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

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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 the possible gap in responsibility and suggests closing this possible gap by holding international organizations, as partners and/or hosts, responsible under international law for the acts of these partnerships.

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

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with global health issues, such as AIDS, tuberculosis and malaria. As a result of this collaboration, there is a shift taking place which moves (at least partly) power over global health from the hands of states and international organizations into the hands of public-private partnerships. These partnerships are managing activities that are normally regarded as in the domain of states and international organizations, such as providing access to preventative and treatment measures for certain diseases or improving health infrastructure within certain states to better manage the growing risk of disease.

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, seem to reside outside the classical, inter-state framework of international law and, in turn, outside the

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1 See Gian Luca Burci, Public/Private Partnerships in the Public Health Sector, 6 INTERNATIONAL ORGANIZATIONS LAW REVIEW 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.”) and U.N. Secretary-General, Enhanced cooperation between the United Nations and all relevant partners, in particular the private sector: Rep. of the Secretary-General, ¶ 8, U.N. 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.”).
framework of responsibility under international law. A gap therefore seems to be created between exercises of public power over global health by public-private partnerships and responsibility under international law.

One way to address this possible 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 case of the Global Alliance for Vaccines and Immunizations\(^2\) (GAVI) and the Global Fund to fight AIDS, Tuberculosis and Malaria\(^3\) (Global Fund), the World Health Organization (WHO) serves as a partner of the partnership and in the case of the Stop TB Partnership\(^4\) (Stop TB) and the Roll Back Malaria Partnership\(^5\) (RBM), the WHO serves as a partner and the host of the partnership. International organizations, as partners and/or hosts, are thereby enabling public-private partnerships to manage those activities which normally fall within the realm of 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 international law? A suggestion is made in this article to attribute the acts of partnerships to international organizations through

application of the International Law Commission’s (ILC) draft articles on the responsibility of international organizations.  

Another way to address this possible 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 of 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)\(^7\), in particular Article 5 – “[c]onduct of persons or entities exercising elements of governmental authority”\(^8\) and Article 8 – “[c]onduct directed or controlled by a State.”\(^9\) This has been discussed further by the author in previous work and, therefore, will not be explored here.\(^10\) 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.\(^11\)

This article begins by describing global health public-private partnerships, specifically partnerships with which the WHO is associated, including GAVI, the Global Fund, Stop

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\(^8\) Id. at art. 5.

\(^9\) Id. at art. 8.


TB and RBM (Section II). 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 to discuss how public power over global health is increasingly being exercised by these partnerships and how this necessarily engages a discussion on responsibility under international law (Section III). It then highlights the possible gap in responsibility in relation to the acts of these partnerships (Section IV) and suggests closing this possible 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 (Section V).

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 further 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). After being hosted by UNICEF for almost a decade, it became, in 2009, a foundation under Swiss law 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).

GAVI’s aims are to improve access to already existing vaccines, strengthen health systems within states and introduce new immunization technology. It pursues these aims through innovative mechanisms such as an Advance Market Commitment, the International Finance Facility for Immunisation and Accelerated Development and

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Introduction Plans. The partners of GAVI contribute by participating in strategy and policy setting; advocating; fundraising; providing support to states; and developing, procuring and delivering vaccines. 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. Private individuals serve as unaffiliated members with voting rights on the Board. And the Chief Executive Officer of the GAVI Secretariat serves on the Board as a member without voting rights.

B. The Global Fund

The Global Fund was established in 2002 as a foundation under Swiss law and signed an Administrative Services Agreement with the WHO whereby the WHO provided the Secretariat for the Global Fund. In 2004, it became recognized as having “international juridical personality and legal capacity” with privileges and immunities in Switzerland and in 2006, it was designated a “public international organization” with privileges and

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17 Innovative Partnership, supra note 15.
18 GAVI Alliance Board members, http://www.gavialliance.org/about/governance/boards/members/index.php (last visited Dec. 3, 2010). Note: the terminology used to describe the partners of GAVI is taken verbatim from the GAVI website.
immunities in the United States. In 2009, it became administratively autonomous by terminating its Administrative Services Agreement with the WHO.

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. 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. 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.

