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# Responsibility of International Organizations under International Law for the Acts of Global Health Public-Private Partnerships

Lisa Clarke\*

## Abstract

*Public-private partnerships governing global health are making progress in relation to the prevention and treatment of diseases such as AIDS, tuberculosis, and malaria. This progress should not be underestimated as these partnerships are making strides above and beyond efforts of either the public or private sector alone. As a consequence, partnerships are increasingly exercising public power over global health in addition to, or instead of, states and international organizations and are thus also becoming capable of adversely impacting the rights of individuals, in particular the right to life and the right to health. Responsibility under international law therefore arises as an issue but, at the moment, partnerships are not directly addressed by the rules of responsibility under international law. This Article describes global health public-private partnerships and discusses how public power over global health is increasingly being exercised by these partnerships thereby necessitating a further discussion on responsibility under international law. It highlights a gap in responsibility and suggests closing this gap by holding international organizations, as partners and/or hosts, responsible under international law for the acts of these partnerships.*

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### I. INTRODUCTION

Public-private partnerships, comprised of states and international organizations (representing the public sector) and companies, non-governmental organizations (NGOs), research institutes, and philanthropic foundations (representing the private sector), are forming as a response to the insufficiency of the public or private sector alone in dealing with global health issues, such as AIDS, tuberculosis, and malaria.<sup>1</sup> As a result of this collaboration, there is a shift taking place that moves (at least partly) power over global health from the hands of states and international organizations into the hands of public-private

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<sup>1</sup> See Gian Luca Burci, *Public/Private Partnerships in the Public Health Sector*, 6 *Int Orgs L Rev* 359, 361 (2009) (describing public-private partnerships, in global health terms, as “long-term collaborative arrangements among a group of diverse stakeholders, some of which of a public nature (e.g. governmental agencies and intergovernmental organizations) and others of a private nature (e.g. non-governmental organizations, private commercial companies, research institutes, professional associations etc.) to jointly pursue a discreet public health goal”). See also UN Secretary-General, *Enhanced cooperation between the United Nations and all relevant partners, in particular the private sector: Rep. of the Secretary-General*, ¶ 8, UN Doc A/60/214 (Aug 10, 2005) (describing public-private partnerships, in general terms, as “voluntary and collaborative relationships between various parties, both State and non-State, in which all participants agree to work together to achieve a common purpose or undertake a specific task and to share risks and responsibilities, resources and benefits”).

partnerships. These partnerships are managing activities that are normally regarded as in the domain of states and international organizations, such as providing access to preventative and treatment measures for certain diseases, or improving health infrastructure within certain states to better manage the growing risk of disease.

This shift to partnerships in the exercise of public power over global health sparks novel discussions and raises fundamental questions of an international legal nature about such partnerships. Among these novel discussions and fundamental questions are those surrounding responsibility under international law for the acts of public-private partnerships. If, for example, a public-private partnership provides (or assists in providing) medication to a population that is damaging to the health and life of the population because it is unsafe, not properly tested, and/or expired, thereby infringing on the right to life and/or the right to health, who is responsible under international law? Partnerships, by intermingling partners from the public and private sector, reside outside the classical, inter-state framework of international law and, in turn, outside the framework of responsibility under international law. A gap is, therefore, created between exercises of public power over global health by public-private partnerships and responsibility under international law.

One way to address this gap might be to hold international organizations responsible under international law for the acts of public-private partnerships. International organizations are often uniquely situated as partners and/or hosts in public-private partnerships. For example, in the cases of the Global Alliance for Vaccines and Immunization (GAVI)<sup>2</sup> and the Global Fund to Fight AIDS, Tuberculosis and Malaria (The Global Fund),<sup>3</sup> the World Health Organization (WHO) serves as a partner of the partnership. And in the cases of the Stop TB Partnership (Stop TB)<sup>4</sup> and the Roll Back Malaria Partnership (RBM),<sup>5</sup> the WHO serves as a partner and the host of the partnership. International organizations, as partners and/or hosts, thereby enable public-private partnerships to manage those activities that normally fall within the realm of states and international organizations. If a partnership infringes on the right to life and/or the right to health of a population, could the international organization involved justifiably disassociate itself from responsibility under

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<sup>2</sup> Global Alliance for Vaccines and Immunization, online at <http://www.gavialliance.org> (visited Apr 8, 2011) ("GAVI").

<sup>3</sup> Global Fund to Fight AIDS, Tuberculosis and Malaria, online at <http://www.theglobalfund.org/en/> (visited Apr 8, 2011) ("The Global Fund").

<sup>4</sup> Stop TB Partnership, online at <http://www.stoptb.org/> (visited Apr 8, 2011) ("Stop TB").

<sup>5</sup> Roll Back Malaria Partnership, online at <http://www.rbm.who.int/> (visited Apr 8, 2011) ("RBM").

international law? This Article suggests attributing the acts of partnerships to international organizations through application of the International Law Commission's (ILC) draft articles on the responsibility of international organizations.<sup>6</sup>

Another way to address this gap might be to hold states, as partners, responsible under international law for the acts of public-private partnerships. This might be done by attributing acts of public-private partnerships to states through application of the Articles on the Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility),<sup>7</sup> specifically Article 5 (“[c]onduct of persons or entities exercising elements of governmental authority”)<sup>8</sup> and Article 8 (“[c]onduct directed or controlled by a State.”)<sup>9</sup> This suggestion has been discussed further by the author in a previous work and, therefore, will not be explored here.<sup>10</sup> Also, debates on the responsibility of non-state actors such as companies and NGOs form a piece of the puzzle in the discussion on the responsibility of public-private partnerships under international law but, at the moment, these remain merely debates.<sup>11</sup>

This Article begins, in Section II, by describing global health public-private partnerships, specifically partnerships with which the WHO is associated, including GAVI, the Global Fund, Stop TB, and RBM. The WHO is chosen as the international organization of focus because of the proliferation of partnerships involving the WHO. It acts as a partner and/or the host of an array of partnerships and therefore its partnerships aptly illustrate the complex relationship between partnerships and international organizations. The growing popularity of public-private partnerships involving the WHO means, however, that full coverage of all such partnerships is not practicable in a single article. This Article therefore draws on GAVI, the Global Fund, Stop TB, and RBM as examples because they are well-established public-private partnerships having an impact on global health. The Article then proceeds, in Section III, to discuss how public power over global health is increasingly being exercised by these

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<sup>6</sup> UN GAOR 64th Sess, Supp No 10 at 13–178, UN Doc A/64/10 (2009), online at <http://untreaty.un.org/ilc/reports/2009/2009report.htm> (visited Apr 8, 2011) (“Draft Articles”).

<sup>7</sup> United Nations General Assembly, *Responsibility of States for internationally wrongful acts*, UN Doc A/RES/56/83 (2002) (“Articles on State Responsibility”).

<sup>8</sup> *Id.* at Art 5.

<sup>9</sup> *Id.* at Art 8.

<sup>10</sup> See Lisa Clarke, *Global Health Public-Private Partnerships: Better Protecting Against Disease but Creating a Gap in Responsibility Under International Law*, 20 Finnish Yrbk of Intl L (2009) (forthcoming July 2011).

<sup>11</sup> See generally Philip Alston, ed, *Non-State Actors and Human Rights* (Oxford 2005); Anna-Karin Lindblom, *The Responsibility of Other Entities: Non-Governmental Organizations*, in James Crawford, Alain Pellet, and Simon Olleson, eds, *The Law of International Responsibility* 343 (Oxford 2010).

partnerships and how this necessarily engages a discussion on responsibility under international law. Section IV then highlights the gap in responsibility in relation to the acts of these partnerships and Section V suggests closing this gap by holding international organizations, as partners and/or hosts, responsible under international law for the acts of these partnerships. More specifically, it considers attributing the acts of these partnerships to international organizations through application of the draft articles on the responsibility of international organizations.

## II. GLOBAL HEALTH PUBLIC-PRIVATE PARTNERSHIPS

Partnerships between the public and private sector, in relation to global health, have long existed, although in the beginning merely as donation agreements between a recipient state and the donating entities. Over time, partnerships have developed into highly integrated relationships among states, international organizations, companies, NGOs, research institutes, and/or philanthropic foundations. A short description of GAVI, the Global Fund, Stop TB, and RBM now follows in order to provide a better picture of the activities of global health public-private partnerships and to provide a background for the subsequent sections discussing responsibility under international law.

