

**ATTRIBUTION OF STATE RESPONSIBILITY FOR ACTIONS
OR OMISSIONS OF STATE-OWNED ENTERPRISES IN
HUMAN RIGHTS MATTERS**

JUDITH SCHÖNSTEINER*

ABSTRACT

State-owned enterprises (SOEs) carry out important activities in many countries, often generating considerable negative impact regarding the enjoyment of human rights. This paper addresses issues of attribution of responsibility in international customary law and international human rights law, considering that international remedies are one of the possible venues for access to justice in case national redress fails. The question is whether responsibility only arises when the State does not comply with its duty of SOEs' human rights impact, or whether acts and/or omissions by SOEs may also be directly attributable to the State. Finally, the paper looks into a recent proposal that it is necessary to use "piercing the veil" theories in order to complement theories of state responsibility and evaluates its usefulness for international human rights law. The article argues, innovating on this point, that SOEs are the only business entities which have, as of now, direct responsibilities under international law *lege lata*.

* The author is an associate professor of public international law and researcher at the Human Rights Center of the Universidad Diego Portales in Chile. Author contact: Judith.schonsteiner@udp.cl. The author wishes to thank Angel Rodrigo, Markus Krajewski, Anne Peters, Christian Sommer, Franz Ebert, Elif Askin, Sabrina Ragone, René Urueña, and the participants of the Human Rights Discussion Group at the Max Planck Institute for Comparative Public Law and Public International Law, for comments on earlier drafts. Errors and opinions are of course my own. This research was undertaken thanks to funding from Fondecyt N° 11150853, from the Chilean Research and Science Council, Conicyt, a body of the Ministry of Education. Project duration: 2015-2018. Principal Researcher: Judith Schönsteiner. Project title: "Responsabilidad internacional del Estado por acciones y omisiones de empresas estatales en materia de derechos humanos."

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1. INTRODUCTION: THE PROBLEM

The question of this paper arises due to the problem of access to justice in corporate human rights violations, which is amply documented.¹ For a series of reasons, third party victims—especially, affected communities—cannot sue foreign (and sometimes also national) corporations effectively when these corporations have participated in human rights abuse. The reasons commonly discussed are the impossibility to access the arbitration forum where the investment contracts or treaties are adjudicated;² the lack of recognition or justiciability of certain human rights at the national level, especially, economic, social and cultural rights;³ general problems of access to justice in the national context, like corruption, lack of effectiveness, lack of legal aid, or similar issues;⁴ lack of recognition of extraterritorial jurisdiction in cases when access to justice in the host state fails;⁵ and unavailability of funds or reserves in special purpose vehicles or other host state

¹ See generally Jennifer Zerk, *Corporate liability for gross human rights abuses: towards a fairer and more effective system of domestic law remedies*, Office of the United Nations High Commissioner for Human Rights (OHCHR), (Feb. 2014), www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf [<https://perma.cc/WQ36-LU9Z>] (investigating the effectiveness of domestic judicial responses to gross human rights abuses by corporations); OHCHR, *Improving accountability and access to remedy for victims of business-related human rights abuse*, U.N. Doc. A/HRC/32/19 (May 10, 2016), https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/A_HRC_32_19_AEV.pdf [<https://perma.cc/M3ME-YHQV>] (providing guidance for the problem of business-related human rights abuses).

² See generally GLOBAL PROJECT FINANCE, HUMAN RIGHTS, AND SUSTAINABLE DEVELOPMENT (Sheldon Leader & David Ong eds., 2011) (providing an overview of the barriers to arbitration of investment contracts or treaties in the project finance sector).

³ See generally SOCIAL AND ECONOMIC RIGHTS AND CONSTITUTIONAL LAW (Sandra Fredman & Meghan Campbell, eds., 2016) (noting that the adjudication of conflicts over socio-economic human rights requires innovative solutions to overcome the obstacles of justiciability at the national level).

⁴ See *La Oroya v. Peru*, Admissibility Decision, Inter-Am. Co. H.R. P-1473-06 at ¶68 (2009) (highlighting the ineffectiveness of domestic judicial remedies when confronting abuses by a state owned metallurgical complex which contaminated La Oroya, Peru by noting the unavailability of evidence of compliance by the complex in regards to a grave and urgent judgement against it 3 years earlier).

⁵ See generally MIRKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES 118–259 (2011) (examining the difficulties involved in holding a state accountable for its obligations under a human rights treaty towards an individual located outside its jurisdiction).

incorporations, which make payment of compensation illusory.⁶ In international law, no direct human rights obligations of corporations have been recognized as of yet; the soft law standards that do exist cannot be enforced.⁷ This replicates, to a large extent, the problems of access to justice that exist in domestic law, unless the State can be made responsible – usually indirectly – for business behavior.

Typical human rights violations will depend on the sector in which the SOE works. SOEs are usually to be found in the extractive and energy sectors; in the services sector, especially banking and passenger transportation; and in telecommunications.⁸ As has been documented in case studies, violations in these sectors include, violations of indigenous land rights,⁹ including eviction or resettlement without free, prior, and informed consent; violations of the right to health, the right to water; or the right to live in a healthy environment in relation to emissions, spills, rupture of tailing dams,¹⁰ or similar environmental damage due to contamination;

⁶ See Leader & Ong, *supra* note 2, at 3–12, 107–142.

⁷ See generally Special Representative of the Secretary General, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) endorsed by A/HRC/Res/17/4 (June 16, 2011) (proposing a set of principles to be followed by transnational corporations and other business enterprises); Tara Melish & Errol Meidinger, *Protect, Respect, Remedy and Participate: ‘New Governance’ Lessons for the Ruggie Framework*, in *THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: FOUNDATIONS AND IMPLEMENTATION* 303, 304 (Radu Mares ed., 2012) (critically appraising the “Protect, Respect, Remedy” framework created by John Gerard Ruggie). For more on direct accountability, see generally JERZEJ LETNAR & TARA VAN HO, *HUMAN RIGHTS AND BUSINESS: DIRECT CORPORATE ACCOUNTABILITY FOR HUMAN RIGHTS* (2015) (examining the direct human rights obligations of international companies); Humberto Cantú, *Derechos Humanos y Empresas: Reflexiones desde América Latina*, Instituto Interamericano de Derechos Humanos (2017), http://perso.unifr.ch/derechopenal/assets/files/obrasportales/op_20170808_02.pdf [<https://perma.cc/BCB3-2KSP>] (discussing the relationship between SOEs and human rights in various Latin American countries).

⁸ See Org. for Econ. Cooperation and Dev. [OECD], *Guidelines on Corporate Governance of State-Owned Enterprises*, at 11 (Nov. 19, 2015) [hereinafter OECD], <https://www.oecdilibrary.org/docserver/9789264244160en.pdf?expires=1550541358&id=id&accname=guest&checksum=5EDC010406031160EE634A13E433E4B3> [<https://perma.cc/GLC2-XBJT>].

⁹ See *Pueblo Indígena Kichwa de Sarayaku v. Ecuador*, Preliminary Exceptions, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) 245, ¶2 (June 27, 2012), https://www.esrnet.org/sites/default/files/Court%20Decision%20_English_.pdf [<https://perma.cc/SFL6-GB3L>] (highlighting threats to indigenous populations by SOEs in the context of resource extraction).

¹⁰ See generally Caio Borges & Tchenna Fernandes Maso, *The Collapse of the River Doce Dam*, 14 SUR (2017), <https://sur.conectas.org/wp->

violations of individual and collective labor rights;¹¹ and violations of the right to life, integrity, freedom of assembly, or freedom of expression in relation to social protest against business projects.¹² Finally, there might be violations of the right to information or the right to participation in the project planning, design, exploration, operation, and closure phases. With regard to community and client relations in the service sector, violations may additionally occur through discrimination, be it due to race, ethnicity, gender, sexual orientation, national origin, religion, participation in a trade union, or socio-economic condition, among other grounds.

In the case of State-owned enterprises (SOEs), there are three additional problems, which in part aggravate the challenges just mentioned. They are also a problem in themselves, with regard to the capacity of a state to avoid responsibility: first, it is not exactly clear *in which cases* a SOE's acts and omissions in matters of human rights can be attributed to the State directly, and in which cases they cannot be attributed. As Georgios Petrochilos puts it, arbitrators "seem to proceed on the basis that if an entity would be an organ in the experience of those needed to decide the issue, then an organ it is,"¹³ which signals, ironically, that jurisprudence is inconsistent. Second, SOEs might in certain contexts claim state immunity and make access to justice in international fora illusory.¹⁴ Third, due

content/uploads/2017/06/sur-25-ingles-caio-borges-tchenna-fernandes-maso.pdf [https://perma.cc/88M6-CDZL] (exploring human rights abuses through the prism of a mining waste dam collapse in Brazil).

¹¹ See *Trabajadores Cesados de Petroperú y otros v. Perú*, Preliminary Exceptions, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 344 (Nov. 23, 2017) (holding that Peru violated labor rights of 165 workers of two ministries and two state-owned enterprises enshrined in article 26 ACHR when dismissing them between 1996 and 1998, as well as their rights to due process and access to justice, recognized in articles 8.1 and 25 ACHR).

¹² See *Pueblo Indígena Kichwa de Sarayaku v. Ecuador*, Preliminary Exceptions, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) 245, ¶2 (June 27, 2012).

¹³ Georgios Petrochilos, *Attribution of Conduct of Non-State Organ Entities: An Introduction*, in *THE ROLE OF THE STATE IN INVESTOR-STATE ARBITRATION* 351, 357 (Shaheez Lalani & Rodrigo Polanco Lazo eds., 2015).

¹⁴ See JULIA PULLEN, *DIE IMMUNITÄT VON STAATSUNTERNEHMEN IM ZIVILRECHTLICHEN ERKENNTNIS- UND VOLLSTRECKUNGSVERFAHREN* 276-280 (2012) (arguing that, if immunity is conceded to state-owned enterprises in civil procedure, based on the modern function-based theory of immunity, then the international law exception to immunity in case of gross human rights violations must also apply). On the internationalization of SOEs, see generally *STATE-OWNED MULTINATIONALS* (Alvaro Cuervo-Cazurra ed., 2018) (discussing the differences between SOEs and state-owned multinational enterprises).

to the fact that many states started high-impact industries like mining, oil and gas, or energy, through the creation of SOEs in times when environmental standards were still low or nonexistent, considerable historic damage was generated by SOEs, with many contaminated sites waiting for clean-up, or workers dealing with serious work-related diseases.¹⁵ Many of these SOEs have since been privatized or liquidated. In these situations, the question of state responsibility is even more pressing. Said more simply, in order to argue a concrete case, it is a condition *sine qua non* to identify the correct hypothesis under which a State is responsible to make a successful case. Otherwise, the result of the judgment would be arbitrary and not based on legal considerations.

The question addressed in this paper is, therefore, under which conditions must acts and omissions of SOEs be attributed to the State and not remain in the private realm. This question has been discussed in public international law but not sufficiently in international human rights law. This justifies going back to the “antique niceties of law (for public bodies)”¹⁶ despite the necessity to (also) analyze SOEs from a perspective of corporate governance.¹⁷ As the latest contribution from a UN body on the topic focused mostly on governance and omitted questions of international public law, this article pretends to complement the debate.