C. Stop TB

Stop TB was established in 2001, building upon the Stop TB Initiative that was created under the auspices of the WHO in 1998. Its Secretariat is hosted by the WHO which means that it manages its administrative, financial and human resources matters

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according to the rules and regulations of the WHO, subject to adaptations to meet the specific needs of Stop TB.\textsuperscript{26} 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.\textsuperscript{27}

The goal of Stop TB is to eliminate tuberculosis as a global health problem. It strives to do this by improving access to accurate diagnosis 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. 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. Partners include international organizations, donors from the public and private sectors, governmental organizations, NGOs, academic/research institutions and patient activist groups.\textsuperscript{28} 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, and

\begin{footnotesize}
\textsuperscript{26} About Us, http://www.stoptb.org/about/ (last visited Dec. 3, 2010).
\textsuperscript{28} About Us, \textit{supra} note 26; Join the Partnership, http://www.stoptb.org/getinvolved/joinus.asp (last visited Dec. 3, 2010); and Welcome to the Stop TB Partnership Partners' Directory, http://www.stoptb.org/partners/ (last visited Dec. 3, 2010). Note: the terminology used to describe the partners of Stop TB is taken verbatim from the Stop TB website.
\end{footnotesize}
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.  

D. RBM

RBM was launched in 1998 by the WHO, UNICEF, United Nations Development Programme (UNDP), and the World Bank. 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. 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.

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. RBM has more than five hundred partners, including malaria endemic countries, bilateral and multilateral development partners, the private sector, NGOs, community-based organizations,

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29 Coordinating Board, http://www.stoptb.org/about/cb/ (last visited Dec. 3, 2010). Note: the terminology used to describe the Board members of Stop TB is taken verbatim from the Stop TB website.


31 Memorandum of Understanding at arts. 2.1 and 3.8.

foundations, and research and academic institutions. Any organization that abides by the strategies of RBM and contributes to its implementation may join as a partner. The Board, however, has a more restrictive membership. It consists of twenty-one voting members and four non-voting ex-officio members. 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 foundations. The non-voting ex-officio members include representatives from the Global Fund, RBM, UNITAID, and the UN Secretary General Special Envoy for Malaria.

GAVI, the Global Fund, Stop TB and RBM each have their own specific goals and distinguishable organizational and governance structures. A significant difference among these partnerships concerns the relationship each of these partnerships has with the WHO. On one end of the spectrum lie GAVI and the Global Fund which operate as independent international institutions and have the WHO as a partner of the partnership. On the other end of the spectrum lie Stop TB and RBM which 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

33 RBM Mandate, supra note 30. Note: the terminology used to describe the partners of RBM is taken verbatim from the RBM website.
35 RBM Partnership Board, http://www.rollbackmalaria.org/mechanisms/partnershipboard.html (last visited Dec. 3, 2010). Note: the terminology used to describe the Board members of RBM is taken verbatim from the RBM website.
later in this article when discussing the responsibility under international law of international organizations for the acts of public-private partnerships.\textsuperscript{36}

Aside from these aforementioned differences, these partnerships also have a commonality. These partnerships are all increasingly exercising power over global health, traditionally seen as in the domain of states and international organizations. It is to this power and the ensuing concerns of responsibility under international law which this article now turns.

\section*{III. Power and Responsibility under International Law}

It almost goes without saying that power and responsibility under international law go hand in hand; responsibility under international law is the “logical corollary” of power.\textsuperscript{37} Responsibility under international law provides a means of dealing with the abuse of power in the international community. It is worth reiterating the significance of this relationship here because as power over global health shifts from states and international organizations to public-private partnerships, responsibility under international law does not seem to follow. Power and responsibility under international law do not seem to go hand in hand when it comes to global health public-private partnerships. This section describes the relationship between power and responsibility under international law with

\textsuperscript{36} See infra Section V.

\textsuperscript{37} PHILIPPE SANDS & PIERRE KLEIN, BOWETT’S LAW OF INTERNATIONAL INSTITUTIONS 518 (2009). See International Law Association, Berlin Conference (2004), Accountability of International Organizations, 1 INTERNATIONAL ORGANIZATIONS LAW REVIEW 221, 225 (2004) (“as 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.”).
respect to states and international organizations and then goes on to show how the power exercised by global health public-private partnerships also calls for a relationship with responsibility under international law.

Writing on the responsibility of states under international law in 1928, Clyde Eagleton argued that “power 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.”

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 at the Articles on State Responsibility 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.”

State responsibility is, and always has been, intricately tied to the power of states.

