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### 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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## **6. RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS**

Another way to address the gap in responsibility under international law in regard to the acts of global health public-private partnerships might be to hold international organizations responsible under international law in relation to the acts of these partnerships. International organizations are often uniquely situated as partners and/or hosts in partnerships. For example, in the case of formal partnerships or alliances, such as the Roll Back Malaria Partnership (RBM) and the Stop TB Partnership (Stop TB), international organizations serve as partners and hosts of the partnership and in the case of separate organizations, such as the GAVI Alliance (GAVI) and the Global Fund to Fight AIDS, Tuberculosis and Malaria (the Global Fund), international organizations serve as partners of the partnership. International organizations, as partners and/or hosts, are thereby enabling public-private partnerships to manage those activities which normally fall within the realm of international organizations. If a partnership infringes on the right to life and/or the right to health of a population, could the international organizations involved justifiably disassociate themselves from responsibility under international law? The suggestion made in this chapter is to close the gap in responsibility in regard to the acts of global health public-private partnerships by holding international organizations, as partners and/or hosts, responsible under international law in relation to the acts of these partnerships.

Reading literature from sixty years ago, one can find writings of a scholar – Clyde Eagleton – who predicted the possible need to hold international organizations responsible for their acts.<sup>1</sup> Such a prediction was striking as it departed from a state-centric perspective which saw responsibility as a concern only between and amongst states. This prediction was supported by the recognition of international organizations as legal persons under international law, joining a once exclusive group comprised of states. It thus became less and less far-fetched to imagine holding international organizations, as

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<sup>1</sup> See Clyde Eagleton, 'International Organization and the Law of Responsibility' (1950) I *Recueil Des Cours* 319, 323

legal persons regulating matters concerning the public, responsible under international law.

Ideas about the responsibility of international organizations grew initially from ideas about state responsibility. Eagleton suggested the translation of notions of state responsibility to the responsibility of international organizations. State responsibility, he wrote in 1928, is “simply the principle which establishes an obligation to make good any violation of international law producing injury committed by the respondent state.”<sup>2</sup> Later, in 1950, he wrote that “[t]hrough it has been stated only in terms of states, this law is properly applicable to all international legal persons.”<sup>3</sup> It is now generally conceded that the responsibility of international organizations has developed as customary international law.<sup>4</sup> The move to set out these rules more concretely came later through the International Law Commission’s (ILC) Articles on the Responsibility of International Organizations.<sup>5</sup>

In 2002, a Special Rapporteur – Giorgio Gaja – was assigned by the ILC to the topic of the responsibility of international organizations.<sup>6</sup> A series of reports on this topic have since been published by the ILC, in consultation with governments and international organizations. In 2011, the ILC adopted the Draft articles on the responsibility of international organizations and submitted them to the General Assembly to be taken note of and annexed to a resolution. On 9 December 2011, the General Assembly, in Resolution 66/100, took note of the Articles on the Responsibility of International Organizations, annexed them to the resolution and commended them to the attention of

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<sup>2</sup> Clyde Eagleton, *The Responsibility of States in International Law* (The New York University Press 1928) 22

<sup>3</sup> Eagleton, *International Organization* (n 1) 324

<sup>4</sup> International Law Association, Berlin Conference (2004), ‘Accountability of International Organizations’ (2004) 1 *International Organizations Law Review* 221, 254

<sup>5</sup> Articles on the Responsibility of International Organizations, UNGA Res 66/100, Annex (27 Feb 2012) (Articles on the Responsibility of International Organizations or ARIO). See Alain Pellet, *Syllabuses on Topics Recommended for Inclusion in the Long-Term Programme of the Work of the Commission – Responsibility of International Organizations*, Report of the International Law Commission on the work of its fifty-second session, 1 May – 9 June and 10 July – 18 August 2000, Official Records of the General Assembly, Fifty-fifth session, Supplement No 10, Annex 135 <<http://untreaty.un.org/ilc/reports/2000/repfra.htm>> accessed 6 June 2012

<sup>6</sup> Summary record of the 2717th meeting, A/CN.4/SR.2717, 8 May 2002 para 41 <[http://untreaty.un.org/ilc/documentation/english/a\\_cn4\\_sr2717.pdf](http://untreaty.un.org/ilc/documentation/english/a_cn4_sr2717.pdf)> accessed 6 June 2012

governments and international organizations.<sup>7</sup> The Articles on the Responsibility of International Organizations are apt to become the leading source determining the responsibility of international organizations under international law.<sup>8</sup>

Several other approaches have been taken or are now being taken, or at least explored, to deal with the increasing power exercised by international organizations. Among them are the International Law Association's work on the accountability of international organizations,<sup>9</sup> New York University's work on global administrative law<sup>10</sup> and the Max

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<sup>7</sup> ILC, Responsibility of international organizations – Analytical Guide <[http://untreaty.un.org/ilc/guide/9\\_11.htm](http://untreaty.un.org/ilc/guide/9_11.htm)> accessed 6 June 2012

<sup>8</sup> The Articles on the Responsibility of International Organizations are modeled on the Articles on State Responsibility. See ILC, 'Report of the International Law Commission on the Work of its 54<sup>th</sup> session' (29 April - 7 June and 22 July - 16 August 2002) General Assembly Official Records 57<sup>th</sup> session Supplement No 10 (A/57/10) 232; Giorgio Gaja, Special Rapporteur on the Responsibility of International Organizations, First report on the responsibility of international organizations, International Law Commission (26 March 2003) UN Doc A/CN.4/532 para 11; Niels M. Blokker, 'Preparing articles on responsibility of international organizations: Does the International Law Commission take international organizations seriously? A mid-term review' in Jan Klabbers and Åsa Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011) 313. A critique of this and other aspects of the Articles on the Responsibility of International Organizations can be found in José Alvarez, 'International Organizations: Accountability or Responsibility?' Canadian Council of International Law, 35<sup>th</sup> Annual Conference on Responsibility of Individuals, States and Organizations, 27 October 2006 <<http://www.asil.org/aboutasil/documents/CCILspeech061102.pdf>> accessed 6 June 2012; José Alvarez, 'My Summer Vacation (Part IV): Misadventures in Subjecthood' *Opinio Juris*, 29 September 2010 <<http://opiniojuris.org/2010/09/29/my-summer-vacation-part-iv-misadventures-in-subjecthood/>> accessed 6 June 2012; Comments and observations of the Office of Legal Affairs on the draft Articles on Responsibility of International Organizations, adopted by the International Law Commission on first reading in 2009, February 2011 <[http://www.globalgovernancewatch.org/docLib/20110316\\_GGW-UN\\_Comments.pdf](http://www.globalgovernancewatch.org/docLib/20110316_GGW-UN_Comments.pdf)> accessed 6 June 2012; Kristen E. Boon, 'New Directions in Responsibility: Assessing the International Law Commission's Draft Articles on the Responsibility of International Organizations' (2011) 37 *The Yale Journal of International Law Online* 1, 8-9 <<http://www.yjil.org/docs/pub/o-37-boon-new-directions-in-responsibility.pdf>> accessed 6 June 2012

<sup>9</sup> International Law Association, New Delhi Conference (2002), Committee on Accountability of International Organizations, 'Third Report Consolidated, Revised and Enlarged Version of Recommended Rules and Practices ("RRP-S")' (2002) 1 <<http://www.ila-hq.org/en/committees/index.cfm/cid/9>> accessed 6 June 2012. See Resolution No 1/2004, Accountability of International Organisations, 16-21 August 2004 <<http://www.ila-hq.org/en/committees/index.cfm/cid/9>> accessed 6 June 2012 recommending that the Committee on the Accountability of International Organisations, having achieved its mandate, be dissolved, without prejudice to whatever other arrangements the Executive Council sees fit to make in order to follow, and contribute to, the continuing work of the International Law Commission on the Responsibility of International Organisations.