Answering this question will enable us to pose (and answer elsewhere)¹⁸ a second question, i.e., in which situations must a State respond for the human rights violations committed by its SOEs. Here, I will only argue that attribution under international law is possible if the State controls the enterprise, or if the latter exercises governmental or public functions. This does in no case exclude State responsibility that arises from the lack of regulation, oversight, or due diligence by state organs, which violates the horizontal obligations to protect that States have under international human rights treaties, a point which is not controversial. Overall, this paper is the first to argue that SOEs have direct responsibilities in international human rights law, thus converting them into the only

¹⁵ See Borges & Maso, *supra* note 10.

¹⁶ Larry Catá Backer, *The Human Rights Obligations of State-Owned Enterprises (SOEs): Emerging Conceptual Structures and Principles in National and International Law and Policy*, 51 VAND. J. TRANSNAT'L. L. 827, 879 (2017).

¹⁷ *Id.*

¹⁸ Schönsteiner, *Human Rights Obligations of State-Owned Enterprises*, Presentation, Heidelberg (Dec. 1, 2016) and Nürnberg (Feb. 13, 2018).

business entities which under international law *lege lata* have direct responsibilities.

This paper proceeds as follows: after briefly setting out the reasons why it matters whether state responsibility arises directly or indirectly (section 1), different sources are analyzed in order to determine and systematize criteria for direct¹⁹ attribution of state responsibility (section 2), drawing especially from the ILC Draft Articles on State Responsibility for Internationally Wrongful Acts of 2001, and taking into account the OECD Guidelines on Governance of SOEs, the rules of state immunity, arbitral jurisprudence and specifically, the jurisprudence of, respectively, the European Court of Human Rights (ECtHR), of the Inter-American Commission and the Inter-American Court of Human Rights (section 3). In the fourth and last section, the proposal of an alternative or complementary argument on piercing the corporate veil between a SOE and the State is discussed. Starting from Petrochilos' observation that "one way to see this case is as one where the corporate veil, which would normally clothe the [state-owned] company and insulate it from the State, [is] lifted on account of pervasive influence of the State on its actions."²⁰ The argument of piercing the corporate veil allegedly fills the voids of responsibility that are said to be left out in the law of international state responsibility (section 4).²¹ The article will show that this hypothesis does not hold true for, at least, international human rights law. Finally, the article concludes with a list of criteria which allows the determination in human rights cases of whether there is direct state responsibility for actions and omissions of SOEs.

¹⁹ Defined as direct responsibility due to the SOEs acts or omissions, or as indirect responsibility due to the omissions of regulatory or oversight organs, respectively; the term is not widely used, but appears in some recent discussions on international responsibilities regarding non-state actors. *See generally* Elizabeth Nielsen, *State Responsibility for Terrorist Groups*, 17 U.C. DAVIS J. INT'L. LAW & POLICY 151 (2010) (examining the range of possible standards of state responsibility for actions of SOEs in the context of counterterrorism measures); Michael Feit, *Responsibility of the State under International Law for the Breach of Contract Committed by a State-Owned Entity*, 28 BERKELEY J. INT'L. L. 142 (2010) (discussing how governments can be held directly responsible when SOEs breach contracts with foreign investors); Antenor Hallo de Wolf, *Reconciling Privatization with Human Rights*, SCHOOL OF HUMAN RIGHTS RESEARCH SERIES 49, INTERSENTIA (2012) (studying the effects of privatizing state functions and services on human rights).

²⁰ *See* Petrochilos, *supra* note 13, at 357.

²¹ *See generally* ALBERT BADIA, *PIERCING THE VEIL OF STATE ENTERPRISES IN INTERNATIONAL ARBITRATION* (2014) (discussing corporate veil-piercing in the context of international law, particularly investment arbitration cases).

2. WHY DOES THE MANNER OF ATTRIBUTION MATTER?

One might think that in the end, it should not matter whether state responsibility derives from a failure of the State to respect (through a SOE) or a failure of an oversight organ to protect human rights against violations from this “private-like” actor. The State will be responsible anyway in both cases. It seems that the European Court of Human Rights, and from a different angle, the Inter-American Court of Human Rights (see sections 3.1 and 3.2) have worked with these or similar presumptions.

But it is not as easy as that, because the distinction between direct and indirect obligations, is associated with different *degrees* of the duty of care regarding the control by state officials versus non-state actors: the threshold of preventative duties is more onerous for state organs themselves than it is for organs tasked with the oversight of private actors, where usually the (lower) standard of due diligence, rather than obligations of result, applies. This is due to reduced assumptions of knowledge of what happens in the private economic sphere and lower standards of control than for state organs.²² Additionally, literature is clear on the fact that due diligence does not apply regarding the State’s duty to refrain from certain acts where obligations of result prevail.²³ If, based on customary international law criteria, we were able to conclude that the SOE were a state organ or acted on behalf of the State, certainly these more onerous obligations would apply to them; and if, to the contrary, they were considered private actors, such obligations would not be due under international law. Only indirectly, by

²² For a discussion on the duties of prevention, see generally Pasquale De Sena, *Responsabilité Internationale et Prévention des Violations des Droits de l’homme*, in Emmanuel Décaux, *LA PREVENTION DES VIOLATIONS DES DROITS DE L’HOMME* (2013); Sébastien Touzé & Emmanuel Décaux, *La Notion de Prévention en Droit International des Droits de l’homme*, in Emmanuel Décaux, *LA PREVENTION DES VIOLATIONS DES DROITS DE L’HOMME* (2013). Dimitri Xenos, *POSITIVE OBLIGATIONS UNDER EUROPEAN CONVENTION ON HUMAN RIGHTS* (Routledge eds., 2012); Franz Ebert, & Romina Sijnienski, *Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems: From the Osman Test to a Coherent Doctrine on Risk Prevention?*, 15 *HUM. RTS. L. REV.* 343 (2015) (arguing that international courts ought to clarify and further develop the *Osman* test, which determines whether a state has the duty to prevent violations of the right to life by non-state actors).

²³ See generally Maja Sersic, *Due Diligence: Fault-Based Responsibility or Autonomous Standard?*, in *CONTEMPORARY DEVELOPMENTS IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF BUDISLAV VUKAS 153* (Rudiger Wolfrum eds., 2015) (examining the historical view that fault is not applicable to international obligation).

virtue of the State's duty to protect through its oversight organs, would a reduced responsibility arise.²⁴

It is generally held that the duties to protect and to guarantee human rights only apply to state organs;²⁵ the question arises how these duties would have to be carried out in case the State chose to provide guarantees of economic or social rights through its SOEs, for example, in the area of water and sanitation.²⁶ Finally, there might also be differences between reparation and non-repetition guarantees awarded by tribunals depending on whether obligations are direct or indirect. Researching this question empirically, however, goes beyond the present argument.²⁷

Another problem regarding attribution, discussed in literature as well, arises through the initial design of SOEs. While it is agreed in international law that the setting up of an enterprise by a State does not *ipso facto* generate state responsibility,²⁸ it will be argued here that there are certain structural designs of SOEs that *per se* impede access to justice, as they might simply have the consequence of avoiding State liability. In those cases, it would seem that the

²⁴ See, e.g., IACHR, *Indigenous Peoples, Communities of African Descent, Extractive Industries*, OEA/Ser.L/V/II.doc.47/15 (2015), <http://www.oas.org/en/iachr/reports/pdfs/extractiveindustries2016.pdf> [<https://perma.cc/H5PN-WKR7>] (discussing positive responsibilities of states to ensure respect for human rights within its jurisdiction under the American Convention).

²⁵ See, e.g., Ricardo Pisillo Mazzeschi, *Responsabilité de l'état pour Violation des Obligations Positives Relatives aux Droits de l'homme*, 333 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 175 (2008) (systematizing international and regional human rights jurisprudence regarding State due diligence and positive obligations to protect and guarantee human rights). For a debate, see Jonathan Bonnitcha & Robert McCorquodale, *The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights*, 28 EUR. J. INT'L L. 899, 916 (2017) (arguing that enterprises have duties to protect regarding their supply chains).

²⁶ See Macarena Contreras & Judith Schönsteiner, *Derecho al Agua, Emergencias y Responsabilidades del Estado y de las Empresas Sanitarias*, INFORME ANUAL SOBRE DERECHOS HUMANOS EN CHILE, EDICIONES UDP 99 (2017) (discussing generally the capacity of the Chilean State to guarantee the right to safe drinking water in the face of emergencies, considering that drinking water is provided by private and a state-owned enterprise).

²⁷ See generally Leader & Ong, *supra* note 4 (discussing non-repetition guarantees in human rights jurisprudence).

²⁸ See JONAS DEREJE, STAATSNAHE UNTERNEHMEN. DIE ZURECHNUNGSPROBLEMATIK IM INTERNATIONALEN INVESTITIONSRECHT UND WEITEREN BEREICHEN DES VÖLKERRECHTS 405 (2015) (referring to international jurisprudence on attribution of acts and omissions of state-owned enterprises to the State, which indicates that the creation of a state-owned enterprises by itself does not generate attributability, while the structure defined in its statutes may well do so).

State has to respond under international human rights law for the sovereign act of creating a badly designed SOE, if this design results in human rights violations in the future.

But there are concerns of international relations and international politics too. As a brief revision of the discussion on SOEs in the current international investment schemes shows, in several States with a high state investment volume, like China and the Nordic or Arab States, it is not always uncontroversial whether the activities of these “enterprises in state-vicinity”²⁹ are acting with purely economic purposes or whether they intervene with the objective of policy-making in their own (home-)states or, in cases of foreign investment through SOE, state-owned financial institutions or similar bodies, with the aim of economic diplomacy or influencing economic policies of the host-state.³⁰ According to Poulsen, this might lead to difficulties in determining “who the true complainant [or respondent, the author] actually is”, especially in “low-transparency environments”.³¹ In the context of potential human rights violations committed by SOEs, such complexity and eventual confusion may constitute an impediment to access to justice, while according to international human rights law, no institutional design may have that effect.

More generally, a detailed determination of direct obligations of business- independent from attribution to any State- is pending under international law for all types of business; majority opinion considers that business do not have direct obligations under international law.³² Soft-law standards define some responsibilities- certainly, however, no business responsibility to

²⁹ *Id.*, at 1. My translation of “Staatsnahe Unternehmen.”

³⁰ See generally Yinzhi Miao, *The Interplay of the State and the Firms: Overseas Listing as a Governance Institution for Chinese SOEs, Focus: Corporate Governance from a Comparative Perspective*, 10 FRONTIERS L. CHINA 46 (2015) (discussing Chinese government efforts to use overseas listing as a tool to restructure and discipline SOEs).

³¹ Lauge Poulsen, *States as Foreign Investors: Diplomatic Disputes and Legal Fictions*, 31 ICSID REV. 12, 17 (2016).

