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Partnerships between International Institutions and Issues of (Shared) Responsibility

Introductory Notes

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Abstract

More and more, international institutions pursue their objectives together in the form of partnerships. Partnerships are established to work towards important policy objectives in relation to global health, environmental protection, and so on. However, the activities of partnerships may lead to questions of responsibility when such objectives are not achieved, or when third party interests are affected. This Forum explores questions of responsibility—the term responsibility being used in a broad sense—that may arise in relation to partnerships and in particular the question of whether responsibility can be shared between the actors that participate in a partnership. These introductory notes provide the necessary background by defining the concepts of partnerships and shared responsibility, and identify ten conclusions on shared responsibility that can be drawn from the case-studies on particular partnerships.

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Keywords

partnerships – international organizations – international institutions – cooperation – shared responsibility – ARIO – responsibility – accountability

1 Introduction

More and more, international institutions pursue their objectives together. While not new, this phenomenon has gained significance over the past few decades. To some extent, cooperation among international institutions can be seen as the extension of inter-State cooperation. States set up international institutions because they cannot achieve their aims alone, but these institutions rapidly find out that they too cannot achieve their aims alone, and thus engage in cooperation with other institutions and with States. At the same time, cooperation among international institutions does not merely replicate inter-State cooperation.

As the stakes of global governance have evolved, so have also the aims that international organizations have set for themselves as actors in the international scene. In this respect, the intensification and diversification of cooperation among international institutions has been the engine for producing new aims, rather than the instrument for fostering existing ones. Let us think, for instance, of global climate governance. Cooperation between international institutions has paved the way for the creation of new tools, such as those of climate finance through trust funds.¹ Not only have these tools marked a step forward in the handling of an existing issue, but climate finance has also entered with full rights into the current strategic agenda of global climate governance. In this sense, the experience of cooperation shapes what international institutions can conceive, and aspire to achieve, as aims of their action.

Along with the aims of cooperation, its forms have also evolved. Contrary to inter-State cooperation, at least in its most significant expression, inter-institutional cooperation is generally based on hybrid and informal arrangements. This is linked to the twofold quality of cooperation: whereas it exposes participating institutions to increased risk due to the complexity of operations, it also offers a shield for international institutions to engage in activities that they would be unable or reluctant to pursue alone. Examples are situations where the United Nations ('UN') faces reluctance from local authorities, or the high-risk operations through which the World Bank collects funds for

¹ In this respect, see L. Boisson de Chazournes, 'Is there Room for Coherence in Climate Financial Assistance?' (2015) 4 *Laws* pp. 541–558.

development initiatives in global financial markets. Striking the balance between these two features—the increased risk and the potential protection offered by cooperation—requires a certain degree of flexibility, which will thus be crucial to the viability and appeal of any collaborative enterprise. As the contributions to this Forum suggest, the preference for informal or not-fully institutionalised arrangements reflects the need to adapt to the specific context depending on the situation at hand. Lack of formality often goes hand in hand with the establishment of loose, and therefore low-risk, collaborative schemes. The adoption of more formal undertakings is, instead, a way to curb the high exposure involved in situations of close cooperation. This in turn strengthens the incentive for cooperation, as being that of pursuing otherwise hardly achievable or manageable objectives.

Various terms have been used to capture the burgeoning of inter-institutional cooperation. Some refer to networks of institutions,² and indeed some of these cooperative ventures refer to themselves as networks.³ However, as will become clear from the contributions to this Forum, both in practice and scholarship, there is now much support for using the label of ‘partnerships’, and it is that concept on which we will focus.

This Forum will focus on one particular question that may arise in the practice of partnerships: how have questions of responsibility—the term responsibility being used in a broad sense—that may arise in relation to partnerships been addressed? Like international organizations generally, partnerships are established to work towards important policy objectives in relation to global health, environmental protection, development, and peace and security. Still, the activities of partnerships, and/or the organizations that participate in them, may pose questions of responsibility when such objectives are not achieved, or when third party interests are affected.

In the case of the Gavi partnership, for instance, responsibility may arise for having funded a vaccine that turns out to be unsafe.⁴ In the context of military activities of the UN or the North Atlantic Treaty Organization (‘NATO’), harm may be caused in the course of military operations carried out in cooperation

2 Discussing the ‘network structure’ in one specific respect of global governance, M. Wilke, ‘Emerging Informal Networks in Global Governance: Inside the Anti-Money Laundering Regime’ (2008) 77 *Nordic Journal of International Law* pp. 509–531.

3 For instance, the International Network for Bamboo and Rattan (‘INBAR’). For a *tour d’horizon*, see the contribution of N. Blokker to this special Forum entitled ‘On the Nature and Future of Partnerships in the Practice of International Organizations’ (with the INBAR discussion at Section 1.1(g)).