<sup>10</sup> Benedict Kingsbury, Nico Krisch and Richard B. Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15; Nico Krisch and Benedict Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) 17(1) *The European Journal of International Law* 1; Gian Luca Burci, 'Public/Private Partnerships in the Public Health Sector' (2009) 6 *International Organizations Law Review* 359

Planck Institute's work on the public law approach.<sup>11</sup> These approaches will not, however, be delved into here. Accountability is seen as imprecise and broad, involving not merely legal mechanisms but also political, administrative and informal non-legal mechanisms.<sup>12</sup> And global administrative law and the public law approach, even though legal, are still developing and not yet authoritative. The responsibility of international organizations under international law, on the other hand, is a more clearly defined and developed legal approach to deal with the internationally wrongful acts of international organizations.<sup>13</sup> The focus here is therefore on the ILC's work on the Articles on the Responsibility of International Organizations in attempting to determine whether international organizations could be held responsible under international law in relation to the acts of global health public-private partnerships.

The responsibility of international organizations is based on the same mantra as the responsibility of states, that being that “[e]very internationally wrongful act ... entails ... international responsibility.”<sup>14</sup> Further, the elements of an internationally wrongful act of an international organization are in line with those of a state: attribution to an international organization under international law and a breach of an international obligation of that international organization.<sup>15</sup>

The following sections of this chapter consider these two elements in the context of global health public-private partnerships, in particular formal partnerships or alliances

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<sup>11</sup> Armin von Bogdandy, Philipp Dann and Matthias Goldmann, ‘Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities’ (2008) 9(11) *German Law Journal* 1375

<sup>12</sup> August Reinisch, ‘Governance Without Accountability?’ (2001) 44 *German Yearbook of International Law* 270, 273-274; August Reinisch, ‘Accountability of International Organizations According to National Law’ (2005) XXXVI *Netherlands Yearbook Of International Law* 119, 121-122. See Gerhard Hafner, ‘Accountability of International Organizations – A Critical View’ in Ronald St. John MacDonald and Douglas M. Johnston (eds), *Towards World Constitutionalism* (Koninklijke Brill NV 2005) 585, 599; Erika de Wet, ‘Holding International Institutions Accountable: The Complementary Role of Non-Judicial Oversight Mechanisms and Judicial Review’ (2008) 9(11) *German Law Journal* 1987, 1987-1988 (also found in Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann and Matthias Goldmann (eds) *The Exercise of Public Authority by International Institutions – Advancing International Institutional Law* (Springer 2010) 855, 855-857)

<sup>13</sup> Reinisch, *Accountability of International Organizations* (n 12) 121. See Hafner (n 12) 601

<sup>14</sup> ARIO (n 5) art 3. See Articles on the Responsibility of States for Internationally Wrongful Acts, UNGA Res 56/83, Annex (28 Jan 2002) art 1 (Articles on State Responsibility or ASR)

<sup>15</sup> ARIO (n 5) art 4. See ASR (n 14) art 2

(RBM and Stop TB) and separate organizations (GAVI and the Global Fund), and an international organization with which they are associated, the World Health Organization (WHO). The element of attribution will be discussed first and will focus on partnerships as agents of international organizations through Article 6 (conduct of organs or agents of an international organization)<sup>16</sup> and Article 8 (excess of authority or contravention of instructions) of the Articles on the Responsibility of International Organizations. It will then focus on international organizations failing to exercise due diligence in relation to the acts of partnerships. The element of breach will be explored second and will consider the obligations international organizations are bound by under international human rights law, especially the right to life and right to health, and will further consider the possibility of a breach of such obligations through the acts of partnerships. Finally, the possibility of a plurality of responsible international organizations and states with regard to the acts of partnerships will be analyzed.

## **6.1. ATTRIBUTION TO INTERNATIONAL ORGANIZATIONS**

One of the two elements of an internationally wrongful act of an international organization is attribution to the international organization under international law. Attribution to an international organization in relation to the acts of global health public-private partnerships might occur by attributing the acts of these partnerships to international organizations or by attributing to international organizations a failure to exercise due diligence with respect to the acts of these partnerships.

### **6.1.1. Responsibility through the Acts of Partnerships**

Attributing the acts of global health public-private partnerships to international organizations is possible if these partnerships are considered to be agents of an international organization, including if they exceed authority or contravene instructions.

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<sup>16</sup> See Lisa Clarke, 'Responsibility of International Organizations under International Law for the Acts of Global Health Public-Private Partnerships' (2011) 12(1) *Chicago Journal of International Law* 55

These rules of attribution are set out in Article 6 and Article 8 of the Articles on the Responsibility of International Organizations.

#### 6.1.1.1. Article 6

According to Article 6(1), “[t]he conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.”<sup>17</sup> Article 6(2) further provides that “[r]ules of the organization apply in the determination of the functions of its organs and agents.”<sup>18</sup>

The question analyzed in this subsection is whether a global health public-private partnership – RBM, Stop TB, GAVI or the Global Fund – can be considered an agent of an international organization – the WHO – such that the conduct of the former can be considered an act of, or attributed to, the latter under international law.

Agent is defined in Article 2(d) to include “an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts.”<sup>19</sup> Further, relying on the commentary on the Articles on State Responsibility that the status of an organ does not depend on the use of particular terminology in the internal law of the state,<sup>20</sup> the ILC adopts an analogous rationale for the Articles on the Responsibility of

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<sup>17</sup> ARIO (n 5) art 6(1). See *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62 para 66; ILC, Draft articles on the responsibility of international organizations, with commentaries 2011 (adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as part of the Commission’s report covering the work of that session (A/66/10). The report, which also contains commentaries to the draft articles (para 88), will appear in Yearbook of the International Law Commission, 2011, vol II, Part Two) 18 <[http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_11\\_2011.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf)> accessed 6 June 2012 (Commentaries)

<sup>18</sup> ARIO (n 5) art 6(2)

<sup>19</sup> *ibid* art 2(d). See *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 177; Commentaries (n 17) 18

<sup>20</sup> James Crawford, *The International Law Commission’s Articles on State Responsibility – Introduction, Text and Commentaries* (CUP 2002) 98

International Organizations.<sup>21</sup> An agent of an international organization may be found regardless of the label given to it by the international organization. The definition in Article 2(d) along with the commentary of the ILC on the Articles on the Responsibility of International Organizations as to the meaning of the term indicates that the formal status of the person or entity is not determinative; what is determinative is whether the person or entity has been conferred functions by the international organization.<sup>22</sup> Applying this understanding of the term agent to RBM, Stop TB, GAVI and the Global Fund and an international organization with which they are associated, the WHO, produces varying results depending on the partnership under scrutiny.

The phrase in the definition of the term agent to consider more closely is – *charged* by the organization with carrying out, or helping to carry out, one of its *functions*.<sup>23</sup> The *functions* of interest here are those of the WHO and these are set out in Article 2 of the Constitution of the World Health Organization. Of particular interest in the context of global health public-private partnerships are the following functions:

- (c) to assist Governments, upon request, in strengthening health services;
- (d) to furnish appropriate technical assistance and, in emergencies, necessary aid upon the request or acceptance of Governments; ...
- (f) to establish and maintain such administrative and technical services as may be required, including epidemiological and statistical services;
- (g) to stimulate and advance work to eradicate epidemic, endemic and other diseases; ...
- (j) to promote co-operation among scientific and professional groups which contribute to the advancement of health; ...
- (n) to promote and conduct research in the field of health; ...
- (q) to provide information, counsel and assistance in the field of health.<sup>24</sup>

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<sup>21</sup> Commentaries (n 17) 17

<sup>22</sup> *ibid* 17-18

<sup>23</sup> ARIO (n 5) art 2(d) (emphasis added)

<sup>24</sup> 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, art 2 <[http://www.who.int/governance/eb/who\\_constitution\\_en.pdf](http://www.who.int/governance/eb/who_constitution_en.pdf)> accessed 6 June 2012



It seems that RBM, Stop TB, GAVI and the Global Fund carry out one or more functions of the WHO, especially strengthening health services in states, providing administrative and technical support, working towards eradicating diseases, promoting co-operation among actors focused on health and encouraging and facilitating research in the area of health.