### A. GAVI

GAVI was established in 2000 under the auspices of the United Nations Children's Fund (UNICEF).<sup>12</sup> After being hosted by UNICEF for almost a decade, it became, in 2009, a foundation under Swiss law<sup>13</sup> and an independent "international institution" with privileges and immunities in Switzerland in accordance with the Federal Act on the Privileges, Immunities and Facilities and the Financial Subsidies granted by Switzerland as a Host State (Host State Act).<sup>14</sup>

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<sup>12</sup> GAVI, *GAVI recognised as an international institution* (June 23, 2009), online at [http://www.gavialliance.org/media\\_centre/press\\_releases/2009\\_06\\_23\\_swiss\\_foundation.php](http://www.gavialliance.org/media_centre/press_releases/2009_06_23_swiss_foundation.php) (visited Apr 8, 2011).

<sup>13</sup> See GAVI, *GAVI Alliance Statutes*, Art 1 (Oct 29–30, 2008), online at [http://www.gavialliance.org/resources/GAVI\\_Alliance\\_Statutes.pdf](http://www.gavialliance.org/resources/GAVI_Alliance_Statutes.pdf) (visited Apr 8, 2011); GAVI, *GAVI Alliance Progress Report 2009*, 44, 46, online at [http://www.gavialliance.org/resources/2009\\_GAVI\\_Alliance\\_Progress\\_Report\\_2.pdf](http://www.gavialliance.org/resources/2009_GAVI_Alliance_Progress_Report_2.pdf) (visited Apr 8, 2011).

<sup>14</sup> GAVI, *GAVI recognised as an international institution* (cited in note 12); Switzerland Federal Department of Foreign Affairs, *Host State Bill* (Feb 3, 2009), online at <http://www.eda.admin.ch/eda/en/home/topics/intorg/chres/reslaw.html> (visited Jan 30, 2011); *Federal Act on the Privileges, Immunities and Facilities and the Financial Subsidies granted by Switzerland as a Host State* (June 22, 2007), online at

GAVI aims to improve access to already existing vaccines, strengthen health systems within states, and introduce new immunization technology.<sup>15</sup> It pursues these aims through innovative mechanisms such as an Advance Market Commitment and the International Finance Facility for Immunisation.<sup>16</sup> The partners of GAVI contribute by participating in strategy and policy setting, advocating, fundraising, providing support to states, and developing, procuring and delivering vaccines.<sup>17</sup> GAVI's partners with representative membership and voting rights on the GAVI Board include developing country governments, donor governments, research and technical health institutes, the industrialized country vaccine industry, the developing country vaccine industry, civil society organizations, the Bill & Melinda Gates Foundation, the WHO, UNICEF, and the World Bank.<sup>18</sup> Private individuals serve as unaffiliated members with voting rights on the Board.<sup>19</sup> The Chief Executive Officer of the GAVI Secretariat serves on the Board as a member without voting rights.<sup>20</sup>

## B. The Global Fund

The Global Fund was established in 2002 as a foundation under Swiss law<sup>21</sup> and signed an Administrative Services Agreement with the WHO whereby the WHO provided the Secretariat for the Global Fund.<sup>22</sup> In 2004 it became recognized as having "international juridical personality and legal capacity" with

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<http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/dipl/diplin.Par.0009.File.tmp/Host%20State%20Act.pdf> (visited Apr 8, 2011).

<sup>15</sup> GAVI, *Innovative partnership*, online at [http://www.gavialliance.org/about/in\\_partnership/index.php](http://www.gavialliance.org/about/in_partnership/index.php) (visited Apr 8, 2011).

<sup>16</sup> GAVI, *Innovative Funding*, online at [http://www.gavialliance.org/about/in\\_finance/index.php](http://www.gavialliance.org/about/in_finance/index.php) (visited Apr 8, 2011).

<sup>17</sup> GAVI, *Innovative partnership* (cited in note 15).

<sup>18</sup> GAVI, *GAVI Alliance Board members*, online at <http://www.gavialliance.org/about/governance/boards/members/index.php> (visited Apr 8, 2011). The terminology used to describe the partners of GAVI is taken verbatim from the GAVI website.

<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> See *The Global Fund, By Laws*, Art 1 (Mar 2, 2011), online at [http://www.theglobalfund.org/documents/core/Core\\_GlobalFund\\_Bylaws\\_en.pdf](http://www.theglobalfund.org/documents/core/Core_GlobalFund_Bylaws_en.pdf) (visited Apr 8, 2011).

<sup>22</sup> *The Global Fund, Report of the Second Meeting of the Board*, GF/B2/13 version 2, 38–39 (May 14, 2002), online at <http://www.theglobalfund.org/documents/board/02/SecondBoardMeetingReport.pdf> (visited Apr 8, 2011).

privileges and immunities in Switzerland,<sup>23</sup> and in 2006 it was designated a “public international organization” with privileges and immunities in the US.<sup>24</sup> In 2009, it became administratively autonomous by terminating its Administrative Services Agreement with the WHO.<sup>25</sup>

The Global Fund focuses on international health financing to support programs in the prevention and treatment of AIDS, tuberculosis, and malaria in states with a low income and a high disease burden. It does not implement programs directly but instead relies on other organizations on the ground for local knowledge and technical assistance.<sup>26</sup> The partners of the Global Fund with representative membership and voting rights on the Board include NGOs representative of the communities living with the diseases, a developed country NGO, a developing country NGO, developed countries, developing countries, private foundations, and the private sector.<sup>27</sup> The partners of the Global Fund with *ex officio* membership, but without voting rights on the Board, include the Global Fund, Partners, the Joint United Nations Programme on HIV/AIDS (UNAIDS), the WHO, the World Bank, and a Board-designated Swiss member.<sup>28</sup>

### C. Stop TB

Stop TB was established in 2001, building upon the Stop TB Initiative created under the auspices of the WHO in 1998.<sup>29</sup> Its Secretariat is hosted by the WHO, which means that it manages its administrative, financial, and human resources matters according to the rules and regulations of the WHO, subject to

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<sup>23</sup> *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* (Dec 13, 2004), GF/B8/7, online at [http://www.theglobalfund.org/documents/board/08/gfb87\\_annex4a.pdf](http://www.theglobalfund.org/documents/board/08/gfb87_annex4a.pdf) (visited Apr 8, 2011).

<sup>24</sup> 3 CFR 13395 (George W. Bush, *Executive Order 13395 Designating the Global Fund To Fight AIDS, Tuberculosis and Malaria as a Public International Organization Entitled To Enjoy Certain Privileges, Exemptions, and Immunities*).

<sup>25</sup> The Global Fund, *The Global Fund Becomes an Administratively Autonomous Institution as of 2009* (Dec 19, 2008), online at [http://www.theglobalfund.org/en/presreleases/?pr=pr\\_081219](http://www.theglobalfund.org/en/presreleases/?pr=pr_081219) (visited Apr 8, 2011).

<sup>26</sup> The Global Fund, *How the Global Fund Works*, online at <http://www.theglobalfund.org/en/how/?lang=en> (visited Apr 8, 2011).

<sup>27</sup> The Global Fund, *Board Members*, online at <http://www.theglobalfund.org/en/board/members/?lang=en> (visited Apr 8, 2011). The terminology used to describe the partners of the Global Fund is taken verbatim from the Global Fund website.

<sup>28</sup> *Id.*

<sup>29</sup> Stop TB, *About Us*, online at <http://www.stoptb.org/about/> (visited Apr 8, 2011).



adaptations to meet the specific needs of Stop TB.<sup>30</sup> It is not an independent partnership, as are GAVI and the Global Fund; rather, it is a partnership operating in close association with an international organization—the WHO. Stop TB does not have juridical personality and any privileges, and immunities granted to Stop TB arise through its relationship with the WHO.<sup>31</sup>

The goal of Stop TB is to eliminate tuberculosis as a global health problem.<sup>32</sup> It strives to do this by improving access to accurate diagnoses and effective treatments; increasing the availability, affordability and quality of anti-tuberculosis drugs; and promoting research and development for new diagnostics and anti-tuberculosis drugs.<sup>33</sup> The partners of Stop TB number over a thousand and this number is not subject to a cap—partnership is open to any organization committed to the measures necessary to eliminate tuberculosis as a global health problem.<sup>34</sup> Partners include international organizations, donors from the public and private sectors, governmental organizations, NGOs, academic/research institutions, and patient activist groups.<sup>35</sup> The Stop TB Board is, however, limited to thirty-four members representing the component constituencies of the partnership including representatives from high burden countries, the WHO, the World Bank, the Global Fund, an international organization, regional areas, working group chairpersons, financial donors, a foundation, NGOs and technical agencies, communities affected by tuberculosis, the chair of the WHO Strategic and Technical Advisory Group, and the corporate business sector.<sup>36</sup>

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<sup>30</sup> Id.