4 See the contribution of E. Szabó to this special Forum entitled ‘Gavi, the Vaccine Alliance: A Unique Case Study in Partnership’, esp. the discussion at Section 3.2.2.

with partner institutions.⁵ In relation to World Bank partnerships, it has been observed that inherent in huge fund flows “that can readily overwhelm local resources and capacity is the possibility ... of fund misuse”.⁶

In such cases, the question is how international law deals with questions of responsibility that arise in the complex setting of a partnership. One option we explore is that in such cases responsibility is, or can be, shared between multiple actors participating in the partnership, or between participants and the partnership itself. In that respect, the present Forum is a case study of a wider inquiry into the possibilities of shared responsibility in international law.⁷ However, it will appear throughout this Forum that this is only one of many options, and that the question of responsibility in the context of partnerships is characterized by a great diversity.

In these introductory notes, we will briefly discuss the concept of partnerships (Section 2), the legal nature of partnerships (Section 3), and the concept of (shared) responsibility (Section 4). We conclude with a brief roadmap (Section 5), and a summary of the main findings relating to responsibility (Section 6).

2 The Concept of Partnerships

The Oxford English Dictionary defines ‘partnership’ as “an association of two or more people as partners”. It then defines ‘association’ as “a group of people organized for a joint purpose”, and ‘partner’ as “a person who takes part in an undertaking with another or others”.⁸ This partnership definition brings us two interesting points. First, partnerships have a joint purpose; and, second, they

5 See the contributions of K. Grenfell to this special Forum entitled ‘Partnerships in UN Peace-keeping’, esp. at Section 3; and M. Zwanenburg entitled ‘What’s in a Word? NATO “Partnerships” between NATO and Other International Institutions and Some Issues of Shared Responsibility’, at Section 4.

6 See the contribution of A. E. Stumpf to this special Forum entitled ‘Trust-Funded Partnership Programmes of the World Bank under the ARIO: A Practitioner’s Perspective’, at Section 4.3.

7 P. A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press, Cambridge, 2014); P. A. Nollkaemper and D. Jacobs (eds.), *Distribution of Responsibilities in International Law* (Cambridge University Press, Cambridge, 2015); P. A. Nollkaemper and I. Plakokefalos (eds.), *Practice of Shared Responsibility in International Law* (Cambridge University Press, Cambridge, 2016 *forthcoming*).

8 Definition of ‘Partnership’, *The Oxford Dictionary of English*, available at <<http://www.oxforddictionaries.com/definition/english/partnership>>.

involve some form of organization or undertaking with another, without necessarily involving a new legal entity (though sometimes they do).⁹

This definition is broad enough to encompass the wide variety of constructions to be found in the world of partnerships. It is difficult to provide a prototype of the collaborative schemes that are reflected in partnerships. Indeed, the assumption that ‘partnerships’ are a useful unit of analysis does not go without saying and calls for further explanation. This point has not only general,¹⁰ but also specific pertinence to the individual subject areas covered by this Forum, such as NATO, the World Bank, and the UN.

Insofar as partnerships vary widely, one may wonder if further distinction would provide more analytical power for describing, understanding, and prescribing in relation to cooperation between international institutions. More specifically, the question arises of what purpose the partnership label can serve for a general responsibility regime. The diversity that one faces at the outset discourages against venturing into more than case-specific considerations. At the same time, the tendency to reproduce certain patterns of collaboration out of institutional emulation is very strong. The apparent universality that seems to underpin the success of the notion of partnerships stands in tension with the variety that this notion includes. This tension calls for theoretical reflection. It is timely, indeed, to measure the theoretical and top-down approach that has prevailed towards the responsibility of international institutions against the tension bred by a notion emanating, on its part, eminently from international practice. Exposing both the variety and the common elements of partnerships in relation to questions of (shared) responsibility is thus in itself a major aim of this Forum.

A more promising option than insisting on a unifying concept is to identify the vectors across which the flexibility of partnerships finds expression. Two such vectors are actors and rationale. A third one (the nature of legal instruments) is discussed in the next section.

One vector across which partnerships can be differentiated is that of actors. Even though our prime interest is in partnerships between international institutions, partnerships have also long seen an important participation of

9 One of the few exceptions is the Global Water Partnership Organization, which has “full legal personality under international law” (Statutes, Article 1). Another exception is the Consortium for Consultative Group for International Agricultural Research (‘CGIAR’), which was established as a fully-fledged international organization after its 2010 reform. Other partnerships in the field of finance development, and particularly those involving the World Bank, are also endowed with international legal personality.