It next needs to be considered whether the WHO has *charged* these functions to RBM, Stop TB, GAVI or the Global Fund and this is determined by looking closely at the relationship between the WHO and each of these partnerships. Before turning to these relationships, however, it needs to be considered whether functions must be charged in a formal sense or whether functions may also be charged on a less formal or *de facto* basis. This relates to Article 6(2) – “[r]ules of the organization apply in the determination of the functions of its organs and agents.”<sup>25</sup> This has been interpreted by the ILC to mean that the functions charged to an agent of an international organization are generally determined by the rules of the international organization. But, according to the ILC, the wording used in Article 6(2) is also intended to leave open the possibility that, in exceptional circumstances, functions may be considered as charged to an agent of an international organization even if not based on the rules of the international organization.<sup>26</sup> One such other basis, cited by the ILC, is where persons or entities are acting on the instruction of or under the direction or control of the international organization.<sup>27</sup> It therefore seems plausible that functions may be considered as charged to an agent of an international organization on a less formal or *de facto* basis.<sup>28</sup>

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<sup>25</sup> ARIO (n 5) art 6(2)

<sup>26</sup> Commentaries (n 17) 19

<sup>27</sup> Giorgio Gaja, Special Rapporteur on the Responsibility of International Organizations, Seventh report on the responsibility of international organizations, International Law Commission (27 March 2009) UN Doc A/CN.4/610, 8; *ibid.* See Pierre Klein, ‘The Attribution of Acts to International Organizations’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 297, 298

<sup>28</sup> See Klein (n 27) 299-300

In RBM, the WHO is both a partner and the host of the partnership. As a partner, it is a founding and key partner of the partnership.<sup>29</sup> It is a member of the Board providing guidance on policy in relation to malaria. As the host, it houses the Secretariat and also provides administrative and fiduciary support and facilities. The operations of the Secretariat are carried out in accordance with the rules and regulations of the WHO, subject to adaptations to meet the specific needs of RBM.<sup>30</sup> The Director-General of the WHO further has the power to refuse to implement a decision of RBM if he/she considers that the implementation of this decision would be inconsistent with the rules or regulations of the WHO or could give rise to liability for the WHO.<sup>31</sup> The WHO enters into contracts, acquires and disposes of property and, if necessary, institutes legal proceedings for the benefit of RBM.<sup>32</sup> The staff of the Secretariat of RBM are staff of the WHO and also officials of the WHO and the privileges and immunities enjoyed by the WHO and its staff and officials also apply to the Secretariat staff, funds, properties and assets of RBM.<sup>33</sup>

In Stop TB, the WHO is also both a partner and the host of the partnership. As a partner, it is the founding and a key partner of the partnership. It is a member of the Board providing guidance on policy in relation to tuberculosis. As the host, it houses the Secretariat. This means that the Secretariat follows the rules and regulations of the WHO when managing administrative, financial and human resources matters, subject to adaptations to meet the specific needs of Stop TB.<sup>34</sup> It is not set out whether the Director-General of the WHO, as with RBM, has the power to refuse to implement a decision of Stop TB if he/she considers that the implementation of this decision would be inconsistent with the rules or regulations of the WHO or could give rise to liability for the WHO; but it is assumed this is the case since Stop TB's hosting arrangement with the WHO is similar to RBM's hosting arrangement with the WHO. The WHO further enters

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<sup>29</sup> Memorandum of Understanding between the Roll Back Malaria Partnership and the World Health Organization Concerning Hosting, Secretariat and Administrative Services, 15 December 2006, preamble <<http://www.rollbackmalaria.org/docs/MoU.pdf>> accessed 6 June 2012 (RBM MoU)

<sup>30</sup> *ibid* arts 2.1, 2.2, 7

<sup>31</sup> *ibid* art 2.6

<sup>32</sup> *ibid* art 2.1

<sup>33</sup> *ibid* arts 3.2, 3.8

<sup>34</sup> About Us <<http://www.stoptb.org/about/>> accessed 6 June 2012

into contracts, acquires and disposes of property and, if necessary, institutes legal proceedings for the benefit of Stop TB.<sup>35</sup> The staff of Stop TB are officials of the WHO and, as such, are accorded the same privileges and immunities.<sup>36</sup>

The relationships of RBM and Stop TB with the WHO are ones of partnership and hosting. The WHO is not only a key partner of these partnerships with membership on the Board and influence through the policies it supports but is also the host of these partnerships. The hosting relationship means that the WHO houses the Secretariat, provides rules and regulations, renders administrative and financial support, hires staff, extends privileges and immunities to such staff, signs legal documents and deals with other legal matters of these partnerships. It is not easy to tell whether the functions of the WHO have been charged to RBM and Stop TB in a formal sense. But it is clear that the WHO is highly integrated in and actively supports, or is passively acquiescence in, the work of these partnerships in carrying out functions normally seen as functions of the WHO. The relationships of RBM and Stop TB with the WHO provide compelling support for the argument that these partnerships are acting on the instructions of or under the direction or control of the WHO. As a result, the functions of the WHO are, possibly, being charged in a formal sense but are, at least, being charged on a less formal or *de facto* basis to these partnerships.

GAVI and the Global Fund have a different relationship with the WHO. In GAVI, the WHO is a founding and key partner of the partnership. It is a member, with voting rights, of the Board and chairs the Board in alternation with the United Nations Children's Fund (UNICEF). GAVI also depends on the WHO for technical advice in framing its policies. Further, the WHO helps states in their application for funds and also in the implementation and monitoring of immunization activities.<sup>37</sup>

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<sup>35</sup> Stop TB Partnership Secretariat, Basic Framework for the Global Partnership to Stop TB, Section III <<http://www.stoptb.org/assets/documents/about/STBBasicFramework.pdf>> accessed 6 June 2012

<sup>36</sup> Stop TB Partnership, Request for Proposals, Independent Evaluation of the Global Stop TB Partnership, 20 March 2007, 15 <<http://www.stoptb.org/assets/documents/news/announcements/RFP20Mar.pdf>> accessed 6 June 2012

<sup>37</sup> The World Health Organization <<http://www.gavialliance.org/about/partners/who/>> accessed 6 June 2012; Board members <<http://www.gavialliance.org/about/governance/gavi-board/members/>> accessed 6 June 2012

In the Global Fund, the WHO is also a key partner of the partnership. It is an *ex officio* member, without voting rights, of the Board.<sup>38</sup> At its establishment, the Global Fund signed an Administrative Services Agreement with the WHO whereby the WHO provided the Secretariat and administrative and financial services for the Global Fund.<sup>39</sup> But this Administrative Services Agreement was terminated as of 1 January 2009 and the Global Fund now manages its own Secretariat and administrative and financial services.<sup>40</sup> The Global Fund relies on the WHO for technical expertise to the Secretariat, Country Coordinating Mechanisms and potential Principal Recipients. The WHO also helps states to prepare applications for funding and to realize the programs and reach the targets set out in the funding agreements.<sup>41</sup>

The relationships of GAVI and the Global Fund with the WHO are ones of partnership. The WHO is a key partner in both partnerships with membership on the Board and further influences these partnerships through the policies it supports. The WHO actively supports, or is passively acquiescence in, the work of these partnerships in carrying out functions normally seen as functions of the WHO. These functions of the WHO do not seem to be charged to GAVI or the Global Fund in a formal sense. It may be argued, however, that GAVI and the Global Fund are acting on the instructions of or under the direction or control of the WHO and consequently, its functions are being charged to these partnerships on a less formal or *de facto* basis.