<sup>31</sup> Stop TB Partnership Secretariat, *Basic Framework for the Global Partnership to Stop TB*, 13, online at <http://www.stoptb.org/assets/documents/about/STBBasicFramework.pdf> (visited Apr 8, 2011); Stop TB, *Request for Proposals—Independent Evaluation of the Global Stop TB Partnership*, 15 (Mar 20, 2007), online at <http://www.stoptb.org/assets/documents/news/announcements/RFP20Mar.pdf> (visited Apr 8, 2011). There is no memorandum of understanding or other official document setting out the relationship between Stop TB and the WHO.

<sup>32</sup> Stop TB, *About Us* (cited in note 29).

<sup>33</sup> Id.

<sup>34</sup> Stop TB, *Join the Partnership*, online at <http://www.stoptb.org/getinvolved/joinus.asp> (visited Feb 6, 2011).

<sup>35</sup> Stop TB, *Welcome to the Stop TB Partnership Partners' Directory*, online at <http://www.stoptb.org/partners/> (visited Feb 6, 2011). The terminology used to describe the partners of Stop TB is taken verbatim from the Stop TB website.

<sup>36</sup> Stop TB, *Coordinating Board*, online at <http://www.stoptb.org/about/cb/> (visited Feb 6, 2011). The terminology used to describe the Board members of Stop TB is taken verbatim from the Stop TB website.

## D. RBM

RBM was launched in 1998 by the WHO, UNICEF, United Nations Development Programme (UNDP), and the World Bank.<sup>37</sup> Its Secretariat is hosted by the WHO, which means that the WHO provides administrative and fiduciary support and facilities to the Secretariat, according to the rules and regulations of the WHO, subject to adaptations to meet the specific needs of RBM.<sup>38</sup> Also, like Stop TB, it is not an independent partnership; rather it is a partnership operating in close association with an international organization—the WHO. RBM is not a separate legal entity, and any privileges and immunities granted to RBM arise through its relationship with the WHO.<sup>39</sup>

The aim of RBM is to free the world of malaria by supporting procurement and supply management efforts for nets, insecticides, medicines, and diagnostics, and improving access to affordable and effective anti-malarial medicines.<sup>40</sup> RBM has more than five hundred partners, including malaria endemic countries, bilateral and multilateral development partners, the private sector, NGOs, community-based organizations, foundations, and research and academic institutions.<sup>41</sup> Any organization that abides by the strategies of RBM and contributes to its implementation may join as a partner.<sup>42</sup> The Board, however, has a more restrictive membership. It consists of twenty-one voting members and four non-voting *ex officio* members.<sup>43</sup> The voting members include representatives from malaria endemic countries, Organisation for Economic Co-operation and Development (OECD) donor countries, UNICEF, UNDP, the WHO, the World Bank, research and academia, NGOs, private sector, and

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<sup>37</sup> RBM, *RBM Mandate*, online at <http://www.rollbackmalaria.org/rbmmandate.html> (visited Feb 6, 2011).

<sup>38</sup> *Memorandum of Understanding between the Roll Back Malaria Partnership and the World Health Organization Concerning Hosting, Secretariat and Administrative Services*, Arts 2.1, 2.2 and 7 (Dec 15, 2006), online at <http://www.rollbackmalaria.org/docs/MoU.pdf> (visited Apr 8, 2011).

<sup>39</sup> Id at Arts 2.1 and 3.8.

<sup>40</sup> RBM, *RBM Vision*, online at <http://www.rollbackmalaria.org/rbmvision.html> (visited Apr 8, 2011); RBM, *Malaria Commodity Access*, online at <http://www.rollbackmalaria.org/psm/index.html> (visited Apr 8, 2011); RBM, *The Affordable Medicines Facility for Malaria (AMFm)*, online at <http://www.rollbackmalaria.org/psm/amfm.html> (visited Apr 8, 2011).

<sup>41</sup> RBM, *RBM Mandate* (cited in note 37). The terminology used to describe the partners of RBM is taken verbatim from the RBM website.

<sup>42</sup> RBM, *RBM Constituencies*, online at <http://www.rollbackmalaria.org/mechanisms/constituencies.html> (visited Apr 8, 2011).

<sup>43</sup> RBM, *RBM Partnership Board*, online at <http://www.rollbackmalaria.org/mechanisms/partnershipboard.html> (visited Apr 8, 2011). The terminology used to describe the Board members of RBM is taken verbatim from the RBM website.

foundations.<sup>44</sup> The non-voting *ex officio* members include representatives from the Global Fund, RBM, UNITAID, and the UN Secretary General Special Envoy for Malaria.<sup>45</sup>

GAVI, the Global Fund, Stop TB, and RBM each has its own specific goal and distinguishable organizational and governance structure. A significant difference among these partnerships concerns the relationship each of these partnerships has with the WHO. On one end of the spectrum, GAVI and the Global Fund operate as independent international institutions and have the WHO as a partner of the partnership. On the other end of the spectrum, Stop TB and RBM operate under the auspices of the WHO and are dependent on the WHO not only as a partner but also as the host of the partnership. These varying relationships with the WHO are notable and are explored later when discussing the responsibility under international law of international organizations for the acts of public-private partnerships.<sup>46</sup>

Aside from these aforementioned differences, these partnerships also have a commonality. These partnerships all exercise power over aspects of global health, traditionally seen as in the domain of states and international organizations. This Article now turns to this power and the ensuing concerns of responsibility under international law.

### III. POWER AND RESPONSIBILITY UNDER INTERNATIONAL LAW

Power and responsibility under international law go hand in hand; responsibility under international law is the “logical corollary” of power.<sup>47</sup> Responsibility under international law provides a means to deal with abuse of power in the international community. As power over global health shifts from states and international organizations to public-private partnerships, responsibility under international law does not, however, follow. This section describes the relationship between power and responsibility under international law with respect to states and international organizations and then shows how the power exercised by global health public-private partnerships also requires a relationship with responsibility under international law.

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<sup>44</sup> Id.

<sup>45</sup> Id.

<sup>46</sup> See Section V.

<sup>47</sup> Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* 518 (Sweet & Maxwell 6th ed 2009). See International Law Association, Berlin Conference (2004), *Accountability of International Organizations*, 1 *Intl Orgs L Rev* 221, 225 (2004) (“[A]s a matter of principle, accountability is linked to the authority and power of an [international organization]. Power entails accountability, that is the duty to account for its exercise.”).

Writing on the responsibility of states under international law in 1928, Clyde Eagleton argued that “[p]ower breeds responsibility” and further argued that “[a] state is increasingly willing to accept responsibility for actions within its territories, if it has sufficient authority over such actions.”<sup>48</sup> The rules on the responsibility of states under international law, developed initially as customary international law and later set out in the Articles on State Responsibility, arose from the need to hold states responsible for an abuse of power resulting in an act that was wrongful under international law. Even the critical look taken by Philip Allott focused on power: “Instead of limiting the power of governments, the ILC’s version of state responsibility establishes the limits of their powers. It affirms rather than constrains power.”<sup>49</sup> State responsibility is, and always has been, tied to the power of states.

The underlying logic of “power breeds responsibility” in relation to states naturally made its way into the world of international organizations.<sup>50</sup> The responsibility of international organizations, like state responsibility, is tied to power. Power over global issues is now being governed by international organizations, in addition to, or instead of, states.<sup>51</sup> This shift in power means that international organizations are capable of acting in ways that impact the “social, political, economic and legal status of individuals.”<sup>52</sup> This impact was not, in the beginning, recognized as troubling, since international organizations were seen in a positive light. International organizations were thought to have “a great role to play in the salvation of mankind” and to be incapable of doing harm.<sup>53</sup> But, as August Reinisch writes, it was precisely this shift in power that opened up the possibility of rights violations by international organizations and led to the question, *quis custodiet ipsos custodes?* (who guards the guardians?): “[I]t is exactly the increased direct involvement of international organizations in aspects of global governance through ‘quasi’ or immediate legislative, administrative, and judicial tasks that has turned the tables and led to situations where international organizations may violate fundamental rights of individuals.”<sup>54</sup>

<sup>48</sup> Clyde Eagleton, *The Responsibility of States in International Law* 206 (New York University 1928).

<sup>49</sup> Philip Allott, *State Responsibility and the Unmaking of International Law*, 29 Harv Intl L J 1, 2 (1988).

<sup>50</sup> See E. Paasivirta and P.J. Kuijper, *Does One Size Fit All?: The European Community and the Responsibility of International Organizations*, 36 Netherlands Yrbk of Intl L 169, 173 (2005).

