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SCHOLARLY ARTICLE

Inter-American Elements for a Systemic Approach to State-Owned Enterprises' Human Rights Obligations

Judith Schönsteiner*

Reader at Universidad Diego Portales Human Rights Centre, Santiago de Chile, Chile
*Corresponding author. Email: Judith.schonsteiner@udp.cl

Abstract

This article addresses the lack of clarity regarding obligations of state-owned enterprises in the UN Guiding Principles on Business and Human Rights. Starting from the Inter-American Commission of Human Rights' latest report on the topic, it develops the scope of human rights obligations for state-owned enterprises in the Americas, framing them in a systemic approach that calls for using both governance and regulatory tools to achieve respect for human rights. The article furthermore argues that there are good reasons for limiting the application of due diligence to the relationships with a company's private business partners, excluding the relationship with its (public) owner where direct responsibility applies. Finally, the article spells out several specific issues that need to be addressed when assessing SOE human rights governance and shows that the enhanced human rights accountability of state-owned enterprises need not contradict a level playing field between public and private business.

Keywords: Due diligence; Inter-American Commission of Human Rights; obligations of result; scope of obligations; state-owned enterprises

I. Introduction

The UN Guiding Principles on Business and Human Rights of 2011 (Guiding Principles) were the first to address human rights responsibilities of state-owned enterprises (SOEs) in international law. They did so indirectly, by mentioning a state's duty to 'take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the state …, including, where appropriate, by requiring human rights due diligence'. They left open, however, how to conceive of human rights responsibilities of the SOE itself. There has been some discussion on the issue.[1] The second pillar of the Guiding Principles is certainly relevant for SOEs, but the exact scope of obligations remains unclear.

[1] UN Working Group on Business and Human Rights, Report to the Human Rights Council, Leading by Example-the State, State-owned Enterprises and Human Rights 2016, A/HRC/32/45. See for discussion, Larry Catá Backer, 'The Human Rights Obligations of State-Owned Enterprises: Emerging Conceptual Structures and Principles in National and International Law and Policy' (2017) 51 *Vanderbilt Journal of Transnational Law* 827; Mihaela Barnes, 'The United Nations Guiding Principles on Business and Human Rights, the State Duty to Protect Human Rights and the State-Business Nexus' (2018) 15 *Revista de Direito Internacional* 41. Camila Wee, 'Regulating Human Rights Impact of State-Owned Enterprises: Tendencies of Corporate Accountability and State Responsibility', *International Commission of Jurists*, 2008. Debate on corporate social responsibility in SOEs has been more abundant, see Raquel Garde-Sánchez et al, 'Current Trends in Research on Social Responsibility in State-Owned Enterprises: a Review of the Literature from 2000 to 2017' (2018) 10 *Sustainability* 2403, doi: 10.3390/su10072403.

Furthermore, while the Second Revised Draft of a future Business and Human Rights Treaty for the first time mentioned SOEs in the definition of 'business activities' (article 1.3), no further specification was included. The Third Revised Draft maintained the reference, included state-owned financial institutions and funds, but did not provide any specific responsibilities or obligations regarding SOEs.

The most detailed standards for SOE governance were adopted in the OECD. They stem from three sources: first, the G20/OECD Principles on Corporate Governance of 2015, that briefly mention human rights encouraging companies 'in addition to their commercial objectives', 'to disclose policies and performance relating to business ethics, the environment and, where material to the company, social issues, human rights and other public policy commitments';[2] second, the OECD Guidelines for Multinational Enterprises of 2011, with standards on labour rights, environmental issues, and human rights; and third, the OECD Guidelines on Corporate Governance of State-Owned Enterprises, complementary to the Principles.[3] The OECD approach consists of a far-reaching, ideal-type separation of management of SOEs and the respective governments, in order to ensure a level playing field for competition with private companies.