This look at the relationships between the WHO and each of RBM, Stop TB, GAVI and the Global Fund helps in deciding whether this international organization has charged its

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<sup>38</sup> 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 6 June 2012

<sup>39</sup> Global Fund to Fight AIDS, Tuberculosis and Malaria, Report of the Second Meeting of the Board, GF/B2/13 version 2, 22-24 April 2002, 14 May 2002, 38 <<http://www.theglobalfund.org/en/board/meetings/second/>> accessed 6 June 2012

<sup>40</sup> Global Fund Press Release, The Global Fund becomes an Administratively Autonomous Institution as of 2009, 19 December 2008 <[http://www.theglobalfund.org/en/mediacenter/pressreleases/The\\_Global\\_Fund\\_becomes\\_an\\_administratively\\_autonomous\\_institution\\_as\\_of\\_2009/](http://www.theglobalfund.org/en/mediacenter/pressreleases/The_Global_Fund_becomes_an_administratively_autonomous_institution_as_of_2009/)> accessed 6 June 2012

<sup>41</sup> Development Partners <<http://www.theglobalfund.org/en/about/partnership/development/>> accessed 6 June 2012

functions to these partnerships resulting in these partnerships being held to be agents of this international organization. If such agency is found, it satisfies one element of an internationally wrongful act of an international organization – attribution to an international organization under international law. A generalization cannot, however, be made as each of these partnerships has a different relationship with the WHO. Some semblance can be found, however, between formal partnerships or alliances, such as RBM and Stop TB, and between separate organizations, such as GAVI and the Global Fund. In RBM and Stop TB, the WHO acts as a partner and the host and in GAVI and the Global Fund, the WHO acts as a partner. The distinction between acting as a partner and the host versus acting as a partner has consequences for the determination of agency and, in turn, attribution. A stronger case for agency and, in turn, attribution lies where the international organization acts as a partner and the host of the partnership as opposed to where the international organization acts only as a partner of the partnership. But, in either case, arguments may be made, to varying strengths, that RBM, Stop TB, GAVI and the Global Fund are agents of the WHO and that the acts of these partnerships may be attributed to this international organization leaving this international organization responsible under international law.

#### 6.1.1.2. Article 8

According to Article 8:

The conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent *acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions.*<sup>42</sup>

The possibility of global health public-private partnerships being considered agents of the WHO was explored previously in the section on Article 6 and thus bears no repeating. Once this threshold has been met, it may then be necessary to consider attribution to the

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<sup>42</sup> ARIIO (n 5) art 8

WHO in the situation of global health public-private partnerships acting in an official capacity and within the overall functions of the WHO but exceeding authority or contravening instructions. Such a scenario is envisioned by Article 8.

Article 8 deals with attribution to an international organization when the conduct of an agent of the international organization is *ultra vires*.<sup>43</sup> Conduct of an agent of an international organization is *ultra vires* if it exceeds authority or contravenes instructions. Such conduct will however only be attributed to the international organization if it occurs in an official capacity and within the overall functions of the international organization. Only official actions (or omissions), as opposed to private actions (or omissions), of an agent of an international organization can be attributed to the international organization. A connection is thus needed between the *ultra vires* conduct of the agent and the capacities and functions of the agent.<sup>44</sup>

How does one determine whether an act of an agent of an international organization is in an official capacity and within the overall functions of the international organization? The commentary holds that this is determined by the rules of the organization. The rules of the organization set out the capacities and functions of an agent of an international organization. The commentary however also mentions exceptional cases when capacities and functions may be considered as charged to an agent of an international organization even if not based on the rules of the organization. This occurs when an agent of an international organization is acting on the instructions, or under the direction or control, of the organization.<sup>45</sup> Capacities and functions of agents of international organizations are thus determined based on the rules of the organization and/or on the instructions, or direction or control, of the organization.

If a staff member of a global health public-private partnership distributes a vaccine, mistakenly, that has not been approved by the WHO and that has adverse effects on a

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<sup>43</sup> Commentaries (n 17) 26. See *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151, 168

<sup>44</sup> Commentaries (n 17) 27-29. See Klein (n 27) 304-306

<sup>45</sup> Commentaries (n 17) 19, 26-27

population then this would be covered by Article 8 since the partnership is acting in an official capacity and within the overall functions of the WHO,<sup>46</sup> even though exceeding authority or contravening instructions. If, however, a staff member of a global health public-private partnership uses a vehicle owned by the partnership to drive to a music concert and causes an accident with another vehicle then this would not be covered by Article 8 since the partnership is not acting in an official capacity or within the overall functions of the WHO.

The reason behind Article 8 is that an international organization cannot elude responsibility for the acts of its agent by stating that the agent, through these acts, was exceeding authority or contravening instructions as set out in the internal law of the international organization. Otherwise, an international organization could rely on its internal law in order to escape attribution and, in turn, responsibility under international law.<sup>47</sup>

### **6.1.2. Responsibility through the Omission of International Organizations**

An international organization is attributed responsibility in relation to not only its actions but also its omissions.<sup>48</sup> An omission includes, by definition, a failure to exercise due diligence.<sup>49</sup>

#### **6.1.2.1. Due Diligence**

A possibility lies to hold an international organization responsible in relation to the acts of global health public-private partnerships by arguing that the international organization has failed to exercise due diligence with respect to the acts of these partnerships. Such a

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<sup>46</sup> Constitution of the WHO (n 24) art 2(g) (“stimulat[ing] and advanc[ing] work to eradicate epidemic, endemic and other diseases”)

<sup>47</sup> Klein (n 27) 305-306

<sup>48</sup> ARIO (n 5) art 4

<sup>49</sup> Commentaries (n 17) 31

failure to exercise due diligence constitutes a delict separate from attributing an act of a partnership to an international organization. An international organization is responsible for its failure to exercise due diligence in relation to the conduct of the partnership rather than responsible for the conduct of the partnership. Suggesting that an international organization has failed to exercise due diligence with respect to the acts of a partnership can therefore be done in addition to suggesting to attribute the acts of the partnership to the international organization.

The Articles on the Responsibility of International Organizations do not explicitly mention the possibility of an international organization failing to exercise due diligence. Article 4 suggests such a possibility by stating that an internationally wrongful act of an international organization may consist of an action or *omission*.<sup>50</sup> Also, Article 12(3) refers to the obligation of an international organization to “prevent a given event” but this is in the context of deciding when a breach of an obligation occurs and the period of time over which it extends.<sup>51</sup> In spite of the sparse mention of an obligation of due diligence in the Articles on the Responsibility of International Organizations, such an obligation is nonetheless generally seen to apply to international organizations.

A couple of international organizations,<sup>52</sup> in the deliberations of drafting the Articles on the Responsibility of International Organizations, were skeptical about whether international organizations can necessarily take positive action.<sup>53</sup> It was argued that international organizations can only act in accordance with the powers given to them under their constitutive documents. Can international organizations be held responsible for failing to take positive action if international organizations in doing so are operating within the ambit of their allotted powers?<sup>54</sup> The ILC responded that this reasoning cannot

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<sup>50</sup> ARIO (n 5) art 4

<sup>51</sup> *ibid* art 12(3)

<sup>52</sup> The International Monetary Fund and United Nations Educational, Scientific and Cultural Organization (UNESCO) (Gaja, Seventh Report (n 27) 16 citing ILC, Comments and observations received from international organizations, 56<sup>th</sup> session of the International Law Commission (2004) UN Doc A/CN.4/545 and ILC, Comments and observations received from international organizations, 58<sup>th</sup> session of the International Law Commission (2006) UN Doc A/CN.4/568/Add.1, respectively)

<sup>53</sup> Gaja, Seventh Report (n 27) 16

<sup>54</sup> Giorgio Gaja, Special Rapporteur on the Responsibility of International Organizations, Third report on the responsibility of international organizations, International Law Commission (13 May 2005) UN Doc



exclude the possibility that international organizations have obligations to take positive action.<sup>55</sup> Obligations to take positive action are found in treaties to which international organizations are a party and possibly under general international law as well.<sup>56</sup>

In relation to the acts of global health public-private partnerships, if an international organization has an obligation under international law to take positive action to protect certain rights and is in a position to protect against a breach of these rights by partnerships but fails to do so then a breach, in the form of a failure to exercise due diligence, arises that is attributable to that international organization.

The first element of an internationally wrongful act of an international organization – attribution – has been met, whether through Article 6 or Article 8 of the Articles on the Responsibility of International Organizations or through an international organization failing to exercise due diligence. The second element of an internationally wrongful act of an international organization – a breach – will now be examined.

## **6.2. A BREACH OF AN OBLIGATION**

The other one of the two elements of an internationally wrongful act of an international organization is that it constitutes a breach of an international obligation of that international organization. A breach of an international obligation occurs “when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned.”<sup>57</sup>

This section begins by setting out the obligations of international organizations under international human rights law, focusing in particular on the WHO and the rights to life

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A/CN.4/553, 3 citing ILC, Comments and observations received from international organizations, 56<sup>th</sup> session (n 52)

<sup>55</sup> Gaja, Seventh Report (n 27) 16. See Gaja, Third Report (n 54) 4

<sup>56</sup> *ibid.* The failure of the United Nations to prevent genocide in Rwanda is cited as an example (*ibid.*). See Boon, *New Directions* (n 8) 6

<sup>57</sup> ARIO (n 5) art 10(1)

and health, and subsequently, it considers the possibility of a breach of such obligations in relation to the acts of global health public-private partnerships.