<sup>51</sup> See generally Christoph H. Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International Law?*, 4 Eur J Intl L 447 (1993).

<sup>52</sup> Gerhard Hafner, *Accountability of International Organizations—A Critical View*, in Ronald St. John MacDonald and Douglas M. Johnston, eds, *Towards World Constitutionalism* 585, 592–93, 629 (Nijhoff 2005).

<sup>53</sup> Nagendra Singh, *Termination of Membership of International Organisations* vii (Praeger 1958).

<sup>54</sup> August Reinisch, *Securing the Accountability of International Organizations*, 7 Global Governance 131, 132 (2001). See Robert McCorquodale, *International Organizations and International Human Rights*

For example, a decision of the WHO to issue a travel ban to a state where the outbreak of an infectious disease has occurred; a decision of the United Nations Security Council to blacklist an individual suspected of terrorist activities and subject him to sanctions; or a decision of the United Nations High Commissioner for Refugees as to a determination of refugee status are all situations where international organizations are capable of having an adverse impact on the rights of individuals. The power exercised by international organizations thus necessitates responsibility. Rules on the responsibility of international organizations developed as customary international law and are now being set out by the ILC in the form of draft articles on the responsibility of international organizations.<sup>55</sup>

Over time, governance over global issues has further shifted from states and international organizations to other entities such as public-private partnerships. Partnerships are stepping in and performing tasks normally seen as in the domain of states and international organizations. But this comes with other possibly adverse consequences and it may, therefore, be necessary to subject these partnerships to legal restraints in the form of responsibility under international law.

In the area of global health, this shift in governance is seen through various activities of public-private partnerships. GAVI, for example, aims to improve access to already existing vaccines, strengthen health systems within states, and introduce new immunization technology.<sup>56</sup> As of August 2008, GAVI had approved granting a total of US \$3.7 billion to states for the period from 2000 to 2015.<sup>57</sup> The Global Fund is focused on international health financing to support programs in the prevention and treatment of AIDS, tuberculosis, and malaria in states with a low income and a high disease burden.<sup>58</sup> As of December 2010, the Global Fund had approved grants totaling US \$21.7 billion for 579 programs in 144 states.<sup>59</sup> Stop TB, with the goal of eliminating tuberculosis, strives to improve access to accurate diagnosis and effective treatments; increase the availability, affordability and quality of anti-tuberculosis drugs; and promote

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*Law: One Giant Leap for Humankind*, in Kaiyan Homi Kaikobad and Michael Bohlander, eds, *International Law and Power: Perspectives on Legal Order and Justice* 141, 142 (Nijhoff 2009).

<sup>55</sup> See Draft Articles (cited in note 6).

<sup>56</sup> GAVI, *Innovative partnership* (cited in note 15).

<sup>57</sup> GAVI, *Approved Support*, online at [www.gavialliance.org/performance/commitments/index.php](http://www.gavialliance.org/performance/commitments/index.php) (visited Apr 9, 2011).

<sup>58</sup> The Global Fund, *How the Global Fund Works* (cited in note 26).

<sup>59</sup> The Global Fund, *Portfolio and Grant Performance*, online at [www.theglobalfund.org/en/performance/grantportfolio/?lang=en](http://www.theglobalfund.org/en/performance/grantportfolio/?lang=en) (visited Apr 9, 2011).

research and development for new diagnostics and anti-tuberculosis drugs.<sup>60</sup> RBM, aiming to free the world of malaria, supports procurement and supply management efforts for nets, insecticides, medicines, and diagnostics and undertakes to improve access to affordable and effective anti-malarial medicines.<sup>61</sup>

GAVI, the Global Fund, Stop TB, and RBM, recognizing the insufficiency of the public or private sector alone in addressing these growing health concerns, are stepping in and filling, or partially filling, the shoes of states and international organizations and, as a result, are exercising public power over global health issues. This power is capable of adversely impacting the rights of individuals, in particular the right to life and the right to health.<sup>62</sup> Such power necessitates legal restraints such as responsibility under international law. A gap in responsibility under international law, however, arises when it comes to the acts of global health public-private partnerships.

#### IV. THE GAP IN RESPONSIBILITY UNDER INTERNATIONAL LAW

Partnerships are developing outside the classical, inter-state framework of international law. This has its advantages, for example, in the flexibility of partnerships to be able to initiate, amend, or terminate projects more easily than states or international organizations.<sup>63</sup> But this also has its disadvantages. One disadvantage, especially from the perspective of individuals who might be adversely impacted by the acts of public-private partnerships, is that partnerships are developing outside the framework of responsibility under international law. This section highlights and offers a rationale for the gap in responsibility under international law arising from the acts of public-private partnerships. It leads to consideration, in the subsequent section, of the responsibility of international organizations for the acts of public-private partnerships.

Existence outside the framework of responsibility under international law stems from the hybrid composition of public-private partnerships. Partnerships

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<sup>60</sup> Stop TB, *About Us* (cited in note 29).

<sup>61</sup> RBM, *RBM Vision* (cited in note 40); RBM, *Malaria Commodity Access* (cited in note 40); RBM, *The Affordable Medicines Facility for Malaria (AMFm)* (cited in note 40).

<sup>62</sup> See Section V.A.

<sup>63</sup> Craig Wheeler and Seth Berkley, *Initial lessons from public-private partnership in drug and vaccine development*, 79 *Bulletin of the World Health Organization* 728, 731 (2001). See Eyal Benvenisti, *"Coalitions of the Willing" and the Evolution of Informal International Law* 16 (Tel Aviv University Law Faculty Papers, Paper 31, 2006), online at <http://law.bepress.com/cgi/viewcontent.cgi?article=1031&context=taulwps> (visited Apr 26, 2011).

are composed of both public and private entities—states and international organizations (representing the public sector) and companies, NGOs, research institutes, and philanthropic foundations (representing the private sector). This composition means that partnerships are neither purely public nor purely private. It is, therefore, impossible to place them in either category exclusively. The legal status of public-private partnerships under international law is, as a result, unclear. Partnerships involve public entities, i.e. states and international organizations, which have legal personality under international law, but also involve private entities, i.e. companies, NGOs, research institutes, and philanthropic foundations, which are not thought to have legal personality under international law. Consequently, the legal personality of public-private partnerships under international law is obscure.

A finding of legal personality under international law is imperative, however, because responsibility under international law depends on legal personality under international law: “[Legal personality] provides a means by which an actor can be held responsible and/or liable under applicable laws, based on its power, competence and functions. Only legal personality can have a legal authority to exist in law and the means to remain accountable.”<sup>64</sup> Legal personality brings not only rights but also duties. As famously stated by the International Court of Justice (ICJ) in *Reparation for Injuries Suffered in the Service of the United Nations*, legal personality means, for an actor, that “it is a subject of international law and capable of possessing international rights and duties.”<sup>65</sup> Or in the words of Chittharanjan Felix Amerasinghe: “Once the existence of

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<sup>64</sup> Bimal N. Patel, *The Accountability of International Organizations: A Case Study of the Organisation for the Prohibition of Chemical Weapons*, 13 *Leiden J Intl L* 571, 577 (2000).

<sup>65</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 ICJ 174, 179 (Apr 11, 1949). See William E. Holder, *International Organizations: Accountability and Responsibility*, American Society of International Law, Proceedings of the 97th Annual Meeting, 231, 231 (2003) (“With such personality, the organization is inducted into the international club, assumes commensurate status, and takes on both rights and obligations.”); McCorquodale, *International Organisations and International Human Rights Law* at 151 (cited in note 54):

[A]s it is uniformly accepted that international organisations have international legal personality, by which they participate in the international legal system, then they must have international rights and responsibilities. Even if these international legal responsibilities are not exactly the same as those of States, international organisations must have some legal responsibilities arising from their participation in the international legal system.

; United Nations Secretary-General, *Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces headquarters—Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing of the United Nations peacekeeping operations*, ¶ 6, UN Doc A/51/389 (Sept 20, 1996) (“The international responsibility of the United Nations for the activities of United Nations forces is an attribute of its international legal personality and its capacity to bear international rights and obligations.”).

international personality for international organizations is conceded, it is not difficult to infer that, just as organizations can demand responsibility of other international persons because they have rights at international law, so they can also be held responsible to other international persons because they have obligations at international law.”<sup>66</sup>

Absent legal personality under international law, responsibility under international law is difficult to allocate. The legal personality of companies and NGOs under international law, for example, is seen as lacking clarity and therefore correlating rules on responsibility under international law are far from determined.<sup>67</sup> As the legal personality under international law of public-private partnerships is open to question, holding them responsible under international law is also open to question. It is useful, therefore, to turn to those partners and/or hosts of partnerships possessing legal personality under international law—states and international organizations—to determine whether or not these partners and/or hosts could be held responsible under international law for the acts of partnerships. The responsibility of states has been discussed elsewhere by the author,<sup>68</sup> therefore the discussion here focuses on the responsibility of international organizations.