10 See generally Blokker, *supra* note 3.

private actors, such as foundations and associations. This has been the case as of the development-oriented partnerships of the 1970s. These early experiences mainly concerned knowledge-related activities, this fact accounting in part for the opening up to the private parties.¹¹ More recently, however, private actors have gained prominence also in security-related initiatives, notably at the regional level, as illustrated by NATO's partnership portfolio.¹² This is also the case in the field of global health.¹³

Along with private actors, partnerships have seen the participation of international institutions of different sorts. This diversity is particularly evident in the field of finance development, where the actors involved range from international financial institutions, including the World Bank and regional development banks, to UN agencies and programmes. Partnerships can also include national institutions. An example is the Global Environmental Facility ('GEF'), a UN—World Bank partnership, which first opened its gates to other organizations, and then to national institutions under the 2010 extended scheme for accreditation.¹⁴

The second principal vector of diversity concerns the rationale behind partnerships. A large part of partnerships consist in loose forms of collaboration the axis of which is formed through the sharing of certain policy goals. This is particularly the case where cooperation is highly sensitive, such as in security-related partnerships. More broadly, one can safely say that the partnership label is used most often precisely to indicate such loose schemes of cooperation.¹⁵ Rather than a common action, the rationale is here that of some sort of alignment in terms of policy orientation. There are however more robust and structured partnerships. The underlying strategic interest is that of pooling resources among partners. In the field of development

11 A good example is the CGIAR, which was launched in 1971 by the World Bank with the sponsorship of the United Nations Development Programme ('UNDP') and the Food and Agricultural Organization ('FAO'). See the contribution of A. Angelini to this special Forum entitled 'A Trouble Shared is a Trouble Halved: How the Structure of Cooperation Matters for the Engagement of Responsibility in the World Bank Partnership Programmes', at Section 2.2.

12 See generally Zwanenburg, *supra* note 5.

13 See generally Szabó, *supra* note 4.

14 See paras. 21 to 27 of the Joint Summary of the Chairs, 39th GEF Council Meeting, 16–18 November 2010, and Document GEF/C.39/7/Rev.1, 'Broadening of the GEF Partnership under Paragraph 28 of the Instrument: Key Policy Issues', available at <www.unep.org>. For a broader discussion, see L. Boisson de Chazournes, 'The Global Environment Facility (GEF): A Unique and Crucial Institution' (2005) 14 *Review of European Community and International Environmental Law (RECIEL)* pp. 193–201.

15 Blokker, *supra* note 3, at Section 1.

finance, the main objective is the design and implementation of concrete projects. Among these more structured partnerships we also find forms of collaboration aimed at knowledge-related activities, including research and networking. In the area of peace and security maintenance, instead, the UN joins forces with other institutions to facilitate the establishment and management of field missions.¹⁶

3 The Nature of the Legal Instruments at the Basis of Partnerships

If partnerships vary widely in terms of actors and rationale, the most immediate expression of such flexibility is in the legal instruments underpinning partnerships. The legal nature of these instruments is not always clear-cut, and much depends on the wider question of what we ultimately consider as an international agreement.

At least as regards their international legal quality, the agreements between international organizations are relatively unproblematic. We shall nonetheless mention two issues that are related in particular to the hybrid nature of these arrangements. First, their binding legal character seems, at least in part, to depend on the type of cooperation set up by the partners. Whereas agreements establishing loose schemes of cooperation tend to exclude expressly their binding legal quality, we do not find similar provisions in the case of more complex schemes of cooperation. A good realm for measuring this difference is that of development finance. The instruments establishing avenues for cooperation between the World Bank and regional development banks are unequivocally couched in non-binding terms.¹⁷ On the contrary, instruments setting up the framework for project financing through trust funds can be considered as legally binding insofar as they contain provisions on entry into force and withdrawal.¹⁸ This applies to agreements concluded with international

16 See generally Grenfell, *supra* note 5.

17 An example is Article IX of the Memorandum of Understanding between the European Bank for Reconstruction and Development, the African Development Bank and the African Development Fund, which reads as follows: "This Memorandum of Understanding reflects the views and intentions of the Parties expressed in good faith but without the creation of any legal obligation or the incurrence of any legal liability on the part of any of them". The Memorandum of Understanding is available from the web site of the African Development Bank at <www.afdb.org/fileadmin/uploads/afdb/Documents/Legal-Documents/SIGNED%20MEMORANDUM%20OF%20UNDERSTANDING%20BETWEEN%20EBRD%20AND%20ADB%20AND%20ADF.pdf>.

18 See *e.g.* paras. 4–5 of the *World Bank and United Nations Fiduciary Principles Accord for Crisis and Emergency Situations* (World Bank, Washington, DC, 2008), available from the

organizations, as either donors or implementing agencies. Even in those cases where a partnership is set up by a legal agreement, it seems that partnerships generally do not have legal personality.¹⁹

Granted that only some of the partnership-related arrangements between international institutions have a binding quality, a second issue worth noting is the effects of such agreements on third parties. Without anticipating the discussion in the contributions to this Forum, we shall only make a general consideration. As provided in Articles 34 and 2(h) of the *1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*,²⁰ Memoranda of Understandings ('MOUs')—even if they are legally binding—cannot produce legal effect for any third party. This means that in most cases, these agreements will be of a factual value for third parties. Article 34 of the *1986 Vienna Convention*, however, leaves open whether the exclusion of third party effect extends to states members of an international organization that are party to an MOU. When the UN is party to the relevant MOUs, the loophole of Article 34 can have important implications insofar as virtually all States are members of the UN. The discussion in this Forum points to this difficulty and its implications, notably in the field of peace and security.²¹

The case of agreements concluded with private entities is somewhat thornier. Some of these agreements have a legally binding nature under domestic law, but this is more the exception than the rule. Notwithstanding the lack of legal personality of private actors, the agreements between them and an international organization shall not be considered as an internal act of this organization. Insofar as these agreements reflect a joint expression of will, it would be erroneous to equate them with unilateral acts of an international organization. There is, in other words, no plausible basis for considering the lack of legal personality of private actors as the lack of an expression of will altogether.