### 6.2.1. Obligations of International Organizations under International Human Rights Law

An international obligation, according to the Articles on the Responsibility of International Organizations and the commentary of the ILC, may arise under the rules of the international organization<sup>58</sup> and/or under treaties, customary international law or general principles of international law.<sup>59</sup> The ICJ has also opined, in *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*,<sup>60</sup> that “international organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.”<sup>61</sup> This opinion is also widely accepted by scholars.<sup>62</sup>

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<sup>58</sup> ARIIO (n 5) art 10(2). This article references international obligations owed by an international organization “towards its members” but expressly states in the commentary on the Articles on the Responsibility of International Organizations that “[t]his reference is not intended to exclude the possibility that other rules of the organization may form part of international law” and that such a reference was made “because these are the largest category of international obligations flowing from the rules of the organization.” (Commentaries (n 17) 33). Attention was therefore not drawn to the phrase “towards its members” in the text of this chapter.

<sup>59</sup> Commentaries (n 17) 31

<sup>60</sup> *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 73

<sup>61</sup> *ibid* para 37

<sup>62</sup> August Reinisch, ‘Securing the Accountability of International Organizations’ (2001) 7 *Global Governance* 131, 133; Reinisch, *Governance Without Accountability?* (n 12) 281-282; Hafner (n 12) 629; C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (CUP 2005) 399-400; José E. Alvarez, *International Organizations as Law-Makers* (OUP 2005) 267; Philippe Sands and Pierre Klein, *Bowett’s Law of International Institutions* (Sweet and Maxwell 2009) 461-464; Jan Wouters, Eva Brems, Stefaan Smis and Pierre Schmitt, ‘Accountability for Human Rights Violations by International Organisations: Introductory Remarks’ in Jan Wouters, Eva Brems, Stefaan Smis and Pierre Schmitt (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia 2010) 1, 6-7; Olivier De Schutter, ‘Human Rights and the Rise of International Organisations: The Logic of Sliding Scales in the Law of International Responsibility’ in Jan Wouters, Eva Brems, Stefaan Smis and Pierre Schmitt (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia 2010) 51, 68-73; Henry G. Schermers and Niels M. Blokker, *International Institutional Law, Unity Within Diversity* (Martinus Nijhoff Publishers 2011) 834-835, 995-1005

But what specific obligations under international law are international organizations bound by? In particular, and in relation to the WHO, where do human rights obligations under international law, such as those arising from the right to life and the right to health, fit within the schema?

### 6.2.1.1. Right to Life and Right to Health

The WHO is not a party to treaties protecting the right to life or the right to health and therefore this possible source of obligations need not be explored. Another possible source of obligations for the WHO, in relation to the right to life and the right to health, is customary international law. It must then be determined whether the right to life and/or the right to health are norms of customary international law. An analysis regarding the status of the right to life and the right to health under customary international law has been made in the previous chapter on state responsibility and therefore needs no repeating.<sup>63</sup> A few points will, however, be re-iterated.

It is often difficult to determine when, exactly, a norm has become customary international law.<sup>64</sup> The right to life is frequently said to have customary status under international law<sup>65</sup> but this seems to be where the right to life is interpreted as protecting

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<sup>63</sup> See Chapter 5, Sections 5.2.1.1.2 and 5.2.1.2.2

<sup>64</sup> Christian Tomuschat, *Human Rights Between Idealism and Realism* (OUP 2008) 37-38; Christine Chinkin, 'Sources' in Daniel Moeckli, Sangeeta Shah and David Harris (eds), *International Human Rights Law* (OUP 2010) 103, 111-112. See Olivier de Schutter, *International Human Rights Law Cases materials, commentary* (CUP 2010) 52-53 (providing a summary of some of the different approaches to discerning customary international law)

<sup>65</sup> See 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, 115; 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, 3; Halûk A. Kabaalioglu, '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, 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 64) 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-

against arbitrary killing. The right to life has, however, been recently interpreted as covering more than negative measures and as also covering positive measures, for example to reduce infant mortality and to increase life expectancy, especially in relation to malnutrition and epidemics.<sup>66</sup> The state practice and *opinio juris* needed for the creation of customary international law in relation to this interpretation, however, do not yet exist. The right to health also has questionable status under customary international law. It is often seen as being indeterminate in its standards thereby impeding the consistent state practice and *opinio juris* necessary for the development of customary international law.<sup>67</sup>

The more likely source of human rights obligations under international law for the WHO, at least in relation to the right to life and the right to health, are the rules of the WHO.<sup>68</sup> The ILC's commentary on the Articles on the Responsibility of International Organizations, however, highlights a debate in relation to the nature of the rules of an

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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, LJN:BR5388; ILDC 1742 (NL 2011) 5 July 2011 <www.oxfordlawreports.com> accessed 6 June 2012) para 6.3

<sup>66</sup> See UN Human Rights Committee 'General Comment No 6 The right to life' (1982) para 5; Ramcharan (n 65) 8-10; F. Menghistu, 'The Satisfaction of Survival Requirements' in B.G. Ramcharan (ed), *The Right to Life in International Law* (Martinus Nijhoff Publishers 1985) 63, 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; Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (CUP 2002) 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; Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2<sup>nd</sup> edn, N.P. Engel 2005) 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* (2<sup>nd</sup> edn, OUP 2004) 155, 184. Cf Dinstein (n 65) 115-116

<sup>67</sup> 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. Cf 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

<sup>68</sup> ARIO (n 5) art 10(2)

international organization as obligations under international law. Some argue that the rules of an international organization form part of international law while others argue that the rules of an international organization do not form part of international law and merely form the internal law of the international organization. Another argument is that certain international organizations are highly integrated and the inclusion of the rules of these international organizations within the sphere of international law is possible on this exceptional basis. And another argument is that certain rules of an international organization fall within the category of international law while other rules of the international organization, such as administrative regulations for example, are excluded from the category of international law.<sup>69</sup> The ILC concedes that deciding on the nature of the rules of an international organization is decisive in determining which obligations an international organization is bound by for the purposes of responsibility under international law.<sup>70</sup> It continues, however, that it “does not attempt to express a clear-cut view on the issue.”<sup>71</sup> Instead, “[i]t simply intends to say that, to the extent that an obligation arising from the rules of the organization has to be regarded as an obligation under international law, the principles expressed in the present article apply.”<sup>72</sup> As a general rule, therefore, it cannot be stated that a breach of a rule of an international organization necessarily means that a breach of an obligation of an international organization under international law has occurred.<sup>73</sup> The nature of the rules of an international organization is rather decided on a case-by-case basis.<sup>74</sup>

Rules are defined in the Articles on the Responsibility of International Organizations as “in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization.”<sup>75</sup> The phrase – in particular – was used to leave open the possibility of rules of an international organization arising from agreements the international organization concludes with third parties and judicial or arbitral decisions

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<sup>69</sup> Commentaries (n 17) 32

<sup>70</sup> *ibid* 33

<sup>71</sup> *ibid*

<sup>72</sup> *ibid*

<sup>73</sup> *ibid*

<sup>74</sup> Gaja, Seventh Report (n 27) 15

<sup>75</sup> ARIO (n 5) art 2(b)

binding the international organization.<sup>76</sup> The phrase – other acts of the organization – was inserted in order to cover the wide variety of acts international organizations undertake.<sup>77</sup> Finally, the phrase – established practice – recognizes that international organizations, and the rules governing them, develop over time.<sup>78</sup>

The rules of the WHO are thus the Constitution of the World Health Organization which sets out the objective and functions of the WHO; decisions of the WHO, resolutions of the World Health Assembly and other acts of the WHO adopted in accordance with its instruments; and the established practice of the WHO. The rules of the WHO, its objective being the attainment of the highest possible level of health,<sup>79</sup> focus on the lives and health of people. Moreover, by associating itself with global health public-private partnerships that work towards preventing and treating life-threatening diseases such as AIDS, tuberculosis and malaria, the WHO is making a commitment, at minimum, to avoid situations harmful to those people it is trying to help. As the rules of the WHO bring with them commitments in relation to the lives and health of people, it is reasonable to regard these as obligations under international law.