## V. THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

Sixty years ago, Eagleton predicted the possible need to hold international organizations responsible for their acts.<sup>69</sup> Such a prediction was striking as it departed from a state-centric perspective that 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. Eagleton suggested that “it seems reasonable to believe that the rules of the international law of responsibility would apply, though perhaps with some variations, to any subject of international law, and not merely to states.”<sup>70</sup> Today, it has become less far-fetched to imagine holding international organizations, as legal persons exercising public power within the international community, responsible under international law.

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<sup>66</sup> C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* 399 (Cambridge 2005).

<sup>67</sup> See generally Alston, *Non-State Actors and Human Rights* (cited in note 11); Lindblom, *The Responsibility of Other Entities* (cited in note 11).

<sup>68</sup> See Clarke, *Global Health Public-Private Partnerships* (cited in note 10).

<sup>69</sup> See Clyde Eagleton, *International Organization and the Law of Responsibility*, 76 *Recueil Des Cours* 323 (1950).

<sup>70</sup> *Id.* at 325.



Ideas about the responsibility of international organizations grew initially from ideas about state responsibility. Eagleton suggested translating the 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>71</sup> Later, in 1950, he wrote “[t]hough it has been stated only in terms of states, this law is properly applicable to all international legal persons.”<sup>72</sup> It is now conceded that the responsibility of international organizations has developed as customary international law: “The principle that [international organizations] may be held internationally responsible for their acts is nowadays part of customary international law.”<sup>73</sup> The move to set out these rules more concretely came later through the ILC’s draft articles on the responsibility of international organizations.<sup>74</sup>

Since 2002, a Special Rapporteur, Giorgio Gaja, has been assigned by the ILC to the topic of the responsibility of international organizations. To date, the ILC has published a series of reports on this topic in consultation with governments and international organizations.<sup>75</sup> Although not yet completed, the draft articles on the responsibility of international organizations are apt to become the leading source determining the responsibility of international organizations under international law.

Several other approaches have been taken or are now being taken (or at least explored) by international bodies and scholars 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, New York University’s work on global administrative law, and the Max Planck Institute’s work on the public law approach. An important aspect of these approaches is the focus on power. The International Law Association’s

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<sup>71</sup> Eagleton, *The Responsibility of States* at 22 (cited in note 48).

<sup>72</sup> Eagleton, 76 *Recueil Des Cours* at 324 (cited in note 69).

<sup>73</sup> International Law Association, 1 *Intl Orgs L Rev* at 254 (cited in note 47).

<sup>74</sup> See Draft Articles (cited in note 6).

<sup>75</sup> Giorgio Gaja, *First Report on the Responsibility of International Organizations*, *Intl Law Commn*, UN Doc A/CN.4/532 (Mar 26, 2003); Giorgio Gaja, *Second Report on the Responsibility of International Organizations*, *Intl Law Commn*, UN Doc A/CN.4/541 (Apr 2, 2004); Giorgio Gaja, *Third Report on the Responsibility of International Organizations*, *Intl Law Commn*, UN Doc A/CN.4/553 (May 13, 2005); Giorgio Gaja, *Fourth Report on the Responsibility of International Organizations*, *Intl Law Commn*, UN Docs A/CN.4/564, A/CN.4/564/Add.1 and A/CN.4/564/Add.2 (Feb 28, 2006); Giorgio Gaja, *Fifth Report on the Responsibility of International Organizations*, *Intl Law Commn*, UN Doc A/CN.4/583 (May 2, 2007); Giorgio Gaja, *Sixth Report on the Responsibility of International Organizations*, *Intl Law Commn*, UN Doc A/CN.4/597 (Apr 1, 2008); Giorgio Gaja, *Seventh Report on the Responsibility of International Organizations*, *Intl Law Commn*, UN Doc A/CN.4/610 (Mar 27, 2009).

recommended rules and practices “are aimed at making accountability operational by *inter alia* fostering the effectiveness and appropriateness of the use of power and sanctioning the abuse or derailment of power.”<sup>76</sup> Global administrative law argues that “the increasing exercise of public power . . . has given rise to serious concerns about legitimacy and accountability”<sup>77</sup> and suggests dealing with these concerns by meeting “adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of [ ] rules and decisions.”<sup>78</sup> The public law approach focuses on the exercise of international public authority, which includes “any kind of governance activity by international institutions . . . if it determines individuals, private associations, enterprises, states, or other public institutions.”<sup>79</sup> It is based on a combination of the constitutional, administrative, and international institutional law approaches to global governance.<sup>80</sup>

This Article will not delve into these approaches. Accountability is a “highly contested and indeterminate concept” and “usually signifies a broad set of ‘control mechanisms’, including but not limited to legal ones”<sup>81</sup> and global administrative law and the public law approach are still developing and not yet authoritative. Responsibility of international organizations under international law, on the other hand, is a more clearly defined and developed legal approach

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<sup>76</sup> International Law Association, New Delhi Conference (2002), Committee on Accountability of International Organisations, *Third Report Consolidated, Revised and Enlarged Version of Recommended Rules and Practices 2* (2002) (“RRP-2”), online at <http://www.ila-hq.org/download.cfm/docid/D585222D-6DBB-429B-A3CF98463CC63979> (visited Feb 7, 2011). See International Law Association, Res No 1/2004, *Accountability of International Organisations* (Aug 16–21, 2004), online at <http://www.ila-hq.org/download.cfm/docid/6A3BA30F-1059-4339-8ED758712F578772> (visited Feb 7, 2011) (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>77</sup> Nico Krisch and Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 *Eur J Intl L* 1, 1–2 (2006).

<sup>78</sup> Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 *L & Contemp Probs* 15, 17 (Summer–Autumn 2005). See Burci, 6 *Intl Orgs L Rev* (cited in note 1).

<sup>79</sup> Armin von Bogdandy, Philipp Dann and Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 9 *German L J* 1375, 1376–77 (2008).

<sup>80</sup> *Id.*

<sup>81</sup> August Reinisch, *Accountability of International Organizations According to National Law*, 36 *Netherlands Yrbk Intl L* 119, 121–22 (2005). See August Reinisch, *Governance Without Accountability?*, 44 *German Yrbk Intl L* 270, 273–74 (2001); Hafner, *Accountability of International Organizations* at 599 (cited in note 52).

to deal with the internationally wrongful acts of international organizations.<sup>82</sup> This Article therefore focuses on the ILC's work on the draft articles on the responsibility of international organizations to determine whether international organizations could be held responsible under international law for the acts of public-private partnerships.

The draft articles on the responsibility of international organizations "apply to the international responsibility of an international organization for an act that is wrongful under international law."<sup>83</sup> International organization is defined here as "an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities."<sup>84</sup>

The responsibility of international organizations is based on the same mantra as the responsibility of states, which is that "[e]very internationally wrongful act . . . entails . . . international responsibility."<sup>85</sup> Further, the elements of an internationally wrongful act of an international organization are in line with those of a state: a breach of an international obligation of an international organization and attributability to that international organization under international law.<sup>86</sup> The following subsections consider these two elements in the context of particular global health public-private partnerships—GAVI, the Global Fund, Stop TB, and RBM—and an international organization with which they are associated, the WHO.

## A. Breach of an International Obligation

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 its origin and character."<sup>87</sup> An international obligation, according to the draft articles on the responsibility of international organizations and the commentary of the ILC,

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<sup>82</sup> Reinisch, 36 *Netherlands Yrbk Intl L* at 121 (cited in note 81). See Hafner, *Accountability of International Organizations* at 601 (cited in note 52).

<sup>83</sup> Draft Articles at Art 1(1) (cited in note 6).

<sup>84</sup> *Id.* at Art 2(a).

<sup>85</sup> *Id.* at Art 3. See Articles on State Responsibility at Art 1 (cited in note 7).

<sup>86</sup> Draft Articles at Art 4 (cited in note 6). See Articles on State Responsibility at Art 2 (cited in note 7).

<sup>87</sup> Draft Articles at Art 9(1) (cited in note 6).

“may arise under the rules of the [international] organization”<sup>88</sup> or “may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order.”<sup>89</sup> This subsection begins by setting out the international obligations of international organizations, focusing in particular on the WHO, and subsequently, it explores the possibility of a breach of such international obligations through the acts of certain global health public-private partnerships.

