of the right to health as follows: to ensure the right of access to health facilities, goods and services on a non-discriminatory basis; to ensure access to the minimum essential food that is nutritionally adequate and safe; to ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water; to provide essential drugs; to ensure equitable distribution of all health facilities, goods and services; and to adopt and implement a national public health strategy and plan of action.[193] Failure by a state to meet any of these core obligations results in a breach of the right to health.

The Committee also set out obligations it considers of "comparable priority": to ensure reproductive, maternal and child health care; to provide immunization against major infectious diseases; to take measures to prevent, treat and control epidemic and endemic diseases; to provide education and access to information concerning health problems; and to provide appropriate training for health personnel.[194] It is not explained what precisely the Committee intended by using the phrase comparable priority. It probably did not intend to equate these obligations with core obligations otherwise the creation of two separate categories would be meaningless. It is probable, however, that it intended to highlight the importance of these obligations by placing them on a rank just below core obligations. Failure by a state to meet any of these obligations of comparable priority also results in a breach of the right to health.

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[190] ibid para 38
[191] ibid para 40. See ibid para 39
[192] See Phillip Alston, 'Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights' (1987) 9 Human Rights Quarterly 332, 353; Committee on Economic, Social and Cultural Rights 'General Comment No. 3 The nature of States parties obligations' (1990) para 10; Toebes (n 182) 276
[193] General Comment 14 (n 115) para 43
[194] ibid para 44

5.2.1.2.2. Customary International Law

Aside from treaties, another possible source of obligations for the right to health is customary international law. It must, however, be determined whether the right to health is, indeed, a norm of customary international law. This involves locating consistent state practice and *opinio juris*.[195] It is, however, difficult to determine when a norm has developed into customary international law.[196] As with the right to life, a detailed exploration into the customary international law status of the right to health is too cumbersome a task to undertake here however a few brief comments must be made.

The status of the right to health as a norm of customary international law is questionable. There are scholars who argue that the right to health is developing, or has already developed, into a norm of customary international law.[197] The right to health is, however, generally seen as being amorphous in its standards thereby obstructing the consistent state practice and *opinio juris* necessary for the creation of customary international law. This does not preclude the possibility of the right to health developing into a norm of customary international law in the future, and there are signs of this development in relation to certain aspects of the right to health, but the consensus is that this day has not yet arrived.[198]

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[195] n 149-151
[196] n 152
[197] See Beth Gammie, Human Rights Implications of the Export of Banned Pesticides (1994) 25 Seton Hall Law Review 558, 590; Jonathan Wike, 'The Marlboro Man in Asia: U.S. Tobacco and Human Rights' (1996) 29 Vanderbilt Journal of Transnational Law 329, 354-357; Eleanor D. Kinney, 'The International Human Right to Health: What Does This Mean For Our Nation and World?' (2000-2001) 34 Indiana Law Review 1457, 1464-1467; Patrick Wojahn, 'A Conflict of Rights: Intellectual Property Under Trips, The Right to Health, and AIDS Drugs' (2001-2002) 6 UCLA Journal of International Law and Foreign Affairs 463, 494-496
[198] David P. Fidler, '"Geographical Morality" Revisited: International Relations, International Law and the Controversy over Placebo-Controlled HIV Clinical Trials in Developing Countries' (2001) 42(2) Harvard International Law Journal 299, 348; Lawrence O. Gostin and Lance Gable, 'The Human Rights of Persons with Mental Disabilities: A Global Perspective on the Application of Human Rights Principles to Mental Health' (2004) 63 Maryland Law Review 20, 109; Rhianna M. Fronapfel, 'AIDS Prevention and the Right to Health under International Law: Burma as the Hard Case' (2006) 15 Pacific Rim Law and Policy Journal 169, 191-194

After having set out the obligations of states in relation to the right to life and right to health, the possibility of a breach of such obligations by states, either through the acts of global health public-private partnerships or through the failure to exercise due diligence in relation to the acts of these partnerships, now needs to be explored.