As the international obligations of the WHO have been set out, the possibility of a breach of such international obligations by the WHO through the acts of global health public-private partnerships now needs to be considered.

### **6.2.2. Possibility of a Breach**

The WHO, through global health public-private partnerships, such as RBM, Stop TB, GAVI and the Global Fund, is meeting the obligations arising from the right to life and the right to health. But in addition to this favorable impact, these partnerships are also

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<sup>76</sup> Commentaries (n 17) 11. See Giorgio Gaja, Special Rapporteur on the Responsibility of International Organizations, Eighth report on responsibility of international organizations, International Law Commission (14 March 2011) UN Doc A/CN.4/640, 8-9

<sup>77</sup> Commentaries (n 17) 11. See Gaja, Eighth Report (n 76) 8-9

<sup>78</sup> Commentaries (n 17) 11. See *Reparation for Injuries* (n 19) 180

<sup>79</sup> Constitution of the WHO (n 24) art 1

capable of having an adverse impact. A breach of an international obligation by a global health public-private partnership has, however, not yet been recorded. It is useful therefore to suggest scenarios where a global health public-private partnership might be found in breach of an international obligation in order to better visualize the possibility of such a breach and ensuing concerns of responsibility under international law.<sup>80</sup> A couple of scenarios will now be provided, in addition to those provided in the previous chapter,<sup>81</sup> in order to further illustrate how a breach of an international obligation might arise through the acts of global health public-private partnerships.

RBM procures the supply of insecticides and spraying equipment to protect against malaria.<sup>82</sup> Stop TB reported, in May 2010, that the Global Drug Facility, managed by Stop TB, will oversee the donation from the Novartis Foundation for Sustainable Development of 250,000 tuberculosis treatments in Tanzania.<sup>83</sup> GAVI, in May 2011, committed US\$100 million to tackle meningitis A with the vaccine MenAfriVac in Cameroon, Chad and Nigeria.<sup>84</sup> The Global Fund, in April 2011, reported progress being made in providing affordable and effective anti-malaria drugs through a pilot initiative of the Global Fund – Affordable Medicines Facility – malaria (AMFm) – in Ghana, Kenya, Madagascar, Niger, Nigeria, Tanzania (including Zanzibar), Uganda and Cambodia.<sup>85</sup>

It is possible, despite precautions taken, that the insecticides and spraying equipment procured by RBM or the tuberculosis treatments overseen by Stop TB's Global Drug Facility or the MenAfriVac vaccine funded by GAVI or the anti-malaria drugs provided

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<sup>80</sup> See Chapter 5, Section 5.2.2

<sup>81</sup> *ibid*

<sup>82</sup> Malaria Commodity Access <<http://www.rollbackmalaria.org/psm/index.html>> accessed 6 June 2012; Procurement: Insecticides and spraying equipment for Indoor Residual Spraying <<http://www.rollbackmalaria.org/psm/procurementIRS.html>> accessed 6 June 2012

<sup>83</sup> Stop TB News Stories, Novartis donates 250 000 TB treatments to the Stop TB Partnership, 19 May 2010 <[http://www.stoptb.org/news/stories/2010/ns10\\_028.asp](http://www.stoptb.org/news/stories/2010/ns10_028.asp)> accessed 6 June 2012; Global Drug Facility <<http://www.stoptb.org/gdf/>> accessed 6 June 2012

<sup>84</sup> GAVI Press release, GAVI commits US\$ 100 million to fight meningitis A, 11 May 2011 <[http://www.gavialliance.org/library/news/press-releases/2011/gavi-commits-us\\$-100-million-to-fight-meningitis-a/](http://www.gavialliance.org/library/news/press-releases/2011/gavi-commits-us$-100-million-to-fight-meningitis-a/)> accessed 6 June 2012

<sup>85</sup> Global Fund Press Release, International initiative slashes cost of anti-malaria drugs in several African countries, 22 April 2011 <[http://www.theglobalfund.org/en/mediacenter/pressreleases/2011-04-21\\_International\\_initiative\\_slashes\\_cost\\_of\\_anti-malaria\\_drugs\\_in\\_several\\_African\\_countries/](http://www.theglobalfund.org/en/mediacenter/pressreleases/2011-04-21_International_initiative_slashes_cost_of_anti-malaria_drugs_in_several_African_countries/)> accessed 6 June 2012

through the Global Fund's AMFm 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 through the acts of global health public-private partnerships has therefore been demonstrated to be a real possibility and thus the second element of an internationally wrongful act of an international organization – a breach – has, in theory, been met.

### **6.3. A PLURALITY OF RESPONSIBLE INTERNATIONAL ORGANIZATIONS AND STATES**

This chapter has focused on attributing responsibility to an international organization – the WHO – in relation to the acts of global health public-private partnerships. It is imaginable, however, that more than one international organization might, at the same time, be attributed responsibility or that more than one international organization and more than one state might, at the same time, be attributed responsibility, in relation to the acts of these partnerships. This section explores the possibility of a plurality of responsible international organizations and also a plurality of responsible international organizations and states.

The Articles on States Responsibility purposively left open the possibility of finding an international organization responsible under international law or of finding a state responsible for the conduct of an international organization under international law. Article 57 states that “[the Articles on State Responsibility] 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.”<sup>86</sup> The Articles on the Responsibility of International Organizations are meant to fill the gap that was left by the Articles on State Responsibility.<sup>87</sup> The scope of the Articles on the Responsibility of International Organizations thus includes the responsibility of an international

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<sup>86</sup> ASR (n 14) art 57

<sup>87</sup> Commentaries (n 17) 89



organization for an internationally wrongful act<sup>88</sup> and the responsibility of a state for an internationally wrongful act in connection with the conduct of an international organization.<sup>89</sup>

The possibility of a plurality of responsible international organizations and states for an internationally wrongful act is not expressly set out in the Articles on the Responsibility of International Organizations but is alluded to in varying forms in both the articles and the commentary. A few examples are as follows. Article 3 states: “Every internationally wrongful act of an international organization entails the international responsibility of that organization.”<sup>90</sup> The commentary on Article 3 then evinces the possibility of the parallel responsibility of other subjects of international law. It states that an international organization being responsible for an internationally wrongful act does not exclude the existence of the parallel responsibility of other subjects of international law for the same internationally wrongful act.<sup>91</sup> The commentary on Part Two, Chapter II – Attribution of conduct to an international organization – further holds that dual or even multiple attribution of conduct to international organizations and/or states is possible to envisage, even though it might not regularly occur in practice.<sup>92</sup> Conduct can thus, according to this commentary, be attributed to more than one international organization and more than one state at the same time.

Article 48 covers the invocation of responsibility in relation to the responsibility of an international organization and one or more states or international organizations. It states that “[w]here an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act.”<sup>93</sup> The possibility to hold an international organization and one or more states or international organizations

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<sup>88</sup> ARIO (n 5) art 1(1)

<sup>89</sup> *ibid* art 1(2)

<sup>90</sup> *ibid* art 3

<sup>91</sup> Commentaries (n 17) 14

<sup>92</sup> *ibid* 16. See Giorgio Gaja, Special Rapporteur on the Responsibility of International Organizations, Second report on responsibility of international organizations, International Law Commission (2 April 2004) UN Doc A/CN.4/541, 3-4; International Law Association, New Delhi (n 9) 16

<sup>93</sup> ARIO (n 5) art 48

responsible for an act that is wrongful under international law is thus presumed. The commentary states that Article 48 addresses the situation of an international organization being held responsible for an internationally wrongful act together with one or more other entities, whether international organizations or states.<sup>94</sup> This article, even though dealing with invocation, supports the possibility of a plurality of responsible international organizations and states.<sup>95</sup>

An example of such a situation arising in the context of global health public-private partnerships would be a partnership managing the trial of a vaccination that is harmful to the life and health of those involved. This conduct might be attributable to an international organization and one or more states or international organizations involved in managing the trial, whether through financing, contributions-in-kind or otherwise. Consequently, it is conceivable that an international organization and one or more states or international organizations is then responsible for the conduct.