The ICJ opines in *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* that “[i]nternational 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>90</sup> This opinion is widely accepted by scholars. Reinisch writes that “[t]he relevant constituent agreements of international organizations, as well as other treaty law and customary international law, form the ‘proper law of international organizations.’”<sup>91</sup> Also, Gerhard Hafner submits that “[t]he treaty law of [international organizations] can no longer be seen as the sole legal basis of their activities so that recourse must be made to customary international law or general principles of law.”<sup>92</sup> But by what specific obligations under international law are international organizations bound? 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?

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, in relation to the right to life and the right to health, is customary international law. In order for this source to hold sway, the right to life and/or the right to health must be norms of customary international law. This is determined by locating consistent state practice and

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<sup>88</sup> Id at Art 9(2).

<sup>89</sup> Id at 77, quoting *Report of the International Law Commission to the General Assembly*, UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2) (2001) at 55.

<sup>90</sup> *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 1980 ICJ 73, 89–90 (Dec 20, 1980).

<sup>91</sup> Reinisch, 7 *Global Governance* at 133 (cited in note 54), quoting C. Wilfred Jenks, *The Proper Law of International Organizations* (Oceana 1962).

<sup>92</sup> Hafner, *Accountability of International Organizations* at 629 (cited in note 52). See Reinisch, 44 *German Yrbk Intl L* at 281–82 (cited in note 81); Sands and Klein, *Bowett's Law of International Institutions* at 461–65 (cited in note 47); Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity Within Diversity* 833–35, 994–1002 (Nijhoff 2003).

opinio juris.<sup>93</sup> Proof of state practice and opinio juris, in relation to human rights, may be found by looking to: (1) diplomatic correspondence; (2) opinions and policy statements of governments; (3) press releases; (4) statements made by governments at international conferences and meetings of international organizations; (5) resolutions of the General Assembly of the United Nations; (6) the acceptance of and adherence to human rights treaties; (7) domestic legislation; (8) judicial decisions of domestic courts; (9) states' reports to treaty bodies of the United Nations; (10) the Human Rights Council Universal Periodic Review process; and (11) the work of domestic human rights organizations.<sup>94</sup>

It is difficult to discern when a norm has crystallized into customary international law.<sup>95</sup> A thorough inquiry into the customary international law status of the right to life and the right to health is therefore not feasible to include here; however, a few remarks must be made. The right to life is often said to have customary status under international law.<sup>96</sup> This, however, tends to be where the right to life is interpreted as protecting against arbitrary killing. There is a growing consensus, however, that the right to life protects against more than arbitrary killing. The Human Rights Committee has stated that “the right to life has been too often narrowly interpreted” and that it not only requires that states adopt negative measures but that it is “desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and

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<sup>93</sup> *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, 1969 ICJ ¶ 77 (Feb 20, 1969).

<sup>94</sup> See Christine Chinkin, *Sources*, in Daniel Moeckli, et al, eds, *International Human Rights Law* 103, 111 (Oxford 2010); Olivier De Schutter, *International Human Rights Law—Cases Materials, Commentary* 50–51 (Cambridge 2010); Ian Brownlie, *Principles of Public International Law* 6–7 (Oxford 7th ed 2008).

<sup>95</sup> Christian Tomuschat, *Human Rights: Between Idealism and Realism* 37–38 (Oxford 2008); Chinkin, *Sources* at 111–12 (cited in note 94). See De Schutter, *International Human Rights Law* at 52–53 (cited in note 94) (providing a summary of some of the different approaches to discerning customary international law).

<sup>96</sup> See Nigel S. Rodley, *Integrity of the Person*, in Moeckli, et al, eds, *International Human Rights Law* 209, 221–22 (cited in note 94); Tomuschat, *Human Rights* at 37 (cited in note 95); Hansje Plagman, *The Status of the Right to Life and the Prohibition of Torture Under International Law: Its Implications for the United States*, *J Inst Just Intl Studies* 172, 177 (2003); Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 *Ga J Intl & Comp L* 287, 343 (1995/1996); B.G. Ramcharan, *The Concept and Dimensions of the Right to Life*, in B.G. Ramcharan, ed, *The Right to Life in International Law* 1, 3 (Nijhoff 1985); Halûk A. Kabaalioglu, *The Obligations to ‘Respect’ and to ‘Ensure’ the Right to Life*, in Ramcharan, ed, *The Right to Life in International Law* 160, 161; 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* 114, 115 (Columbia 1981); *Las Palmeras v Colombia*, Preliminary Objections, Inter-Am. CtHR 67 ser C Separate Opinion of Judge A.A. Cançado Trindade ¶ 15 (Feb 4, 2000).

epidemics.”<sup>97</sup> It is this interpretation of the right to life that is of interest here. Arguing that this interpretation has status under customary international law, however, has its challenges. If the right to life includes taking all possible measures to reduce infant mortality and to increase life expectancy then the door is likely left open for states to decide how to implement these measures. 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. But given that this interpretation of the right to life is relatively recent, the requisite state practice and *opinio juris* do not yet exist.

The status of the right to health under customary international law is even more questionable. There are scholars who argue that the right to health is developing, or has already developed, into a norm of customary international law.<sup>98</sup> The right to health is, however, generally seen as 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.<sup>99</sup>

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<sup>97</sup> United Nations Office of the High Commissioner for Human Rights, *General Comment No 06: The right to life (Art 6)*, ¶ 5 (Apr 30, 1982) online at <http://www.unhcr.ch/tbs/doc.nsf/0/84ab9690cccd81fc7c12563ed0046fae3> (visited Feb 8, 2011). See Bertrand Mathieu, *The Right to Life* 95, 98 (Council of Europe 2006); Alicia Ely Yamin, *Not Just a Tragedy: Access to Medications as a Right under International Law*, 21 BU Intl L J 325, 330–31 (2003); Ramcharan, *The Concept and Dimensions of the Right to Life* at 8–10 (cited in note 96); F. Menghistu, *The Satisfaction of Survival Requirements*, in Ramcharan, ed., *The Right to Life in International Law* 63, 64, 80–81 (cited in note 96); *Juan Humberto Sánchez v Honduras*, Inter-Am CtHR 99 ser C ¶ 110 (June 7, 2003); *Villagrán Morales et al v Guatemala*, The “Street Children” Case, Inter-Am Ct HR 63 ser C ¶ 144 (Nov 19, 1999); *Association X v the United Kingdom*, App No 7154/75, 14 Eur Commn HR Dec & Rep 31, 32 (1978). But see Dinstein, *The Right to Life* at 115–16 (cited in note 96).

<sup>98</sup> See Eleanor D. Kinney, *The International Human Right to Health: What Does This Mean for Our Nation and World?*, 34 Ind L Rev 1457, 1464–67 (2001); Patrick L. Wojahn, *A Conflict of Rights: Intellectual Property under TRIPS, The Right to Health, and AIDS Drugs*, 6 UCLA J Intl L & Foreign Aff 463, 494–96 (2001–2002); Jonathan Wike, *The Marlboro Man in Asia: U.S. Tobacco and Human Rights*, 29 Vand J Transnat L 329, 354–57 (1996); Beth Gammie, *Human Rights Implications of the Export of Banned Pesticides*, 25 Seton Hall L Rev 558, 590 (1994).

<sup>99</sup> David P. Fidler, “Geographical Morality” Revisited: *International Relations, International Law, and the Controversy over Placebo-Controlled HIV Clinical Trials in Developing Countries*, 42 Harv Intl L J 299, 348 (2001); 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*, 63 Md L Rev 20, 109

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, is the rules of the WHO itself. As mentioned above, an international obligation of an international organization “may arise under the *rules* of the [international] organization.”<sup>100</sup> Rules are defined in the draft articles on the responsibility of international organizations as “the constituent instruments, decisions, resolutions and other acts of the organization adopted in accordance with those instruments, and established practice of the organization.”<sup>101</sup> The rules of the WHO thus include: the Constitution of the World Health Organization,<sup>102</sup> 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. Since the objective of the WHO is “the attainment by all peoples of the highest possible level of health,”<sup>103</sup> the rules of the WHO 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. If the rules of the WHO bring with them commitments in relation to the lives and health of people and if, according to the draft articles on the responsibility of international organizations, international obligations of the WHO arise under the rules of the WHO, then it is reasonable to conclude that the WHO has obligations in relation to the right to life and the right to health.

After having set out the international obligations of the WHO, 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 explored.

