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**Public Power and Preventive Responsibility:
Attributing the Wrongs of International Joint Ventures**

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**Public Power and Preventive Responsibility:
Attributing the Wrongs of International Joint Ventures**

*Tom Dannenbaum**

1. Introduction

What ought to happen legally when multiple states and international organisations (IOs or organisations) participate in an institutionally thick cooperative venture that subsequently engages in wrongdoing? To whom should such wrongdoing be attributed?

The question is a pressing one. States and organisations are engaging with increasing frequency in cooperative enterprises of growing sophistication. The pursuit of international law's core objectives of peace, security, justice, human rights, and development depends on that trend continuing and perhaps accelerating.¹ Yet the legal regime of responsibility for wrongs that occur in the course international cooperation remains disturbingly immature.² Responding to that lacuna, this Chapter proposes a way of thinking about responsibility for a particular form of cooperative action – what I term here the joint public enterprise (JPE). My claim is that the normative principle underpinning the *ex post* attribution of JPE wrongdoing should be that of reciprocity between public power and preventive responsibility. Enterprise wrongs ought to be attributed to the participant states or organisations that hold the levers of control most relevant to preventing the type of wrongdoing in question.³ The proposal has two primary virtues. First, it

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¹ Many of the greatest threats to those objectives (adapted from the UN Charter's preamble) demand collaborative solutions. Consider: mass atrocity, terrorism, depleting fishing stocks, climate change, wrongdoing by multinational corporations, refugee flows, peacekeeping, transnational wars, piracy, water resources, and global health.

² Independent responsibility remains dominant. Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA Commentary) at 64; Articles on the Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA). See also P.A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law' (2013) 34 *MIJIL* 359; I. Brownlie, *Principles of Public International Law*, 8th edn. (Oxford: OUP, 2008), 457; J.E. Noyes and B.D. Smith, 'State Responsibility and the Principle of Joint and Several Liability' (1998) 13 *YJIL* 225, at 225.

³ This expands and deepens earlier arguments on attribution in UN peacekeeping. T. Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability' (2010) 51 *Harv ILJ* 113, at 156-83; T. Dannenbaum, 'Finding Balance in the Attribution of Liability for the Human Rights Violations of U.N. Peacekeepers' (2010) 51 *Harv ILJO* 69; T. Dannenbaum, 'Killings at Srebrenica, Effective Control, and the Power to Prevent Unlawful Conduct' (2012) 61 *ICLQ* 713, at 719-27.

aligns *ex post* attribution in JPEs with a deep moral principle that already undergirds state responsibility in unilateral contexts. Second, it strikes the right balance between preventing wrongdoing and encouraging cooperation.

Sections 2-3 define the question and identify the alternative answers advanced thus far. Sections 4 and 5 then seek a guiding normative principle to select among those alternatives. Here, I look not to articulate and defend a moral account from the ground up, untethered to extant law, but instead to understand and build on the existing normative substructure of some of the better-elaborated areas of state responsibility under international law. Running through the doctrines of preventive due diligence, the responsibility to protect, and the attribution of state organs' conduct is a common normative thread: asserting legitimate public power entails a reciprocal duty to prevent wrongdoing of global concern. The immanence of this principle in more developed adjacent domains of the law gives it two advantages as a foundational tenet of JPE attribution: legitimacy in a world of plural values and a preliminary promise of viability. The final two sections elaborate and then hone a JPE attribution regime built on this principle.

2. Why JPEs? Why attribution? Why wrongdoing?

Before proceeding to the core argument, it is necessary to define and justify its scope, starting with its focus on JPEs. JPEs arise when multiple states or international organisations cooperate to form a public organ or venture with partially merged processes of decision-making and action. Unlike international organisations, however, JPEs lack full legal personality, and are ordinarily temporary.⁴ Classic examples include first, 'common organs' – public entities created collectively by a number of states or organisations to act on their behalf, like the trusteeship administration of Nauru;⁵ and second, multilateral operations in which states place their organs at the disposal of another state, international organisation, or group thereof, such as peacekeeping

⁴ Cf. Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO); Commentary to the Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO Commentary), at 52-172, paras. 87-88, Article 2(a) ARIO; *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174.

⁵ ARSIWA Commentary, n. 2, at 44, 64, 124. On Nauru, see *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, ICJ Reports 1992, 240.

operations and multinational military forces.⁶ Today, JPEs also include ventures that fit into neither of those classic paradigms. Frontex operations, for example, involve cooperation between an European Union (EU) agency, a host state, and personnel contributors in which all three exercise some autonomy, despite the host's formal supremacy.⁷ Other examples include ventures like the Joint Investigation Team in which German, Dutch, and Europol participants engage in merged police and investigative operations,⁸ and the Tilburg prison (rented from the Netherlands by Belgium, staffed by Dutch guards, and run by a Belgian Prison Director).⁹ JPEs may operate extraterritorially for all participants,¹⁰ extraterritorially for active participants at the invitation of a passive host,¹¹ or on an active participant's territory.¹²

Key features distinguish JPE wrongdoing from other shared wrongdoing. First, unlike non-collaborative aggregations of independent wrongdoing,¹³ collective failures to engage in required cooperation,¹⁴ or contributory fault,¹⁵ JPEs are cooperative. Second, unlike collaborations

⁶ Article 6 ARSIWA, n. 2. Peacekeeping includes not just UN, but also regional operations, see UN Doc. S/RES/1671 (25 April 2006) (authorising an EU mission in the Democratic Republic of the Congo ((DRC)); and UN Doc. S/RES/2085 (20 December 2012) (authorising an ECOWAS mission in Mali). For multi-national military forces under unified command, see UN Doc. S/RES/2098 (28 March 2013) (authorising a UN-led force in the eastern DRC); and UN Doc. S/RES/1386 (20 December 2001) (authorising a North Atlantic Treaty Organization ((NATO))-led force in Afghanistan); International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001) ch. 7 (ICISS Report). NATO and the UN used a dual-key process in Bosnia. UN Doc. S/RES/836 (4 June 1993), para. 10.

⁷ I. Mann, *The EU's Dirty Hands* (Human Rights Watch, 2011), at 10-18, 38-45 (on Frontex in Greece).

⁸ Netherlands Ministry of Defense, Press Release, 'German-Dutch Team Join Forces Against Pirates', 23 November 2011.

⁹ Government of the Netherlands, Press Release, 'Lower House Agrees to Placement of Belgian Detainees in Tilburg', 19 January 2010.

¹⁰ UN Doc. S/RES/678 (29 November 1990); UN Doc. S/RES/1973 (17 March 2011).

¹¹ This is the case in the classic peacekeeping mission.

¹² Frontex missions take this form, but also involve high seas operations. E. Papastavidris, "'Fortress Europe and FRONTEX": Within or Without International Law?' (2010) 79 Nord JIL 75.

¹³ Compare the failures of hostile Russia and Moldova to secure detainee rights in Transdniestria. *Ilaşcu and others v. Moldova and Russia*, App. No. 48787/99 (ECtHR, 8 July 2004), paras. 352, 385, 393. See also *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, ICJ Report 1949, 4, at 15-23, 36; Council of Europe, Parliamentary Assembly, 'Lives lost in the Mediterranean Sea: who is responsible?' Doc. 12895 (5 April 2012); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977, in force 7 December 1979, 1125 UNTS 3, Article 51(7)-(8). On the cumulative/cooperative distinction: Nollkaemper and Jacobs, 'Shared Responsibility in International Law', n. 2, at 368-9; Noyes and Smith, 'State Responsibility and the Principle of Joint and Several Liability', n. 2, at 228-30. On climate change: M.G. Faure and P.A. Nollkaemper, 'International Liability as an Instrument to Prevent and Compensate for Climate Change' (2007) 43 Stan JIL 123; and J.W. Dellapenna, 'International Water Law in a Climate of Disruption' (2008) 17 MSUJIL 43, at 68-76.

¹⁴ States must cooperate to combat *jus cogens* violations, protect the environment, and further development. See Article 41 ARSIWA, n. 2; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, 7, paras. 112-13, 141-43; Rio Declaration, UN Doc. A/CONF.151/5/Rev.1 (1992) Principles 5, 7, 9, 11-14, 19; United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 16 November 1994, 1833

between a state or international organisation and entities lacking international legal personality, JPEs involve multiple participants with full international legal personality.¹⁶ Third, JPEs' merged structure of action distinguishes them both from collaborative but independent action,¹⁷ and from scenarios in which the decisions of a merged entity are implemented independently.¹⁸

These distinctions emphasise why JPEs pose a unique problem for *ex post* attribution. In most shared international wrongs, it is relatively straightforward to isolate the conduct of each state or organisation and thus solve the first-order problem of attribution. The key challenges in those other contexts are instead those of first, apportioning liability when the aggregation of those distinguishable state and international organisation acts leads to a single harm, and second, determining the scope of vicarious responsibility among states and international organisations.¹⁹ JPEs are different. The issue is not just 'who pays for the damage?' but 'who do we understand to have committed the wrong?' The uniquely thorny nature of that question warrants focusing on JPE attribution in isolation.

Finally among matters of scope, I use the term *wrongs* (rather than legal breaches) purposely to

UNTS 3 (LOSC), Articles 194, 197, 199-200, 207-208, 210-212; Declaration on the Right to Development, UN Doc. A/RES/41/128 (1986) Articles 3-4; UN Millennium Declaration, UN Doc. A/RES/55/2 (2000); International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, in force 3 January 1976, 993 UNTS 3, Articles 2(1), 11(1), 23.

¹⁵ Article 39 ARSIWA, n. 2; Article 39 ARIO, n. 4.

¹⁶ For examples of collaboration between states and entities lacking international legal personality, see text and sources at n. 59-61, below; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia & Montenegro)*, Judgment, ICJ Reports 2007, 43, paras. 235-241 (*Bosnian Genocide case*).

¹⁷ *Refoulement* provides one classic example, see discussion and sources at n. 71, below. Another involves one state allowing another to use its territory to do wrong. Definition of Aggression, UN Doc. A/RES/3314 (XXIX) (14 December 1974) Article 3(f); *El-Masri v. The Former Yugoslav Republic of Macedonia*, App. No. 39630/09 (ECtHR, 13 December 2012), para. 206. More generally, see Article 16 ARSIWA, n. 2; *Bosnian Genocide*, *ibid.*, paras. 416-24.

¹⁸ This crucial distinction is not always noticed. See, for example, N. Gal-Or and C. Ryngaert, 'From Theory to Practice: Exploring the Relevance of the Draft Articles on the Responsibility of International Organizations (DARIO) – The Responsibility of the WTO and the UN' (2012) 13 GLJ 511, at 513. A number of prominent cases touching on the independent implementation of collective decisions have arisen recently. For example: *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*, App. No. 45036/98 (ECtHR, 30 June 2005), paras. 137, 152-56; *Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [2008] ECR I-6351, joined cases C-402/05 P and C-415/05 P; *Commission v. Kadi* [2013] ECR Case C-584/10 P, C 593/10 P, C 595/10 P (2013); *Nada v. Switzerland*, App. No. 10593/08 (ECtHR, 12 September 2012). See also ARIO, n. 4, at 105-10.