³² See generally PETER MUCHLINSKI, *MULTINATIONAL CORPORATIONS AND THE LAW* (2d ed. 2007) (discussing the regulations currently imposed on Multinational Enterprises (“MNEs”)); ANDREW CLAPHAM, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS* (Oxford University Press 2006) (exploring international case law, statutes, and treaties to determine what, if any, obligations to non-state actors have in international forums). But see LETNAR & VAN HO, *supra* note 7.

protect- but generally, those standards remain vague, and are non-binding.³³

Finally, pressing questions of attribution arise around the issue of past damage to the environment, or health, caused by SOEs when domestic (and international) standards were still low or non-existent. It will be argued in section 3 that if such negative impact continues, it must be considered a continuous violation under international law, even though in domestic law, statutes of limitations apply. It will be argued that in such cases the State should be considered directly responsible for the acts and omissions of its SOE.

Given the challenges of access to justice in business and human rights issues generally, and the specific difficulties that might arise when trying to sue SOEs for human rights violations in national courts, there is a pressing argument for defining more clearly the type of attribution of responsibility that arises under international human rights law and the differences between these two types of attribution, both regarding actions and omissions of SOEs. This is the case even though access to international human rights bodies or foreign jurisdictional fora might as well prove illusory, due to their notorious backlog of cases³⁴ and in the Inter-American System, underfunding.³⁵ Partly, problems also arise due to limited jurisdiction, specifically on economic, social and cultural rights.

Overall, the motive behind this paper is to at least discuss and maybe propose a solution to some of the doctrinal or interpretive challenges in this regard. The paper therefore does not pretend to analyze all those issues in depth or derive conclusions on customary international law, but rather, to draw together recent research from different PIL disciplines around a single type of actors, i.e., SOEs, and examine to what extent a State should be held directly

³³ See generally Mares, *supra* note 7; Friedrich, *International Environmental "Soft-law"*, *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, Springer Verlag (2013).

³⁴ Luzius Wildhaber, *Der "Backlog" (Rückstand in der Fallbehandlung) des Europäischen Gerichtshofs für Menschenrechte*, in *COEXISTENCE, COOPERATION AND SOLIDARITY 1825-32* (Holger Hestermeyer et al. eds., 2012) (discussing the backlog of cases in the European Court of Human Rights).

³⁵ See, e.g., Ariel Dulitzky, *Maximizing Justice, Minimizing Delay: Streamlining Procedures of the Inter-American Commission on Human Rights*, University of Texas, 21 (2011), <https://law.utexas.edu/wp-content/uploads/sites/11/2015/04/2012-HRC-IACHR-Maximizing-Justice-Report.pdf> [<https://perma.cc/FU57-FPR2>] (discussing the limited resources of the Inter-American Commission on Human rights, the "Commission suffers a chronic problem of underfunding").

responsible for its SOEs' acts or omissions relating to *human rights* issues.³⁶

2.1. *State responsibility and attribution: borrowing from the ILC and from arbitral decisions*

This section analyzes if and to what extent SOE's acts and omissions in human rights issues can be attributed directly to the State. This will basically depend on whether these acts and omissions can be qualified as governmental acts or not. Recently, literature has summarized applicable criteria found in jurisprudence; the following critical overview will be based on these works and on the analysis of jurisprudence itself. As criteria differ between general international law, OECD standards, the law on state immunity, European human rights law, and Inter-American human rights law, the respective sources will be discussed separately. Despite an increase in recent debate and publications,³⁷ the issue is not yet settled in international legal doctrine.

2.2. *SOEs in the Draft Articles of 2001*

The Draft Articles on International State Responsibility of 2001 only mention SOEs in the commentary to Article 5 when they state that acts and omissions may be attributed if these enterprises "exercise functions of a public character normally exercised by State

³⁶ Sovereign Wealth Funds go beyond the scope of this paper; for an analysis of SWF and human rights, see Angela Cummine, *Ethical Sovereign Investors: Sovereign Wealth Funds and Human Rights*, in MAKING SOVEREIGN FINANCING AND HUMAN RIGHTS WORK 163 (Juan Pablo Bohoslavsky & Jernej Letnar Čerňič, eds., 2014) (discussing the links between government-financed investment and human rights by examining sovereign wealth funds). See generally, Jiangyu Wang, *State Capitalism and Sovereign Wealth Funds: Finding a "Soft" Location in International Economic Law*, in ALTERNATIVE VISIONS OF THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 405 (C.L. Lim ed., 2016) (concluding that soft legislation should develop a separate legal framework for sovereign wealth funds).

³⁷ See Backer, *supra* note 16 (discussing attribution in a more general context of questions around SOEs and human rights).

organs, and the conduct of the entity relates to the exercise of the governmental authority concerned".³⁸

Surprisingly, the commentary to Article 8 does not mention SOEs either, although SOEs could of course engage in *de facto* exercise of public authority. Authors such as Dereje have, very correctly in my eyes, criticized this view.³⁹ The more consistent approach is to treat SOEs as no different from other entities that might exercise governmental authority without being formally authorized to do so.⁴⁰ According to Dereje's thorough study on general international law, arbitral tribunals have developed a more accurate understanding of the Draft Articles; nevertheless, he found inconsistencies when arbitral tribunals apply Articles 5 and 8 of the Draft Articles. Although this criticism is not necessarily shared, it is sufficiently clear that the exercise of governmental functions by SOEs needs to be subsumed under Articles 5 (when explicitly delegated) and 8 (when exercised *de facto*) by SOEs; in those cases, state responsibility accrues for acts *and* omissions of SOEs.

The ILC commentary on Article 8 explicitly excludes that government ownership and the initial establishment of the entity by the State *automatically* ensue state responsibility. This point has been accepted by literature seemingly without further debate. There is no significant debate either about excluding the percentage of ownership from the debate about attribution;⁴¹ no discussion about whether there is an obligation to retain control over a SOE due to (certain levels of) State ownership; nor about whether there is a difference between majority or minority ownership. The sole criterion on whether there is a link between the company and the State is the degree of control the latter exercises over the enterprise. In this context, the ILC Commentary adds that the analysis cannot overlook that "what is regarded as "governmental" under Article 5 depends on the particular society, its history and traditions."⁴²

³⁸ U.N. International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, U.N. Doc. A/56/10, art. 5 ¶ 2 (2001) [hereinafter ILC], http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [<https://perma.cc/T6LM-EP39>].

³⁹ DEREJE, *supra* note 28, at 435.

⁴⁰ See DEREJE, *supra* note 28, at 436.

⁴¹ The statistical distinction of the World Bank on State ownership (10%) is irrelevant, as the criterion turns on the examination of "control"—it is not necessarily the case that a minority shareholder position implies less control.

⁴² ILC, *supra* note 38, at 43. See also Jaemin Lee, *State Responsibility and Government Affiliated Entities in International Economic Law*, 49 J. WORLD TRADE 117,

According to Dereje, in cases of Article 8 attribution, the respective act or omission must be proven to stem from a state order or directive, or be subject to *de facto* control by the State.⁴³ The difference with Article 5 attribution is sometimes blurry, but is mainly an issue of proof, and structural integration of the link between the SOE and the State itself. If a formal and stable link between the SOE and the State cannot be shown, it might still be possible that the lower threshold of Article 8 is met, which only requires some kind of formal instruction or instances of control, not necessarily a detailed instruction on a legal or regulatory basis.⁴⁴

The most relevant question in doctrinal debate generally is, however, just as for the purposes of the present argument, whether and when SOEs could come under Article 4 of the Draft Articles, that is, under a definition of “state organ.” The commentary to Article 4 is silent about the issue of SOE—this means that the Draft Articles do not conceive of any hypotheses under which SOEs could come under the definition of state organs.⁴⁵ If an entity is controlled by the State, maybe even if not completely, but in a sufficiently important manner, does this indicate that it is a state organ? As Lee puts it: “More specifically, problems have arisen when Article 4 analyses attempt to address (i) governmental ownership, (ii) relevant societal or cultural contexts, and/or (iii) the function being carried out by the entity in question.”⁴⁶ Li for his part insists, likewise, in considering different local specificities of SOEs, showing that Chinese SOEs function quite differently from their Western counterparts.⁴⁷ The Commentary on Draft Article 5 accounts of such

138 (2015) (emphasizing the importance of cultural context in the determination of what is “governmental”).

⁴³ See DEREJE, *supra* note 28, at 435–36.

⁴⁴ See DEREJE, *supra* note 28, at 421–424; see also ILC, *supra* note 38, commentary to art. 8.

⁴⁵ See Lee, *supra* note 42 (arguing that international courts have discarded the approach of the ILC in defining “state organs”); State Immunity and State-Owned Enterprises, CLIFFORD CHANCE (2008), <https://business-humanrights.org/sites/default/files/media/bhr/files/Clifford-Chance-State-immunity-state-owned-enterprises-Dec-2008.PDF> [<https://perma.cc/6NZZ-LBT3>] (noting that the commentary to article 5 states that entities who “may be empowered by the law of a State to exercise elements of governmental authority” may not be state organs). *But see* DEREJE, *supra* note 28, at 401.

⁴⁶ Lee, *supra* note 42, at 127.

⁴⁷ See Ji Li, *State-Owned Enterprises in the Current Regime of Investor-State Arbitration*, in *THE ROLE OF THE STATE IN INVESTOR STATE ARBITRATION* 380, 403 (Shaheez Lalani & Rodrigo Polanco Lazo eds., 2015) (demonstrating “significant variations among SOEs” in China).

differences, too, when indicating that governmental functions depend on “the particular society, its history and traditions”.⁴⁸ Lee, concluding, suggests resolving the issues by including an explicit definition of “state organ” in newly negotiated treaty texts.⁴⁹ This would also allow to ensure that no specific references to types of conduct or functions are necessary when determining the scope of the term “state organ”, and would permit that those tests are relegated exclusively to examinations under Articles 5 and 8. Dereje argues that the differences between the Draft Articles and ICJ jurisprudence on Article 4 need to be harmonized considering that an entity should be considered a state organ if it does not enjoy sufficient autonomy, independent of whether the entity has a legal personality separate from the State.⁵⁰ He shows that the examination of attribution under Article 4 Draft Articles that the ICJ carries out, is consistent, systematic and suitable to clarify confusion that might arise under the ILC commentary. In Article 4 tests, the question of ownership should not play a role, as both Dereje and Lee argue. Lee explains:

There may be a chain of command and organic relationship among various governmental agencies of all sorts and levels, but (. . .) looking into the governmental ownership in the course of Article 4 state organ discussions, does not fit into the basic structure embodied in the ILC Draft Articles.⁵¹

The question that ensues for Lee is: what about the “chain of command” type argument when there is close control of an SOE by governmental organs?⁵² It seems that this question could be brought under considerations of Article 4, or if not applicable for other reasons, Article 5 of the Draft Articles. As Dereje summarizes, the line between Article 4 and Article 5 attribution is not always that clear.⁵³

⁴⁸ ILC, *supra* note 38, at 43, commentary to art. 5, ¶ 6.

⁴⁹ Lee, *supra* note 42, at 147.

⁵⁰ DEREJE, *supra* note 28, at 401–403.

⁵¹ Lee, *supra* note 42, at 130.