A breach of an international obligation by the partnerships used as examples throughout this Article—GAVI, the Global Fund, Stop TB, and RBM—has not yet been recorded. But the possibility of such a breach is real. It is useful here to draw an analogy between these partnerships and international organizations. International organizations were, in the beginning, thought of as incapable of doing harm.<sup>104</sup> Capability to do harm was however foreseen by Eagleton. In 1950, he wrote about the possibility of a breach of an international

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(2004); Rhianna M. Fronapfel, *AIDS Prevention and the Right to Health under International Law: Burma as the Hard Case*, 15 Pac Rim L & Pol J 169, 191–94 (2006).

<sup>100</sup> Draft Articles at Art 9(2) (cited in note 6) (emphasis added).

<sup>101</sup> *Id.* at Art 2(b).

<sup>102</sup> *Constitution of the World Health Organization*, 45<sup>th</sup> ed, Supplement (Oct 2006).

<sup>103</sup> *Id.* at Art 1.

<sup>104</sup> See Singh, *Termination of Membership of International Organisations* at vii (cited in note 53).

obligation by the United Nations and its ensuing responsibility under international law even though no such breach 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.<sup>105</sup> 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 exercise public power over global health, they become increasingly capable of doing harm<sup>106</sup> and therefore responsibility under international law needs to be addressed. A few scenarios illustrate how a breach of an international obligation might arise through the acts of global health public-private partnerships.

GAVI, as of September 2010, approved for purchase two pneumococcal vaccines from two major pharmaceutical companies, Pfizer and GlaxoSmithKline, to immunize infants and young children in developing states.<sup>107</sup> These companies committed to supply 600 million doses at a fraction of the price charged to developed states.<sup>108</sup> The Global Fund, as of July 2010, finalized agreements with six manufacturers to provide malaria drugs at an affordable price in eight countries in Sub-Saharan Africa and Asia.<sup>109</sup> Stop TB reported in May 2010 that the Global Drug Facility, managed by the Stop TB Secretariat, will oversee the donation from the Novartis Foundation for

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<sup>105</sup> Eagleton, 76 *Recueil Des Cours* at 385–404 (cited in note 69). See Paasivirta and Kuijper, 36 *Netherlands Yrbk of Intl L* at 173 (cited in note 50) (transposing Eagleton’s “power breeds responsibility” from Eagleton, *The Responsibility of States* at 206 (cited in note 48) to international organizations).

<sup>106</sup> See Burci, 6 *Intl Orgs L Rev* at 379 (cited in note 1) (“[Public-private partnerships] engaged in activities, such as financing research and development or procurement of new medicines . . . can generate non-contractual liability.”).

<sup>107</sup> GAVI, *Pfizer vaccine receives AMC approval by Independent Assessment Committee* (Sept 10, 2010), online at [http://www.gavialliance.org/media\\_centre/press\\_releases/pfizer\\_amc\\_approval.php](http://www.gavialliance.org/media_centre/press_releases/pfizer_amc_approval.php) (visited Apr 10, 2011).

<sup>108</sup> *Id.*

<sup>109</sup> The Global Fund, *Agreements Reduce Prices of Malaria Medicines by up to 80%* (July 14, 2010), online at [http://www.theglobalfund.org/en/pressreleases/?pr=pr\\_100714](http://www.theglobalfund.org/en/pressreleases/?pr=pr_100714) (visited Apr 10, 2011). See also Amir Attaran, et al, *WHO, the Global Fund, and medical malpractice in malaria treatment*, 363 *The Lancet* 237 (Jan 17, 2004); Vinand M. Nantulya and Jon Lidén, *Response to accusations of medical malpractice by WHO and the Global Fund*, 363 *The Lancet* 397 (Jan 31, 2004) (taken from Davinia Abdul Aziz, *Privileges and Immunities of Global Public-Private Partnerships: A Case Study of the Global Fund to Fight AIDS, Tuberculosis and Malaria*, 6 *Intl Orgs L Rev* 383, 386 (2009)).



Sustainable Development of 250 thousand tuberculosis treatments in Tanzania.<sup>110</sup> RBM procures the supply of long-lasting insecticidal mosquito nets and also insecticides and spraying equipment to protect against malaria.<sup>111</sup> Notwithstanding precautionary measures, a possibility exists that the pneumococcal vaccines approved for purchase by GAVI, the malaria drugs provided through the Global Fund, the tuberculosis treatments overseen by Stop TB's Global Drug Facility or the nets, insecticides, and spraying equipment procured by RBM are unsafe and, as a result, damaging to the health and life of a population, thereby infringing on the right to life and the right to health.

As a breach of an international obligation through the acts of global health public-private partnerships has been demonstrated to be a real possibility, the discussion moves to attributability to an international organization.

## B. Attribution

The other element of an internationally wrongful act of an international organization is attributability to an international organization under international law. Attributability is dealt with in draft Article 5 of the draft articles on the responsibility of international organizations.<sup>112</sup> According to draft Article 5(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 as an act of that organization under international law whatever position the organ or agent holds in respect of the organization.”<sup>113</sup> Draft Article 5(2) further provides that “[r]ules of the organization shall apply to the determination of the functions of its organs and agents.”<sup>114</sup>

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<sup>110</sup> Stop TB, *Novartis donates 250 000 TB treatments to the Stop TB Partnership* (May 19, 2010), online at [http://www.stoptb.org/news/stories/2010/ns10\\_028.asp](http://www.stoptb.org/news/stories/2010/ns10_028.asp) (visited Apr 10, 2011). See Stop TB, *What is the GDF?*, online at <http://www.stoptb.org/gdf/whatis/default.asp> (visited Apr 10, 2011).

<sup>111</sup> RBM, *Malaria Commodity Access* (cited in note 40); RBM, *Procurement: Long lasting insecticidal mosquito nets (LLINs or LNs)*, online at <http://www.rollbackmalaria.org/psm/procurementLLINs.html> (visited Apr 10, 2011); RBM, *Procurement: Insecticides and spraying equipment for Indoor Residual Spraying*, online at <http://www.rollbackmalaria.org/psm/procurementIRS.html> (visited Apr 10, 2011).

<sup>112</sup> See Draft Articles at Art 5 (cited in note 6).

<sup>113</sup> *Id.* at Art 5(1) (cited in note 6). See *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, 1999 ICJ 62, 88-89 (Apr 29, 1999) (“[D]amages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damage arising from such acts.”); Draft Articles at 60 (cited in note 6) (“What was said by the International Court of Justice with regard to the United Nations applies more generally to international organizations, most of which act through their organs (whether so defined or not) and a variety of agents to which the carrying out of the organization’s functions is entrusted.”).

<sup>114</sup> Draft Articles at Art 5(2) (cited in note 6).

The question analyzed in this subsection is whether a public-private partnership (specifically GAVI, the Global Fund, Stop TB, or RBM) may be considered an “agent” of an international organization (specifically 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 draft Article 2 to include “officials and other persons or entities through whom the organization acts.”<sup>115</sup> Further, relying on the commentary on the Articles on State Responsibility, which states that attribution does not depend on the use of particular terminology in the internal law of the state,<sup>116</sup> the ILC adopts an analogous rationale for the draft articles on the responsibility of international organizations.<sup>117</sup> An agent of an international organization may be found regardless of the label given to it by the international organization. The sweeping definition in draft Article 2 along with the commentary of the ILC on the draft articles on the responsibility of international organizations as to the meaning of the term indicates that 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>118</sup> The ICJ, in *Reparation for Injuries Suffered in the Service of the United Nations*, stated:

The Court understands the word “agent” in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the Organization with carrying out, or helping to carry out, one of its functions—in short, any person through whom it acts.<sup>119</sup>

Applying this understanding of the term agent to GAVI, the Global Fund, Stop TB, and RBM and an international organization with which they are associated—the WHO—produces varying results depending on the partnership under scrutiny.

The phrase “*charged by an organ of the Organization with carrying out, or helping to carry out, one of its functions*”<sup>120</sup> must be considered more closely. 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.<sup>121</sup> Of particular interest in

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<sup>115</sup> Id at Art 2.

<sup>116</sup> *Report of the International Law Commission*, at 40–42 (cited in note 89).

<sup>117</sup> Draft Articles at 58 (cited in note 6).

<sup>118</sup> Id at 58–60.

<sup>119</sup> *Reparation for Injuries*, at 177 (cited in note 65) (dealing with the issue of whether the United Nations had the capacity to bring a claim in the case of injury caused to one of its agents).

<sup>120</sup> Id (emphasis added).

<sup>121</sup> *Constitution of the World Health Organization* at Art 2 (cited in note 102).