¹⁹ Distinguishing *ex post* attribution and *ex post* liability, see Nollkaemper and Jacobs, 'Shared Responsibility in International Law', n. 2, at 414; R. Pisillo-Mazzeschi, 'Forms of International Responsibility for Environmental Harm', in F. Francioni and T. Scovazzi (eds.), *International Responsibility for Environmental Harm* (London: Graham and Trotman, 1991), 15.

single out illegal action of public concern to the global community.²⁰ The legal category of duties *erga omnes* provides doctrinal substance to this concept.²¹ However, in addition to the narrow list elaborated by the International Court of Justice (ICJ) thus far,²² I include aspects of environmental law, the full corpus of human rights, and the humanitarian aspects of the laws of war.²³

I focus on global wrongs for three reasons.²⁴ First, because they cause ‘irreparable harm’, the consequentialist imperative is prevention, more than compensation.²⁵ Second, because attributing wrongdoing entails public condemnation (rather than merely bilateral responsibility), it should be rooted in a robust underlying institutional moral responsibility. Third, whereas liability apportionment is central to the private dimension of *ex post* responsibility, attribution is its public dimension.²⁶

²⁰ P.A. Nollkaemper, ‘Constitutionalization and the Unity of the Law of International Responsibility’ (2009) 6 Indiana JGLS 535 (on the ‘public or constitutional’ dimension of international law); and N.H.B. Jorgensen, *The Responsibility of States for International Crimes* (Oxford: OUP, 2000) (on state crimes). The ILC repudiates public/private or civil/criminal distinctions in international law. ARSIWA Commentary, n. 2, at 55, 111. However, this sits uneasily with the recognition (and even special status) it accords *erga omnes* and *jus cogens*. ARSIWA Commentary, n. 2, at 33, 56, 110-16, 126-28.

²¹ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, ICJ Reports 1970, 3, para. 33 (*Barcelona Traction*); C. Tomuschat and J.-M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order* (Leiden: Martinus Nijhoff, 2005).

²² *Ibid.*, *Barcelona Traction*, para. 34 (including prohibitions on aggression, genocide, and violations of ‘basic [human] rights’ like slavery and racial discrimination); *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, 90, para. 29 (adding self-determination).

²³ On environmental law: United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, 1771 UNTS 107, preamble and Article 3(1); M.H. Arsanjani and W.M. Reisman, ‘The Quest for an International Liability Regime for the Protection of the Global Commons’, in K. Wellens (ed.), *International Law* (Leiden: Martinus Nijhoff, 1998), 469; Rapporteur F. Orrego Vicuña, *Responsibility and Liability Under International Law for Environmental Damage*, Institut de Droit International (1997), Articles 23, 28. On human rights: Human Rights Committee (HRC), General Comment 31, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 2. Human rights and humanitarian law are central to the ‘humanisation’ or ‘moralisation’ of international law. R. Teitel, *Humanity’s Law* (Oxford: OUP, 2011); T. Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006); Nollkaemper and Jacobs, ‘Shared Responsibility in International Law’, n. 2, at 372-74; Nollkaemper, ‘Constitutionalization and the Unity of the Law of International Responsibility’, n. 20, at 540. Their protection from countermeasures emphasises the awkwardness of forcing these norms into a bilateral responsibility regime. Article 50 ARSIWA, n. 2.

²⁴ Despite the doctrinal failure to categorise along these lines, the deeper normative distinction between public and private international legal breaches demands separate analysis and treatment. Nollkaemper and Jacobs, ‘Shared Responsibility in International Law’, n. 2, at 372-373, 405, 408.

²⁵ See L.A. Kornhauser, ‘Incentives, Compensation, and Irreparable Harm’, in P.A. Nollkaemper and D. Jacobs (eds.), this volume, at _____. While irreparable harms are not necessarily public wrongs, public wrongs are inherently irreparable.

²⁶ Nollkaemper and Jacobs, ‘Shared Responsibility in International Law’, n. 2, at 414.

3. Doctrinal dissension

Currently on the table in one form or another are five approaches to attributing JPE wrongdoing: authorial control, operational control, blanket multiple attribution, the *Nicaragua* interpretation of ‘effective control’, and the broader interpretation of ‘effective control’ that I have advocated elsewhere and elaborate here – call it ‘preventive control’.²⁷ Sections 4-6 identify the normative principle that ought to guide attribution and explain why the first four approaches fall short in that respect. To frame that discussion, this section sketches the alternative attribution regimes and the rationales offered for each. For the most part, the rebuttal of these rationales is left for section 6.

The authorial control test holds that if a JPE exists pursuant to the authorisation and delegation of one or more of the participants, enterprise conduct is to be considered the conduct of those authorial participants and none of the others. Thus, in *Behrami*, the ECtHR attributed the conduct of United Nations (UN)-authorised, North Atlantic Treaty Organization (NATO)-led troops in Kosovo exclusively to the UN (and *not* to NATO or any state participant).²⁸ The ILC also advocates an authorial control standard, although only for the narrower category of ‘common organs’, like the Nauru trusteeship managed by Australia but authorised by Australia, New Zealand, and the United Kingdom (UK).²⁹ A few other courts and states have adopted or asserted this test.³⁰ The rationale is that it reflects the authorial entity’s ‘obligation to ensure that it can

²⁷ See sources cited at n. 3, above.

²⁸ *Agim Behrami and Bekir Behrami v. France and Ruzhdi Saramati v. France, Germany and Norway*, App. No. 71412/01 and App. No. 78166/01 (ECtHR, 2 May 2007), paras. 132-41. Initially, the Court continued with this ‘ultimate authority and control’ test. *Kasumaj v. Greece*, Admissibility Decision, App. No. 6974/05 (ECtHR, 7 July 2007); *Gajić v. Germany*, Admissibility Decision, App. No. 31446/02 (28 August 2007). More recently, it hedged on whether to persist with ‘ultimate authority and control’ or to use ‘effective control’ (discussed below) for British troops’ conduct in the UN-authorised force in Iraq. *Al-Jedda v. the United Kingdom*, App. No. 27021/08 (ECtHR, 7 July 2011), para. 84.

²⁹ ARSIWA Commentary, n. 2, at 64, 124; R. Ago, ‘Seventh Report on State Responsibility’, ILC *Yearbook* 1978/II(2), at 99. On Nauru, see *Certain Phosphate Lands in Nauru*, n. 5, paras. 45-47; *Ibid.*, Separate Opinion of Judge Shahabuddeen, para. 4; Trusteeship Agreement for the Territory of Nauru (Australia - UK - New Zealand), approved by the UNGA on 1 November 1947, 10 UNTS 3. Crawford describes the three states as ‘acting as a collective’. J. Crawford, ‘Multilateral Rights and Obligations in International Law’ (2006) 319 CCHAIL 325, at 336. The case was settled by Australia and Nauru, obviating final judgment. Agreement between Australia and the Republic of Nauru for the Settlement of the Case in the International Court of Justice concerning *Certain Phosphate Lands in Nauru*, Nauru, 10 August 1993, in force 20 August 1993, 1770 UNTS 379. The UK and New Zealand contributed to Australia’s payment. Except in the context of common organs, the ILC rejects authorial control [ARIO, n. 4, at 87-88, 110] as does the UN Secretariat. *Ibid.*, at 110.

³⁰ *Anglo-Chinese Shipping v. United States*, 127 F. Supp. 553 (Fed Cl 1955); *Eurotunnel Arbitration (The Channel Tunnel Group Ltd & France-Manche S.A. v. the Secretary of State for Transport of the Government of the United*

exercise effective authority and control over the way in which its delegated powers are being exercised.’³¹

Although also emphasising formal hierarchy, the second approach attributes enterprise conduct to the entity with operational command and control, whether or not it is the authorial entity. In 2008, the District Court in The Hague applied this test to impute the acts of the Dutch peacekeeping battalion at Srebrenica to the UN.³² The rulings have since been reversed,³³ but the standard remains popular and is asserted by the UN and troop-contributing states in most peacekeeping operations.³⁴

Some advocates of this standard claim that holding contributing states responsible for wrongs occurring in a mission under another entity’s operational control would deter contributions, undermining valuable international cooperation.³⁵ This position is misleading. By the same logic, effective attribution to the entity with operational control would undermine the very same ventures by deterring states and International Organisations from adopting an operational leadership role. In peacekeeping, the latter danger is obviated by UN immunity.³⁶ But that ‘solution’ entails eviscerating the proscription of such wrongs in the context of international cooperation. Rather than articulating a defensible attribution framework, its supporters are really advocating attribution to no one.³⁷ A genuine rationale for the operational control test would

Kingdom of Great Britain and Northern Ireland and le ministre de l'équipement, des transports, de l'aménagement du territoire, du tourisme et de la mer du Gouvernement de la République française), Partial Award, (2007) 132 ILR 1, para. 179; *Legality of Use of Force (Serbia and Montenegro v. United Kingdom)*, Transcript, CR 1999/25 (12 May 1999), at 16 (Federal Republic of Yugoslavia advocating authorial control).

³¹ D. Sarooshi, *The United Nations and the Development of Collective Security* (Oxford: OUP, 1999), 164.

³² *Hasan Nuhanović v. Netherlands*, ECLI:NL:RBSGR:2008:BF0181 (Rechtbank 's-Gravenhage, 10 September 2008) (*Nuhanović* District Court). Identifying the ‘operational command and control’ test, see *ibid.*, para. 4.9. This basis for attribution would have been countered only if the Netherlands had ‘cut across’ UN command, directing Dutchbat ‘to ignore’ or ‘to go against’ UN orders. *Ibid.*, para. 4.14.1.

³³ See sources cited at n. 44, below.

³⁴ ARIO, n. 4, at 88; UN Secretary-General, ‘Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations’, UN Doc. A/51/389 (1996), paras. 7-8; Dannenbaum, ‘Translating the Standard of Effective Control into a System of Effective Accountability’, n. 3, at 153.

³⁵ *Al-Jedda*, n. 28, para. 68; M. Simons, ‘Dutch Peacekeepers Are Found Responsible for Deaths’, *New York Times*, 7 September 2013, at A3. The UN has indicated that its acceptance of exclusive responsibility is driven in part by ‘political’ considerations. ARIO, n. 4, at 88.

³⁶ For a recent example, see *Mothers of Srebrenica v. the Netherlands and the United Nations*, ECLI:NL:HR:2012:BW1999 (Supreme Court of the Netherlands, 13 April 2012), upheld in *Stichting Mothers of Srebrenica and others v. the Netherlands*, App. No. 65542/12 (ECtHR, 11 June 2013), paras. 135-70.

³⁷ The UN’s ‘acceptance’ of responsibility is invariably combined with a universal assertion of immunity and the diversion of claims to a woefully inadequate internal claims system. Dannenbaum, ‘Translating the Standard of Effective Control into a System of Effective Accountability’, n. 3, at 121-9. Recently, see R. Roshan Lall and E.

instead need to identify operational control as the relevant superior feature in a *respondeat superior* narrative.³⁸

A third category of frameworks, yet to find judicial affirmation, would expand attribution to a broader subset. The more conservative version would attribute JPE conduct to both those with operational or authorial control *and* any entity that supplied the individual perpetrators of the wrong.³⁹ A more expansive version would attribute wrongful JPE conduct to *all* enterprise participants, irrespective of venture control or connection to the individual perpetrators.⁴⁰ The rationale for such automatic joint attribution is that it maximally protects victim compensation and ensures robust deterrence.

Ultimately, the authorial control, operational control, and blanket joint attribution tests all focus on general enterprise structure, rather than the specifics of the wrongful conduct.⁴¹ This is a mistake. What makes JPEs unique among public ventures is that they disaggregate the concentrated power that a state ordinarily holds over its organs and agents, distributing the levers of command, authority, and control in various ways depending on the negotiated compromise underpinning the particular enterprise. The result is that the influence of any given state or international organisation over conduct varies significantly depending not just on that participant's position in the enterprise, but also on the nature of the impugned conduct. For JPEs, a contextual, conduct-specific standard of attribution is more likely to pair legal attribution with moral responsibility and optimal incentives.

This is the appeal of the 'effective control' standard adopted by the ILC and several courts in the context of one particular form of JPE: the placement of multiple states' and international

Pilkington, 'UN Will Not Compensate Haiti Cholera Victims, Ban Ki-moon Tells President', *The Guardian*, 21 February 2013.

³⁸ Section 6 rebuts such a rationale.

³⁹ J.J. Paust, 'The U.N. Is Bound By Human Rights' (2010) 51 *Harv ILJO* 1, at 8.