⁵² See Ru Ding, *Public Body or Not: Chinese State-Owned Enterprise*, 48 J. WORLD TRADE 167 (2014) (stating that the debate on the scope of “public body” vs. “state organ” in WTO jurisprudence needs not to be addressed here, as it would seem that the differentiation does not fundamentally change issues in the context of human rights obligations).

⁵³ DEREJE, *supra* note 28, at 415.

Taking these issues together, the following criteria for attribution can be summarized, following Dereje's systematization: attribution requires effective control, which is usually given if structural control is taking place. This criterion is not controversial.⁵⁴ The foundation by the State is not decisive for the later attribution of state responsibility, just as State ownership is not.⁵⁵ Rather, structural elements such as the State's voting rights in the SOE are critical, together with the right to nominate and withdraw leading executives⁵⁶ and the right to give concrete instructions or to exercise veto powers.⁵⁷ Finally, reporting and accountability obligations, just as the public presentation of the SOE, especially by state officials, is an element that must be taken into account when deciding attribution in concrete cases.⁵⁸ It is very relevant to note in the present context that human rights compliance of the obligation to fulfill is always considered a governmental function. This becomes clear when, for example, the Inter-American Court of Human Rights decides in *Ximenes Lopes vs. Brazil* that despite privatization and/or concessioning of the country's mental health system, the State remains responsible for preventing human rights violations in those private institutions.⁵⁹ The Committee on Economic, Social and Cultural Rights has used a similar approach regarding the right to the highest attainable standard of health,⁶⁰ the right to water, and also in relation to equality between men and women.⁶¹ The European Court of Human Rights has, however, been

⁵⁴ DEREJE, *supra* note 28, at 401.

⁵⁵ DEREJE, *supra* note 28, at 405.

⁵⁶ DEREJE, *supra* note 28, at 406.

⁵⁷ DEREJE, *supra* note 28, at 407, 410.

⁵⁸ DEREJE, *supra* note 28, at 411-12.

⁵⁹ See *Ximenes Lopes v. Brazil*, Preliminary Exceptions, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 149 (July 4, 2006), http://www.corteidh.or.cr/docs/casos/articulos/seriec_149_ing.pdf [<https://perma.cc/AM7X-KEPK>] (holding that Brazil had violated the rights to life and humane treatment of a mental health patient).

⁶⁰ See CESCR, *General Comment No. 14: The right to the highest attainable standard of health* (art. 12), ¶. 12(b) and 35, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000), <https://www.refworld.org/pdfid/4538838d0.pdf> [<https://perma.cc/X5LR-3VQ6>] (stressing accessibility as essential elements in the provision of right to health and duties of states to provide equal access).

⁶¹ See CESCR, *General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights* (art. 3 of the International Covenant on Economic, Social, and Cultural Rights), U.N. Doc. E/C.12/2005/4 (Aug. 11, 2005), <https://www.refworld.org/docid/43f3067ae.html> [<https://perma.cc/Q8B4->

more cautious, and as stated in *Hatton vs. United Kingdom*, awards a “wide margin of appreciation”⁶² on how to regulate private services.⁶³

2.3. OECD standards on SOE and the report of the WG on Business and Human Rights

The OECD Guidelines on Corporate Governance of State-Owned Enterprises principally address States; they are not directed to the companies themselves. This is, in the first place, indirect evidence for the close relationship that exists or may exist between SOEs and the State. The Guidelines nevertheless insist, more than any other international document on SOEs, on the separation between the State and the SOE, especially regarding the selection of board members and CEOs. This becomes most apparent in their recommendation of several measures that distance the enterprise from the principal, i.e., the State.⁶⁴ The Guidelines explicitly establish that SOEs should not have to perform “charitable acts or to provide public services that would more appropriately be carried out by the relevant public authorities.”⁶⁵ Contrary to the empirical evidence, which shows that many States have opted to provide public services through SOEs,⁶⁶ the OECD seems to push States towards SOEs that have exclusively utility objectives, not policy objectives. The mere fact, however, that the Guidelines are addressed to the State—both as owner and regulator of SOEs—makes it clear that their actions and omissions cannot be easily separated from the State and its responsibility, even with regard to management, and human rights risk management. This fact should

DSVR] (clarifying state actors’ responsibility to monitor and regulate non-state actors to ensure equal rights to enjoy social, economic and cultural rights).

⁶² See *Hatton and others v. the UK*, Eur. Ct. H.R., Reports 2003-VIII (July 8, 2003), ¶ 100-101, <https://hudoc.echr.coe.int/eng#%22itemid%22:%22001-61188%22> [<https://perma.cc/2VZ2-U5RH>] (discussing whether an increase in night flights to London Heathrow Airport violated the Convention for the Protection of Human Rights and Fundamental Freedoms by increasing noise levels for those living under the approach flight path).

⁶³ On human rights obligations in the process of and after privatization, see generally Hallo de Wolf, *supra* note 19, at 126-198.

⁶⁴ OECD, *supra* note 8, *passim*.

⁶⁵ OECD, *supra* note 8, at 60.

⁶⁶ OECD, *supra* note 8, at 7, 30.

at least be taken into account when discussing attribution, and the political options the OECD suggests are to be taken.

The Guidelines directly reference human rights, when indicating that “SOEs should observe high standards of responsible business conduct, including with regards to the environment, employees, public health and safety, and human rights. The state’s expectations regarding the responsible business conduct of SOEs should be disclosed in a clear and transparent manner.”⁶⁷ The role of boards and management is to ensure that those expectations “are integrated into the corporate governance of SOEs, supported by incentives and subject to appropriate reporting and performance monitoring.”⁶⁸

If the normative ideal of the OECD Guidelines were implemented faithfully by States, it seems that no direct attribution would arise. While Chapter 17 of the Transpacific Partnership maintained the OECD approach, it is more realistic when establishing, in line with the Draft Articles, that when a SOE carries out governmental functions, these actions or omissions can be attributed to the State (Art. 17.3). As several authors indicate, the definition of “governmental authority” or “governmental functions” is still pending.⁶⁹ For Li, SOEs should only be excluded from investor-state arbitration if they “discharge clear and narrowly-defined governmental functions.”⁷⁰ It will be argued in sections 3.1 and 3.2 that regional human rights jurisprudence has a consistent response to this conundrum, at least with regard to SOE related human rights guarantees, and that in those cases, governmental functions are precisely, but not narrowly, defined. Indirectly, the OECD confirms that interpretation, when its 2015 report suggests that public services (corresponding to the fulfillment of human rights) should be kept clearly within state responsibility.

The UN Working Group on Business and Human Rights based its report on SOEs and Guiding Principle 4 on SOEs, on the OECD Guidelines of 2015. The Guiding Principles nor the report mention or discuss issues of attribution. While criticizing the details of the report, Catá Backer coincides that only a governance approach to SOE human rights responsibility can effectively cover the real *modus*

⁶⁷ OECD, *supra* note 8, at 57–61.

⁶⁸ *Id.* at 60.

⁶⁹ See Petrochilos, *supra* note 13, at 353–360; see also Lee, *supra* note 42; DEREJE, *supra* note 28.

⁷⁰ See Li, *supra* note 47, at 404 (following the arbitral tribunal in the case *Československa Obchodní Banka, A.S. (CSOB) v. The Slovak Republic*, ICSID Case No ARB/97/4, Decision on Jurisdiction (May 24, 1999)).

operandi of SOEs.⁷¹ This approach—as well as Catá Backer’s recommendations—departs from the approach UN and regional human rights treaty bodies have taken on SOEs. These bodies consider that States owe the obligation to respect under human rights treaties,⁷² rather than only being encouraged to “lead by example,”⁷³ adopting human rights due diligence policies that are to be above industry standards (rather than in line with the minimum core of international human rights obligations).

Catá Backer, who does not discuss the issue of *attribution* in debt, considers that the Guiding Principles introduce a contradiction regarding the human rights responsibility of SOEs. By defining a special rule for SOEs in Guiding Principle 4, they create a “disjunction” from the business responsibilities of pillar 2.⁷⁴ This reading should be considered overly pessimistic about the consistency of the Guiding Principles. It seems, rather, that, just as companies, SOEs have to respect human rights just as defined in pillar 2, but as *state-owned* companies, they have to do better about this than private companies, and additionally, state responsibility can arise pursuant to their violations. Looking at SOEs from the perspective of international human rights law, however, finds both readings problematic. Neither can a SOEs claim in all situations that it is “only” a company or an “exemplary” company, nor does a careful reading of the Guiding Principles exclude Catá Backer’s claim that SOEs are to be subject to governance related measures on business and human rights—as their internal structure and relation with their supply chains actually are based on a company-logic, not a public-law logic.

⁷¹ Catá Backer, *supra* note 16.

⁷² See, e.g., UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 58, U.N. Doc. E/C.12/GC/23 (Apr. 26, 2016), <https://www.refworld.org/docid/5550a0b14.html> [https://perma.cc/RML7-QFTZ] (“First, State parties have an obligation to respect the right by refraining from interfering directly or indirectly with its enjoyment. This is particularly important when the State is the employer including in State owned or State controlled enterprises.”).

⁷³ See UN Working Group on the issue of human rights and transnational corporations and other business enterprises, *Report on State-owned Enterprises*, U.N. Doc. A/HRC/32/45 (May 4, 2016) [hereinafter UN Working Group], <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/32/45&Lang=E> [https://perma.cc/2QKP-L67T] (illustrating what States are expected to do in their role as owners of enterprises and rationale).

⁷⁴ See Catá Backer, *supra* note 16, at 860–61.

The present research provides arguments on the end contrary to Catá Backer's concern: it looks at the "state-like" elements of SOEs and argues, precisely, for enhanced State accountability in relation to SOE's human rights violations. Not because the SOE is governed or administered as a public organ; rather, because the SOEs private body is closely linked to the State – by control or by function. To use an image, this research looks at making sense of the fact that SOEs continue to be linked to the State through complex but not less evident, umbilical cords.

2.4. *State immunity and State-owned Enterprises*

There is an additional criterion that may be taken into account when establishing whether an entity must be considered a state organ or exercising any kind of governmental function. States tend to claim immunity in foreign or arbitral courts if they consider that a certain activity is sovereign.⁷⁵ To a certain extent this also applies to SOEs.⁷⁶ According to the 2004 Convention, immunity may be claimed when a SOE performs governmental functions; more precisely, when "agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State" (Art. 2.1b.iii).

Various authors have criticized the ambiguous language in the 2004 Convention on the Immunity of States and their Property, which leads to difficulties in determining the concrete status of SOEs under that Convention.⁷⁷ In addition, the concept of state immunity may well be abused in the context of state enterprises and several authors claim that this indeed occurs.⁷⁸ Be this as it may, invoking state immunity is evidence that the State considers a certain entity as a state organ, or as exercising governmental functions.⁷⁹ It should

⁷⁵ For a useful overview of state immunity doctrines in the UK, US and 2004 Convention on State Immunity, see generally CLIFFORD CHANCE, *supra* note 45; HAZEL FOX & PHILIPPA WEBB, *THE LAW OF STATE IMMUNITY* (3d ed. 2015).

⁷⁶ See generally PULLEN, *supra* note 14.

⁷⁷ See CLIFFORD CHANCE, *supra* note 45, at 17.

⁷⁸ See Lee, *supra* note 42.