5.2.2. Possibility of a Breach

States, through global health public-private partnerships, such as RBM, Stop TB, GAVI and the Global Fund, are meeting the obligations arising from the right to life and the right to health. These partnerships are thus having a favorable impact but these partnerships are also capable of having an adverse impact. A breach of an international obligation by these partnerships has not yet been recorded however the possibility of such a breach is real. It is useful here to draw an analogy between these partnerships and international organizations. International organizations in their beginning years were seen as incapable of doing harm.[199] Capability to do harm was however foreseen by Clyde Eagleton, in 1950, who wrote on the responsibility of the United Nations under international law even though no breach of an international obligation by the United Nations had been recorded necessitating recourse to responsibility under international law. His idea was that as powers were being readily transferred to the United Nations, the United Nations was becoming increasingly capable of doing harm and therefore responsibility under international law needed to be addressed. In the absence of recorded breaches of international obligations, he suggested scenarios where the United Nations might be found in breach of international obligations and then proceeded to address responsibility under international law.[200] The same reasoning may be applied, admittedly to a different degree, to global health public-private partnerships. Partnerships are changing the face of global health and the lives of millions. But as partnerships regulate

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

[200] Clyde Eagleton, 'International Organization and the Law of Responsibility' (1950) I Recueil Des Cours 319, 386-404. See E. Paasivirta & 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 (transposing Eagleton's "power breeds responsibility" from Eagleton, The Responsibility of States (n 84) 206 to international organizations).

matters of global health, these partnerships become increasingly capable of doing harm[201] and therefore responsibility under international law needs to be addressed. A couple of scenarios help in illustrating how a breach of an international obligation might arise through the acts of global health public-private partnerships.

RBM procures the supply of long-lasting insecticidal mosquito nets to protect against malaria.[202] Stop TB reached an agreement with Bayer HealthCare in August 2011 to supply Stop TB's Global Drug Facility with 620,000 tablets of the antibiotic moxifloxacin to be provided to China's national tuberculosis program.[203] GAVI announced in October 2011 that Ethiopia will join fifteen other states[204] in introducing a vaccine against pneumococcal disease through an innovative finance mechanism – Advance Market Commitment (AMC)[205] – overseen by GAVI.[206] The Global Fund, in July 2010, finalized agreements with six manufacturers, Ajanta Pharma, Cipla, Guilin, Ipca, Novartis and Sanofi-aventis, to provide malaria drugs at an affordable price in eight countries in Sub-Saharan Africa and Asia.[207]

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[201] See Gian Luca Burci, 'Public/Private Partnerships in the Public Health Sector' (2009) 6 International Organizations Law Review 359, 379

[202] Malaria Commodity Access <http://www.rollbackmalaria.org/psm/index.html> accessed 4 June 2012; Procurement: Long lasting insecticidal mosquito nets (LLINS or LNs) <http://www.rollbackmalaria.org/psm/procurementLLINs.html> accessed 4 June 2012

[203] Stop TB News Stories, BAYER to provide second-line drugs to the Global Drug Facility, 15 August 2011 <http://www.stoptb.org/news/stories/2011/ns11_055.asp> accessed 4 June 2012; Global Drug Facility <http://www.stoptb.org/gdf/> accessed 4 June 2012. This Stop TB news story further states that moxifloxacin does not currently have approval for the treatment of tuberculosis. However, the WHO has included it as part of a second-line tuberculosis regimen. Through the cooperation of Stop TB and the WHO, moxifloxacin is to be administered in China in a highly controlled and monitored manner. (Bayer (n 203))

[204] Nicaragua, Kenya, Guyana, Sierra Leone, Yemen, Honduras, Democratic Republic of the Congo, Mali, Central African Republic, Gambia, Benin, Cameroon, Rwanda and Burundi

[205] Innovative finance <http://www.gavialliance.org/funding/how-gavi-is-funded/innovative-finance/> accessed 4 June 2012

[206] GAVI Press release, GAVI Alliance partners to tackle childhood killer in Ethiopia, 15 October 2011 <http://www.gavialliance.org/library/news/press-releases/2011/gavi-alliance-partners-to-tackle-childhood-killer-in-ethiopia/> accessed 4 June 2012