⁴⁰ This standard was asserted unsuccessfully on behalf of Saddam Hussein against twenty-one members of the US-led coalition that invaded Iraq in 2003. *Saddam Hussein v. Albania and others*, Declaration on Admissibility, App. No. 23276/04 (ECtHR, 14 March 2006). Something like this view is also hinted at in Human Rights Watch's work on Frontex operations in Greece. Mann, *The EU's Dirty Hands*, n. 7, at 46-52. Although stopping short of a legal claim that wrongful detainee transfers by Frontex are attributable to all contributors to the mission, it does insist that all contributing states withdraw. *Ibid.*, at 52, 55.

⁴¹ There are marginal exceptions. See sources and discussion at n. 32, above, on 'cutting across' the chain of command.

organisations' organs at the disposal of an international organisation.⁴² There are at least two relevant interpretations of 'effective control', so this divides into two alternative standards.

This Chapter deepens the normative foundations of the 'preventive control' interpretation I have advocated elsewhere and extends it to all JPEs.⁴³ The Hague Court of Appeal adopted a version of this standard in 2011 and was affirmed two years later by the Dutch Supreme Court.⁴⁴ The preventive control framework is detailed in section 6, but four features warrant foregrounding. First, for any given wrong, it inquires of each enterprise participant whether that participant held the levers of control most relevant to preventing the type of wrongful conduct in question.⁴⁵ Second, those levers include not just the authority to direct, but also authority over training, discipline, hiring, promotion, criminal jurisdiction, and more. Third, which of these levers underpins responsibility depends on the type of wrongful conduct. Finally, preventive control can be shared.

The dominant alternative interpretation of 'effective control' is that used by the ICJ in *Nicaragua* and later judgments to evaluate state responsibility for the wrongs of non-state armed groups.⁴⁶

⁴² Article 7 ARIIO, n. 4; ARIIO Commentary, n. 4, at 87. The ILC's stricter test for organs placed at the disposal of a *state* asks whether the organ exercises 'elements of the governmental authority' of the borrowing state; the Commentary elaborates that the borrower must exercise *exclusive* direction and control to be attributed with organ conduct. ARSIWA Commentary, n. 2, at 43-44. Endorsing effective control, see: *Hasan Nuhanović v. the Netherlands*, ECLI:NL:GHSGR:2011:BR0133 (Gerechtshof 's-Gravenhage, 5 July 2011) (*Nuhanović* Court of Appeal); also ILDC 1742 (NL 2011). Upheld in: *The Netherlands v. Hasan Nuhanović*, ECLI:NL:HR:2013:BZ9225 (Supreme Court of the Netherlands, 6 September 2013) (*Nuhanović* Supreme Court); *R (on the Application of Al-Jedda) (FC) v. Sec'y of State for Def.* [2007] UKHL 58, upheld in: *Al-Jedda*, n. 28, paras. 80, 84.

⁴³ Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability', n. 3, at 157. The ILC has termed mine a 'wide meaning' of effective control. ARIIO, n. 4, at 93, fn. 129. It is, I think, the optimal interpretation of Article 7 ARIIO, n. 4 (Dannenbaum, 'Killings at Srebrenica, Effective Control, and the Power to Prevent Unlawful Conduct', n. 3, at 721), but that doctrinal debate is tangential here, since not all JPEs are covered by Article 7.

⁴⁴ *Nuhanović* Court of Appeal, n. 42. In affirming the Court of Appeal's interpretation of effective control without caveat, the Supreme Court did not follow its Procurator General. *Nuhanović* Supreme Court, n. 42, paras. 3.11.2-3, 3.12.2-3. The latter had advised upholding the lower judgment, but using a narrower interpretation of effective control. P.A. Nollkaemper, 'Procurator General of the Dutch Supreme Court Concludes to Reject Appeal against Srebrenica Judgment', SHARES Blog, 3 May, 2013. Drawing the connection to my proposal, see ARIIO, n. 4, at 93, fn. 129; Dannenbaum, 'Killings at Srebrenica, Effective Control, and the Power to Prevent Unlawful Conduct', n. 3, at 719-27.

⁴⁵ *Nuhanović* Court of Appeal, n. 42, paras. 5.8-5.9; Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability', n. 3, at 157; Dannenbaum, 'Killings at Srebrenica, Effective Control, and the Power to Prevent Unlawful Conduct', n. 3, at 721.

⁴⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports 1986, 14, para. 115 (*Nicaragua*); *Bosnian Genocide*, n. 16, paras. 397-401; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Report 2005, 168, paras. 146-147 (*Armed Activities*).

Adapted to JPEs, this would attribute enterprise conduct to the state or organisation that ‘directed or enforced the perpetration of [the wrongful] acts.’⁴⁷ When the conduct is directed by one of the state or international organisation enterprise participants, this test is attractive. But it breaks down in the common case that the wrong occurs in the absence of such directions, or even in contravention thereof.⁴⁸

It would be implausible to attribute such wrongful conduct straightforwardly to a state or international organisation when performed by one of its organs acting alone (as is uncontroversial legal orthodoxy), and yet to leave precisely the same wrongful conduct of an otherwise identical JPE organ completely unattributed to *any* legal person merely because the organ is the collaborative product of a number of states and organisations.⁴⁹ Filling that implausible attribution gap would mean supplementing the *Nicaragua* test with a presumptive rule of attribution to a particular participant for enterprise conduct not occurring pursuant to state or international organisation direction. Such a presumption has mixed doctrinal credentials, but the more important point here is that it sacrifices the value of a conduct-specific test.⁵⁰ Any confluence between the presumption and actual institutional influence over the conduct in any given case would be serendipitous.

⁴⁷ *Nicaragua*, *ibid.*, para. 115. See also *Bosnian Genocide*, n. 16, paras. 397, 400; *Armed Activities*, *ibid.*, para. 146. Along these lines, some have suggested the test for military JPEs should be: ‘who is giving the orders – the [troop contributing] State or the [authorial] organization?’ M. Milanović and T. Papić, ‘As Bad as it Gets: the European Court of Human Rights’s *Behrami* and *Saramati* Decision and General International Law’ (2009) 58 ICLQ 267, at 282.

⁴⁸ P. Rowe, ‘United Nations Peacekeepers and Human Rights Violations’ (2010) 51 Harv ILJ 69, at 76 (*most* peacekeeping wrongs contravene superior orders).

⁴⁹ Dannenbaum, ‘Killings at Srebrenica, Effective Control, and the Power to Prevent Unlawful Conduct’, n. 3, at 722; Dannenbaum, ‘Translating the Standard of Effective Control into a System of Effective Accountability’, n. 3, at 158-9. Such non-attribution of JPE conduct would contradict the ILC framework. ARIO, n. 4, at 88, 95. It is, of course, the typical result of applying the *Nicaragua* test to non-state armed groups. *Nicaragua*, n. 46, para. 116; *Bosnian Genocide*, n. 16, paras. 413-5; *Armed Activities*, n. 46, para. 160.

⁵⁰ Under Article 7 ARIO, n. 4, the seconded organ’s conduct is attributed to the receiving international organisation ‘if the organization exercises effective control over that conduct’ (emphasis added). Since Article 6 ARIO, n. 4 and Article 4 ARSIWA, n. 2 hold that a state’s or international organisation’s organs’ conduct is attributable to that state or organisation, one might argue that if the receiving international organisation lacks effective control, the conduct would be attributed automatically to the lender. The Dutch Procurator General and the ECtHR have hinted at this, but both equivocate by emphasising the control of the respective lending states. Nollkaemper, ‘Procurator General of the Dutch Supreme Court Concludes to Reject Appeal against Srebrenica Judgment’, n. 44; *Al-Jedda*, n. 28, paras. 80-86. It is difficult to reconcile such a presumption with the ECtHR’s endorsement of dual attribution (*ibid.*, para. 80) or the ILC’s Commentaries. Dannenbaum, ‘Killings at Srebrenica, Effective Control, and the Power to Prevent Unlawful Conduct’, n. 3, at 720-1. Further confusing the doctrinal space, other authorities have suggested the opposite presumption (that conduct *ultra vires* is attributable to the receiving international organisations, not the contributor). ARIO, n. 4, at 96; *Nuhanović* District Court, n. 32, paras. 4.8-4.15; *Behrami*, n. 28, paras. 133-35. Problematically, that presumption would render Article 7 ARIO, n. 4 redundant.

The preventive control approach is alone among JPE attribution frameworks in tracking institutional influence in all contexts. In doing this, it instantiates legally the deeper normative reciprocity between public power and preventive responsibility that underpins various more mature rules of international responsibility – most obviously, those on preventive due diligence.

4. Vigilant prevention of wrongdoing in international law

The principle that states have a duty to act vigilantly to prevent wrongdoing within their spheres of power is central to international law's approach to ensuring global values. In its early guise, this doctrine of preventive due diligence developed in a context of bilateral state relations, and it remains significant in certain bilateral realms.⁵¹ But even in that form it has always been premised on the notion that claiming sovereign authority entails a fundamental duty to use that power in a way that protects those most vulnerable to wrongdoing within its sphere. That idea provided the foundation for legal frameworks governing: first, neutrality, in which the state must prevent private actors within its jurisdiction from using force transnationally;⁵² second, states' obligations *vis-à-vis* one another's citizens, in which the state has a duty to prevent harm to foreign nationals,⁵³ foreign investors,⁵⁴ and diplomatic and consular premises and officials⁵⁵ in its territory; and third, non-violent transboundary harm, in which states must prevent private entities from polluting neighbouring states.⁵⁶

In line with international law's (partial) transition from a regime focused on bilateral inter-state

⁵¹ *Barcelona Traction*, n. 21, paras. 33-35, 88.

⁵² *Caroline Incident: Webster's letter to Fox* (24 April 1841); *Alabama claims of the United States of America against Great Britain*, Award, (1872) 29 RIAA 125.

⁵³ *British Claims in the Spanish Zone of Morocco (Great Britain/ Spain)*, Award, (1924) 2 RIAA 615; *Janes et al. (United States of America v. United Mexican States)*, Award, (1926) 4 RIAA 82; *Youmans (United States of America v. United Mexican States)*, Award, (1926) 4 RIAA 110; *Massey (United States of America v. United Mexican States)*, Award, (1927) 4 RIAA 155.

⁵⁴ This remains a bilateral frame. For example: *Asian Agricultural Products (AAPL) Ltd. v. Republic of Sri Lanka*, Final Award, ICSID Case No. ARB/87/3 (1990); *Noble Ventures, Inc. v. Romania*, Award, ICSID Case No. ARB/01/11 (2005), para. 164; *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment, ICJ Report 1989, 15.

⁵⁵ *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, ICJ Reports 1980, 3, paras. 63-68.

⁵⁶ *Trail Smelter (United States of America v. Canada)*, Award, (1938) 3 RIAA 1905. On *Trail Smelter* controversies, see R.M. Bratspies and R.A. Miller (eds.), *Transboundary Harm in International Law* (Cambridge: CUP, 2006); Pisillo-Mazzeschi, 'Forms of International Responsibility for Environmental Harm', n. 19, at 29.

relations to a regime of global public normativity, preventive vigilance is now central to the legal frameworks for quelling global terrorism, upholding human rights, protecting the global environment, and combating mass atrocity. At the normative crux of these regimes is the reciprocity between the state's claim to legitimate power and its duty to prevent wrongs of global concern.