⁷⁹ See UN Convention on Jurisdictional Immunities of States and Their Property, Arts. 2 and 10(3), U.N. Doc. A/59/508, (Dec. 2, 2004), https://treaties.un.org/doc/source/recenttexts/english_3_13.pdf [<https://perma.cc/HN5B-82UY>] (clarifying that when a state is capable of suing or

therefore, simply for the sake of consistency, not be able to avoid state responsibility and direct attribution of its acts or omissions, as it would be a logical error to uphold, simultaneously, that a SOE should enjoy state immunity, but not generate state responsibility.

As Van Aaken argued in 2014, recent jurisprudence by the ECtHR and ICJ shows that indeed, immunity does not automatically exclude human rights concerns, but must be balanced against human rights obligations.⁸⁰ In that sense, Catá Backer's 2017 recommendation on this specific issue had already entered into human rights jurisprudence.⁸¹ The ILC furthermore suggests that certain commercial activities that are undertaken for the public good, such as purchase of food or medicine in emergency situations, could qualify for granting immunity. Finally, regulatory immunity might apply to SOEs, and they might eventually be immune from execution, especially in relation to decisions handed down against the State (and not the SOE itself).⁸²

3. HUMAN RIGHTS JURISPRUDENCE

The criteria for attribution presented in sections 2.1–2.3 stem from general international law. Being interested specifically in human rights responsibility of SOEs, however, it is impossible not to revise whether human rights instruments or jurisprudence define specific rules on the attribution of state responsibility; if this were the case, those rules would have to be applied in substitution to general international law, due to the principle of *lex specialis*.⁸³ The two International Covenants are silent on the issue, and only speak of “states” as owners of obligations.

The same is true for the European Convention on Human Rights and the American Convention on Human Rights; the Inter-American Court has never explicitly argued on the issue of

being sued or possesses legal personality, its immunity cannot be affected); *see also* Anne Van Aaken, *Blurring Boundaries between Sovereign Acts and Commercial Activities: A Functional View on Regulatory Immunity and Immunity from Execution*, in IMMUNITIES 131, 143–145 (Anne Peters ed., 2014) (observing that SOEs are granted sovereign immunity for activities where the SEO is exercising sovereignty, i.e. performing government functions); FOX & WEB, *supra* note 75.

⁸⁰ Van Aaken, *supra* note 79, at 140.

⁸¹ Catá Backer, *supra* note 16, at 38.

⁸² Van Aaken, *supra* note 79, at 149–157, 157–168.

⁸³ ILC, *supra* note 38, art. 55.

attribution. However, it has decided several cases involving State-owned enterprises, simply applying an Article 4 hypothesis. Thus, in *Kichwa Indigenous Community of Sarayaku vs. Ecuador*, the regional Court simply assumed the governmental function of a SOE, which was in charge of administering oil concessions, without debate and without dissenting opinions. The implicit criteria the Court is using will be spelt out in section 3.2.

In the European Court of Human Rights, in turn, criteria of attribution have been discussed explicitly, and have also been analyzed in—although scarce⁸⁴—literature (see section 3.1). As will be shown in the light of jurisprudence, these criteria provide a better understanding of the way in which States have to be responsible for the acts and omissions of their enterprises in human rights matters. What will become clear is that in international human rights law, more than in general international law, there are hypotheses of attribution which responds more clearly to the effectiveness standard regarding access to justice.

3.1 *Decisions of the European Court of Human Rights*

The European Court has discussed many cases that involve, in some way or the other, state-owned enterprises or state property. The present analysis only looks at those cases in which the Court has discussed attribution matters.

In *Fadeyeva vs. Russia*, the European Court of Human Rights was asked to decide on state responsibility for the failure to resettle a person living close to a steel plant, which was responsible for 95% of the air pollution in the city. Although the diseases the woman suffered from could not be derived directly from air pollution, the Court found that the State had not struck a fair balance between the dangerous situation in which the applicant was in, and other interests, especially, the interests of other persons on the council housing waiting list, which should have been considered less urgent if not exposed to the same health threat. On attribution, the Court concluded—after taking into account private ownership at the

⁸⁴ See generally Mikko Rajavuori, *How Should States Own? Heinisch v. Germany and the Emergence of Human Rights Sensitive State Ownership*, 26 EUROPEAN J. INT'L L. 727 (2015), <http://www.ejil.org/pdfs/26/3/2603.pdf> [<https://perma.cc/P68U-UT2M>] (suggesting that the notion of public shareholder is helpful in understanding how states should govern the human rights performance of corporations through ownership).

moment of the complaint, the State obligation to regulate and exercise oversight, and initial State-ownership – that:

The authorities in the present case were certainly in a position to evaluate the pollution hazards and to take adequate measures to prevent or reduce them. The combination of these factors shows a *sufficient nexus* between the pollutant emissions and the State to raise an issue of the State’s positive obligation under Article 8 of the Convention.⁸⁵

It is not clear, however, if or why the fact that the company had been privatized actually had any impact on the outcome of the case. The *ratio* turns entirely on the illegality of operating without a “safety belt” around the enterprise, and the failure to resettle the claimant,⁸⁶ both activities intimately linked to the responsibilities of oversight organs or state organs responsible for public services.

In *Uj vs. Hungary*, to the contrary, the Court found that the “reputational interest” of a SOE was “commercial” in nature, and therefore, not protected under the morals limitations to the freedom of expression.⁸⁷ In cases such as *Industrial Financial Consortium Investment Metallurgical Union vs. Ukraine*, which dealt with the fairness of privatization proceedings of a SOE, attribution criteria were neither an issue.

More telling regarding attribution is the question whether a state-owned entity would have any standing under the ECHR (and therefore, would not be considered part of the State it belonged to) is the judgment in *Islamic Republic of Iran Shipping vs. Turkey*, where the Court assessed the entity’s “legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the political authorities.”⁸⁸ For the Court, the

⁸⁵ See *Fadeyeva v. Russia*, Judgment, 45 Eur.Ct.H.R. 10, ¶ 92 (2005) (“The Court concludes that the authorities in the present case were certainly in a position to evaluate the pollution hazards and to take adequate measures to prevent or reduce them. The combination of these factors shows a sufficient nexus between the pollutant emissions and the State to raise an issue of the State’s positive obligation under Article 8 of the Convention.”).

⁸⁶ *Id.* at ¶116-134.

⁸⁷ See *Uj v. Hungary*, App. No. 23954/10, Eur. Ct. H.R. ¶ 22 (2011) (finding that commercial reputational considerations do not implicate a moral dimension).

⁸⁸ See *Islamic Republic of Iran Shipping v. Turkey*, App. No. 40998/98 Eur. Ct. H.R. 1081, ¶ 79 (2007) (reasoning that the entity being considered “neither

control over the company was decisive, not who held the property in it. Comparing the criteria of the ECtHR with the criteria in arbitral jurisprudence, the human rights court uses one additional criterion to determine the business-state nexus: the *nature* of a company's activities. This criterion seems to mirror, the OECD concern on maintaining public services within the public realm (see section 2.2).

In *Transpetrol vs. Slovakia*, the Court applied a slightly more detailed list of criteria in order to establish whether a State-owned company could have standing under the Convention, as a claimant against the State, which at the time of the facts, held 51% of ownership in the company. The Court dismissed this argument, considering that:

The applicant company was a private-law entity subject to the jurisdiction of the ordinary courts and to the same legal regime as any other commercial company in Slovakia. It did not have immunity, did not carry out any public-administration functions and did not participate in the exercise of public power.⁸⁹

Furthermore, “[t]he applicant company had professional management and its operations were of a commercial nature. The State carried no liability for the applicant company's obligations and the applicant company was subject to the normal rules and procedures concerning insolvency.”⁹⁰ In addition, it was relevant for the Court that the company did not enjoy a monopoly position.⁹¹ The Court found it critical that the entity “is governed essentially by company law, does not enjoy any governmental or other powers beyond those conferred by ordinary private law in the exercise of its activities and is subject to the jurisdiction of the ordinary rather than the administrative courts.”⁹² Additionally, the Court found a joint interests in the proceedings, as the State acted as a common intervener, and the SOE was represented by the same lawyer as the State in other proceedings.⁹³

participates in the exercise of governmental powers nor has a public-service role or a monopoly in a competitive sector.”).

⁸⁹ See *Transpetrol v. Slovakia*, Ap. No. 28502/08 Eur. Ct. H.R. (Third Section) ¶ 58. (2011).

⁹⁰ *Id.*

⁹¹ *Id.* ¶ 62.

⁹² *Id.* ¶ 61.

⁹³ *Id.* ¶ 74.

In the case *Luganskvugillya vs. Ukraine*, the ECtHR had to evaluate whether a Ukrainian coal company could be considered having *ius standi* against Ukraine. The court argued that:

The applicant company is managed and fully controlled by the Government of Ukraine, through its various institutional structures, including formerly through the Ministry of Fuel and Energy of Ukraine and currently the Ministry of Coal Industry of Ukraine. The company exercised certain public functions in administration of funds allocated by the State for restructuring of the coal industry.⁹⁴

The Court found that the petition was inadmissible. It is not clear from the judgment which role liquidation proceedings play in the attribution (or not) of state responsibility. In other decisions, however, the Court considered that the non-applicability of insolvency laws suggests attribution of state responsibility.⁹⁵

Regarding the issue of whether the State must be considered vicariously liable for debts of State-owned or State-related companies, the Court reiterated regarding attribution in *Yershova vs. Russia*—a case over a formerly State-owned steel plant, which significantly contaminated the town where the claimant lived, that:

[T]he Court will have regard to such factors as the company's legal status, the rights that such status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the authorities (. . .). The Court will notably have to consider whether the company enjoyed sufficient institutional and operational independence from the State to absolve the latter from its responsibility under the Convention for its acts and omissions.⁹⁶

It thus puts emphasis on the independence from the State, but also confirmed the “nature of activities” criterion of earlier jurisprudence.

The Court also pointed out that “the applicant company's domestic legal status as a separate legal entity does not, on its own, absolve the State from its responsibility under the Convention for

⁹⁴ See *State Holding Company Luganskvugillya v. Ukraine*, App. No. 23938/05, Eur. Ct. H.R. (Fifth Section) 2 (2009).

⁹⁵ See *Transpetrol*, *supra* note 89, ¶ 58.

⁹⁶ *Yershova v. Russia*, App. No. 1387/04 Eur. Ct. HR (2010) (First Section), ¶ 55.

the company's debts."⁹⁷ This is certainly an important limitation to abuse by separate corporate entities, when these are acting *de facto* on the State's behalf. While highlighting in the *Yershova* case that the nexus between State and company was not as close as in the *Mykhaylenky* case,⁹⁸ the court concluded that "given in particular the *public nature* of the company's *functions*, the significant control over its assets by the municipal authority and the latter's decisions resulting in the transfer of these assets and the company's subsequent liquidation," it was the State that was "to be held responsible under the Convention for [the company's] acts and omissions."⁹⁹ The Court spelled out the meaning of "nature" and linked the concept to the consideration of whether the company's functions were "public" (governmental in other contexts). This means that the acts and omissions of state-owned public services companies have to be considered more readily attributable to the State.