[207] Global Fund Press Release, Agreements Reduce Prices of Malaria Medicines by up to 80%, 14 July 2010 <http://www.theglobalfund.org/en/mediacenter/pressreleases/Agreements_reduce_prices_of_malaria_medicines_by_up_to_80__/> accessed 4 June 2012. See Davinia Abdul Aziz, 'Privileges and Immunities of Global Public-Private Partnerships: A Case Study of the Global Fund to Fight AIDS, Tuberculosis and Malaria' (2009) 6 International Organizations Law Review 383, 386 (referring to an allegation by The Lancet that the Global Fund funds ineffective malaria treatments (see Amir Attaran *et al*, 'WHO, the Global Fund, and medical malpractice in malaria treatment' (17 January 2004) 363 The Lancet 237;

Notwithstanding precautionary measures, a possibility exists that the long-lasting insecticidal mosquito nets procured by RBM or the moxifloxacin tablets provided by Stop TB's Global Drug Facility or the introduction of pneumococcal vaccines overseen by GAVI or the malaria drugs provided through the Global Fund are unsafe and, as a result, damaging to the life and health of a population, thereby infringing on the right to life and/or the right to health.

A breach of an international obligation in relation to the acts of global health public-private partnerships is thus a real possibility and accordingly, the second element of an internationally wrongful act of a state – a breach – has, in theory, been met.

5.3. A PLURALITY OF RESPONSIBLE STATES

The language used throughout this chapter – referring to *states* – presumes the possibility of finding more than one state responsible in the instance there is a breach of an obligation under international law. Mention must therefore briefly be made to the possible situation of a plurality of responsible states for an internationally wrongful act in relation to the conduct of global health public-private partnerships.

Scant reference is made to the possibility of a plurality of responsible states in the Articles on State Responsibility however Articles 1 and 47, and related commentary, do suggest such a possibility. Article 1 states that "[e]very internationally wrongful act of a State entails the international responsibility of that State."[208] The related commentary states that this does not, however, preclude the responsibility of other states for the same wrongful act or resulting injury.[209] Article 47 deals with invocation and a plurality of responsible states. It states that "[w]here several States are responsible for the same

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Vinand M Nantulya and Jon Lidén, 'Response to accusations of medical malpractice by WHO and the Global Fund' (31 January 2004) 363 The Lancet 397))

[208] ASR (n 6) art 1

[209] Crawford (n 10) 80

internationally wrongful act, the responsibility of each State may be invoked in relation to that act."[210] This implies the possibility of a plurality of responsible states and the related commentary confirms this implication. It states that it is possible that an act is attributable to more than one state and thus possible that more than one state is responsible for the act. It further states, as a general principle, that where more than one state is responsible for an act, each state is separately responsible for the conduct that is attributable to it and responsibility is not reduced because other states are also found responsible.[211] This article, although relating to invocation, is regularly cited in support of the possibility of a plurality of responsible states.[212]

The notion that a state is responsible for conduct attributed to it, regardless of the fact that another state is also attributed and responsible for the same conduct, is supported by the decision of the ICJ in *Case Concerning Certain Phosphate Lands in Nauru (Nauru v. Australia).*[213] In this case, Nauru instigated proceedings against Australia in relation to the rehabilitation of certain phosphate lands in Nauru before its independence.[214] Australia argued that the claim was not against Australia but against the Administering Authority in relation to Nauru, comprised of Australia, New Zealand and the United Kingdom, and therefore, the claim could only be brought against the three states together and not against one of them alone.[215] The ICJ held that no reason had been provided as to why a claim brought against only Australia should be declared inadmissible merely