The underlying logic of “power breeds responsibility” in relation to states naturally made its way into the world of international organizations. The responsibility of international organizations, like state responsibility, is tied to power. Power over global issues is now

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38 Clyde Eagleton, The Responsibility of States in International Law 206 (1928).
being governed by international organizations, in addition to, or instead of, states.\textsuperscript{41} This shift in power means that international organizations are capable of acting in ways which impact the “social, political, economic and legal status of individuals.”\textsuperscript{42} This impact was not, in the beginning, recognized as troubling as international organizations were seen in a positive light. International organizations were thought to have “a great role to play in the salvation of mankind” and to be incapable of doing harm.\textsuperscript{43} But, as August Reinisch writes, it was precisely this shift in power which opened up the possibility of rights violations by international organizations and led to the question – \textit{quis custodiet opsos 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.”\textsuperscript{44} A decision of the WHO to issue a travel ban to a state where the outbreak of an infectious disease has occurred or a decision of the United Nations Security Council to blacklist an individual suspected of terrorist activities and subject him/her to sanctions or a decision of the United Nations High Commissioner for Refugees as to a determination of refugee status are just a few examples of situations where the decisions of international organizations are capable of having an adverse impact on the rights of individuals. The work of international organizations is now seen also in a negative light.


\textsuperscript{43} NAGENDRA SINGH, \textit{TERMINATION OF MEMBERSHIP OF INTERNATIONAL ORGANISATIONS} vii (1958).

and it is in this negative light that a call came for the responsibility of international organizations. The power exercised by international organizations necessitated a counterbalance to responsibility and this counterbalance came in the form of customary international law and is now being set out by the ILC in the form of draft articles on the responsibility of international organizations.

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. These partnerships are getting the job done but this comes not without 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.

GAVI, for example, aims to improve access to already existing vaccines, strengthen health systems within states and introduce new immunisation technology. As of August 2008, GAVI had approved granting a total of US$3.7 billion to states for the period from 2000 to 2015. 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. As of December 2010, the Global Fund had approved granting a total of US$19.7 billion for 570 programs in 144 states. As the

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world’s largest funder of programs fighting AIDS, tuberculosis and malaria, it funds one-quarter of all global spending on AIDS, two-thirds of all global spending on tuberculosis and three-quarters of all global spending on malaria.\(^{48}\) 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 research and development for new diagnostics and anti-tuberculosis drugs.\(^{49}\) 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.\(^{50}\)

As can be seen from these examples, public-private partnerships are managing activities that are normally regarded as in the realm of states and international organizations. 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, like the power of states and international organizations, is capable of having an adverse impact on the rights of individuals, in particular the right to life and the right to health.\(^{51}\) Such power then needs to be subject to legal restraints such as responsibility under international law.


\(^{49}\) About Us, \textit{supra} note 26.

\(^{50}\) RBM Vision, \textit{supra} note 32; Malaria Commodity Access, \textit{supra} note 32; and The Affordable Medicines Facility for Malaria (AMFm), \textit{supra} note 32.

\(^{51}\) \textit{See infra} Subsection V A.
A gap in responsibility under international law, however, seems to arise when it comes to the acts of global health public-private partnerships.

IV. The Possible Gap in Responsibility under International Law

Partnerships seem to be developing outside the classical, inter-state framework of international law. This has its advantages, such as, for example, the flexibility of partnerships to be able to initiate, amend or terminate projects more simply and quickly than states or international organizations. But this also has its disadvantages. A disadvantage, especially from the perspective of individuals possibly adversely impacted by the acts of public-private partnerships, is that partnerships, as a result, seem to be developing outside the framework of responsibility under international law. This section highlights and offers an underlying rationale for the possible gap in responsibility under international law arising when it comes to 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.

Possible residence outside the framework of responsibility under international law appears to stem from the hybrid composition of public-private partnerships. Partnerships are composed of both public and private entities – states and international organizations (representing the public sector) and companies, NGOs, research institutes and

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philanthropic foundations (representing the private sector). Such a composition means that partnerships are neither purely public nor purely private and placing them in the category of either public exclusively or private exclusively is therefore not possible. This hybrid composition means that the legal status of public-private partnerships under international law is not clear. Partnerships involve public entities – states and international organizations – which have legal personality under international law but also involve private entities – companies, NGOs, research institutes and philanthropic foundations – which are not thought to have legal personality under international law. The legal personality of public-private partnerships under international law is, as a consequence, 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.”53 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.”54 Or in the

words of Chittharanjan Felix Amerasinghe: “Once the existence of 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.”