On the same token, in *Heinisch vs. Germany*, the Court found in 2011 that public shareholders have major obligations of due diligence and investigation into possible wrongdoing or negligence;¹⁰⁰ the Court explained that:

[W]hile the Court accepts that State-owned companies also have an interest in commercial viability, it nevertheless points out that the protection of public confidence in the quality of the provision of vital public service by State-owned or administered companies is decisive for the functioning and economic good of the entire sector. For this reason the public shareholder itself has an interest in

⁹⁷ *Id.* ¶ 56.

⁹⁸ *Id.* ¶ 57 ("the Court notes the Government's argument that the degree of the State's involvement in the company's activities cannot be equated with that in the *Mykhaylenky and Others* case.").

⁹⁹ *Id.* ¶ 62 *emphasis added*.

¹⁰⁰ See Rajavuori, *supra* note 84, at 736 (discussing the result of *Heinisch v. Germany*, in which he believes the court gave public shareholders of an SOE a second obligation and purpose. "When a company in the state's portfolio is involved in human rights-sensitive activity, a public shareholder should allow for a thorough examination, investigating and clarifying the alleged deficiencies on the issue"); see, e.g., *Heinisch v. Germany*, 2011 V Eur. Ct. H.R. 229, ¶ 71 (observing that it is especially important for state-owned companies' to disseminate information to public shareholders).

investigating and clarifying alleged deficiencies in this respect within the scope of an open public debate.¹⁰¹

This rationale has not been reiterated explicitly, however. In a case in 2016, the Court did not provide a response to a similar argument submitted by the applicant,¹⁰² and there has not been any opportunity to know whether the Grand Chamber would agree with the reasoning of the Chamber. The argument, however, is consistent with the viewpoint of the Inter-American Court of Human Rights in *Ximenes Lopes vs. Brazil*, where the regional body considered that even private actors carrying out health services on behalf of the State, have to be regulated following strict due diligence standards, as if they were in fact public services.¹⁰³

In *Mykhaylenky*, the Court solved a question on debts generated by SOEs towards its workers, holding that the State was liable. The reason was that:

The debtor company had operated in the highly regulated sphere of nuclear energy and conducted its construction activities in the Chernobyl zone of compulsory evacuation, which is placed under strict governmental control on account of environmental and public-health considerations, [especially, that] the State [had] prohibited the seizure of the company's property on account of possible contamination.¹⁰⁴

The Court also considered relevant that the company management was in the hands of the Ministry of Energy, and not an independent board.¹⁰⁵ Just as with monopolies, the more regulated an area of economy in which the SOE operates is, the more attributable an activity is.

In *Alisic*, the ECtHR confirmed *Mykhaylenky* insofar "a State may be responsible for debts of a State-owned company, even if the

¹⁰¹ *Id.* para. 89.

¹⁰² See generally *Langner v. Germany*, Eur. Ct. H.R. App. No. 14464/11 (Fifth Section) (2016).

¹⁰³ See *Ximenes Lopes v. Brazil*, Preliminary Exceptions, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 149, ¶ 141 (July 4, 2006) ("The Court has established that the duty of the States to regulate and supervise the institutions which provide health care services, as a necessary measure aimed at the due protection of the life and integrity of the individuals under their jurisdiction, includes both public and private institutions which provide public health care services, as well as those institutions which provide only private health care."). See, e.g., *id.* ¶ 27 (Ramirez, J., concurring).

¹⁰⁴ *Mykhaylenky v. Ukraine*, Eur. Ct. H.R. (Second Section) ¶ 45, (2005).

¹⁰⁵ *Id.*

company is a separate legal entity, provided that it does not enjoy sufficient institutional and operational independence from the State to absolve the latter from its responsibility under the Convention."¹⁰⁶ The test of previous jurisprudence was thus reiterated,¹⁰⁷ and recently applied in *Krndija vs. Serbia*¹⁰⁸ and *Burmych vs. Ukraine*.¹⁰⁹ The Court specified:

In this kind of cases, the Court needs to examine whether the non-enforcement was caused by the delay attributable to the respondent State itself, or whether the insolvency of the debtor company could have made it objectively impossible for the respondent State to honour its obligation to enforce the judicial decision in the applicant's favour.¹¹⁰

As the State had not provided any explanation as to why the judgment could not be enforced, the Court found the State responsible under the European Convention under the *effet utile* principle.¹¹¹

In several recent cases that involved SOEs, no mention whatsoever was made regarding attribution.¹¹² The case of *Šimaitienė*, allowed the Court to reiterate its previous jurisprudence regarding past violations of the right to property by a former SOE,

¹⁰⁶ See *Ališić et al. v. Bosnia and Herzegovina*, Eur. Ct. H.R. Grand Chamber App. No. 60642/08 ¶ 114 (2014).

¹⁰⁷ *Id.*; see also, *Voronkov v. Russia*, Eur. Ct. H.R. App. No. 39678/03 ¶ 47 (2015) ("The court reiterates that a state may be responsible for debts of a State-owned company, even if the company is a separate legal entity.").

¹⁰⁸ *Krndija et al. v. Serbia*, Eur. Ct. H.R. App. No. 30723/09 (Third Section) ¶ 66 (2017) ("The court observes that . . . decisions rendered against a socially/state-owned company . . . that the state is directly liable for their debts and omissions.").

¹⁰⁹ *Yuriy Nikolayevich Ivanov v. Ukraine*, Eur. Ct. H.R. App. No. 40450/04 ¶ 36, 78-82 (2010) (discussing implementation of a pilot program based off of the Recommendation of the Committee of Ministers in 2004 that would enable human rights claims of a similar nature to go directly to a specific state body as to streamline enforcement rather than hinder the courts with similar issues); *Burmych v. Ukraine*, Eur. Ct. H.R. Grand Chamber App. No. 46852/13 ¶ 11 (2017) (following the *Ivanov* pilot decision to implement a pilot program in Ukraine).

¹¹⁰ See *Krndija*, *supra* note 108, ¶ 68.

¹¹¹ See *Krndija*, *supra* note 108, ¶ 68, 73-74.

¹¹² See generally *Surikov v. Ukraine*, Eur. Ct. H.R. App. No. 42788/06 (2017) (failing to even mention attribution); *Dickmann and Gion v. Romania*, Eur. Ct. H.R. App. No. 10346/03 and 10893/04 ¶ 14, 18-20 (2017) (assuming attribution by virtue of jointly suing the municipality and a municipal enterprise); *Medzlis v. Bosnia*, Eur. Ct. H.R. App. No. 17224/11 ¶ 80 (2017); *Merabishvili v. Georgia*, Eur. Ct. H.R. App. No. 72508/13 (2017) (regarding the detention of a CEO to coerce sale of private company to a SOE, where the Court's argument was entirely based on direct state responsibility of security forces).

which held that partial restitution and compensation were sufficient to repair the damage.¹¹³

In 2018, finally, the Court explicitly pronounced itself on state responsibility of Bulgaria with regard to the actions (and omissions) of a state-owned mine. The Court explained:

The mine was managed by a company which was entirely State-owned. For the Court, the fact that that company was a separate legal entity under domestic law cannot be decisive to rule out the State's direct responsibility under the Convention. The parties have provided no information on the extent of State supervision and control of the company at the relevant time. Of relevance is that it was not engaged in ordinary commercial business, operating instead in a heavily regulated field subject to environmental and health-and-safety requirements. It is also significant that the decision to create the mine was taken by the State, which also expropriated numerous privately-owned properties in the area to allow for its functioning, under legislation concerning "especially important State needs". *All of the above factors demonstrate that the company was the means of conducting a State activity and that, accordingly, the State must be held responsible for its acts or omissions raising issues under the Convention.*¹¹⁴

It thus reiterated and specified the threshold for state responsibility, including, interestingly, a new aspect: the reference to the degree of environmental and health-and-safety regulation, which differentiated the nature of the activities from usual "commercial activities." Future jurisprudence should clarify this reasoning, as the strong regulation seems to be generally related to the dangerous character of activities, rather than their non-commercial character. Therefore, this indicator should not be included in an attribution checklist until further specified or confirmed by the Court. Finally, in *Könyv-Tár Kft and Others*, the Court in 2018 found Hungary responsible for indirect expropriation through the creation of a monopoly administered by a SOE. The finding of the violation was based, however, on the evaluation of

¹¹³ See *Simaitienė v. Lithuania*, Eur. Ct. H.R. App. No. 550556/10 ¶ 53 (2017) (finding that partial restitution and compensation are appropriate remedies for property which cannot be returned).

¹¹⁴ See *Dimitar Yordanov v. Bulgaria*, ECHR App. No., 3401/09 ¶60 (2018). References to case-law omitted. *Emphasis added*.

government action and SOE action, and therefore, the case is not too useful for defining differentiate criteria of attribution. The same is true for *Kurşun vs. Turkey* where the SR originated from failures in the investigative process into a gas explosion, and *Khadija Ismayilova*, a wiretapping case in which Azerbaijan was found responsible for not investigating correctly into whether wiretapping to an opposition leader was carried out pursuant to specific orders by a state-owned telecommunications company, or pursuant to unofficial orders by some of that company's employees.¹¹⁵

While coinciding with arbitral jurisprudence regarding attribution on several issues, the European Court of Human Rights has been clear and consistent on including two important points in its analysis. First, the nature of SOE activities. Very recently, it included the consideration of environmental and health-and-safety regulation into that analysis. Second, it seems that more often than not, the Court implicitly departs from a Draft Article 4 assessment; in such cases, it revises globally (not separately for SOE and oversight organs) whether, on the merits, the Convention rights have been guaranteed. It is only in its admissibility jurisprudence that the Court addresses SOE issues separately. It would seem that a more detailed argument on direct and indirect State responsibility would be useful, in order to effectively distinguish, for example, the different levels of due diligence that the State as a whole owes.

3.2. Reasoning in the Inter-American System of Human Rights

The Inter-American Court of Human Rights dealt with several cases involving a SOE without discussing attribution at all. Instead, the Court simply assumed attribution and eventually, found the States responsible for several of the violations alleged. Thus, for example, in *Abrill Alosilla vs. Peru*, a case on unlawful dismissal of civil servants, workers and technical staff employed in a SOE, attribution of the violations to the State was not even mentioned, and less so, argued upon. The SOE was dealt with on the same footing as a ministry. Similarly, in *Sarayaku vs. Ecuador*, the Court analyzed the role of the Ecuadorian SOE *Petroecuador*, a contractual partner of a private company that gained the right to explore and

¹¹⁵ See *Khadija Ismayilova v. Azerbaijan*, Eur. Ct. H.R. App. 65286/13 and 57270/14 ¶ 125 (2018) (finding that investigative deficiencies on the part of the state contributed to an inability to conclude state responsibility).

exploit an oil concession through said contract.¹¹⁶ *Petroecuador* in addition carried out oversight functions in relation to environmental regulation, permits¹¹⁷ and closure of the activities.¹¹⁸ The Court did not explicitly problematize the role of the SOE, but treated it without discussion by any of the parties before the Court, and in this author's view, correctly, as a regulatory organ rather than an enterprise, although the form of the concession, and especially, the assertion that there were no "environmental impacts" after closure, were solely covered in private law instruments (contracts).¹¹⁹ For the outcome of the case, it was significant that *Petroecuador* had passed on a request for military intervention by the concessionary to the Ministry of Defense;¹²⁰ the intervention of the thus solicited armed forces resulted in violations of members of the *Sarayaku* indigenous community's right to life. Also, at the domestic level, the Ecuadorian Ombudsman found *Petroecuador* responsible, in the context of the operations of the private enterprise, for incompliance with the obligation to protect from violations of constitutional and international human rights.¹²¹ This confirms the belief that international law is applicable to SOE as a state organ, by virtue of its close nexus with the State.