[210] ASR (n 6) art 47(1)
[211] Crawford (n 10) 272
[212] See also ASR (n 6) art 19 ("This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State") and art 57 ("These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization"). This research does not inquire into the responsibility of a state in connection with the act of another state, as set out in Articles 16-18. These articles indeed play a role in a discussion on a plurality of responsible states but fall outside the scope of this research. The partnerships under scrutiny in this research, i.e. formal partnerships or alliances and separate organizations, are separate identifiable entities. This research does not break down these partnerships into the constitutive partners, e.g. states, in order to analyze the interactions between them. This would be akin to treating these partnerships as networks, as defined in the introductory chapter (see Chapter 1, Section 1.1.1.1.), which misunderstands the nature of formal partnerships or alliances and separate organizations.
[213] *Case Concerning Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) [1992] ICJ Rep 240
[214] ibid 242
[215] ibid 255, 258

because the claim raised issues regarding the administration of Nauru, which was administered by not only Australia but also New Zealand and the United Kingdom. Australia had obligations under the Trusteeship Agreement and there was nothing in this agreement prohibiting a consideration of a claim that a breach of these obligations by Australia had occurred.[216] Judge Shahabuddeen, in a separate opinion, held that the obligations of the three states – Australia, New Zealand and the United Kingdom –, under the Trusteeship Agreement, were "joint and several."[217] Australia could thus be held responsible for conduct, regardless of the fact that New Zealand and the United Kingdom might also be held responsible for the same conduct. A plurality of responsible states – here, Australia, New Zealand and the United Kingdom – was thus seen as a possibility.[218]

An example of such a situation arising in the context of global health public-private partnerships would be a partnership providing medication to a population for the treatment of an infectious disease that is damaging to the life and health of the population. This conduct might be attributable to more than one state that financed the medication and/or more than one state that decided to provide the medication. It is thus conceivable that more than one state is then responsible for the conduct.

The above-described situation involves a plurality of responsible states in relation to the same internationally wrongful act. But what of the situation of a plurality of responsible states causing the same damage through separate internationally wrongful acts? In this situation, the commentary holds that the responsibility of each state is to be determined independently.[219] In the *Corfu Channel case*,[220] the United Kingdom brought a claim against Albania for its failure to warn of mines it knew, or should have known, were in the Corfu Channel that resulted in damage to ships and also death and personal

[216] ibid 258–259. See *Case Concerning East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 90, 100-105
[217] *Nauru* (n 213) 271
[218] See Christian Dominicé, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 281, 282-283; André Nollkaemper, 'Issues of Shared Responsibility Before the International Court of Justice' in Eva Rieter and Henri de Waele (eds) *Evolving Principles of International Law. Studies in Honour of Karel C. Wellens* (Martinus Nijhoff 2012) 199, 203
[219] Crawford (n 10) 274-275
[220] *Corfu Channel* (n 78)

injuries.[221] Albania was solely named in the claim however in the proceedings it was also alleged that the mines were laid by Yugoslav warships.[222] This allegation did not, however, affect the responsibility of Albania, even though this meant that the damage was potentially the result of the separate internationally wrongful act of Yugoslavia as well.[223] In *Case of Ilaşcu and Others v. Moldova and Russia*,[224] four Moldovan nationals brought an application to the ECtHR against Moldova and Russia concerning acts committed by the authorities of the Moldavian Republic of Transdniestria (MRT), a region in Moldova which proclaimed independence but is not recognized by the international community. It was asserted by the applicants that Moldova was responsible for not putting an end to breaches of human rights by the MRT and that Russia was responsible for breaches of human rights by the MRT since the MRT was under the *de facto* control of Russia.[225] The ECtHR found Moldova and Russia responsible for causing the same damage through separate internationally wrongful acts.[226] A more recent case of the ECtHR – *Case of M.S.S. v Belgium and Greece*[227] – involved an application brought against Belgium and Greece by an Afghan national for his expulsion by Belgium to Greece and the treatment he then received in Greece.[228] The ECtHR held Belgium and Greece were responsible, through separate internationally wrongful acts, for causing the same damage.[229] As the case law demonstrates, a plurality of responsible states may therefore arise when separate internationally wrongful acts cause the same damage, with the responsibility of each state determined independently.[230]