Absent legal personality under international law, responsibility under international law is difficult, if not impossible, to allocate. The legal personality under international law of companies and NGOs, for example, is seen as lacking and therefore correlating rules on responsibility under international law are far from determined. As the legal personality under international law of public-private partnerships is open to question, holding them responsible under international law, in their own right, 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.

personality, the organization is inducted into the international club, assumes commensurate status, and takes on both rights and obligations’’); McCorquodale, supra note 44 at 151 (“as 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.”); and U.N. 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: Rep. of the Secretary-General, ¶ 6, U.N. Doc. A/51/389 (Sept. 20, 1996) (“[t]he 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.”).

56 See Alston, supra note 11 and Lindblom supra note 11.
by the author\textsuperscript{57} therefore the discussion here focuses on the responsibility of international organizations.

V. The Responsibility of International Organizations

Reading literature of sixty years ago, one can find writings of a scholar who predicted the possible need to hold international organizations responsible for their acts.\textsuperscript{58} Such a prediction was striking as it departed from a state-centric perspective which saw responsibility as a concern only between and amongst states. This prediction was supported by the recognition of international organizations as legal persons under international law, joining a once exclusive group comprised of states. 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.”\textsuperscript{59} It became less and less far-fetched to imagine holding international organizations, as legal persons exercising public power within the international community, responsible under international law.

Ideas about the responsibility of international organizations grew initially from ideas about state responsibility. Eagleton suggested the translation of notions of state responsibility to the responsibility of international organizations. State responsibility, he wrote in 1928, is “simply the principle which establishes an obligation to make good any

\textsuperscript{57} Clarke, \textit{supra} note 10.


\textsuperscript{59} \textit{Id.} at 325, 327.
violation of international law producing injury committed by the respondent state.”

Later, in 1950, he wrote that “[t]hough it has been stated only in terms of states, this law is properly applicable to all international legal persons.” It is now generally 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.”

The move to set out these rules more concretely came later through the ILC’s draft articles on the responsibility of international organizations.

Since 2002, a Special Rapporteur – Giorgio Gaja – has been assigned by the ILC to the topic of the responsibility of international organizations. To date, a series of reports on this topic have been published by the ILC, in consultation with governments and international organizations. 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.

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60 Eagleton, THE RESPONSIBILITY OF STATES, supra note 38 at 22.
61 Eagleton, International Organization, supra note 58 at 324.
62 International Law Association, supra note 37 at 254.
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. A red thread of these approaches is the focus on power. The International Law Association’s 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.”64 Global administrative law argues that “the increasing exercise of public power … has given rise to serious concerns about legitimacy and accountability” and suggests dealing with these concerns by meeting “adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions.”65 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.”66 It is based on a

combination of the constitutional, administrative and international institutional law approaches to global governance.\textsuperscript{67}

This article will not, however, 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.”\textsuperscript{68} 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 to deal with the internationally wrongful acts of international organizations.\textsuperscript{69} This article therefore focuses on the ILC’s work on the draft articles on the responsibility of international organizations in attempting 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.”\textsuperscript{70} International organization is here defined as “an organization established by a treaty or other instrument governed by international law and possessing

\textsuperscript{67} Id.


\textsuperscript{69} Reinisch, Accountability of International Organizations at 121. See Hafner, supra note 42 at 601.

\textsuperscript{70} draft articles, supra note 6 at draft art. 1, pg. 19.
its own international legal personality. International organizations may include as
members, in addition to States, other entities.”71

The responsibility of international organizations is based on the same mantra as the
responsibility of states, that being that “[e]very internationally wrongful act … entails …
international responsibility.”72 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.73 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.”74 An international obligation,
according to the draft articles on the responsibility of international organizations and the
commentary of the ILC, “may arise under the rules of the [international] organization”75

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71 Id. at draft art. 2, pg. 20.
72 Id. at draft art. 3, pg. 20. See Articles on State Responsibility, supra note 7 at art.1.
73 Id. at draft art. 4, pg. 20. See Articles on State Responsibility, supra note 7 at art. 2.
74 Id. at draft art. 9(1), pg. 22.
75 Id. at draft art. 9(2), pg. 22.
and/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.”