This might appear to sound like legal technicalities, but if it means that SOEs end up not respecting human rights or that access to justice against these entities is meeting multiple obstacles in their home states and abroad, these technicalities have considerable relevance for victims of human rights violations. Contributing to 16 per cent of the GDP in Latin American countries – on average, with countries such as Costa Rica, Chile, Colombia or Uruguay at around 20 per cent[4] – in often high-impact sectors such as mining or public services such as drinking water, their human rights impact does indeed matter.

The OECD Guidelines for SOEs include a mention on human rights when calling them to 'observe high standards of responsible business conduct, including with regards to the environment, employees, public health and safety, and human rights'.[5] However, building human rights respect and protection in Latin America or Asia (only) around that approach is problematic and in a certain way, misleading. The problem is that the ideal-type description of SOEs might fit for European SOEs,[6] but does not necessarily correspond to the reality in many developing countries, including many Latin American states. For example, Chile's governance model for SOEs has had to undergo considerable change to make it fit for approval by the OECD, and still is characterized by important levels of *de facto* control over strategically important companies in the gas and mining sector.[7]

While the European human rights system aligns with the OECD approach,[8] this is thus not the case in the Americas. In addition, the two organs of the Inter-American System of Human Rights adopted approaches on SOE accountability that differ from case-law by the European Court of Human Rights or arbitral awards and other instances of international economic

[2] G20/OECD Principles on Corporate Governance (2015), 38.

[3] OECD Recommendation of the Council on Principles of Corporate Governance, 8 July 2015, printed in Principles note 2, 55.

[4] See Aldo Musacchio and Emilio Pineda (eds), *Fixing State-Owned Enterprises. New Policy Solutions to Old Problems* (Washington: Inter-American Development Bank, 2019).

[5] OECD, *OECD Guidelines on Corporate Governance of State-Owned Enterprises* (Paris: OECD Publishing, 2015) 60.

[6] Backer, note 1, 837.

[7] Judith Schönsteiner, Vicente Martínez and Carlos Miranda, 'Atribuibilidad al Estado de Chile de Actos y Omisiones de sus Empresas Públicas del Sector Extractivo a la Luz de la Jurisprudencia de Tribunales Regionales de Derechos Humanos' (2020) 47 *Revista Chilena de Derecho* 757.

[8] See for such a reading, based on European jurisprudence, Charline Daelman, 'State-Owned Enterprises and Human Rights: The Qualification and the Responsibility of the State', in Jernej Letnar Černič and Tara Van Ho (eds), *Human Rights and Business: Direct Corporate Accountability for Human Rights* (Oisterwijk: Wolf Publishers, 2015), 421.

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law.[9] Up to now, whenever the Inter-American Court of Human Rights (hereafter the Court) dealt with acts by SOEs, it attributed these acts to the state, without even discussing the reasons for doing so. Only in the recent *Muelle Flores* decision, as we shall see below, did the Court provide reasons, arguing that the privatization of a SOE could not exempt the state from responsibility for actions or omissions occurred beforehand.[10]

This article maintains that the Inter-American approach manages to tackle some of the main conceptual challenges that have been identified in relation to the Guiding Principles' take on SOEs. I submit that the Inter-American approach identifying obligations of SOEs themselves *in addition to* those of their owners contributes a unique view to the global debate on the respect of human rights by these enterprises.

The specific questions I will address in this article are: first, what can the Inter-American take on SOEs and human rights contribute to bringing greater clarity towards the scope of a SOE's obligations, and those of its state-owner?; and second, how could this scope be further specified in the future? I posit that state obligations arise for both regulatory and governance instruments applicable to SOEs and are not restricted to obligations of due diligence, but rather include obligations of result. Therefore, I submit that the issue is best addressed in a systemic way, considering the distinction between Pillar I and Pillar II of the Guiding Principles merely a distinction of means, not of the scope or quality of obligations. Finally, I will briefly address two corollary issues: I will submit that state immunity in case of SOE human rights violations abroad does not apply; and argue that making human rights due diligence obligatory for *all* companies, might, in passing, solve possible problems of an unlevel playing field for SOEs.