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>122</sup>

GAVI, the Global Fund, Stop TB, and RBM 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 cooperation among actors focused on health, and encouraging and facilitating research in the area of health.

Next, it is necessary to consider whether the WHO has *charged* these functions to these partnerships. This can be determined by scrutinizing the relationship between the WHO and GAVI, the Global Fund, Stop TB, and RBM. Before turning to these relationships, it needs to be determined whether functions must be charged in a formal sense or whether functions may be charged on a less formal or *de facto* basis. This relates to draft Article 5(2)—“[r]ules of the organization shall apply to the determination of the functions of its organs and agents.”<sup>123</sup> The ILC has interpreted this to mean that the functions charged to an agent of an international organization are generally determined by the rules of the international organization.<sup>124</sup> But, according to the ILC, the wording used in draft Article 5(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>125</sup> One such other basis, cited by the ILC, is when persons or entities are acting on the instructions of or under the direction or control of the international organization.<sup>126</sup> It is, therefore, plausible

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<sup>122</sup> Id.

<sup>123</sup> Draft Articles at Art 5(2) (cited in note 6).

<sup>124</sup> Id at 61.

<sup>125</sup> Id.

<sup>126</sup> Gaja, *Seventh Report on the Responsibility of International Organizations* at ¶ 22 (cited in note 75); Draft Articles at 61–62 (cited in note 6). See Pierre Klein, *The Attribution of Acts to International*

that functions may be considered as charged to an agent of an international organization on a less formal or *de facto* basis. As Pierre Klein writes, “it is nonetheless important to look beyond situations of formal links, and to take into account the actual relations of the individuals (or groups of individuals) with an international organization in any given situation.”<sup>127</sup>

In GAVI, the WHO is a founding and key partner of the partnership.<sup>128</sup> It is a member, with voting rights, of the GAVI Board and chairs this Board in alternation with UNICEF.<sup>129</sup> GAVI also depends on the WHO for technical advice in framing its policies.<sup>130</sup> Further, the WHO helps states in their application for funds and also in the implementation and monitoring of immunization activities.<sup>131</sup> 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 Global Fund Board.<sup>132</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>133</sup> But this Administrative Services Agreement was terminated in January 2009 and the Global Fund now manages its own Secretariat and administrative and financial services.<sup>134</sup> The Global Fund relies on the WHO for technical expertise to the Secretariat, Country Coordinating Mechanisms, and potential Principal Recipients.<sup>135</sup> The WHO also helps states prepare applications for funding and carry out the programs and reach the targets set out in the funding agreements.<sup>136</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

*Organizations*, in Crawford, et al, eds, *The Law of International Responsibility* 297, 298 (cited in note 11) (“[A]n organ or an agent may or may not be connected to the organization by formal organic ties, and, in the latter case, acts may be attributed to the organization if the entity or person is under the control of the organization.”).

<sup>127</sup> Klein, *The Attribution of Acts to International Organizations* at 299 (cited in note 126).

<sup>128</sup> GAVI, *The World Health Organization (WHO)*, online at [http://www.gavialliance.org/about/in\\_partnership/who/index.php](http://www.gavialliance.org/about/in_partnership/who/index.php) (visited Apr 10, 2011).

<sup>129</sup> Id.

<sup>130</sup> Id.

<sup>131</sup> Id.

<sup>132</sup> The Global Fund, *Board Members* (cited in note 27).

<sup>133</sup> The Global Fund, *The Global Fund becomes an Administratively Autonomous Institution* (cited in note 25).

<sup>134</sup> Id.

<sup>135</sup> The Global Fund, *Development Partners*, online at <http://www.theglobalfund.org/en/developmentpartners/?lang=en> (visited Apr 10, 2011).

<sup>136</sup> Id.

membership on the Board and influence through the policies it supports. The WHO supports 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 is a difficult argument to make and may stretch the responsibility of international organizations too far. But it is worth thoughtful consideration given the effect of these partnerships on global health and the gap in responsibility under international law in relation to the acts of these partnerships.

Stop TB and RBM, however, have a different relationship with the WHO. In Stop TB, the WHO is 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 Stop TB Board providing guidance on policy in relation to tuberculosis.<sup>137</sup> As the host, it houses the Stop TB Secretariat. This means that the Stop TB 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>138</sup> The WHO enters into contracts, acquires and disposes of property, and, if necessary, institutes legal proceedings for the benefit of Stop TB.<sup>139</sup> All staff of Stop TB are officials of the WHO and, as such, are accorded privileges and immunities.<sup>140</sup> In RBM, the WHO is also both a partner and the host of the partnership. As a partner, it is a founding and key partner of the partnership.<sup>141</sup> It is a member of the RBM Board providing guidance on malaria policy.<sup>142</sup> As the host, it houses the RBM Secretariat and also provides administrative and fiduciary support and facilities.<sup>143</sup> The operations of the RBM Secretariat are carried out in accordance with the WHO Constitution and other rules, regulations, policies, procedures, and practices of the WHO, subject to adaptations to meet the specific needs of RBM.<sup>144</sup> The Director-General of the WHO further has the power to refuse to implement a decision of RBM if he considers that implementation would be inconsistent with the rules, regulations, policies, procedures, or practices of the WHO or could

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<sup>137</sup> Stop TB, *About Us* (cited in note 29).

<sup>138</sup> *Id.*

<sup>139</sup> Stop TB, *Basic Framework* at 13 (cited in note 31).

<sup>140</sup> Stop TB, *Request for Proposals* at 15 (cited in note 31).

<sup>141</sup> *Memorandum of Understanding* at Preamble (cited in note 38).

<sup>142</sup> *Id.* at Art 1.3.

<sup>143</sup> *Id.* at Art 2.1.

<sup>144</sup> *Id.* at Arts 2.2, 7.

give rise to liability for the WHO.<sup>145</sup> The WHO enters into contracts, acquires and disposes of property, and, if necessary, institutes legal proceedings for the benefit of RBM.<sup>146</sup> All staff of the RBM Secretariat are staff members of the WHO and the privileges and immunities enjoyed by the WHO and its staff also apply to the RBM Secretariat staff, funds, properties, and assets.<sup>147</sup>

The relationships of Stop TB and RBM with the WHO are different than the relationships of GAVI and the Global Fund with the WHO. This is due to the fact that the WHO is not only a key partner of Stop TB and RBM 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 of the WHO 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 Stop TB and RBM in a formal sense. But it is clear that the WHO is highly integrated in and supports the work of these partnerships in carrying out functions normally seen as functions of the WHO. The relationships of Stop TB and RBM 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. It is therefore conceivable that Stop TB and RBM are agents of the WHO.

This examination of the relationships between the WHO and GAVI, the Global Fund, Stop TB, and RBM sheds light on whether the WHO has charged its functions to these partnerships, making them agents of this international organization. If such agency is found, it satisfies the other element of an internationally wrongful act of an international organization—attributability to an international organization under international law. A generalization cannot, however, be made, because each of these partnerships has a different relationship with the WHO. But there are similarities between GAVI and the Global Fund and between Stop TB and RBM. In GAVI and the Global Fund, the WHO acts as a partner and in Stop TB and RBM, the WHO acts as a partner and the host. The distinction between acting as a partner versus acting as a partner and the host has consequences for the determination of agency and, in turn, attribution. A stronger case for agency and, in turn, for attribution lies where the international organization acts as a partner and the host of the

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<sup>145</sup> *Memorandum of Understanding* at Art 2.6.

<sup>146</sup> *Id* at Art 2.1.

<sup>147</sup> *Id* at Arts 3.2, 3.8.

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 GAVI, the Global Fund, Stop TB, and RBM 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.

## VI. CONCLUSION

Public-private partnerships are important players in the response to global health issues such as AIDS, tuberculosis, and malaria. But as these partnerships increasingly exercise public power over global health, they also become increasingly capable of adversely impacting the rights of individuals, such as the right to life and the right to health. These partnerships, therefore, need to be embedded within a framework of responsibility under international law. The fact that the legal personality of partnerships under international law is open to question, however, means that partnerships are not capable of being found responsible under international law. To address this gap in responsibility under international law, this Article suggested turning to international organizations who act as partners and/or hosts of these partnerships. It considered attributing the acts of partnerships, GAVI, the Global Fund, Stop TB, and RBM, to an international organization, the WHO, through application of the draft articles on the responsibility of international organizations. Such application would require applying these draft articles in ways not foreseen by its drafters and an argument may be made that this application 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 is not stretched that far. A possibility, therefore, lies to invoke the draft articles on the responsibility of international organizations in relation to the acts of global health public-private partnerships and thereby helps to meet the challenges posed by the changing and expanding actors in the international community.