World Bank web site at <<http://documents.worldbank.org/curated/en/2008/09/9875505/world-bank-united-nations-fiduciary-principles-accord-crisis-emergency-situations>>. See also Angelini supra note 11, at Section 2.2.3.

- 19 Certain partnerships in the field of development finance have a separate legal personality, as for instance the CGIAR, and several partnerships established under the *1992 United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994), such as the Green Climate Fund and the Adaptation Fund.
- 20 Adopted by the UN General Assembly on 21 March 1986, UN Doc. A/CONF.129/15 (1986) (not yet in force).
- 21 See the contribution of V. Pergantis to this special Forum entitled 'UN-AU Partnerships in International Peace and Security: Allocation of Responsibility in Cases of UN Support to Regional Missions', at Section 4.1.

To further complicate the picture of the legal nature of agreements setting up partnerships, it is worth noticing that partnerships often comprise several instruments of a different legal nature. This ‘patchwork’ structure is to be found particularly in the field of development finance. The complex schemes proper to financing through trust funds may comprise unilateral acts of an international organization,²² more classical legal agreements, as well as informal arrangements couched in political terms. One example of this complexity is the Global Environmental Facility (‘GEF’).²³ This partnership reunites UN agencies, the World Bank, multilateral development banks, and, on an *ad hoc* basis, national institutions. Part of the relevant legal relationships are established by international agreements (e.g., the GEF Instrument and Financial Procedure Agreements); part are regulated by a combination of hybrid instruments—for instance, the relationships with Executing Agencies are based on various GEF Council decisions, as well as on MOUS.

It will appear in the various contributions to this Forum that the variety in the legal nature of the constitutive instruments is of direct relevance for the possible existence, and form, of (shared) responsibility.

4 (Shared) Responsibility

In this Forum, we will focus on one particular aspect of partnerships between institutions: how questions of responsibility that may arise in the course of the operation of partnerships are resolved. While partnerships have noble objectives in relation to public policy, this does not exclude the possibility that the activities of partnerships, and/or the institutions that participate in them, lead to outcomes that are harmful to either some participants in the partnership, or to third parties. If so, the complexity of partnerships makes the question of responsibility a thorny one.

We define the term ‘harm’ broadly. In some (rare) cases, activities of partnerships may lead to legal injury for third parties, for instance in situations of peacekeeping where rights of civilians are violated.²⁴ But much more common are situations where a partnership sets out to achieve certain objectives,

22 This is, for instance, the case of the Trust Fund for Gaza and the West Bank established by the World Bank.

23 See the contribution of P. Palchetti to this special Forum entitled ‘Applying the Rules of Attribution in Complex Scenarios: The Case of Partnerships among International Organizations’, at Section 2.

24 For instance, Key Findings and Recommendations of the Investigation on Sexual Exploitation and Abuse (‘SEA’) in AMISOM by an Independent Investigation Team, Addis Ababa, 21 April 2015, available at <<http://cpauc.au.int>>.

perhaps causing interested parties to rely on the realisation of such aims, and the partnership does not deliver its promises. In both cases, the question arises as to how questions of responsibility are to be addressed. Is the partnership as such responsible, is responsibility channelled to particular members, or is responsibility somehow shared between multiple actors?

We define 'responsibility' in a broad sense as well. The term includes in any case responsibility as used by the International Law Commission ('ILC'): i.e. responsibility based on an internationally wrongful act.²⁵ However, it will appear in the course of this Forum that the role of this formal responsibility in relation to partnerships has been very limited. To capture also the variety of other, 'softer' responses to situations where partnerships affect particular interests, we use the term responsibility to include situations where some forum (e.g., an inspection panel) assesses conduct of partners in a partnership against some international standards, without making determinations of an internationally wrongful act. The term responsibility then covers what often is referred to as accountability.²⁶

We observe that different types of responsibilities can be engaged.²⁷ Generally, most attention is focused on what can be called 'implementation responsibility': responsibility for actual conduct 'on the ground', such as the actual spending of money of trust funds, actual conduct for health prevention (such as vaccination), and actual military conduct in operations of NATO, the African Union ('AU') or the UN. In partnerships, however, issues arise in relation to two further dimensions. One set of issues has to do with implementation: is control at this level carried out by the partnership as such (rarely), or rather by one of the organizations involved (mostly, as in the case of the UN and the World Bank)?²⁸

Another set of issues has to do with the exercise of supervision. In all partnerships, there needs to be some degree of supervision, which is exercised over

25 Article 1 of the Articles on the Responsibility of International Organizations, with commentaries, *ILC Report on the work of its sixty-third session*, UN Doc. A/66/10 (2011) ('ARIO') p. 4.