The above articles and commentary address the situation of a plurality of responsible international organizations and states in relation to the same internationally wrongful act but do not address the situation of a plurality of responsible international organizations and states causing the same damage through separate internationally wrongful acts. Does

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<sup>94</sup> Commentaries (n 17) 76. See Giorgio Gaja, Special Rapporteur on the Responsibility of International Organizations, Sixth report on responsibility of international organizations, International Law Commission (1 April 2008) UN Doc A/CN.4/597, 9 (“The possibility of a plurality of responsible entities is even more likely when one of them is an international organization, given the existence of a variety of cases in which this may occur”)

<sup>95</sup> See also ARIIO (n 5) art 19 (“This Chapter is without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization”) and art 63 (“This Part is without prejudice to the international responsibility of the international organization which commits the act in question, or of any State or other international organization”). This research does not inquire into the responsibility of an international organization in connection with the act of a state or another international organization, as set out in Articles 14-18. Nor does this research inquire into the responsibility of a state in connection with the conduct of an international organization, as set out in Articles 58-62. These articles indeed play a role in a discussion on a plurality of responsible international organizations and 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. international organizations and 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.

the absence of reference to such a situation mean that such a situation is not feasible? It is reasonable to assume, analogizing with the Articles on State Responsibility and its commentary, that a plurality of responsible international organizations and states might arise when separate internationally wrongful acts cause the same damage and that the responsibility of each international organization and state will then be determined independently.<sup>96</sup>

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 managing the trial of a vaccination that is harmful to the life and health of those involved. International organizations and/or states involved in managing the trial, whether through financing, contributions-in-kind or otherwise, might be responsible for the damage while the international organization and/or state under whose auspices or jurisdiction the trial was taking place might also be responsible, through a failure to exercise due diligence, for the same damage.

A plurality of responsible international organizations and states has not, however, been regularly demonstrated in practice, even though it is, in principle, possible and further inevitable given the increasing variety of actors on the international plane.<sup>97</sup> This lacuna is seen in *Behrami v. France and Saramati v. France, Germany and Norway*<sup>98</sup> of the European Court of Human Rights (ECtHR). This case falls within the ambit of Article 7 of the Articles on the Responsibility of International Organizations dealing with conduct of organs of a state or organs or agents of an international organization placed at the disposal of another international organization.<sup>99</sup> This is not the situation in relation to

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<sup>96</sup> See Chapter 5, Section 5.3

<sup>97</sup> André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Concept Paper' (2011) ACIL Research Paper No 2011-07 (SHARES Series), finalized 2 August 2011 ([www.sharesproject.nl](http://www.sharesproject.nl)) 1, 3 <<http://www.sharesproject.nl/wp-content/uploads/2011/08/Nollkaemper-Jacobs-Shared-Responsibility-in-International-Law-A-Concept-Paper.pdf>> accessed 7 June 2012

<sup>98</sup> *Behrami v. France and Saramati v. France, Germany and Norway* App no 71412/01 and App no 78166/01 (ECtHR, 2 May 2007)

<sup>99</sup> ARIO (n 5) art 7 ("The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.")

global health public-private partnerships but the case is nonetheless illustrative of the possibility, or not, of a plurality of responsible international organizations and states.

In *Behrami and Saramati*, the ECtHR had to decide whether the states named in the claim could be attributed certain acts of KFOR<sup>100</sup> and UNMIK<sup>101</sup> in Kosovo. The ECtHR found that KFOR was delegated and exercising Chapter VII powers of the Security Council of the United Nations and therefore the conduct of KFOR was attributable to the United Nations.<sup>102</sup> It also found that UNMIK was a subsidiary organ of the United Nations, created under Chapter VII powers of the Security Council, and thus the conduct of UNMIK was also attributable to the United Nations.<sup>103</sup> The link between the claimants and the respondent states was then held by the ECtHR to be insufficient for it to maintain jurisdiction over the matter.<sup>104</sup> These holdings of the ECtHR are considered highly controversial and have generally been rejected.<sup>105</sup> The key point, for the purposes of this chapter, is that once the ECtHR determined that the acts were attributable to the United Nations, it did not proceed to consider the possibility that these acts might be attributable to the involved states as well.<sup>106</sup> The focus was not on the factual

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<sup>100</sup> Kosovo Forces

<sup>101</sup> United Nations Mission in Kosovo

<sup>102</sup> *Behrami and Saramati* (n 98) para 141

<sup>103</sup> *ibid* para 143

<sup>104</sup> *ibid* paras 144, 149, 151-152. See *Kasumaj v Greece* App no 6974/05 (ECtHR, 5 July 2007); *Gajic v Germany* App no 31446/02 (ECtHR, 28 August 2007); *Berić and Ors v Bosnia and Herzegovina*, App nos 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05 (ECtHR, 16 October 2007)

<sup>105</sup> Aurel Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* Cases' (2008) 8(1) *Human Rights Law Review* 151, 162-170; Kjetil Mujezinović Larsen, 'Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test' (2008) 19(3) *European Journal of International Law* 509; Erika de Wet, 'The Governance of Kosovo: Security Council Resolution 1244 and the Establishment and Functioning of Eulex' (2009) 103(1) *American Journal of International Law* 83, 94-95; Marko Milanović and Tatjana Papić, 'As Bad as it Gets: The European Court of Human Rights's *Behrami* and *Saramati* Decision and General International Law' (2009) 58 *International & Comparative Law Quarterly* 267, 289; Klein (n 27) 300-303; Kristen E. Boon, 'Regime Conflicts and the U.N. Security Council: Applying the Law of Responsibility' (2010) 42 *George Washington International Law Review* 787, 815-816; Commentaries (n 17) 22-25; Marko Milanović, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 23(1) *European Journal of International Law* 121, 134-135

<sup>106</sup> In *Case of Al-Jedda v The United Kingdom* App no 27021/08 (ECtHR, 7 July 2011) the ECtHR did not need to consider dual attribution to international organizations and states since it was held that the conduct was within the effective control of the United Kingdom and not the United Nations. (paras 84-85) See Pieter Jan Kuijper, 'Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?' (2010) 7 *International Organizations Law Review* 9, 30-31

circumstances rather the focus was on the formalistic ties to the United Nations via Chapter VII powers of the Security Council. A plurality of responsible international organizations and states was thus not explored or even mentioned as a possibility. The consensus is, however, that, in this case, such a possibility indeed existed and should have, at least, been considered.<sup>107</sup>

A recent case of the Court of Appeal in the Hague, *Nuhanović v. Netherlands*,<sup>108</sup> shows that situations giving rise to a plurality of responsible international organizations and states are conceivable. This case also falls within the ambit of Article 7 of the Articles on the Responsibility of International Organizations dealing with conduct of organs of a state or organs or agents of an international organization placed at the disposal of another international organization.<sup>109</sup> As mentioned above, this is not the circumstance of global health public-private partnerships but the case is nevertheless indicative of the possibility, or not, of a plurality of responsible international organizations and states.