II. Lack of Legal Clarity in the UN Guiding Principles and the Working Group Report

The UN Guiding Principles address the topic of SOEs, but there is agreement among scholars they are far from resolving the issue. Particularly, they do not specify the relationship between regulatory and governance approaches, an issue that remains also unresolved in the explanation of the UN Working Group on the issue of human rights and transnational corporations and other business enterprises (UNWG) on the topic.

The UN Guiding Principles

The Guiding Principles are divided into three pillars: the first addresses the role of the state (1–10), the second the responsibilities of business (11–24) and the third, the shared duties to remedy human rights violations (25–31). The document is considered non-binding soft law with respect to the responsibilities of business,[11] despite arguments that human rights obligations of business under international law are or should be binding.[12] It is commonly accepted, that state obligations in business and human rights matters derive from human

[9] For those approaches, Albert Badia, *Piercing the Veil of State Enterprises in International Arbitration* (Alphen aan den Rijn: Wolters Kluwer, 2014); Mikko Rajavuori, 'How Should States Own? *Heinisch v Germany* and the Emergence of Human Rights Sensitive State Ownership' (2015) 26 *European Journal of International Law* 727; Carlo de Stefano, *Attribution in International Law and Arbitration* (Oxford: Oxford University Press, 2020), 79; see also Judith Schönsteiner, 'Attribution of State Responsibility for Actions or Omissions of State-Owned Enterprises in Human Rights Matters' (2019) 40 *University of Pennsylvania Journal of International Law* 895.

[10] *Muelle Flores v Peru*, IACtHR Series C 375 (2019).

[11] Justine Nolan, 'The Corporate Responsibility to Respect Human Rights', in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (Cambridge: Cambridge University Press, 2013), 138; and David Bilchitz, 'A Chasm Between 'is' and 'ought'? A Critique of the Normative Foundations of the SRSG's Framework and the Guiding Principles', ibid, 107.

[12] For a debate, ibid, and contributions in Letnar and Van Ho, note 8.

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rights treaties that a given state has ratified, as these include obligations to protect and guarantee human rights.[13] These obligations are not replaced by Pillar I. It remains partly unclear to what extent states might also incur international state responsibility when their SOEs are failing to respect human rights, despite increasing regional human rights case-law and UN treaty bodies' general comments that include evidence to the affirmative.[14]

The Guiding Principles call upon states to 'take additional steps' incentivizing and ensuring respect for human rights by state-owned enterprises.[15] Thus, Principle 4, in the first (state-based) pillar, refers to SOEs and reads:

> 'States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.'

The commentary to that principle explains in addition that:

> 'The closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State's policy rationale becomes for ensuring that the enterprise respects human rights. [...] Where States own or control business enterprises, they have greatest means within their powers to ensure that relevant policies, legislation and regulations regarding respect for human rights are implemented. Senior management typically reports to State agencies, and associated government departments have greater scope for scrutiny and oversight, including ensuring that effective human rights due diligence is implemented [...].'[16]

As Barnes observes, 'the approach adopted is very broad and ... includes all manner of entities that are owned or controlled by States, regardless of how they are formally structured from a legal point of view'.[17]

Nevertheless, the approach has considerable legal shortcomings. They refer to four main points. These issues are (a) the silence on the attribution of state responsibility for actions and omissions of SOEs; (b) the lack of detail regarding the scope of Guiding Principle 4 and a state's obligations regarding the regulation and oversight of SOEs; (c) the lack of clarity regarding the scope of human rights obligations that SOEs themselves might have; and finally, (d) how Guiding Principle 4 and Pillar II relate.

The Working Group's approach

The UNWG, mandated by the UN Human Rights Council to cooperate with states and other stakeholders in the implementation of the Guiding Principles, issued a report on how to understand and implement Guiding Principle 4 regarding SOEs in 2016. Despite contradictions and lacunae identified in a detailed revision by Backer,[18] as well as questionable identification of 'good practice' in Chile that did not correspond to human rights measures, but

[13] For example, Markus Krajewski, 'The State Duty to Protect Against Human Rights Violations through Transnational Business Activities' (2018) 23 *Deakin Law Review* 13.