26 D. Curtin and P. A. Nollkaemper, 'Conceptualizing Accountability in International and European Law' (2005) 36 *Netherlands Yearbook of International Law* pp. 3–20; see also L. Dubin and P. Bodeau-Livinec, 'La responsabilité des institutions internationales dans tous ses états', in L. Dubin and M. C. Runavot (eds.), *Le phénomène institutionnel international dans tous ses états: transformation, déformation ou reformation?* (Pedone, Paris, 2014) pp. 331–334.

27 See in particular, Stumpf, *supra* note 6, at Sections 7.2–7.3.

28 Respectively Grenfell, *supra* note 5, esp. Section 3; Stumpf, *ibid.*; and Angelini, *supra* note 11, at Section 2.2.4.

the implementation of partnerships' policies and partnership funds.²⁹ The questions are who is in charge of such a supervisory function, what is the legal nature of the supervisory role, and whether a failure to supervise can trigger responsibility in its legal or political dimension.

In those, admittedly rare, situations where the practice of partnerships raises questions of responsibility, our particular interest is in the question of whether such responsibility is, or can be, shared between multiple actors participating in the partnership, or between participants and the partnership itself. If so, we can speak of shared responsibility for harm caused by a partnership. We speak of 'shared responsibility' when a multiplicity of actors who participate in a partnership, or the partnership as such, contributes to a particular harmful outcome, and the responsibility for this harmful outcome is distributed separately among more than one participant and the partnership as such.³⁰

However, notwithstanding the multiplicity of actors involved in a partnership, shared responsibility clearly is only one option. Other possibilities are that the partnership as a whole is considered responsible; that only one of the participating actors is held responsible; or that, because of the multiplicity of actors involved in the partnership, and also because of the absence of procedural mechanisms, no single actor is responsible.

The obvious starting point for questions of responsibility arising in partnerships of international institutions are the ILC Articles on the Responsibility of International Organizations ('ARIO').³¹ The ARIO are relevant to questions of shared responsibility, as they recognize that international organizations can be responsible for acts done together with States, and importantly, other international organizations.³² The ILC could only refer to very little practice of such shared responsibility between international organizations in its commentary. But in any case, it is not immediately clear that the ARIO are very relevant for questions that arise in practice in partnerships among institutions.³³ To the extent that questions of responsibility arise, the relevant actors appear to have preferred other solutions. Certain partnerships, for instance,

29 Stumpf, *ibid.*, at Section 7.3.

30 P. A. Nollkaemper, 'Introduction', in Nollkaemper and Plakokefalos (eds.), *Principles of Shared Responsibility in International Law*, *supra* note 7, pp. 1–24, at pp. 6–12.

31 Art. 3 ARIO, *supra* note 25.

32 Arts. 14–19 ARIO.

33 L. Boisson de Chazournes, 'United in Joy and Sorrow: Some Considerations on Responsibility Issues under Partnerships among International Financial Institutions', in M. Ragazzi (ed.), *Responsibility of International Organizations—Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff Publishers, The Hague, 2013) pp. 211–224.

contemplate mechanisms for redress, and particularly, for the presentation of claims by third parties.³⁴

In general, it can be said that the law of responsibility in relation to partnerships among international institutions is underdeveloped, and that international practice has not yet been sufficiently analysed and systemised. It is the aim of this Forum to contribute to the understanding of the practice of partnerships. Two issues emerge as particularly problematic across the different contributions to this Forum.

The first issue is the significance of *lex specialis*.³⁵ Although not all partnerships present provisions in this respect, some of them provide for an explicit allocation of responsibility among partners. One is thus confronted with the question of whether these provisions have any relevance for the invocation of responsibility by third parties that are possibly affected by the harmful implications of partnership-related activities.

The second issue is that of dealing with the different levels at which the joint character of a partnership can find expression. In some cases, such as those involving development finance, there is some degree of joint action both at the level of decision making and at the level of the implementation of activities. In other cases, the joint character of partnerships extends exclusively to an operational aspect. As it will appear, this is important for the purposes of deciding whether the paradigm of direct responsibility of each single partner is more fitting than that of indirect responsibility of one partner for the acts of other partners.

5 Roadmap

Against this background, the present Forum primarily seeks to identify and map the relevant practice and arrangements of partnerships, to confront these with the established rules on responsibility, and to identify what responsibility practices have emerged that lie outside the notion of responsibility as articulated by the ILC. Among the questions that are discussed in this Forum are the usefulness of the concept of partnerships as an analytical tool; the nature of the problem (i.e. to what extent activities of partnerships have resulted in harmful outcomes); and the arrangements or practices that partnerships have developed for addressing responsibility for harm. With respect to

34 Grenfell, *supra* note 5, at Sections 2.1 and 2.2.

35 Pergantis, *supra* note 21, at Section 4.1; and Stumpf, *supra* note 6, at Section 8.2.

these issues, the Forum attempts to assess the relevance of general principles of responsibility, as developed by the ILC, for determining responsibility in partnerships among international institutions; the degree to which we can speak of shared responsibility between actors participating in a partnership; whether the arrangements by which partnerships are set up provide for the possibility of responsibility; and how responsibility is or should be divided in the partnership. The scope and thrust of *ex ante* arrangements in relation to responsibility are also addressed.