The contours of the state's preventive responsibility regarding transnational armed groups are the subject of heated debate, but few would deny the central legal importance of such a duty.⁵⁷ The ICJ offered the most modest (and heavily criticised) articulation of the standard when it held that the Democratic Republic of the Congo (DRC) – a profoundly weak state lacking control over the relevant territory – was for those reasons excused from engaging in significant preventive action.⁵⁸ More expansively, others point to Security Council support, near-universal acceptance, and extensive participation in the American response to Al-Qaeda's 2001 attacks, which involved waging war on Afghanistan on the grounds that it had 'harboured' Al-Qaeda.⁵⁹ This stimulated an ongoing debate as to whether the state's duty to act vigilantly to prevent actors on its territory from launching transnational attacks might be transforming into a rule whereby preventive failure could underpin attribution with the attack (and thus trigger the attributed state's vulnerability to lawful defensive force).⁶⁰ This remains a minority view, but regardless of ongoing disagreements as to the appropriate trigger for lawful defensive force, the basic preventive duty is clear.⁶¹ It has been strengthened and operationalised over the past 15 years in a series of Security Council resolutions.⁶²

⁵⁷ The ICJ has affirmed the customary international law status of the prohibition on states acquiescing in others' transnational uses of force from their territory. Declaration on Friendly Relations, UN Doc. A/RES/2625, UN Doc. A/8028 (24 October 1970) at 123; Definition of Aggression, UN Doc. A/RES/3314 (XXIX) (14 December 1974) Article 3(f); *Armed Activities*, n. 46, paras. 162, 300.

⁵⁸ *Ibid.*, paras. 301-304. But see *ibid.*, Separate Opinion of Judge Kooijmans, para. 82; and Separate Opinion of Judge Tomka, paras. 1-6.

⁵⁹ T. Becker, *Terrorism and the State* (Oxford: Hart, 2006), 218; D. Jinks, 'State Responsibility for the Acts of Private Armed Groups' (2003) 4 *Chic JIL* 83, at 89.; V.-J. Proulx, 'Babysitting Terrorists' (2005) 23 *Berk JIL* 615, at 637-38.

⁶⁰ Y. Dinstein, *War, Aggression, and Self-Defence*, 5th edn. (Cambridge: CUP, 2012), 261; T. Franck, *Recourse to Force* (Cambridge: CUP, 2002), 54; G. Travalio and J. Altenburg, 'Terrorism, State Responsibility and the Use of Military Force' (2003) 4 *Chic JIL* 97, at 100-111; Proulx, *ibid.*, at 637; Jinks, *ibid.*, at 89-90. Some states have used the US model to assert broad claims. T. Ruys, 'Quo Vadit Jus ad Bellum?' (2008) 9 *MJIL* 334, at 354-56.

⁶¹ C. Gray, *International Law and the Use of Force*, 3rd edn. (Cambridge: CUP, 2008), 135 (on the controversial nature of liability to defensive force post-Afghanistan).

⁶² Prior to 11 September 2001, see for example UN Doc. S/RES/1267 (15 October 1999). Following the attacks, the Council issued a slew of resolutions elaborating states' preventive duties. Most immediately: UN Doc. S/RES/1373

Duties of preventive vigilance have also taken on a public dimension in environmental law.⁶³ Moving beyond bilateral harm, the ICJ has recognised the state's obligation to ensure that private actors under its jurisdiction respect the *global* environment,⁶⁴ emphasising the stakes for 'the whole of mankind'.⁶⁵ Upholding this preventive legal obligation is considered a core governmental duty.⁶⁶

Perhaps most notable, however, has been the rise of preventive duties in human rights law. Many human rights treaties lack explicit provisions obligating the state to use its sovereign power affirmatively to prevent human rights violations by private actors.⁶⁷ It was not until the 1980s that the preventive dimension of human rights obligations under these treaties came to the fore.⁶⁸ In an early and influential statement of this responsibility, the Inter-American Court of Human Rights held that states must organise 'all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. [They] must prevent, investigate and punish any violation of the rights recognized by the Convention.'⁶⁹ This basic preventive responsibility has now been endorsed and affirmed repeatedly across human rights regimes.⁷⁰

(28 September 2001). These resolutions continue, see UN Doc. S/RES/2083 (17 December 2012).

⁶³ Framework Convention on Climate Change, n. 23, Articles 3-6; Rio Declaration, n. 14, Principles 2, 11, 16; Articles on Prevention of Transboundary Harm from Hazardous Activities, in ILC Report on the work of its fifty-third session, UN Doc. A/56/10 Supp. No. 10 (2001), at 370, 372 (Article 3), 393, 395, 411; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, 14, paras. 101, 187, 197, 204, 223, 265; LOSC, n. 14, Articles 192-194, 196, 199, 207-212; *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS), Case No. 17, (2011) 50 ILM 458, paras. 99-120; ILA, Berlin Conference: Water Resources Law (2004) Articles 2, 5- 8, 11, 12, 16, 22- 27, 32-35 and Commentaries.

⁶⁴ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Report 1996, 226, para. 29 (*Nuclear Weapons*); *Gabčíkovo-Nagymaros*, n. 14, para. 53. See also Rio Declaration, n. 14, Principle 2.

⁶⁵ *Gabčíkovo-Nagymaros*, n. 14, paras. 53, 140. See also *Nuclear Weapons*, *ibid.*, at 505-07 (Judge Weeramantry, dissenting).

⁶⁶ Vicuña, *Responsibility and Liability Under International Law for Environmental Damage*, n. 23, Article 3; P. Birnie and A. Boyle, *International Law and The Environment*, 2nd edn. (Oxford: OUP, 2002), 112. See also ITLOS Advisory Opinion 2011, n. 63, para. 112; Dellapenna, 'A Climate of Disruption', n. 13, at 86.

⁶⁷ V.P. Tzevelekos, 'In Search of Alternative Solutions' (2010) 35 Brook JIL 155, at 182.

⁶⁸ See H. Shue, *Basic Rights*, 2nd edn. (Princeton: Princeton University Press, 1996), 52; A. Eide, Report on the Right to Adequate Food as a Human Right, UN Doc. E/CN.4/Sub.2/1987/23 (7 July 1987), at 34-36, 112-15, 167-81.

⁶⁹ *Velásquez Rodríguez v. Honduras*, IACtHR, (Ser. C) No. 4 (1988), para. 166.

⁷⁰ A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart, 2004); *Delgado Páez v. Colombia*, Communication No. 195/1985, UN Doc. CCPR/C/39/D/195/1985 (1990); Human Rights Committee, General Comment 20, UN Doc. HRI/GEN/1/Rev.1 (1992), paras. 2, 10, 13; HRC, General Comment 31, n. 23, paras. 6, 8; Committee Against Torture, General Comment 2, UN Doc. CAT/C/GC/2 (2007), paras. 18-24; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious

The strength of the reciprocal link between the state's claim to legitimate power and the duty to exercise that power preventively is spotlighted in its extraterritorial application. *Non-refoulement* prohibits the state from transferring individuals under its control to a state where they would be at risk of severe abuse (even when the former state's agents are holding the persons on the territory of the latter).⁷¹ States have been found to have a duty to prevent rights violations by private persons acting in foreign territories over which they exercise effective control,⁷² and by private persons over whom they have preventive influence.⁷³ This latter doctrine may prove especially important in regulating multinational corporations.⁷⁴ Overall, the extraterritoriality of human rights illustrates the tight link between the scope of the state's preventive responsibilities and the scope of its asserted power, a point sharpened by the European Court of Human Rights (ECtHR)'s holding that human rights obligations abroad can be 'divided and tailored' to reflect the nature of the state's control.⁷⁵

These developments in human rights have become intertwined with the preventive dimension of the laws of war.⁷⁶ Building on belligerent occupiers' duty to restore public order,⁷⁷ the ICJ found Uganda responsible for failing to act vigilantly to prevent 'rebel groups acting on their own

Violations of International Humanitarian Law, UN Doc. A/RES/60/147 (16 December 2005), para. 3; O. De Schutter et al., 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 HRQ 1084, at 1134; Committee on Economic, Social and Cultural Rights, General Comment 12, UN Doc. E/C.12/1999/5 (1999), para. 15; *MFHR v. Greece*, European Committee of Social Rights, Complaint No. 30/2005 (2006), para. 192; *SERAC and CESR v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 155/96 (2001), paras. 46, 58, 61, 63, 65-66. But see M. Hakimi, 'State Bystander Responsibility' (2010) 21 EJIL 341, at 367-371 (limiting the duty to a narrow category of abuses).

⁷¹ *Al-Saadoon and Mufdhi v. the United Kingdom*, App. No. 61498/08 (ECtHR, 2 March 2010).

⁷² HRC, General Comment 31, n. 23, para. 10; *Loizidou v. Turkey*, App. No. 15318/89 (ECtHR, 23 March 1995), paras. 62-64. Conversely, even when a state lacks control over part of its territory, it retains 'a duty to take all the appropriate [preventive] measures which it is still within its power to take.' *Ilaşcu*, n. 13, para. 313.

⁷³ The ECtHR required Russia to use its 'dissuasive influence' [later described as 'decisive'] to prevent the breakaway Transdniestrian regime in Moldova from violating rights. *Ilaşcu*, n. 13, para. 387. See also De Schutter, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights', n. 70, at 1136-7.

⁷⁴ J. Ruggie, *Guiding Principles on Business and Human Rights*, UN Doc. A/HRC/17/31 (2011) Annex, Part I; De Schutter, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights', n. 70, Article 25(c), at 1135-6, 1139-45; Committee on Economic, Social and Cultural Rights, Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights, UN Doc. E/C.12/2011/1 (2011), para. 5; Committee on the Elimination of Racial Discrimination, Concluding Observations, UN Doc. CERD/C/CAN/CO/18 (2007), para. 17; Tzevelekos, 'In Search of Alternative Solutions', n. 67.

⁷⁵ *Al-Skeini and others v. the United Kingdom*, App. No. 55721/07 (ECtHR, 7 July 2011), para. 137.

⁷⁶ Basic Principles on the Right to a Remedy, n. 70, para. 3.

⁷⁷ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, in force 26 January 1910, 1 Bevans 631, Article 43.

account' from violating human rights and humanitarian law in the Eastern DRC.⁷⁸ The Inter-American Court has interpreted Additional Protocol II and Common Article 3 to impose a similar duty on states with respect to the violations of non-state actors in internal armed conflicts.⁷⁹

Perhaps the most explicit articulation of the deep normative reciprocity discussed throughout this section is the 'responsibility to protect' (R2P).⁸⁰ Still searching for a clear legal status, R2P is currently a complex cluster of *lex lata* and *lex ferenda*.⁸¹ It is, in my view, best understood as an expression of the normative foundation of an evolving legal regime – the blueprint for the legitimation of sovereign power under a humanised international law. It transforms sovereignty from a shield into a bundle of powers justified because they enable the prevention wrongs of global concern.⁸² Seen in this light, R2P captures the moral reciprocity between public power and responsibility – a foundational principle that makes normative sense of the rise of the range of preventive duties described above.

Indeed, one can read R2P as holding state power *contingent* on its preventive use. A state that fails to protect its people from atrocity loses temporarily the basic sovereign right not to be subject to forceful external intervention, with preventive responsibility extending to the international community.⁸³ Precisely what this means is hotly disputed, but the latter duty is widely thought to apply at least to the UN Security Council – notably, the body with the most expansive claims to legitimate global public power – and it has been suggested that the permanent members bear a special obligation not to obstruct such action.⁸⁴ Here, too, the basic moral reciprocity is apparent.

⁷⁸ *Armed Activities*, n. 46, paras. 178-80, 219-229, 248-250.

⁷⁹ *The Mapiripán Massacre v. Colombia*, IACtHR, (Ser. C) No. 134 (2005), para. 114.

⁸⁰ ICISS Report, n. 6; UN Doc. S/RES/1674 (2006), para. 4; 2005 World Summit Outcome, UN Doc. A/RES/60/1 (2005), UN Doc. A/60/L.1 (2005), para. 138; UN Secretary-General, *Implementing the Responsibility to Protect*, UN Doc. A/63/677 (2009), at 8-9.

⁸¹ The Libya intervention of 2011 bolstered R2P's legal status. UN Doc. S/RES/1973 (2011), preamble. Discussing R2P's mixed legal credentials, see C. Stahn, 'Responsibility to Protect' (2007) 101 AJIL 99. On R2P and existing law, see M. Hakimi, 'Distributing the Responsibility to Protect', in P.A. Nollkaemper and D. Jacobs (eds.), this volume, at ____.