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 “international organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.” 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’.”

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.” But what specific obligations under international law are international organizations bound by? In particular, and in relation to the WHO, where do human rights obligations under

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78 Reinisch, Securing the Accountability, supra note 44 at 133 (quoting C. WILFRED JENKS, THE PROPER LAW OF INTERNATIONAL ORGANIZATIONS (1962)).
79 Hafner, supra note 42 at 629. See Reinisch, Governance Without Accountability?, supra note 68 at 281-282; Sands & Klein, supra note 37 at 461-464; and HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW, UNITY WITHIN DIVERSITY 833-835, 994-1002 (2003).
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, it must be determined whether the right to life and/or the right to health are norms of customary international law. This is determined by locating consistent state practice and *opinio juris*.  

Proof of state practice and *opinio juris*, in relation to human rights, may be found by looking to diplomatic correspondence; opinions and policy statements of governments; press releases; statements made by governments at international conferences and meetings of international organizations; resolutions of the General Assembly of the United Nations; the acceptance of and adherence to human rights treaties; domestic legislation; judicial decisions of domestic courts; states’ reports to treaty bodies of the United Nations; the Human Rights Council Universal Periodic Review process; and the work of domestic human rights organizations. It is, not surprisingly, difficult to discern when, precisely, a norm has crystallized into customary international law. A thorough inquiry into the

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81 Christine Chinkin, *Sources*, in *INTERNATIONAL HUMAN RIGHTS LAW* 103, 111 (Daniel Moeckli, Sangeeta Shah & David Harris eds., 2010); Olivier De Schutter, *INTERNATIONAL HUMAN RIGHTS LAW CASES MATERIALS, COMMENTARY* 50-51 (2010); and Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 6-7 (2008).
82 Christian Tomuschat, *HUMAN RIGHTS BETWEEN IDEALISM AND REALISM* 37-38 (2008) and Chinkin at 111-112. See De Schutter at 52-53 (providing a summary of some of the different approaches to discerning customary international law).
customary international law status of the right to life and the right to health is therefore not feasible to include in this article, however a few short remarks must be made.

The right to life is often said to have customary status under international law. 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 epidemics.” It is this interpretation of the right to life that is of interest in this article. Arguing that this interpretation of the right to life 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

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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 however given that the right to life is relatively recently being interpreted as extending beyond protection against arbitrary killing and to taking all possible measures to reduce infant mortality and to increase life expectancy, the requisite state practice and *opinio juris* likely 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. The right to health is, however, generally seen as being amorphous in its standards thereby obstructing the consistent state practice and *opinio juris* necessary for the creation of customary international law. This does not preclude the possibility of the right to health developing into a norm of customary international law in the future, and there are signs of this development in relation to certain aspects of the right to health, but the consensus is that this day has not yet arrived.

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The more likely source of human rights obligations under international law for the WHO, at least in relation to the right to life and the right to health, are the rules of the WHO. As mentioned above, an international obligation of an international organization “may arise under the rules of the [international] organization.”

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.”

The rules of the WHO are thus the Constitution of the World Health Organization which sets out the objective and functions of the WHO; decisions of the WHO, resolutions of the World Health Assembly and other acts of the WHO adopted in accordance with its instruments; and the established practice of the WHO. The rules of the WHO, its objective being “the attainment by all peoples of the highest possible level of health,” focuses 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 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

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87 draft articles, supra note 6 at draft art. 9(2), pg. 22. [emphasis added].
88 Id. at draft art. 2(b), pg. 20.
90 Id. at art. 1.
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.

Focusing on the partnerships used as examples throughout this article – GAVI, the Global Fund, Stop TB and RBM –, a breach of an international obligation by these partnerships 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 in their beginning years were thought of as incapable of doing harm. Capability to do harm was however foreseen by Eagleton, in 1950, who wrote on the responsibility of the United Nations under international law even though no breach of an international obligation by the United Nations had been recorded necessitating recourse to responsibility under international law. His idea was that as powers were being readily transferred to the United Nations, the United Nations was becoming increasingly capable of doing harm and therefore responsibility under international law needed to be addressed. In the absence of recorded breaches of international obligations, he suggested scenarios where the United Nations might be found in breach of international obligations and then proceeded to address responsibility under international law.