The Forum includes eight contributions that address these questions. It starts with two more general discussions. Niels Blokker provides a general overview and analysis of partnerships among international institutions. He shows that there is a wide variety of forms of cooperation between international organizations and external entities in the current practice of international organizations. Some of these are called partnerships; others have different names. Blokker argues that the need for international organizations to cooperate with other entities is likely to stay, that probably more partnerships—whatever their name—will be established in the future, and that in principle this is a positive development.

Paolo Palchetti focusses specifically on partnerships among international organizations from the angle of the law of international responsibility. By examining a number of issues relating to this problem—such as whether, and to what extent, the fact that an organization hosts a partnership has an impact on attribution of conduct—his study aims at assessing the potential and limits of the current rules of attribution in dealing with the complex scenarios created by partnerships.

After these two general discussions, six articles examine specific partnerships. The first three of these concern military matters. Katarina Grenfell discusses the partnerships established between the UN and regional organizations, in particular the African Union ('AU') and the European Union. Her article examines the policy and practice of the UN regarding the use of partnerships in peacekeeping operations, including the legal framework which applies in respect of issues of responsibility.

Vassilis Pergantis discusses partnerships between the United Nations and the AU. His article sheds light on the multifaceted role of the UN on the strategic and operational planning and evolution, as well as the funding of regional (AU) peace support operations. The analysis of the relevant responsibility allocation clauses shows that a holistic rather than a micromanaging approach should be adopted. The different aspects of UN involvement in regional missions should be treated as an aggregate, which should be taken into account as a whole when allocating responsibility.

Marten Zwanenburg illustrates NATO-established partnerships. The article describes NATO's policy and practice related to partnerships, and then discusses issues of responsibility.

These contributions are followed by two articles on the World Bank. Andrea E. Stumpf examines trust-funded partnership programmes involving the World Bank. She suggests that the variety and complexity of World Bank partnership programmes, especially those that contract major fund flows, can be sustained only if partners are able to allocate roles and responsibilities amongst themselves. She also argues that agreed terms, set forth in signed agreements and adopted partnership documents, should be considered 'rules of the organization' under the ARIO, and should be recognised when allocating responsibility among international organizations and other partners in international development initiatives.

Antonella Angelini examines World Bank partnerships from a different angle. She focuses on how the logic of risk management shapes partnerships in their relational dimension and legal design. Separate, and often parallel, threads of accountability correspond to the bundles of relationships among partners. She then argues that while general rules of responsibility are not altogether displaced, these have few chances to cover those partnerships in which risk allocation is pervasive. In such cases, partners exercise virtually no factual control over one another, fundamentally limiting the role of the ARIO.

Finally, Eelco Szabó examines partner arrangements in Gavi, the Vaccine Alliance. Gavi has evolved from a loose partnership, bringing together the major stakeholders in immunization, to an organization in its own right with legal personality. He exposes how the original partnership set-up remains a very important part of Gavi's structure, since it became an organization in its own right. The analysis is centred on how Alliance partners aim to increase access to immunisation in the poorest countries of the world, and the implications this may have on partner accountability or responsibility to third parties.

6 Overview of the Main Findings in Relation to Responsibility

Without striving for completeness, we articulate ten findings that emerge from the collection of articles in this Forum with respect to questions of (shared) responsibility.

- (1) The assessment of responsibility in partnerships invariably raises the question of the legal personality of the partnership—if only because legal personality is a *conditio sine qua non* for the allocation of responsibility

to the partnership as such. The collection of articles makes clear that partnerships tend to be loose forms of cooperation, which rarely take the form of a legal person.³⁶ In some cases, notably Gavi, such personality only exists under domestic law.³⁷ Indeed, precisely because of the absence of personality, there is at least a theoretical risk that responsibility ‘falls through the cracks’. In relation to Gavi, for instance, the combination of immunity from domestic jurisdiction in Switzerland and the non-applicability of the ARIO risks depriving third parties of all legal recourse.³⁸ In a different context, but in a similar tone, Stumpf notes: “the collective nature of the governing body tends to obscure individual responsibility, resulting in less responsibility than the sum of its parts”.³⁹ Similar problems exist also in relation to NATO,⁴⁰ where they seem to result in part from the absence of access to relevant information on the roles and conduct of various partners.⁴¹

- (2) Because of the high risks of responsibility to which partners are mutually exposed, they have an interest in clarifying *ex ante* their respective role in the partnership. As Szabó notes: “[d]efining clear roles and responsibilities and developing mechanisms to verify whether agreements on the roles and responsibilities have been implemented appear to be important aspects for the success of a partnership”.⁴² In a similar vein, Stumpf stresses that “[i]n the interest of clarity, it is World Bank practice to contractually articulate the lack of (transfer of) responsibility in the same way that the acceptance of responsibility is made clear.”⁴³ As to UN practice, Grenfell makes clear that the exchange of letters governing the partnerships between the EU and the UN generally set out principles concerning their cooperation, including that each force would remain under separate command and control, and under their own rules of engagement.⁴⁴ Such *ex ante* arrangements, however, do not always exist; and, where they exist, they are not always clear. Lack of clarity is somewhat problematic also in the case of World Bank partnerships, in part because

36 See generally Blokker, *supra* note 3. On a specific example concerning NATO partnerships, see Zwanenburg, *supra* note 5, at Section 5.