⁸² ICISS Report, n. 6, paras. 1.35, 2.14-2.15, 2.30-2.32; High-Level Panel on Threats, Challenges, & Changes, *A More Secure World*, UN Doc. A/59/565 (2004), paras. 29-30; Stahn, *ibid.*, at 118.

⁸³ ICISS Report, n. 6, para. 2.25; L. Feinstein and A.-M. Slaughter, 'A Duty to Prevent' (2004) Foreign Affairs (describing R2P as 'nothing less than the redefinition of sovereignty itself').

⁸⁴ ICISS Report, n. 6, ch. 6, especially para. 6.21. A. Peters, 'The Responsibility to Protect and the Permanent Five – The Obligation to Give Reasons for a Veto', in J. Hoffmann and P.A. Nollkaemper (eds.), *Responsibility to Protect: From Principle to Practice* (Amsterdam: Amsterdam University Press, 2012), 199.

In a final case illustrating the doctrinal reach of that underlying principle, the ICJ held the Federal Republic of Yugoslavia (FRY) responsible under the Genocide Convention⁸⁵ for failing to make ‘the best efforts within [its] power to try and prevent’ Vojska Republike Srpske (VRS) [Bosnian Serb Army] atrocities in Bosnia.⁸⁶ Responsibility hinged on the FRY’s ‘capacity to influence effectively’ the génocidaires’ actions (whether or not it could have stopped the genocide).⁸⁷ Notwithstanding caveats emphasising the FRY’s special links to the VRS and the former’s failure to abide by a provisional measures ruling, the judgment adds to the broad trend towards recognising in law the normative reciprocity between public power and the responsibility to use it to prevent wrongdoing of global concern.⁸⁸

Four features of this trend warrant emphasis. First, the *ex ante* duty to prevent such wrongdoing is not reflected in a strict responsibility *ex post* – if the state acts with vigilance, it is not responsible for wrongs it was unable to prevent.⁸⁹ Second, even if the state fails to act with vigilance, it is not attributed with the ensuing wrongs; its violation is the separate delict of failing to prevent.

Third, however, in the areas of greatest global public concern, the line between attribution and preventive failure is blurring. Some now argue that states that fail to prevent private human rights abuses or transnational uses of force should be held responsible *ex post* for the underlying wrong (not just preventive failure) and judicial decisions are occasionally ambiguous on this issue.⁹⁰ Moreover, any technical distinction is anyway of reduced significance if the consequences are the same (such as if failing to prevent transnational terrorism makes a state liable to defensive force).

Fourth, and most significantly, the doctrine of preventive vigilance is a trans-substantive principle (arguably, a general principle) by which lines of responsibility are drawn between states

⁸⁵ Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948, in force 12 January 1951, 78 UNTS 277.

⁸⁶ *Bosnian Genocide*, n. 16, para. 438.

⁸⁷ *Ibid.*, paras. 430, 434, 462.

⁸⁸ For the caveats, see *ibid.*, paras. 429, 430, 435.

⁸⁹ P.-M. Dupuy, ‘Reviewing the Difficulties of Codification’ (1999) 10 EJIL 371, at 379. See *Corfu Channel*, n. 13, at 18-22; *Armed Activities*, n. 46, para. 300; *Velásquez-Rodríguez*, n. 69, paras. 172-75; *Bosnian Genocide*, n. 16, para. 430; Faure and Nollkaemper, ‘International Liability as an Instrument to Prevent and Compensate for Climate Change’, n. 13, at 145-146; Birnie and Boyle, *International Law and The Environment*, n. 66, at 112.

⁹⁰ On transnational force, see sources and discussion at n. 59-60, above; on human rights, see sources and discussion at n. 110, 113-115, above. Occasionally, courts blur the line. *El-Masri*, n. 17, para. 206; *Velásquez-Rodríguez*, n. 69, para. 177; *Cyprus v. Turkey*, App. No. 25781/94 (ECtHR, 10 May 2001), paras. 76-77.

and fundamental wrongs.⁹¹ Although what counts as the diligence due is highly contextual, there is a consistent normative core: states have a duty to act vigilantly and reasonably within their sphere of lawful influence to prevent wrongdoing of global concern. The separation of delicts is misleading in this respect. There is no due diligence violation unless the wrong itself occurs; the *ex ante* vigilance obligation is only a ground for *ex post* responsibility *vis-à-vis the core global wrong*. A state that fails to act with vigilance will not be responsible *ex post* if the core wrong does not occur. Preventive due diligence is thus functionally far closer to attribution than the delictual distinction allows. The global wrong is the same; the difference is in the route by which the state is connected to it.⁹²

This is important. On the prevailing legal account, rules of preventive vigilance and rules of attribution are classified as primary and secondary rules, respectively.⁹³ Critics have noted that purportedly secondary rules of international law often import or create primary obligations.⁹⁴ But the reverse point is no less powerful: as a trans-substantive method of drawing a line of responsibility between the state and an underlying primary wrong, preventive due diligence shares key features with secondary rules on attribution.⁹⁵ Both define the connective link between state and wrongdoing.

This functional commonality, explored in the next section, is crucial, because underpinning the connective analysis in *both* contexts (due diligence and attribution) is a deeper normative commonality. Namely, the moral reciprocity between the state's claim to (and exercise of) public power, and its duty to use that power to prevent wrongdoing of global concern.⁹⁶ The normative resonance of that principle in both of these contexts, and across substantive domains sets the stage for starting with that reciprocity in assessing responsibility for JPE wrongdoing.

⁹¹ Tzevelekos, 'In Search of Alternative Solutions', n. 67, at 160; De Schutter, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights', n. 70, at 1135-6; *Corfu Channel*, n. 13, at 22; *Trail Smelter*, n. 56; L. Condorelli, 'The Imputability to States of Acts of International Terrorism' (1989) 19 *Isr YHR* 233, at 240. See also Hakimi, 'State Bystander Responsibility', n. 70, at 345. But see *Bosnian Genocide*, n. 16, para. 429.

⁹² For example: *Velásquez-Rodríguez*, n. 69, para. 172: 'a private 'act which violates human rights (...) can lead to international responsibility of the State (...) because of the lack of due diligence to prevent the violation'.

⁹³ ARSIWA Commentary, n. 2, at 31, 38-9.

⁹⁴ Nollkaemper and Jacobs, 'Shared Responsibility in International Law', n. 2, at 408-12.

⁹⁵ Defending the infusion of primary rules in its rules on complicity, the ILC emphasises complicity's 'derivative' nature. ARSIWA Commentary, n. 2, at 65. However, the duty of preventive vigilance is no less derivative of the underlying wrong.

⁹⁶ *Armed Activities*, n. 46, Separate Opinion of Judge Tomka, para. 2.

5. Due diligence, attribution, and drawing lines of responsibility

At the crux of the functional similarity between preventive vigilance and attribution is the fact that state responsibility is always at least minimally vicarious.⁹⁷ This is not to deny the moral reality of state responsibility – states and international organisations have morally significant agential features that warrant holding them (and not only their members or agents) responsible for official conduct.⁹⁸ However, because state action just is some combination of human acts (albeit acts defined and enabled by their institutional context), state responsibility necessarily involves drawing a normative link between the state and the conduct of natural persons.⁹⁹ And on prevailing moral and legal understandings, this connection is not merely one of direct causation, whereby human agents carry out institutionally defined obligations. State organs and their constituent individuals take initiative; they act beyond, and sometimes *contrary* to, what is institutionally required. But as long as they engage in ‘official’ conduct, the dominant view attributes their acts to the state.¹⁰⁰

The line of responsibility connecting the state to such conduct is not obvious. Indeed, emphasising the distinction between the perpetrators and the state, and thus the need for a normative account of the latter’s responsibility, one way in which a legally responsible state may be required to repair victims is by punishing the perpetrators.¹⁰¹

Making sense of the state’s *ex post* responsibility for the conduct of agents acting on initiative or even contrary to instructions requires a moral narrative that connects the behaviour of the agent to the failures of the state institution. Much like the contexts described in section 4, that narrative is a story of preventive responsibility reciprocally entailed by claiming or holding public power.

The functional congruity of vigilance and attribution analyses in this context is plain from the structure of judicial examinations of wrongdoing of global public concern. When such a wrong is

⁹⁷ Notably, the ILC’s work state responsibility began with the protection of aliens. United Nations, *The Work of the International Law Commission*, 4th edn. (1988) at 91. Compare sources cited at n. 53, above. See also C. Chinkin, ‘A Critique of the Public/Private Dimension’ (1999) 10 EJIL 387, at 395.

⁹⁸ On the moral responsibility of organisations (simultaneous or not with that of individual members), see P. Pettit, ‘Responsibility Incorporated’ (2007) 117 *Ethics* 171. See also P.A. Nollkaemper, ‘Systemic Effects of International Responsibility for International Crimes’ (2010) 8 SCJIL 313 (on the state organisational system’s role in international crimes).

⁹⁹ ARSIWA Commentary, n. 2, at 35.

¹⁰⁰ Article 7, ARSIWA, n. 2; Article 8 ARIIO, n. 4.

¹⁰¹ ARSIWA Commentary, n. 2, at 106.

not directed or authorised by the relevant state authorities, the judicial evaluation of *ex post* responsibility involves considering potential normative connections between the state and the wrongful conduct, including both direct attribution and a failure of preventive vigilance, often considered in turn.¹⁰²

The normative congruity of the two forms of linking is most obvious in the case of an organ acting *ultra vires*.¹⁰³ The state holds – or has the capacity to hold – significant levers of control over its organs. It is the combination of that heightened preventive capacity with the importance of restraining those who wield public power that drives the moral narrative underpinning a strict institutional duty to prevent *ultra vires* wrongdoing by state officials.¹⁰⁴ Giving voice to this narrative, the ECtHR held in *Ilaşcu* that state authorities ‘are under a duty to impose their will [on their subordinates] and cannot shelter behind their inability to ensure that it is respected.’¹⁰⁵

In this scenario and that of a failure of preventive vigilance, the underlying wrong is motivated by the will and initiative of a natural person. In both cases, the moral basis of the state’s responsibility with respect to that wrong is in its failure to prevent the wrongful conduct.¹⁰⁶ Emphasising precisely this parallel, a former UN Special Rapporteur observes, ‘[i]n addition to preventing violations committed by *state agents*, human rights law obligates states to use *due diligence to prevent* harm (...) caused by armed *individuals and groups*.’¹⁰⁷ The common moral narrative is one of the reciprocity between public power and prevention. As discussed below, the different legal applications of that concept are explained not by a deviation from the reciprocity principle, but by different regulatory dangers in the two contexts.

¹⁰² See, for example, *Bosnian Genocide*, n. 16, para. 379; *Consular Staff in Tehran*, n. 55, paras. 58, 61; *Ilaşcu*, n. 13, para. 313; *Velásquez-Rodríguez*, n. 69, paras. 165-7.

¹⁰³ Although considering it a misuse of the technical term, Ago acknowledges that both state responsibility arising from private wrongs and state responsibility for public organs acting *ultra vires* have been termed ‘indirect’ or ‘vicarious’ responsibility. Eighth report on state responsibility by Special Rapporteur R. Ago, ILC *Yearbook* 1979/II(1), at 4. See also R. Jennings and A. Watts (eds.), *Oppenheim’s International Law*, 9th edn. (Harlow: Longman, 1992), at 500-02.

¹⁰⁴ Hakimi, ‘State Bystander Responsibility’, n. 70, at 356; D.D. Caron, ‘The Basis of Responsibility’, in R.B. Lillich and D.B. Magraw (eds.), *The Iran-US Claims Tribunal* (Ardsley: Transnational, 1998), at 109, 138; M.N. Shaw, *International Law*, 5th edn. (Cambridge: CUP, 2003), 700; B.A. Frey, ‘Small Arms and Light Weapons: The Tools Used to Violate Human Rights’ (2004) 3 *Disarmament F.* 37, at 40.