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91 Singh, supra note 43.
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 and therefore responsibility under international law needs to be addressed. A couple of scenarios may help in illustrating 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. These companies committed to supply 600 million doses and at a fraction of the price charged to developed states. The Global Fund, as of July 2010, finalized agreements with six manufacturers, Ajanta Pharma, Cipla, Guilin, Ipca, Novartis and Sanofi-aventis, to provide malaria drugs at an affordable price in eight countries in Sub-Saharan Africa and Asia. 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 Sustainable Development of 250,000

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93 See Burci, *supra note* 1 at 379 (“[public-private partnerships] engaged in activities, such as financing research and development or procurement of new medicines … can generate non-contractual liability”).


RBM procures the supply of long-lasting insecticidal mosquito nets and also insecticides and spraying equipment to protect against malaria. Notwithstanding precautionary measures, a possibility exists that the pneumococcal vaccines approved for purchase by GAVI or the malaria drugs provided through the Global Fund or 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/or 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 one of the two elements 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. 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

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position the organ or agent holds in respect of the organization.”

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.”

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.”

Further, relying on the commentary on the Articles on State Responsibility that attribution does not depend on the use of particular terminology in the internal law of the state, the ILC adopts an analogous rationale for the draft articles on the responsibility of international organizations. 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

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98 draft articles, supra note 6 at draft art. 5(1), pg. 21. See Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. ¶ 66 (Apr. 29) (“damages 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”) and draft articles, supra note 6 at 60 (“[w]hat 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”).

99 draft articles at draft art. 5(2), pg. 21.

100 Id. at draft art. 2, pg. 20.

101 Report of the International Law Commission, supra note 76 at 40-42.

102 draft articles, supra note 6 at 58.
entity is not determinative; what is determinative is whether the person or entity has been conferred functions by the international organization. The ICJ, in *Reparation for Injuries Suffered in the Service of the United Nations*, 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, 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.” 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 of the ICJ’s understanding of the term agent to consider more closely is – “charged by an organ of the Organization with carrying out, or helping to carry out, one of its functions.” The functions of interest here are those of the WHO and these are set out in Article 2 of the Constitution of the World Health Organization. Of particular interest in the context of global health public-private partnerships are the following functions:

(c) to assist Governments, upon request, in strengthening health services;
(d) to furnish appropriate technical assistance and, in emergencies, necessary aid upon the request or acceptance of Governments; …
(f) to establish and maintain such administrative and technical services as may be required, including epidemiological and statistical services;
(g) to stimulate and advance work to eradicate epidemic, endemic and other diseases; …

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103 Id. at 58-60.
104 *Reparation for Injuries*, supra note 54 at 177.
105 Id. at 177. [*emphasis added*.]
(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.\(^{106}\)

It seems that 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 co-operation among actors focused on health and encouraging and facilitating research in the area of health.

It next needs to be considered whether the WHO has *charged* these functions to these partnerships and this can only be determined by looking closely at the relationship between the WHO and each of GAVI, the Global Fund, Stop TB and RBM. Before turning to these relationships, however, it needs to be considered whether functions must be charged in a formal sense or whether functions may also be charged on a less formal or *de facto* basis. This relates to draft Article 5(2) – “[r]ules of the organization shall apply to the determination of the functions of its organs and agents.”\(^{107}\) This has been interpreted by the ILC to mean that the functions charged to an agent of an international organization are generally determined by the rules of the international organization. But, according to the ILC, the wording used in 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.\(^{108}\) One such other basis, cited by the ILC, is where persons or


\(^{107}\) draft articles, *supra* note 6 at draft art. 5(2), pg. 21.

\(^{108}\) *Id.* at 61.
entities are acting on the instruction of or under the direction or control of the international organization.\textsuperscript{109} It therefore seems plausible that functions may be considered as charged to an agent of an international organization on a less formal or \textit{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.”\textsuperscript{110}

In GAVI, the WHO is a founding and key partner of the partnership. It is a member, with voting rights, of the GAVI Board and chairs this Board in alternation with UNICEF. GAVI also depends on the WHO for technical advice in framing its policies. Further, the WHO helps states in their application for funds and also in the implementation and monitoring of immunization activities.\textsuperscript{111} In the Global Fund, the WHO is also a key partner of the partnership. It is an \textit{ex officio} member, without voting rights, of the Global Fund Board. 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. But this Administrative Services Agreement was terminated as of 1 January 2009 and the Global Fund now manages its own Secretariat and administrative and financial services.\textsuperscript{112} The Global Fund relies on the WHO for technical expertise to the Secretariat, Country Coordinating Mechanisms and

\textsuperscript{109} Seventh Rep. on the Responsibility of International Organizations, \textit{supra} note 63 at 8 and \textit{id.} at 61-62. See Pierre Klein, \textit{The Attribution of Acts to International Organizations}, in \textit{THE LAW OF INTERNATIONAL RESPONSIBILITY} 297, 298 (James Crawford, Alain Pellet & Simon Olleson eds., 2010) (“an 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.”)