The Inter-American Commission of Human Rights has not made an argument on attribution either. It referred briefly to SOEs when observing in its 2016 report on Indigenous Peoples' rights and extractive industries, that State obligations include oversight over SOEs and control by independent state organs.¹²² The Commission also referred to Guiding Principle 4 on State-Owned Enterprises and the expectation that they lead by example the efforts of the industry to respect human rights.¹²³ Otherwise, the language shows preoccupation that *despite* State ownership, SOEs need to be subject

¹¹⁶ Pueblo Indígena Kichwa de Sarayaku v. Ecuador, Preliminary Exceptions, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) 245, ¶¶64–64 (June 27, 2012).

¹¹⁷ *Id.* ¶ 67.

¹¹⁸ *Id.* ¶ 123.

¹¹⁹ *Id.* ¶ 64, 123.

¹²⁰ *Id.* ¶ 192.

¹²¹ *Id.* ¶ 195.

¹²² See IACHR, *supra* note 24, ¶ 101 ("Therefore, in the opinion of the IACHR, when extractive and development projects are implemented by State-run companies, the State is required to implement measures of strict supervision.").

¹²³ *Id.* ¶ 100.

to oversight mechanisms.¹²⁴ The Commission's view seems to build on the experience that SOEs in some countries operate beyond regulation and control, and enjoy privileges that private companies do not enjoy. However, there has been no development on the legal criteria of attribution.

Most significantly in its recent quasi-judicial activity, the Commission had to decide over the admissibility of a complaint against Peru, regarding severe contamination by the La Oroya industrial complex. The metallurgic industry was owned by the State between 1974 and 1997, and then sold to Doe Run, a US company.¹²⁵ The parties had agreed on the fact that when Doe Run bought the factory, the environmental obligations were to be divided in two parts: the private enterprise would be responsible for the installation of pending and new environmental measures, and the State of Peru assumed responsibility for the clean-up of the soils contaminated before 1997.¹²⁶ The agreement between the private investor and the State would suggest that the State considers itself responsible for clean-up regarding past contamination, even though environmental legislation at the time of pollution had not yet been in force. The available information does not tell whether Peru considers this an international obligation; an obligation under domestic law only; or whether the agreement was simply an outcome of the balance of forces between the US Company and the State.¹²⁷ But it can be expected to be a significant element for knowing about the Commission's understanding of SOE obligations, when the IAS body will have to decide on whether the agreement was in conformity with the American Convention on Human Rights.

Overall, the Inter-American human rights bodies have not had the opportunity to discuss the responsibilities of SOEs as investors or enterprises rather than regulators; a very recent case on the dismissal of workers from Peruvian SOEs was decided exactly on the same token as dismissals by ministries.¹²⁸ The criterion used in *Abrill Alosilla* has thus not changed, and it is unclear whether it is the level of control, the functions of the SOEs or simply state-ownership which determine the type of attribution that applies.

¹²⁴ *Id.* ¶ 101.

¹²⁵ La Oroya, *supra* note 4, ¶ 10.

¹²⁶ La Oroya, *supra* note 4, ¶ 10.

¹²⁷ This point cannot be addressed in this paper.

¹²⁸ *Trabajadores Cesados*, *supra* note 11, ¶ 81.

The Inter-American Court has always applied direct attribution of state responsibility in cases of SOEs. The Inter-American Commission has used the same criterion, but as shown above, recently and it would seem confusingly, added a reference to Principle 4 of the UN Guiding Principles, without clarifying the relation of its content to the American Convention; there might, therefore, arise a contradiction to the hypothesis of direct attribution, at least if Guiding Principle 4 is interpreted according to the Working Group's reading: in that case, the obligation would consist only of "leading by example" and not the human rights obligations a State owes through its bodies and institutions (see also above, section 2.2).¹²⁹ It would be important that once presented with the opportunity to do so, the Inter-American Court of Human Rights or the Commission could clarify the hypotheses of attribution they recur to in case of SOEs. This would allow to differentiate responsibility by SOEs—with their respective thresholds, and different obligations regarding the obligation to guarantee of human rights—from responsibility by State oversight organs. What is valuable from the perspective of access to justice, nevertheless, is the preoccupation that State ownership must not limit access to justice. In that sense, the Court and Commission are consistent in simply assuming that state-ownership may never lead to a reduced level of attribution or responsibility. What sounds legally surprising in comparison the remainder of international jurisprudence on SOEs, addresses, in fact, a major concern: the risk of impunity.

4. SPECIFIC CHALLENGES

Victims should have an effective remedy even if the act or omission of an SOE were not attributable to the State, just as they have the right to an effective remedy regarding private business. But they might find themselves encountering problems that domestic law cannot easily solve. For example, the SOE might not be solvent to pay out compensation under domestic law. In such a situation, access to justice is ineffective unless the victim can access compensation paid by the State, i.e., the principal or "parent" of the SOE. In that sense, when discussing state responsibility, and the separate entity character of SOEs, the question arises whether there are situations that are "left out" by the current theory of attribution,

¹²⁹ UN Working Group, *supra* note 73, ¶ 28, 45, 46.

but nevertheless, under international human rights law, require providing access to justice. A typical case would be that a victim obtains a favorable judgment that protects his or her rights, but finds that the SOE is unable to pay out compensation due to lack of liquidity.

In arbitration law, Badia has made a similar argument. He considers that the Draft Articles have left loopholes of accountability that need to be closed by referring to theories of piercing the corporate veil (section 4.1). In human rights law, there are two issues that could generate, among others, such loopholes: the initial design of a SOE,¹³⁰ and the impact of old contamination sites, left unattended by the SOE or the State.¹³¹ The two examples seem to have little in common; however, the legal structure accompanying them shows what they have in common.

4.1 Responsibility for human rights violations caused by the initial design of SOEs

Certainly, the establishment of a SOE is not in itself an internationally wrongful act. However, the design of a SOE, responsibility of governmental organs that clearly fall under Draft Article 4, can have consequences which make human rights compliance by that same SOE impossible. Such situations could arise when the corporate structure is created in order to avoid transparency on issues which clearly correspond to public functions; on corruption; campaign financing; environmental protection or respect of privacy in health services. Most frequently, however, the design of SOE mirrors the design of subsidiaries which are deprived almost immediately of the revenues they have generated in order to avoid pay-out in case of suits. This does not only affect competitors who have a founded claim against a subsidiary or a SOE, but also vitiates the claim of individuals or communities who are owed compensation for human rights violations found by courts.

¹³⁰ For a consideration of this argument in jurisprudence, see Dimitar Yordanov v. Bulgaria, ECHR App. No. 3401/09 ¶60 (2018).

¹³¹ See generally Wolf Richter, *Ökologische Altlasten und Sanierungen im Treuhandnachfolgebereich*, STAATSEIGENTUM. LEGITIMATION UND GRENZEN 319 (Otto Deppenheuer & Bruno Kahl, eds., 2014) (analyzing how the reunified German State implemented functions of environmental clean-up through state-owned enterprises).

Badia has proposed that in international arbitration, the theory of piercing the corporate veil should apply in order to cover cases where no state responsibility arises according to the Draft Articles. This can be the case, for example, if initial under-funding of the SOE can be proven, and leads to the failure of debt-serving, then the state as a principal could be made responsible.¹³² In that sense, he argues that “when a state is behind [a SOE], the veil should be pierced if justice so requests.”¹³³ To our knowledge, the theory has not been applied by international tribunals yet, but was received positively by some other scholars of international economic law.¹³⁴

As Badia does not refer to international human rights law and its specific jurisprudence on SOEs, this section will examine to what extent a theory of piercing the veil – taken from corporate law, and considered a general principle of international law by Badia¹³⁵ – would effectively improve access to justice for (potential) victims of human rights violations committed by SOEs. It should be clarified that in civil law jurisdictions, principles of good faith and abuse of rights often fulfill the same purpose as the theory of piercing the veil.¹³⁶

Victims of human rights violations defined in the universal and regional human rights treaties should not remain without a remedy.¹³⁷ In that sense, it is possible to draw a parallel to corporate law where in certain situations, the parent company is considered liable for its subsidiary’s torts or crimes. Arguably, there are three situations that are of special interest: first, the structural set-up of the SOE, its capitalization and rules on skimming profits. In particular, it has to be asked whether a mechanism has been set up in order to

¹³² See BADIA, *supra* note 21, at 198.

¹³³ See BADIA, *supra* note 21, at 201.

¹³⁴ See Michael Feit, Book Review of *Piercing the Veil of State Enterprises in International Arbitration*, by Albert Badia, 30 ICSID REV. 268, 273 (2015) (praising Badia for his work and noting that the piercing the veil doctrine has become a necessary part of holding SOEs accountable for their actions).

¹³⁵ See generally Katherine Lyons, *Piercing the Corporate Veil in the International Arena*, 33 SYRACUSE J. INT’L L. & COM. 523 (2006).

¹³⁶ See José María Lezcano, *Piercing the Corporate Veil in Latin American Jurisprudence*, Routledge (2016), at 21–48 (discussing the English theory of corporate personality in comparison with civil law models, and treatment of damage to health). See generally Joseph Mauricio Bello, *An Overview of the Doctrine of the Piercing of the Corporate Veil as applied by Latin American Countries: A US Legal Creation exported to civil law jurisdictions*, 14 ILSA J. INT’L & COMP. L. 615 (2008) (discussing the application of piercing the corporate veil in Latin America, and specifically in Mexico, Argentina, and Venezuela).

¹³⁷ See generally Leader & Ong, *supra* note 2.

pay out compensation to human rights victims, including a definition on which place they take in the cascade of obligations;¹³⁸ or whether and how funds have been set aside for clean-up after closure. Badia observed that initial underfunding should be considered fraudulent.¹³⁹ Piercing through to the state should also be possible if privatization was achieved with clauses that aim at avoiding responsibility.

Second, the corporate veil should be lifted when a state organ does not authorize the corresponding funds for taking necessary preventive measures with regards to human rights or the environment. In those cases, direct state responsibility would arise due to the acts or omissions of the regulatory organ, for example, Congress or the Ministry of Finance.¹⁴⁰ Although these are primary obligations under international environmental law, they often cannot be enforced, and a residual argument of piercing the corporate veil might be considered, in case access to justice cannot otherwise be guaranteed, or as Badia has it, if “justice so requires.”