37 Szabó, *supra* note 4, at Section 2.2.

38 *Ibid.*, at section 3.2.2. See also Angelini, *supra* note 11, at Sections 3.1.1 and 4.

39 Stumpf, *supra* note 6, at Section 7.5.

40 Zwanenburg, *supra* note 5.

41 *Ibid.*, at Section 4.

42 Szabó, *supra* note 4, at Section 3.3.1.

43 Stumpf, *supra* note 6, at Section 7.4.

44 Grenfell, *supra* note 5, at Section 2.1.

of the hybrid legal nature of the instruments underpinning these partnerships.⁴⁵ At the same time, notwithstanding their general appeal, *ex ante* arrangements are not always viable or desirable. Insofar as partnerships evolve profoundly over time, partners are keen on keeping some leeway in the definition of their respective roles.⁴⁶

- (3) While it is common to articulate the various roles in a partnership, it is far less common to include express arrangements on the allocation of responsibility between the partners in a partnership.⁴⁷ For instance, arrangements for NATO partnerships do not contain provisions on the responsibility of the involved actors, be that other international organizations or States.⁴⁸ The answer to the question whether partners have agreed to arrangements for addressing responsibility for harm is complicated by the fact that in some cases (for instance in relation to NATO), documents relating to such partnerships are not in the public domain.⁴⁹ However, there are some noteworthy examples of provisions that do articulate such rules. One is Article 23 of the Gavi Statutes, providing that Board members and the organizations they represent shall not be liable for any of the “activities or commitments” of the Gavi Alliance.⁵⁰ Other examples are the Adaptation Fund, which excludes the Board from responsibility for the activity of the implementing entities,⁵¹ and the mutual exclusion of responsibility in the Advance Market Commitment (in which the Bank and the Gavi Alliance have agreed that “[n]either Party to this Agreement is responsible for the obligations of the other Party to this Agreement”).⁵² Likewise, the question of claims made by third parties was governed by an EU-UN exchange of letters, providing that “each organization would handle any claims that might be made by third parties against the other organization, for which it or its personnel was responsible”.⁵³ To the extent that specific arrangements have been made, these would qualify as *lex specialis* in terms of Article 64 of the ARIO. This clause, which has been emphasised repeatedly by international

45 Angelini, *supra* note 11, at section 2.2.1.

46 Stumpf, *supra* note 6, Sections 5.3, 7.3 and 7.5.

47 Blokker, *supra* note 3, Section 1.2(d).

48 Zwanenburg, *supra* note 5, at Section 4.

49 *Ibid.*

50 Art. 23 of the Gavi Statutes, which are available at: <www.gavi.org/about/governance/gavi-board/>.

51 Angelini, *supra* note 11, at Section 2.2.4.

52 *Ibid.*

53 Grenfell, *supra* note 5, at Section 2.1.

organizations in their comments to the ARIO, is referenced in the contributions on the World Bank and the UN in the present Forum.⁵⁴

- (4) To the extent that no specific arrangements have been made for the allocation of responsibility, the question of allocation is in principle governed by the ARIO. The general headings of the ARIO seem applicable,⁵⁵ including the presumption of independent responsibility, the (limited) possibility of derived responsibility, and the absence of a clear provision on joint and several liability. However, a few caveats are in order. One is that, in the absence of legal personality of the partnership, the ARIO do not apply to the partnership as such. Another is that, with the exception of military matters, the ARIO have so far played a small role in actual discussions on responsibility in partnerships. Perhaps most importantly, due to the intricate nature of a partnership, the ARIO does not appear to provide a solution to all questions concerning the allocation of responsibility. It will often be difficult to establish whether the contribution of the members to the harm is such that it justifies the attribution of responsibility to them. Palchetti refers in particular to the “question of the responsibility of members of a partnership for the conduct of an organization or a state, with a view to implementing decisions taken by the governing body of the partnership”.⁵⁶ While decision-making activity of collective bodies of a partnership may certainly contribute to harmful outcomes, “it can hardly give rise to the international responsibility of the partners involved in such activity”.⁵⁷ Palchetti observes that this situation could fall within the scope of Article 65 of the ARIO, which recognizes the existence of issues of responsibility not covered by the ARIO, “also in view of possible developments on matters that are not yet governed by international law”.
- (5) Turning to the substance of questions of responsibility, it is clear from our overview that the most common approach to questions of responsibility in partnerships is to ‘individualize’ responsibility. It then will come down to identifying individual contributions by individual actors. For instance, Szabó notes that while Gavi brings together organizations that work collectively on achieving a common goal, “it would appear that each of those partners would retain responsibility for contributions

54 *Ibid.*, at Section 3; and Stumpf, *supra* note 6, at Section 8.2.