¹⁰⁵ *Ilaşcu*, n. 13, para. 319. See also *Youmans*, n. 53, para. 14; *Velásquez-Rodríguez*, n. 69, para. 171.

¹⁰⁶ Compare the *Ilaşcu* attribution principle to the due diligence principle articulated in *Armed Activities. Armed Activities*, n. 46, para. 246: ‘Uganda violated its duty of vigilance by not taking adequate measures to ensure that its military forces did not’ loot and plunder’ (emphasis added). See also Chinkin, ‘A Critique of the Public/Private Dimension’, n. 97, at 395.

¹⁰⁷ Frey, ‘Small Arms and Light Weapons’, n. 104, at 41 (emphasis added).

An alternative to the reciprocity narrative might emphasise that state organs act on *behalf* of the state in a way that the private natural persons under its jurisdiction do not.¹⁰⁸ They represent it, and act in furtherance of its projects, and this representative function might be thought to underpin the attribution of their conduct. The problem with this is that, in acting *ultra vires*, state organs diverge from the state's projects and often fail to advance its interests. Moreover, *de facto* organs – which are subject to the same attribution rules – do not 'represent' the state at all; their connection to the state is defined solely by their subjection to its control.¹⁰⁹ These contours of *ultra vires* attribution are explained better by a moral account rooted in the state's obligation to prevent global wrongful conduct as a reciprocal entailment of its claimed or asserted public power than they are by one focused on the idea of organs acting on behalf of states.

Of course, if this is true, one might ask why the legal operationalisation of that basic normative principle differs meaningfully in the preventive vigilance and attribution contexts. The state is strictly responsible for the *ultra vires* wrongs of its organs, but only responsible under a due diligence standard for the wrongs of private persons acting within the scope of its claimed or exercised public power. If the prevention of such wrongs is part of what it means to exercise public power legitimately, why should the same test of responsibility not apply in both cases?

This question is at the heart of long-running criticisms of the public/private divide in international law.¹¹⁰ And that is telling. The divergent operationalisation of preventive reciprocity reflects the ideas that some functions are quintessentially public in character,¹¹¹ and that the state must ensure *without fail* that these functions (but not private actions) are exercised lawfully.¹¹² It is, in other words, rooted in the public/private distinction.

¹⁰⁸ It is important to note that there are contexts in which principles other than control and the reciprocity principle underpin attribution. Article 9 ARSIWA, n. 2; ARSIWA Commentary, n. 2, at 43; Caron, 'The Basis of Responsibility', n. 104, at 128.

¹⁰⁹ *Bosnian Genocide*, n. 16, paras. 391-392.

¹¹⁰ H. Charlesworth and C. Chinkin, *The Boundaries of International Law* (Huntington: Juris, 2000), at 59-61; Chinkin, 'A Critique of the Public/Private Dimension', n. 97, at 395.

¹¹¹ ARSIWA Commentary, n. 2, at 39-49.

¹¹² If the state contracts such functions to private actors, it does so at its own normative risk. Human Rights Committee, Communication No. 273/1989, UN Doc. A/44/40 (1989); Committee on Economic, Social and Cultural Rights, General Comment 19, UN Doc. E/C.12/GC/19 (2008), para. 46. Courts in Israel and India have found unconstitutional the contracting of prisons and special police, respectively. *Academic Center of Law and Business, Human Rights Division and others v. Minister of Finance and others*, HCJ 2605/05 (2009); *Nandini Sundar and others v. State of Chattisgarh and Union Government*, Supreme Court of India, (2011). See also ARSIWA Commentary, n. 2, at 38; R. Higgins, *Problems and Process* (Oxford: Clarendon, 1994), 153.

Critics of that distinction variously emphasise four things. First, dissensus as to which functions are *quintessentially* public and significant variance in the functions actually allocated to public entities.¹¹³ Second, the fact that a disproportionate number of the human rights violations suffered by women occur in the ‘private’ sphere, whereas a disproportionate number of those suffered by men occur in the ‘public’ sphere.¹¹⁴ Third, the relative invisibility of multinational corporations in an international legal regime focused on public actors.¹¹⁵ And, finally, the lack of a meaningful normative distinction between terrorists and the states that ‘harbour’ them.¹¹⁶ Overall, the worry is that the public/private divide allows for wrongs that ought to be concerns of the international community to be sheltered from international law.¹¹⁷

The preventive vigilance obligations described in section 4 offer a way to accommodate that concern without eliminating the public/private distinction. They allow international law to respond to violence against women, the wrongdoing of multinational corporations, and transnational terrorism.¹¹⁸ They narrow the public/private divide so as to mitigate its pathologies. However, although this narrowing is a virtue, the public/private distinction remains normatively significant, particularly in operationalising the principle of preventive reciprocity.

First, the state’s preventive control over the *ultra vires* acts of its organs vastly exceeds its preventive control over the acts of private individuals within its jurisdiction. It is through state processes that individuals are selected to be entrusted with public power, through state systems that they are trained and prepared for it, and under state supervision, in the context of a state organisation, subject to state discipline, and under state organisational rules that they exercise it. This warrants different expectations regarding the state’s capacity to control the respective

¹¹³ H. Charlesworth et al., ‘Feminist Approaches to International Law’ (1991) 85 AJIL 613, at 626; Chinkin, ‘A Critique of the Public/Private Dimension’, n. 97, at 388.

¹¹⁴ Charlesworth, ‘Feminist Approaches to International Law’, *ibid.*; UN Commission on Human Rights, Report of the Special Rapporteur on Violence Against Women UN Doc. E/CN.4/1996/53 (1996), paras. 26-31.

¹¹⁵ See discussion and sources at n. 122, below.

¹¹⁶ See discussion and sources at n. 59-61, above.

¹¹⁷ Chinkin, ‘A Critique of the Public/Private Dimension’, n. 97.

¹¹⁸ On multinational corporations, see discussion and sources at n. 122, below. On counter-terrorism, see discussion and sources at n. 57-62, above. On violence against women, see, for example, Committee on the Elimination of Discrimination Against Women, General Recommendation 19, in UN Doc. A/47/38 (1992), para. 9; Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, Belém do Pará, 9 June 1994, in force 5 March 1995, Article 7; Committee on the Elimination of Discrimination Against Women, Comm. No. 2/2003, *AT v. Hungary*, in UN Doc. A/60/38 (Part I) Annex III (2005), paras. 9.2-9.6; *Opuz v. Turkey*, App. No. 33401/02 (ECtHR, 9 June 2009), paras. 146-149, 191; Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, Istanbul, 11 May 2011, CETS No. 210.

actors' conduct.¹¹⁹

Second, when state organs and agents engage in wrongs of global public concern, they wield great power over human victims.¹²⁰ Endowed with the coercive force of a public authority, the public actor has a significantly greater opportunity than does her private analogue to inflict such wrongs on those who lack the equivalent means to defend themselves. Indeed, in many cases, the public perpetrator would be the very actor to whom such potential victims would most plausibly turn for protection when faced with an analogous private threat.¹²¹ This undermining of self- and other-help in response makes it especially important that abuses of public power be prevented by the state.¹²²

Third, and perhaps most important, is the different *nature* of the state's preventive control over public and private actors. The most potent mechanisms through which states can prevent private actors from inflicting wrongs of global concern involve using the tools of law enforcement and national security.¹²³ Holding the state strictly responsible for the wrongs of private actors within its jurisdictional sphere would demand implicitly the zealous use of these tools.¹²⁴ Given the tendency for the zealous use of these tools to violate human rights, a strict responsibility to eliminate threats from private actors would itself threaten the very global human values motivating the preventive duty, and unfairly condemn states that seek to strike an optimal balance on precisely that dimension.¹²⁵ By holding states responsible only when they fail to enact

¹¹⁹ See generally *Restatement (Third) Of Agency* section 2.04 (2006); P.S. Atiyah, *Vicarious Liability in the Law of Torts* (Oxford: Butterworths, 1967), at 15-18. Preventive duties intensify with control. Hakimi 'State Bystander Responsibility', n. 70, at 357-68; *Juan Humberto Sánchez v. Honduras*, IACtHR, (Ser. C) No. 99 (2003), para. 111.

¹²⁰ Individuals' states may be the formal legal claimant on their behalf, but the violation is of *global* concern because of the profound harm to human beings.

¹²¹ The typical public perpetrators of wrongs of global concern are in the security sector.

¹²² Multinational corporations may also exercise great power over individuals, but this only emphasises why there is normative tension regarding their status under international law. Ruggie, *Guiding Principles on Business and Human Rights*, n. 74; C. Albin-Lackey, 'Without Rules' (Human Rights Watch, 2013); S. Ratner, 'Corporations and Human Rights', (2001) 111 YLJ 443.

¹²³ They are not the only tools; education is also crucial.

¹²⁴ Caron, 'The Basis of Responsibility', n. 104, at 127.

¹²⁵ *Bámaca Velásquez v. Guatemala*, IACtHR, (Ser. C) No. 70 (2000), para. 174; *Osman v. the United Kingdom*, App. No. 23452/94, Case No. 87/1997/871/1083 (ECtHR, 28 October 1998), para. 116; J.A. Hessbruegge, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law' (2004) 36 NYUJILP 265, at 276-77. Prior to the humanisation of international law, the dominant normative account of the public/private divide focused on sovereignty. *British Claims in the Spanish Zone*, n. 53.

reasonable preventive measures, the vigilance standard avoids upsetting that balance.¹²⁶

Preventing global wrongs by state organs or agents raises very different institutional concerns. The levers of preventive control held by the state over its organs are manifold. They do not depend on law enforcement, and they do not carry the danger of overzealous prevention inflicting new global harms. Moreover, given the heightened importance of protecting against the infliction of such harms by public authorities (due to potential victims' vulnerability to those authorities and public authorities' status as victims' primary protective recourse), the imperative to exercise those preventive levers is especially acute. As a result, when the state fails to rein in violations by organs or agents, there is a sense of condemnation of the state itself, even if there is not specific evidence of institutional failure.¹²⁷

This reflects a presumption (typically vindicated) that when state organs engage in wrongs of global public concern, there *must* have been some institutional preventive failure at some level.¹²⁸ Of course, institutional imperfections and failures that *could* lead to wrongful conduct of global concern are common to all states. However, this does not lessen the sense that those states for which these failures *do* lead to such wrongdoing are properly condemned for it – a judgment rooted in an organisational analogue to moral luck.¹²⁹

In sum, the vulnerability of the potential victim, the degree of preventive power available to the state, the importance of prevention in the context of irreparable harm, and the lack of overwhelming global human values militating in the opposite direction – underpin the state's strict *ex post* responsibility for the *ultra vires* wrongs of its organs. At the heart of that judgment is the assessment that preventing such wrongs is central to the sovereign legitimacy of the state and that this responsibility is especially pointed for those most tightly under its control.

¹²⁶ Vigilance is, in that sense, connected deeply to balancing in human rights adjudication. *Ilaşcu*, n. 13, para. 332.

¹²⁷ *Ilaşcu*, n. 13, para. 319 (the state 'cannot shelter behind' the *ultra vires* nature of the act); *Al-Skeini*, n. 75, Separate Opinion of Judge Bonello, para. 16. The language of responsibility here is the language of blame. L. Comiteau, 'Court Says the Dutch are to Blame for Srebrenica Deaths', *Time*, 6 July 2011.

¹²⁸ Vindication of this often comes in a retrospective inquiry into the institutional context of *ultra vires* wrongs. For example: Public Works and Government Services of Canada, *Dishonoured Legacy* (1997); Netherlands Institute for War Documentation, *Srebrenica: A 'Safe Area'* (2002).

¹²⁹ T. Nagel, 'Moral Luck', in *Mortal Questions* (Cambridge: CUP, 1979), at 24-38; B. Williams, 'Moral Luck', in *Moral Luck* (Cambridge: CUP, 1981), at 20-39.