Third, according to Badia, the state should be made liable when it knew or should have known—as owner—of certain practices or violations that occur in the SOE. This due diligence argument depends, ultimately, on the degree of control that the parent (the state) has over the enterprise. However, it seems that all of these criteria would also lead to attribution under the law of state responsibility as it was presented in section 2. The gap that a theory of piercing the veil could cover is essentially the same that international human rights law has already filled through interpreting the notions of “control” and “public or governmental authority” in the sense the ECtHR has done.

Thus, in relation to the first and second situations, a state is responsible for setting up a SOE under conditions that avoid liability in matters of human rights. As the design of a SOE is elaborated by state organs that fall under Article 4 Draft Articles, attribution of such acts is not controversial in international law, and if they result in human rights violations, the State will be responsible under the treaties that were in force at the time of setting up a SOE. As ECtHR

¹³⁸ See Rasmiya Kazimova, *Insurance as a Risk Management Tool: A Mitigating or Aggravating Factor?*, in Leader & Ong, *supra* note 2, at 239.

¹³⁹ BADIA, *supra* note 21, at 95–98.

¹⁴⁰ The regulatory creation of industry-wide general compensation funds is another option, but it cannot be discussed here.

jurisprudence shows, the State is also responsible for continuous violations that ensue from set-up faults.¹⁴¹

In relation to preventive measures, it would be extremely difficult in most jurisdictions to argue in favor of piercing the veil, although the argument is very similar to the unavailability of funds for reparation. The reason seems to be that the obligation of prevention is very difficult to enforce. Under international law, however, preventive measures have become part and parcel of the obligation to guarantee human rights standards to inhabitants, communities, and individuals affected by business.¹⁴² In that sense, it seems that attribution of responsibility, through the finance organs that do not authorize the respective budgetary measures, is the easiest and more accepted way of solving this type of problem.

In the third situation, the decision in *Heinisch* reported above refers to this issue of assuming that governmental organs should be more interested in and can be better informed about what is happening in relation to SOEs over which they have oversight or which they (partly) control. While the ECtHR has been reluctant to reiterate its rationale from *Heinisch*, the IACtHR has consistently and automatically assumed knowledge in all cases related to SOEs it has decided. One question remains pending in this research: Is it a reason to pierce the veil if the lack of funding for clean-ups or environmental measures is due to mismanagement or corruption in the SOE? Does the state have any vicarious liability in such a situation?¹⁴³ Considering the principle of *effet util*, and the access to an effective remedy, it seems that the answer would have to be in the affirmative. Research on corruption and human rights has repeatedly shown how this crime prejudices human rights protection or places it at risk.¹⁴⁴

¹⁴¹ Fadeyeva, *supra* note 85.

¹⁴² See generally Ebert & Sijnienski, *supra* note 22 (discussing the application of the *Osman* test).

¹⁴³ See generally PAULA GILIKER, *VICARIOUS LIABILITY IN TORT* (2010).

¹⁴⁴ See generally Anne Peters, *Corruption as a Violation of International Human Rights*, 18 MPIL Research Paper (2016), www.mpil.de [<https://perma.cc/GQ3B-9HZ7>] (linking corruption and a hostility towards human rights in corrupt and crime ridden countries). For a critical argument, see generally Cecily Rose, *The Limitations of a Human Rights Approach to Corruption*, 65 INT'L & COMP. L. Q. 405 (2016).

4.2 Past damage at contaminated sites and state responsibility

Another specific problem about access to justice in SOE cases needs to be mentioned separately. It is related to historical circumstances, but entails important legal consequences. State-owned enterprises have often started high-impact business in the extractive or energy sectors, when environmental standards were still low or non-existent. Contaminated sites, which tend to generate long-lasting environmental or health-related damage, remain beyond closure of a site, liquidation of the enterprise, insolvency or privatization of SOEs, and continues to risk violating human rights or causing damage. In domestic law, unless there is specific regulation, or a legal or common law disposition regarding continuous harmful effects of licit or illicit acts,¹⁴⁵ there is usually no general remedy available, due to statutes of limitations. Piercing the veil, however, would not solve that problem.

In such cases, attribution under international law might be the only way of accessing a remedy, as international law *does* recognize continuous illicit acts – according to Articles 14 and 15 of the Draft Articles of 2001 – and does not impose statutory limitations. If the damage had been initially caused by a SOE, it would be the state that would be accountable for the continuous consequences of that pollution. Peru implicitly acknowledged such a situation when carrying out the clean-up for the contamination at La Oroya (see section 3.2). International law, however, does not contain explicit or specific rules on old contaminated sites,¹⁴⁶ which would have been created before the enforcement of international treaties. Therefore, attribution of continuous violations would be possible if State control over the SOE fulfilled the criteria set out in section 2.1, at the time of contamination, or afterwards when damage could have been mitigated or cleaned up. If this were not the case, attribution is only possible for lack of due diligence by oversight organs or other state organs, either under human rights treaties or under customary international law.¹⁴⁷ In those cases, only indirect responsibility

¹⁴⁵ See Richter, *supra* note 131 (discussing the specific case of ecological clean-up through SOEs in Eastern Germany after re-unification).

¹⁴⁶ See generally Anastasia Telesetsky, An Cliquet & Afshin Akhtar-Khavari, *Ecological Restoration in International Environmental Law*, Routledge (2016) (detailing the “soft” legal régime that ecological restoration lives under in the international law context, the regional law context, and the individual law context).

¹⁴⁷ See generally JOANNA KULESZA, *DUE DILIGENCE IN INTERNATIONAL LAW* (2016).

would arise, by virtue of the horizontal state obligation to protect, pursuant to, for one example, Article 1.1 of the American Convention on Human Rights.

5. CONCLUSION: SUMMARY OF CRITERIA FOR ATTRIBUTION OF SOE ACTS AND OMISSIONS TO THE STATE

This paper discussed to what extent acts and omissions of SOEs in matters of human rights must be attributed to the state. Under current general international law, jurisprudence and literature seem to exclude the possibility of attributing responsibility for SOE acts and omissions unless they are related to governmental authority, or, arguably, a sufficiently close control over the SOE by the state. Thus, any purely commercial activity, and human rights violations committed in their pursuit, would not be directly attributable. Rather, for those cases, there seems to be a consensus in international human rights law that if *the regulatory or supervisory organs* had not acted diligently or acted in any other way contrary to the state's international human rights obligations, responsibility arises for *that organs'* acts and omissions. Also, state responsibility accrues for the lack of access to justice rather than for the initial act carried out by the SOE.

The criteria that indicate direct state responsibility for SOEs, to the contrary, have been developed in arbitration jurisprudence, and more specifically, in the European Court of Human Rights. The Inter-American System has not developed criteria for distinguishing cases of attribution from others; rather, it has dealt with all SOEs as if they were state organs. This is justifiable due to the close control of government over the SOE, or its governmental (usually regulatory) function. However, it would be useful if the IAS bodies would clarify their criteria for attributing acts and omissions of SOEs to a state.

The criteria of direct attribution that have been found in international human rights law—explicitly or implicitly—can be summarized as follows:

- a. Public function or governmental authority
 - Regulatory or governmental function
 - Administrative law or special legal schemes applicable, instead of insolvency law or general corporate law

- Jurisdiction of administrative courts, rather than ordinary courts
 - The nature of the SOE's activity is public, i.e. refers to provision of public services (only in IHRL)
 - Monopoly position
 - b. State control over the company
 - Nomination and withdrawal of leading executives and board members
 - Ministerial participation in boards, especially with specific voting rights
 - Veto provisions or decision-making prerogatives for state organs, regarding certain decisions, especially, budgetary assignments
 - Jurisdiction of administrative courts, rather than ordinary courts
 - The SOE has specific accountability or reporting obligations towards the State
 - The SOE is identified as a governmental organ in publicity, internet presence, and especially, discourse by leading executives
 - c. Additional indicators: procedural consistency
 - State has invoked immunity for the SOE, in this or other proceedings
 - Coherence of procedural facts, for example, representation by governmental organs in domestic or international disputes

These criteria need to be assessed globally for 'control' and 'public function and governmental authority'; this means that not all of these elements have to be fulfilled in order to find in favor of attribution. Rather, all facts are taken together to see whether the SOE carries out governmental functions, and/or is closely controlled by state organs, respectively. As was shown, there are additionally some soft-law standards such as the UN Guiding Principles on Business and Human Rights, which do not relate to any definition on attribution. Rather, they define a manner to proceed with minimum requirements, which do not comply with international human rights law.

Regarding the proposal to use theories of piercing the corporate veil regarding SOEs, in cases where the Draft Articles leave doubt about effective state responsibility, this paper has argued that all situations that such a legal device could cover, are encompassed by international human rights jurisprudence already: No specific situation could be detected where the theory of piercing the corporate veil, understood as a principle of international law, would

actually suggest responsibility, while attribution rules for human rights cases would not. Rather, all situations that Badia identified as problematic, can be subsumed under the attribution rules identified in this article. The main systematic reason for this conclusion is the fact that both corporate veil theories and attribution theories are based on the examination of the control of the SOE by the State (the “parent”). Additionally, public service hypotheses, recognized in international human rights law as a basis for attribution, cannot be accounted for by corporate veil theories. Furthermore, one of the difficult cases from a human rights perspective—the case of historically contaminated sites abandoned or created by SOEs—cannot be solved by piercing the veil, but only by attributing state responsibility for continuous violations.

As this article has shown, there are several strong arguments for attributions of actions and omissions by SOEs in matters of human rights to the state itself, especially if the SOE carries out governmental functions, are significantly controlled by the State, or might avoid paying out compensation through early reincorporation of revenues to the state budget. Jurisprudence in several human rights bodies shows that SOEs must be considered the first business entities that under international law, have direct responsibilities. Of course, this responsibility is “mediated” through the state to which SOE actions and omissions are attributable, but regional courts and UN committees have found that a state cannot sever itself from its human rights obligations by creating a SOE. Future research and legal argument has to show whether these arguments are equally applicable to different rights, or whether they are rights-specific, just like positive obligations, due diligence obligations and obligations of progressive realization. In order to decide on state responsibility in concrete cases, and once attribution issues are solved, it is necessary to assess the scope and content of human rights obligations owed by a SOE. In that sense, SOEs are the only business entities which can be seen, as of now, to have direct responsibility under international law *lege lata*.

Furthermore, it seems to be clear that a state should not consider its due diligence obligations exhausted when determining that a SOE is not solvent to pay out compensation, if this lack of funds is due to initial underfunding, or to the excessive incorporation of utilities into the state budget. By the same token, the state cannot avoid responsibility—in this case, responsibility of state organs under Article 4 of the Draft Articles—when failing to assign additional funds to human rights protection. The same is true for

failure to provide access to justice in SOE cases. Finally, if a state chooses to comply with its obligations to guarantee and provide services, which are considered fulfillment of rights, through SOEs, the jurisprudence of various human rights bodies coalesces around the assertion that state responsibility should not be limited, in comparison with a state that chooses to provide those services through public services or private entities.

Of course, solving specific SOE problems does not solve access to justice problems for those cases in which it is accepted that a SOE acts as private business. In those cases, an alleged victim of human rights violations encounters the challenges of, for example, third party standing, the definition of human rights in domestic constitutional or legal provisions, or issues of extraterritorial liabilities.