\textsuperscript{110} Klein at 299.


\textsuperscript{112} Board Members, \textit{supra} note 25 and \textit{The Global Fund becomes an Administratively Autonomous Institution, supra} note 23.
potential Principal Recipients. The WHO also helps states to prepare applications for funding and to realize the programs and reach the targets set out in the funding agreements.\textsuperscript{113}

The relationships of GAVI and the Global Fund with the WHO are ones of partnership. The WHO is a key partner in both partnerships with membership on the Board and further influences these partnerships through the policies it supports. The WHO actively supports, or is passively acquiescence in, the work of these partnerships in carrying out functions normally seen as functions of the WHO. These functions of the WHO do not seem to be charged to GAVI or the Global Fund in a formal sense. It may be argued, however, that GAVI and the Global Fund are acting on the instructions of or under the direction or control of the WHO and consequently, its functions are being charged to these partnerships on a less formal or \textit{de facto} basis. Admittedly, this is a difficult argument to make and one may say, stretching the responsibility of international organizations too far. But it is worth thoughtful consideration given the effect of these partnerships on global health and the possible 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. 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. The WHO enters into contracts, acquires and disposes of property and, if necessary, institutes legal proceedings for the benefit of Stop TB. All staff of Stop TB are officials of the WHO and, as such, are accorded privileges and immunities. In RBM, the WHO is also both a partner and the host of the partnership. As a partner, it is a founding and a key partner of the partnership. It is a member of the RBM Board providing guidance on policy in relation to malaria. As the host, it houses the RBM Secretariat and also provides administrative and fiduciary support and facilities. 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. The Director-General of the WHO further has the power to refuse to implement a decision of RBM if he/she considers that the implementation of this decision would be inconsistent with the rules, regulations, policies, procedures or practices of the WHO or could give rise to liability for the WHO. The WHO enters into contracts, acquires and disposes of property and, if necessary, institutes legal proceedings for the benefit of RBM. All staff of the RBM Secretariat are staff members of the WHO and the privileges and immunities enjoyed by

114 About Us, supra note 26.
115 Basic Framework, supra note 27.
116 Request for Proposals, supra note 27.
117 Memorandum of Understanding, supra note 30 at preamble.
118 Id. at arts. 2.2 and 7.
119 Id. at art. 2.6.
120 Id. at art. 2.1.
the WHO and its staff also apply to the RBM Secretariat staff, funds, properties and assets.\(^{121}\)

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 actively supports, or is passively acquiescence in, the work of these partnerships in carrying out functions normally seen as functions of the WHO. The relationships of 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 look at the relationships between the WHO and each of GAVI, the Global Fund, Stop TB and RBM helps in deciding whether this international organization has charged

\(^{121}\) *Id.* at arts. 3.2 and 3.8.
its functions to these partnerships resulting in these partnerships being held to be 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 as each of these partnerships has a different relationship with the WHO. Some semblance can be found, however, 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, attribution lies where the international organization acts as a partner and the host of the partnership as opposed to where the international organization acts only as a partner of the partnership. But, in either case, arguments may be made, to varying strengths, that 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 rights to health and life. These
partnerships are therefore in need of belonging within a framework of responsibility under international law. The fact that the legal personality of partnerships under international law is open to question, however, likely means that partnerships are not capable of being found responsible under international law. To address this possible 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 these draft articles to be applied in ways not foreseen by its drafters and an argument may be made that this stretches the responsibility of international organizations too far. But where international organizations act not only as partners but also as hosts of partnerships, the responsibility of international organizations actually need not be stretched too far. A possibility lies to invoke the draft articles on the responsibility of international organizations in order to meet the challenges posed by the changing and expanding actors in the international community, such as global health public-private partnerships.