6. Attribution and lawful joint public enterprises

The reciprocity between claimed or asserted public power and preventive responsibility is no less important a foundational normative principle in the context of JPE wrongdoing than it is with respect to the unilateral contexts described above. And the considerations that affect how that principle is operationalised in unilateral contexts should also inform its legal operationalisation in the context of merged multilateral ventures. This leads to analysing JPE wrongdoing on two levels. The primary line of responsibility for such wrongs – elaborated in this section – should be one of strict attribution to at least one of the enterprise participants. Secondarily, as discussed in section 7, additional participants should be responsible for maintaining preventive vigilance.

The case for attributing JPE wrongs to at least one participant state or international organisations rests on the same factors underpinning strict attribution in the unilateral context: the strength of potential preventive control, the robust imperative that it be maintained and exercised, the fact that JPEs wield public authority, and the reduced danger (relative to private wrongdoing) of overzealous enforcement. In determining the object of that attribution, the guiding principle, as identified in sections 4-5, must be the reciprocity between claimed or asserted public power and the responsibility to use it to prevent wrongdoing. In the context of a JPE, that means focusing on the distribution of levers of control relevant to prevention – a distribution that varies with enterprise structure and with the nature of the wrongful conduct.

The exercise of public authority over human persons and the imperative that this power is not to be exercised abusively is no less significant for JPEs than it is for states acting unilaterally. Such enterprises, by definition, exercise public authority, and their constituent members wield public power with respect to those with whom they interact. When they engage in wrongdoing of global concern, they often do so as the putative protectors of the very principles that they violate.¹³⁰ As such, like state actors, JPEs undermine their own existential foundation when they violate core global human values.¹³¹ And, as in the unilateral context, the zealous exercise of the levers of control by which JPE wrongdoing might be prevented – levers like training, discipline, personnel selection, leadership, and so on – do not carry the inherent threat to global human values that is

¹³⁰ For example, Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability,' n. 3, at 119-20.

¹³¹ Ibid.

posed by the zealous exercise of state power to prevent private actors from engaging in similar wrongs.

Ultimately, then, just as it is important that the public acts or omissions of a state organ be attributed to that state even when the individual perpetrators act *ultra vires*, so it is for the same reasons important that official JPE conduct be attributed to one or more of the participating states and international organisations. In a sense, this conclusion is uncontroversial; as canvassed in section 3, the need to attribute enterprise acts to at least one participant is widely accepted. The debate is over what this entails.

Recognising the foundational importance of the reciprocity between public power and preventive responsibility illuminates that choice. Attributing JPE wrongdoing based on the reciprocity principle would align JPE legal responsibility with the deeper normative sense of institutional responsibility manifest in adjacent legal contexts. It would affirm and entrench the contemporary reframing of public power as a trigger for international responsibility, rather than a shield against international interference.

This matters because legal responsibility for inflicting *wrongs* of global public concern carries with it condemnation. Fairness to the legally responsible state demands that attribution with such wrongdoing reflect some basic principle of organisational moral responsibility. Fairness to those wronged demands the same, particularly in light of the fact that a core aspect of reparation for such wrongs is the ‘satisfaction’ of an official judgment holding the responsible party to account.¹³² From both perspectives, *ex post* legal responsibility ought to reflect a plausible account of deeper moral responsibility. Founding attribution on the reciprocity principle does that in a way that preserves normative consistency across adjacent domains of international legal responsibility.

An additional perspective from which any attribution regime should be evaluated is consequentialist. As a matter of global public order, and to the extent that legal responsibility creates incentives for state and international organisations action, those incentives ought to be balanced so as to deter JPE wrongs without undermining international cooperation.

¹³² For example, *Bosnian Genocide*, n. 16, paras. 460-462. On its value to human rights claimants, see T. Dannenbaum, ‘The International Criminal Court, Article 79, and Transitional Justice’ (2010) 28 WILJ 234, at 281-286; Comiteau, ‘Court Says the Dutch are to Blame for Srebrenica Deaths’, n. 127.

In each of these respects, the preventive control standard introduced in section 3 is superior to its four alternatives. Stated most succinctly, this rule attributes JPE wrongs to any participant state(s) or international organisation(s) holding a sufficient concentration of the lawful levers of control relevant to preventing the type of wrongful conduct in question. The recent use of something like this test in the Dutch courts is an important step forward, but it lacks specificity, and leaves the contours of the standard largely undefined.¹³³ The framework below elaborates a more comprehensive vision.

The analysis starts with a typology of enterprise conduct. That classification is necessarily enterprise-specific, but it typically includes: (i) conduct pursuant to commands or directions that generate a duty to obey (as is typical); (ii) conduct pursuant to commands or directions that generate a duty to disobey (such as manifestly criminal orders); (iii) conduct pursuant to authorisations creating a sphere of discretion that includes the wrongful conduct; (iv) conduct *ultra vires*; and (v) conduct caused by resource constraints or intra-enterprise excuse.¹³⁴ The attribution analysis builds on this classification in four steps.

Step 1: In the case of conduct undertaken pursuant to a command, direction, or authorisation [conduct (i-iii)], the analysis would identify whether the initial mandate to perform the wrong originated outside of the enterprise [step 1] or within the enterprise [step 2]. If the former, the wrongful conduct would be attributed to the state or international organisation whose organ proclaimed the initial requirement or permission.

Additional lines of attribution could then be layered on top of this baseline. First, if the command or direction were such as to trigger a duty to disobey [conduct (ii)], then the state(s) or international organisation(s) holding preventive control over the obedient executors of the order or directive would also be attributed with the conduct [see step 3]. Similarly, if the conduct were within the scope of the natural perpetrators' organisational discretion [conduct (iii)], the state(s) or international organisation(s) with preventive control over those natural persons would also be attributed with the conduct [see step 3]. However, conduct occurring pursuant to a command or direction *not* generating a duty to disobey [conduct (i)], would not be attributed to any actors

¹³³ Dannenbaum, 'Killings at Srebrenica, Effective Control, and the Power to Prevent Unlawful Conduct', n. 3, at 719-27; *Nuhanović* Supreme Court, n. 42, paras. 3.11.3, 3.12.2, 3.12.3.

¹³⁴ Applying this to peacekeeping, see Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability', n. 3, at 158-83.

other than the state(s) or international organisation(s) from which the mandate originated.

Step 2: Suppose, however, that the order requiring or authorising the wrongful conduct originated *within* the enterprise. This would raise two alternative possibilities: either the intra-enterprise actor who originated the wrongful order acted within her mandate, or she acted *ultra vires*. If she acted within her mandate in issuing the wrongful command, direction or authorisation, then the analysis would proceed precisely as in step 1 to identify the originator of that permissive mandate, with the same consequences for attribution. If, on the other hand, she acted *ultra vires*, then the analysis would proceed as stipulated in step 3.

Step 3: A preventive control analysis would be applied to all official conduct *ultra vires* and to the scenarios identified in the paragraphs immediately above. As in unilateral action, this would involve a strict responsibility analysis, not a vigilance test. Rather than examining the reasonableness of the efforts taken to prevent the wrongful conduct, it would require an assessment of the *de jure* and *de facto* distributions of the levers of control relevant to preventing that type of wrong. Those state(s) or international organisation(s) with a concentration of such levers would be attributed with responsibility, regardless of how they actually exercised their control. The levers of control relevant to this analysis would vary depending on the enterprise and the impugned conduct.¹³⁵ In many scenarios they would include: disciplinary authority; authority over personnel selection; authority to structure enterprise subunits; authority over training; authority to dismiss individuals from the enterprise; authority to select enterprise leaders; responsibility for enterprise legal advice; and criminal jurisdiction.¹³⁶

The rule of step 3 is that all states or international organisations holding a concentration of these levers of preventive control over one or more enterprise members involved in the wrongful conduct (except those acting pursuant to orders that did not trigger a duty to disobey [conduct (i)]) would be attributed with the conduct. The rare scenario in which none of the participant states or international organisations holds a sufficient concentration of preventive levers is

¹³⁵ Wrongs in Tilburg Prison, Mediterranean Frontex patrols, United Nation Mission in the Democratic Republic of the Congo peacekeeping, and International Security Assistance Force operations demand different preventive mechanisms, as do criminal and non-criminal wrongs.

¹³⁶ Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability', n. 3, at 160-64; Basic Principles on the Right to a Remedy, n. 70, para. 23. In aggregate, the Hague Court of Appeal and the ILC have recognised most of these as relevant to attribution. *Nuhanović* Court of Appeal, n. 42, para. 5.10; ARIO, n. 4, at 87-88. See also *Nuhanović* Supreme Court, n. 42, paras. 3.10.2, 3.11.3.

discussed in section 7, below.

Step 4: The final step applies a special rule to wrongdoing caused by ‘intra-enterprise excuse’. In this scenario, a subunit or individual member of the JPE is forced to engage in the wrongful conduct by necessity, duress, or an equivalent excuse, the conditions of which were caused by another JPE participant. Responsibility in this scenario would take one of two forms, depending on the legal status of the excuse-creating act. When that act is unlawful, responsibility for the excused act would be determined by applying steps 1-3 to the excuse-creating actor. However, when the excuse-creating act is lawful, responsibility reverts instead to the state or international organisation with overall operational control of the enterprise, because such wrongs are best prevented through operational coordination.

This four-step framework provides for shared attribution in a range of scenarios.¹³⁷ On the private dimension of responsibility, this raises the question of liability apportionment – a vexed issue given the obstacles to enforcing international contribution and indemnity. However, public responsibility need not be apportioned at all; attribution to one entity does not dilute simultaneous attribution to another. Thus, although the method for sharing liability is important (and almost certainly requires a scheme of joint and several liability), the specifics of such a scheme are beyond the scope of this Chapter.

Ultimately, the virtues of the proposed framework are twofold. First, it reflects the normative reciprocity described above; when a state or international organisation holds a sufficient concentration of levers of preventive control over those involved in a JPE, its strict responsibility is to ensure that they do not participate in wrongdoing of global concern. Second, by holding responsible only the entities best placed to prevent the wrongdoing, the proposed framework calibrates incentives so as to recognise not just the importance of deterrence, but also the global value of international collaboration.¹³⁸

It is worth pausing to reflect on the importance of international cooperation because it in fact informs both of these virtues. An advocate of broader attribution might respond to the discussion

¹³⁷ On shared ‘effective control’, see *Al-Jedda*, n. 28, para. 80; *Nuhanović* Court of Appeal, n. 42, para. 5.9; *Nuhanović* Supreme Court, n. 42, para. 3.11.2; ARIO, n. 4, at 83.

¹³⁸ In the absence of significant financial reparations, deterrence may occur through condemnation, other reparations, or outcasting. On the latter: O.A. Hathaway and S. Shapiro, ‘Outcasting’ (2011) 121 YLJ 252.

above by observing that the distribution of levers of preventive control in a JPE is itself the result of a collective choice by all participants. States contributing peacekeepers cede operational control to the UN; New Zealand and Britain ceded administrative control over Nauru to Australia; contributors to a Frontex mission cede control to Frontex and the host state; and the UN and contributing states often cede operational control of a Chapter VII authorised military force to a lead state or international organisation.

The objection has force. After all, when states cede control over public functions to private actors, they do not escape responsibility for wrongdoing by those actors.¹³⁹ Relinquishing their preventive authority in that way is just another way of failing to take adequate preventive measures. The fact that the failure occurs earlier in the process is immaterial. Analogous reasoning in the JPE context has underpinned arguments in favour of attributing the UN with all acts of UN-authorized military forces, even when the UN cedes operational control to one of the participant states or international organisations.¹⁴⁰ Framed in this way, authorial control is depicted as an element of preventive control. Indeed, one might take the point further and argue that even non-authorial, contributing states have a preventive power in that they voluntarily cede control over their organs or agents when they second them to an enterprise over which they do not have complete control. Here, too, the contributing state could have made its contribution conditional on retaining total control over its personnel.