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[221] ibid 10
[222] ibid 15-17
[223] See Crawford (n 10) 274-275; Nollkaemper (n 218) 219-220
[224] *Case of Ilaşcu and Others v Moldova and Russia* App No 48787/99 (ECtHR, 8 July 2004)
[225] ibid paras 1-3
[226] ibid paras 352, 382, 385, 394, Holdings p. 80-81. This case has, however, faced criticism as it held that Moldova "does not exercise authority over part of its territory, namely that part which is under the effective control of the "MRT"" (para 330) yet also held that Moldova "has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention." (para 331). See Alexander Orakhelashvili, 'Division of Reparation between Responsible Entities' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 647, 659-660
[227] *Case of M.S.S. v Belgium and Greece* App No 30696/09 (ECtHR, 21 January 2011)
[228] ibid paras 1, 3
[229] ibid Holdings p. 58-59
[230] See Dominicé (n 218) 284; Nollkaemper (n 218) 202

An example of such a situation arising in the context of global health public-private partnerships, using the same scenario as above, would be a partnership providing medication to a population for the treatment of an infectious disease that is damaging to the life and health of the population. States that financed the medication and/or decided to provide the medication might be responsible for the damage while the state to whom the medication was provided might also be responsible, through a failure to exercise due diligence, for the same damage.

5.4. CONCLUDING REMARKS

As regulation over global health is increasingly being undertaken by entities other than states, such as public-private partnerships, concerns of responsibility under international law are arising. In order to address these concerns, the foregoing analysis suggested relying on rules of state responsibility under international law. But are the *lex lata* rules of state responsibility under international law capable of adequately addressing this shift in regulation of global health from states to other entities such as public-private partnerships?

This chapter suggested attributing the acts of global health public-private partnerships to states, as integral partners in such partnerships, by relying on the following articles of the Articles on State Responsibility: 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/or Article 9 (conduct carried out in the absence or default of the official authorities). Applying these articles to these partnerships is, however, not routine. It would require these articles to be applied in ways not foreshadowed. But, in order to address concerns of responsibility under international law in relation to the acts of global health public-private partnerships, such application must be given consideration.

This chapter also suggested holding states responsible under international law for a failure to exercise due diligence in relation to the acts of global health public-private partnerships. States are under an obligation to prevent, investigate, punish and compensate when a human right under international law has been breached by a partnership within its territory or jurisdiction. States are not, however, responsible for every breach of a human right under international law by a partnership within its territory or jurisdiction. Consideration must be had to the circumstances of the case and the knowledge, based on reasonableness, of the involved state. The avenue of due diligence is, nevertheless, more easily applied than the above-described avenues of attribution as due diligence is the commonly accepted way for a state to deal with persons or entities operating within its territory or jurisdiction.

A breach of an international obligation of a state – the other element, in addition to attribution, of an internationally wrongful act of a state – was subsequently explored, focusing in particular on the right to life and the right to health. It examined both treaty law and customary international law and investigated the scope of these human rights as relevant to the context of global health public-private partnerships. It finally concluded by illustrating the possibility of a breach of obligations arising under the right to life and the right to health by states through the acts of these partnerships or through the failure to exercise due diligence in relation to the acts of these partnerships.

Finally, this chapter suggested the possibility of finding more than one state responsible in the instance there is a breach of an obligation under international law in relation to the acts of global health public-private partnerships. It was concluded that the conduct of a partnership could be attributed to more than one state and thus that more than one state could be held responsible for this conduct of the partnership. It was also concluded that, in relation to the conduct of a partnership, more than one state could be attributed and held responsible for causing the same damage through separate internationally wrongful acts.

In sum, given the gap in responsibility under international law in relation to the acts of partnerships, stemming from the absence of legal personality under international law of these partnerships, and the immunity certain partnerships have from the jurisdiction of domestic courts, one must be willing to step outside the box and explore other avenues in order to deal with concerns of responsibility with respect to the acts of partnerships. The avenues suggested in this chapter focused on holding states, as partners of partnerships, responsible under international law in relation to the acts of partnerships. Another possibility might be to hold international organizations, as partners and/or hosts of partnerships, responsible under international law in relation to the acts of partnerships and this possibility will be explored in the next chapter.