It was held in *Nuhanović* that the Netherlands exercised effective control and was to be attributed certain conduct of the Dutch battalion – Dutchbat – that was set up to participate in the United Nations peacekeeping force UNPROFOR<sup>110</sup> in order to protect the safe area in Srebrenica.<sup>111</sup> The possibility of the United Nations also exercising effective control and being attributed conduct was not considered by the court as

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<sup>107</sup> See Pierre Bodeau-Livinec, Gionata P. Buzzini and Santiago Villalpando, ‘Agim Behrami & Bekir Behrami v. France; Ruzhdi Saramati v. France, Germany & Norway. Joined App. Nos. 71412/01 & 78166/01’ (2008) 102(2) *American Journal of International Law* 323, 329-330; Sari, *Jurisdiction and International Responsibility* (n 105) 167-168; Larsen (n 105) 517, 520, 523-524; Milanović and Papić (n 105) 289; Caitlin A. Bell, ‘Reassessing Multiple Attribution: The International Law Commission and the *Behrami* and *Saramati* Decision’ (2010) 42 *NYU Journal of International Law and Politics* 501, 503-504, 514-520; André Nollkaemper, ‘Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica’ (2011) 9 *Journal of International Criminal Justice* 1143, 1150; Aurel Sari, ‘Autonomy, attribution and accountability’ in Richard Collins and Nigel D. White (eds) *International Organizations and the Idea of Autonomy* (Routledge 2011) 257, 271; Milanović (n 105) 134-135

<sup>108</sup> *Nuhanović* (n 65). An almost identical ruling, on the same day, of the Court of Appeal in the Hague can be found in *Mustafić-Mujić et al v The Netherlands*, Court of Appeal in the Hague, Case number 200.020.173/01, 5 July 2011 (an English translation of the judgment can be found at de Rechtspraak, LJN: BR5386, Gerechtshof 's-Gravenhage, 200.020.173/01 <<http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR5386>> accessed 7 June 2012)

<sup>109</sup> n 99

<sup>110</sup> United Nations Protection Force

<sup>111</sup> *Nuhanović* (n 65) para 5.20

necessary to explore. But the court did accept that both states and international organizations could exercise effective control and that conduct could be attributed to both of them.<sup>112</sup>

This raises the issue of whether or not effective control can be exercised by two (or more) entities thereby leading to dual (or multiple) attribution. The court in *Nuhanović*, in determining whether or not the Netherlands exercised effective control over the conduct of Dutchbat, placed emphasis on the factual circumstances.<sup>113</sup> That the Netherlands *in fact* exercised control over the conduct of Dutchbat contributed to this control being categorized as effective. The focus of *Nuhanović* on the factual circumstances opened up the possibility of two entities, i.e. the Netherlands and the United Nations, being seen as exercising effective control thereby leading to dual attribution and in doing so, accurately reflected the situation on the ground.

The reasoning in *Nuhanović* will serve as a useful precedent as collaborations among entities on the international plane continue to be a growing trend. It is imaginable that when global health public-private partnerships engage in conduct that breaches human rights under international law, a close inspection of the factual circumstances will possibly lead to this conduct being seen as under the effective control of more than one international organization and/or more than one state thereby leading to attribution to more than one international organization and/or more than one state. Such a conclusion then emulates reality.

*Nuhanović* has stated that the possibility of effective control being exercised by two (or more) entities thereby leading to dual (or multiple) attribution is “generally accepted”.<sup>114</sup>

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<sup>112</sup> *ibid* para 5.9. See Tom Dannenbaum, ‘The Hague Court of Appeal on Dutchbat at Srebrenica Part 2: Attribution, Effective Control, and the Power to Prevent’ EJIL: Talk!, 10 November 2011 <<http://www.ejiltalk.org/the-hague-court-of-appeal-on-dutchbat-at-srebrenica-part-2-attribution-effective-control-and-the-power-to-prevent-2/>> accessed 7 June 2012; Nollkaemper (n 107) 1154. That attribution to each entity can be considered separately even though attribution to all entities is possible relates back to the “individual nature of attribution.” (Nollkaemper (n 107) 1154. See Nollkaemper and Jacobs (n 97) 10)

<sup>113</sup> *Nuhanović* (n 65) paras 5.9, 5.12, 5.17, 5.18. See Nollkaemper (n 107) 1151-1152

<sup>114</sup> *Nuhanović* (n 65) para 5.9

Support for this statement by the court exists in theory<sup>115</sup> but illustrations in practice are few.<sup>116</sup> *Nuhanović* is a step towards a change in practice. It demonstrates a changing attitude towards the possibility of two (or more) entities exercising effective control and thus the possibility of dual (or multiple) attribution. This case is, however, inaugural and involves a unique set of facts. Its value as a precedent is, as a result, limited.<sup>117</sup> As *Nuhanović* is seen as having a limited precedential value in fact situations bearing resemblance to its fact situation, i.e. involving peacekeeping, the extension of *Nuhanović* to fact situations involving global health public-private partnerships may be seen as even more dubious. The gates opened by this pioneering judgment must not, however, be overlooked and may lead to a plurality of responsible entities in various circumstances, in the future, including in relation to global health public-private partnerships.

#### 6.4. CONCLUDING REMARKS

As public-private partnerships continue to regulate matters of global health, in addition to, or instead of, international organizations and states, responsibility under international law becomes an issue. In order to deal with this issue, this chapter suggested relying on rules of responsibility under international law in relation to international organizations. But are the *lex lata* rules of responsibility under international law in relation to international organizations capable of adequately addressing this shift in regulation of global health from international organizations and states to public-private partnerships?

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<sup>115</sup> See Amerasinghe (n 62) 404; Bodeau-Livinec, Buzzini and Villalpando (n 107) 329-330; Sari, Jurisdiction and International Responsibility (n 105) 167-168; Larsen (n 105) 517, 520, 523-524; Milanović and Papić (n 105) 289; Boon, Regime Conflicts (n 105) 817; Bell (n 107) 503-504, 512-513, 516-519, 532-533; Commentaries (n 17) 22; Nollkaemper and Jacobs (n 97); Nollkaemper (n 107) 1152, 1157; Sari, Autonomy (n 107) 271; Milanović (n 105) 134-135

<sup>116</sup> See *Behrami and Saramati* (n 98); *Al-Jedda* (n 106); Nollkaemper (n 107) 1152

<sup>117</sup> Nollkaemper (n 107) 1157; Tom Dannenbaum, 'The Hague Court of Appeal on Dutchbat at Srebrenica Part 1: Narrow Finding on the Responsibilities of Peacekeepers' EJIL: Talk!, 25 October 2011 <<http://www.ejiltalk.org/the-hague-court-of-appeal-on-dutchbat-at-srebrenica-part-1-a-narrow-finding-on-the-responsibilities-of-peacekeepers/#more-3931>> accessed 7 June 2012. Also, the decision of the Court of Appeal is subject to appeal to the Supreme Court (see Nollkaemper (n 107) 1144)

This chapter considered attributing the acts of global health public-private partnerships – formal partnerships or alliances, such as RBM and Stop TB, and separate organizations, such as GAVI and the Global Fund – to an international organization acting as a partner and host in these partnerships – the WHO – through application of Article 6 and Article 8 of the Articles on the Responsibility of International Organizations. These articles deal with attribution in the context of conduct of agents of an international organization and in the context of excess of authority or contravention of instructions, respectively. It also considered attributing responsibility to the WHO through a failure to exercise due diligence in relation to the acts of global health public-private partnerships.

The avenue of applying Article 6 and Article 8 of the Articles on the Responsibility of International Organizations would require these articles to be applied in ways not foreseen by its drafters and an argument may be made that this stretches the responsibility of international organizations too far. But where international organizations act not only as partners but also as hosts of partnerships, the responsibility of international organizations need not be stretched too far. The avenue of failure to exercise due diligence may also prove to be feasible as this means seems to be generally accepted. A possibility lies, however, to invoke either avenue in order to meet the challenges posed by the changing and expanding actors in the international community, including global health public-private partnerships.

A breach of an international obligation of an international organization – the other element, in addition to attribution, of an internationally wrongful act of an international organization – was then examined, concentrating on the right to life and the right to health. It explored both customary international law and the rules of the organization as sources of obligations of these human rights. It then concluded by considering the possibility of a breach of obligations arising under the right to life and the right to health by international organizations through the acts of partnerships or through the failure to exercise due diligence in relation to the acts of partnerships.



This chapter finally considered the possibility of finding an international organization and one or more states or international organizations 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 an international organization and one or more states or international organizations and therefore that an international organization and one or more states or international organizations could be held responsible for this conduct of the partnership. It was also concluded that, in relation to the conduct of a partnership, an international organization and one or more states or international organizations could be attributed and held responsible for causing the same damage through separate internationally wrongful acts.

In conclusion, the gap in responsibility under international law in relation to the acts of partnerships, arising from the lack of legal personality under international law of these partnerships, and the immunity certain partnerships have from the jurisdiction of domestic courts, means one must be willing to consider other ways to address responsibility in relation to the acts of partnerships. The ways considered in this chapter included holding international organizations, as partners and/or hosts of partnerships, responsible under international law in relation to the acts of partnerships.