Insightful though this objection is, four reasons militate in favour of an attribution framework that reflects only the *actual* distribution of the levers of control in the JPE as negotiated, not authorial or contributory status (and the implicit power to have designed a different structure).

First, a state's delegation of public functions to a private actor is not analogous to a state or international organisation ceding control to a JPE. Delegation to a private actor without preventive checks involves freeing the function from the preventive control of *any* international legal person. If such abdication were to relieve the state of responsibility, it would eliminate international responsibility for the function entirely. Relinquishing preventive control to another state or international organisation does not extinguish international responsibility; it merely changes the international legal person responsible. Second, as long as the participant(s) with

¹³⁹ ARSIWA Commentary, n. 2, at 42-3.

¹⁴⁰ Sarooshi, *The United Nations and the Development of Collective Security*, n. 31, at 164.

preventive control are attributed with the wrong, the framework fulfills the reciprocity principle and creates incentives for wrong prevention. Third, and crucially, ceding control is essential to rich and effective international collaboration, which is, in turn, vital to realising the promise of international law. Conversely, encouraging each venture participant to retain all levers of control and to interfere preventively in JPE functioning would undermine the advancement of global values. Fourth, the application of preventive due diligence can address the core danger of responsibility evasion *without* thereby undermining international cooperation.

The final two points warrant greater elaboration – the third here, the fourth in section 7. The vital role of thick international cooperation in realising international law’s core objectives is manifest in a broad range of cooperative ventures, including many JPES.¹⁴¹ Indeed, the enforcement of international law is itself *dependent* on effective international collaboration.¹⁴² And yet, the very reason that cooperation is so vital – the absence of a global sovereign – is also one of the key reasons it is so difficult to achieve and sustain. International collaboration requires states ordinarily subject to little superior coercion to cede control to other states and international organisations in contexts in which they often have significant interests. This can be achieved only through careful negotiation and compromise – a process over which no participant has unilateral control.

It is a mistake to assume that because the United Nations, for example, holds authorial control over a multilateral military force, that it therefore has the power to determine the distribution of levers of control. Its options are determined through negotiation, and they are most likely to be limited to first, an operation in which it cedes control and second, no operation at all. For the same reason, many states will rarely have the realistic option of retaining greater control over their contributions to a JPE. The options facing a state considering sending a contingent of border guards on a Frontex mission may be to withhold the contingent altogether, or to accept that it must cede some levers of control to Frontex and the host state.

It would be unfair and counterproductive to human values to attribute conduct to a state or international organisation whose only modes of preventive action would have been to refuse to participate in a lawful collaboration under the agreed terms, to violate those terms, or to withdraw

¹⁴¹ See Introduction and section 2.

¹⁴² Hathaway and Shapiro, ‘Outcasting’, n. 138.

from the venture altogether.¹⁴³ Moreover, even when a given state or organisation *could* negotiate the retention of total control over its contributions to a lawful JPE, it would rarely be desirable that it do so. Quite the contrary, the unification of decision-making and control in collaborative ventures augments their efficacy and coherence.¹⁴⁴ Some of the gravest cases of JPE wrongdoing have occurred in ventures in which control was insufficiently unified and integrated.¹⁴⁵

Given the value of international cooperation and the challenge of achieving it, as long as control is held by at least one participant with international legal personality, as long as legal obligations are not circumvented, and as long as the right to reparation is not nullified, a preventive control analysis ought to reflect the *actual* distribution of control agreed by participants, not a hypothesis about what authorial or other entities *might or might not* have relinquished in an alternative enterprise structure. Deference to the compromise that was reached is an important virtue.

Preventive control has important advantages over the alternative attribution frameworks for JPE wrongdoing. By incorporating the reciprocity principle, it aligns legal JPE responsibility with the deeper moral underpinnings of legal responsibility in adjacent domains. By tying responsibility to prevention, it provides the best framework for deterrence. And by applying sharing attribution only when the nature of the conduct and the distribution of powers are such that multiple actors directed the action or held significant levers of preventive control, it honors the imperative of international collaboration.

7. Addressing the limits of the preventive control framework

Despite these virtues, three potential objections to the proposed attribution framework warrant attention. First, it may be vulnerable to manipulation by powerful states. Second, its conduct-sensitivity places a significant epistemic and evidentiary burden on claimants and adjudicators. Third, rare JPE wrongdoing may occur over which no entity holds a concentration of the levers of preventive control.

¹⁴³ See Dannenbaum, ‘Translating the Standard of Effective Control into a System of Effective Accountability’, n. 3, at 189-90; Dannenbaum, ‘Finding Balance in the Attribution of Liability’, n. 3, at 107-11.

¹⁴⁴ ICISS Report, n. 6, para. 7.20.

¹⁴⁵ *Ibid.*; Dannenbaum, ‘Translating the Standard of Effective Control into a System of Effective Accountability’, n. 3, at 161; Dannenbaum, ‘Finding Balance in the Attribution of Liability’, n. 3, at 115-6.

The first worry is that powerful states would design enterprise structures so as to ensure sufficient influence to achieve their objectives, while avoiding the costs of responsibility for collateral wrongdoing. This threat is particularly pernicious in contexts in which the participant to which key levers of control are ceded is immune from legal action, is likely to be unmoved by international responsibility, is too weak to exercise that control effectively, is insolvent, or is unbound by the relevant legal regime.

This danger is genuine, but it does not weigh against the preventive control model. On the contrary, with the sole exception of blanket multiple attribution (which itself poses a severe threat to international cooperation), the alternative attribution regimes discussed in section 3 are all significantly *more* vulnerable to manipulation of this kind. A preventive control test involves conduct-specific, factual analysis, and ignores the formal ceding of authority unless it reflects a genuine transfer of factual control. In contrast, the operational and especially authorial control tests enable powerful states to cede *de jure* authority and thereby wash their hands of responsibility, despite retaining robust factual influence over enterprise conduct. States are traditionally more reluctant to relinquish many of the levers of preventive control described above than they are willing to cede formal authority. And when they *do* relinquish those factual elements of control, they lose considerable influence over enterprise activity. In short, although manipulation cannot be eliminated, the proposed regime is structured to guard against it while continuing to encourage international cooperation.

Moreover, the attribution regime would not operate in isolation. As in the case of unilateral action, it would work alongside preventive vigilance requirements. Under that two-level analysis, JPE participants not attributed with the conduct would be assessed for whether they exercised vigilance in ensuring the lawful conduct of the enterprise, or whether they should have engaged in reasonable preventive measures, such as applying diplomatic pressure on their co-participants or assisting under-resourced states with training or other support.¹⁴⁶ In addition to combating manipulation, this would recognise the escalating responsibility of all participant states and international organisations to act preventively as wrongdoing becomes increasingly endemic to an enterprise. Unlike blanket joint attribution, however, it would avoid undermining desirable collaboration.

¹⁴⁶ Cf. *Ilaşcu*, n. 13, paras. 333, 336-52.

Supplementary vigilance analysis of this sort could be particularly useful in the context of UN peacekeeping. Although more likely to attribute wrongful peacekeeper conduct to troop-contributing states than most other attribution regimes, the preventive control framework does attribute wrongful conduct exclusively to the UN in some contexts.¹⁴⁷ Given UN immunity, and the woeful inadequacy of the internal claims system, an accountability gap remains in those scenarios.¹⁴⁸ However, under a supplementary vigilance standard, states might be held responsible for failing to pressure the organisation to institute a robust and transparent claims review system.¹⁴⁹

Preventive vigilance could also provide the basis for the responsibility of states and organisations that contribute to JPEs through means other than personnel. Depending on the likelihood of misuse, the provision of resources, objects, or even territory may generate obligations on contributing states to seek assurances and impose conditions on the use of their contributions, or to withhold those contributions if it becomes apparent they are being misused.¹⁵⁰

A second danger of the preventive control framework is epistemic. Authorial control, operational control, and blanket multiple attribution all provide victims with clarity as to the party liable for JPE wrongdoing. Simply knowing that the JPE perpetrated the violation is enough to know which entity to sue. Conduct-specific tests lack that clarity. The preventive control test, in particular, requires an case-by-case assessment of the *de facto* and *de jure* distributions of the levers of control with respect to each wrong (not to mention the complication of intra-enterprise excuse).

This is a genuine procedural disadvantage of the system. However, precisely because that disadvantage is procedural, it is best remedied with a procedural, rather than a substantive, response – namely, adopting a victim friendly evidentiary presumption on attribution. Given that state and international organisation participants in a JPE have greater knowledge of the

¹⁴⁷ See Dannenbaum, ‘Translating the Standard of Effective Control into a System of Effective Accountability’, n. 3, at 165-83.

¹⁴⁸ *Ibid.*, at 121-29.

¹⁴⁹ The UN’s Model Status of Forces Agreement provides for such a mechanism, but none has ever been instituted. Secretary-General, Draft Model Status of Forces Agreement for Peace-Keeping Operations, UN Doc. A/45/594 (1990), Article 51.

¹⁵⁰ By way of analogy see sources and discussion at n. 71, above, on *non-refoulement*. Peacekeeping operations are often funded and equipped by states that do not send troops. *Troop and Police Contributors* at www.un.org/en/peacekeeping/resources/statistics/contributors.shtml; *Financing Peacekeeping* at www.un.org/en/peacekeeping/operations/financing.shtml (last accessed 5 June 2014). On territory, consider the Tilburg prison, n. 9.

distribution and use of the relevant levers of preventive control in specific operations than does any claimant or court, once a JPE wrong is proven, it would be just to shift to the defendant state or international organisation the burden of establishing that it did not hold the relevant levers of control over the impugned conduct.¹⁵¹

The final danger of the framework is that of non-attribution in the case that no state or international organisation holds a concentration of the relevant levers of preventive control over certain enterprise wrongs – whether due to private contracting or an unusually fragmented enterprise structure. Despite the general advantages of basing attribution on the actual power distribution that is negotiated and applied by enterprise participants, it would be a mistake to leave such conduct unattributed.¹⁵²

As noted above, the fact that the preventive control ‘relinquished’ by participants in JPEs is ordinarily taken up by others with international personality is one of the key reasons it makes sense to focus on the actual negotiated structure of preventive control. When that context does not apply, the case for reverting to an authorial control test strengthens. Simultaneously, the reasons against authorial control weaken. First, attribution to authorial entities would be the only way of deterring wrongful conduct in that context, and may stimulate the repossession of preventive control by one or more participants. Second, a joint enterprise with a widespread lack of preventive control is less likely the result of a carefully brokered compromise among entities reluctant to cede control, and more likely the result of states or international organisations deliberately insulating themselves from responsibility. Third, the value of lawful international cooperation loses its overriding normative weight when it is attainable only through the creation of entities that exercise public power in a way that is invisible to international law, out of control, and shielded from responsibility or accountability. Ultimately, then, when a JPE is structured to eliminate the levers of preventive control, authorial states and international organisations must be attributed with its wrongful conduct.

¹⁵¹ Several international authorities have applied or advocated evidentiary burden shifting in the interests of justice. *Corfu Channel*, n. 13, at 18; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, ICJ Reports 2003, 161, Separate Opinion of Judge Simma, para. 68; *Velásquez-Rodríguez*, n. 69, paras. 135-36; ARSIWA Commentary, n. 2, at 72.

¹⁵² *Ibid.*, at 42-3; ARIQ, n. 4, at 88, 95.

8. Conclusion

The reciprocity between claimed or asserted public power and preventive responsibility has grown in importance as a moral foundation of legal responsibility in contemporary international law. Its standing in a world of plural values emphasises its merit and viability as the normative basis from which to develop a regime of responsibility for the wrongs of joint public enterprises. With a few caveats outlined in section 7, enterprise wrongs ought to be attributed to the participant states or organisations that hold the levers of control most relevant to preventing the type of wrongdoing in question. This regime builds on the reciprocity between public power and preventive responsibility while affirming the importance of thick international collaboration in advancing international law.