55 Palchetti, *supra* note 23, at p. 46.

56 *Ibid.*, at section 6.

57 *Ibid.*

that they themselves fund and conduct”.⁵⁸ In relation to NATO, “the basic principle appears to be that of independent responsibility: each troop-contributing State settles claims that are the result of damage caused by that State’s troops”.⁵⁹ In UN practice, partnership arrangements with regional organizations are usually structured in such a way that “[e]ach is responsible for the conduct and discipline of its own personnel”.⁶⁰ All of this is in line with the dominance of independent responsibility in general international law.⁶¹ Moreover, it is supported by weighty considerations of legal policy: it is a plausible proposition that organizations would be less inclined to join partnerships if they believe that their participation would result in a responsibility or accountability for the actions of others.

- (6) A form of shared responsibility could nonetheless be construed when partnerships can be seen as a common organ. Palchetti refers to the examples of the Global Environmental Facility and UNAIDS.⁶² If so, all subjects are indeed capable of bearing responsibility.
- (7) The general principle that control underlies attribution—which is, for instance, articulated in Article 7 of the ARIO and in a different form in Article 15 of the ARIO—is relevant in the context of partnerships. Depending on the nature of control, this may either lead to exclusive (non-shared) responsibility, or derived (and mostly shared) responsibility. Grenfell observes that, due to the control it exercises over UNAMID, the UN will be responsible for addressing third party claims.⁶³ However, it would seem that control in partnerships is often fractured over the multiple participating actors. Angelini observes that

[a]s a result of the different forms of allocation of risk among partners, control is fractioned, and it does not run through the entire PP [partnership programme] chain with the same intensity. Nor is control necessarily of the same nature throughout the PP chain, and it surely is not of the factual and material kind envisaged in the ARIO.⁶⁴

58 Szabó, *supra* note 4, at Section 3.3.2.

59 Zwanenburg, *supra* note 5, at Section 4.

60 Grenfell, *supra* note 5, at Section 2.3.

61 P. A. Nollkaemper and D. Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’ (2013) 34 *Michigan Journal of International Law* pp. 381–388.

62 Palchetti, *supra* note 23, at Section 2.

63 Grenfell, *supra* note 5, at Section 2.3.

64 Angelini, *supra* note 11, at Section 3.1.2.

- The point is also made in relation to Gavi and NATO, which both have weak control over implementing partners and the AU respectively.⁶⁵
- (8) In some cases, partnerships as such have the ability to adopt decisions. This may potentially pave the way for shared responsibility. However, such decisions are, at least in the examples surveyed in this Forum, not legally binding. No basis therefore exists for the engagement of responsibility in terms of Article 17 of the ARIO.⁶⁶
- (9) Similarly, the ARIO provisions on aid and assistance seem to set the standards so high that only in exceptional cases contributions to, or by, the partnership would lead to responsibility, and eventually would result in shared responsibility. This point is made expressly by Zwanenburg in relation to NATO partnerships.⁶⁷ However, the very risk of responsibility for aid and assistance has exercised a pull towards applying certain policies of protection. For instance, as noted by Grenfell, the UN has established a ‘Human Rights Due Diligence Policy’ to address the possible violations of international human rights and humanitarian law.⁶⁸ Along similar lines, Palchetti observes that when members, “following a decision taken in the context of a partnership—and therefore outside the constitutional framework of the organization—provide funds to the organization for implementing certain activities, this conduct may certainly amount to a form of aiding and assisting, and may therefore give rise to the ‘derived’ responsibility of the members for the conduct of the organization”.⁶⁹ However, he also notes that, in relation to possible responsibility based on the assignment of trust funds, trustees may have no power of supervision over the way in which the resources are used by the recipients. In such a case “[i]t may be asked whether the very limited role played by the organization in such circumstances should not lead to exclude the possibility of holding it responsible for having aided or assisted a state in the commission of a wrongful act.”⁷⁰
- (10) As a final point, it could be noted that our survey has yielded no examples of joint or joint and several responsibility. Some cases come close, however. For instance, when the responsible troop contributing state cannot be identified, NATO Headquarters will deal with the claims. Such

65 Szabó, *supra* note 4, Section 3.2.2; and Zwanenburg, *supra* note 5, Section 5.

66 Palchetti, *supra* note 23, at Section 4.

67 Zwanenburg, *supra* note 5, at Section 4.

68 Grenfell, *supra* note 5, at Section 3.

69 Palchetti, *supra* note 23, at Section 4.

70 *Ibid.*, at Section 5.

settlement will be financed through collective funding. As Zwanenburg observes, this “can be regarded as a form of shared responsibility”.⁷¹ This remains a rare situation however, as partners tend to prefer alternative, softer ways for addressing possible questions of shared responsibility.

71 Zwanenburg, *supra* note 5, at Section 4.