[14] Schönsteiner et al, note 7, 910.

[15] Generally, Barnes, note 1, 50.

[16] UN Working Group, note 1, para 26.

[17] Barnes, note 1, 58.

[18] Backer, note 1.

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rather to very limited social responsibility measures that had not been approved by the respective board of directors at the time the report was written,[19] the report makes a couple of interesting points. It recommends that the tools that states should use to clarify their expectations towards SOE's human rights performance, not only consist of policy recommendations like National Action Plans on business and human rights, but primarily of the amendment of national legislation.[20] The report also suggests that by improving the transparency and accountability of SOE management generally, in line with the Guidelines on SOE governance issued by the OECD, human rights performance would also benefit.[21]

Using a management approach designed by another international organization is unusual for a UN human rights special procedure. Backer considers that it is exactly this venture into the intersection of state duties and a governance approach that constitutes the single contribution of the report.[22] He shows that it 'makes excellent sense and draws on the notions of regulatory governance in a useful way' to conceive of 'the SOE board as a sort of conduit for state direction but also as the institution that protects the SOE from absorption into the state.'[23] At the same time, Backer criticizes the report for confusion around the concepts of complicity, attribution, and sovereign immunity.[24] Overall, the authoritativeness of the Working Group's approach remains to be seen, both conceptually and practically. What is more important, as a UN Special Procedure, its reports do not enter the category of authoritative treaty interpretation as do those issued by treaty organs,[25] such as the reports and decisions of the Inter-American Commission and Court of Human Rights. The next section turns to these decisions and reports, showing how they solved several puzzles the Guiding Principles and UNWG left us with.

III. A Regional Take on SOEs' Human Rights Obligations

For the Americas, and especially for Latin America, the regional human rights system is a crucial actor in human rights protection. The Inter-American System (IAS) is based on the OAS Charter and more particularly, the American Convention on Human Rights (ACHR). The Inter-American Court of Human Rights (IACtHR) issues binding judgments in contentious cases and awards different types of reparation (Article 63 ACHR); it also adopts Advisory Opinions (Article 64 ACHR). The Inter-American Commission of Human Rights (IACHR) publishes thematic reports on human rights standards and typical violations, as well as recommendations regarding individual complaints. Upon non-compliance with these recommendations by states, the IACHR may submit the case to the Court. The IAS organs

[19] For example, *SEP Chile* was identified as an example of good practice, but at the time did not have a human rights policy or statement. The term *derechos humanos* was not mentioned in any official document at the time. The Chilean government reported, in a survey carried out by the UN Working Group, that the SEP committed to have 100 per cent sustainability reports by 2018, and that there is a gender balance policy. These are elements towards a human rights approach but cannot replace a due diligence assessment of negative impacts. It should be noted that one member of the Working Group at the time works in a consultancy on sustainability, and corporate social responsibility, that was hired for advising SEP on sustainability and human rights issues. The draft of the Annual Report was written by the same consultancy. Working Group HRC Report 2016, note 1, paras 59, 66, 70 and 71 without explicit sources; maybe all refer to Code of Conduct SEP.

[20] UN Working Group, note 1, para 98.

[21] Ibid, para 38ff, especially, para 39.

[22] Backer, note 1, 855.

[23] Ibid, 869.

[24] Ibid, 863 and 876.

[25] There is one single reference in General Comment 24, for example, indicating that the document applies to both privately and state-owned enterprises; Committee on Economic Social and Cultural Rights, 'General Comment No. 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities', E/C.12/GC/24 (10 August 2017), para 3.

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interpret the ACHR in the light of human rights standards developed by treaty bodies and other human rights organs insofar the state in question has ratified the respective treaties (Article 29b ACHR).

Although the system does not take as many cases as its European counterpart – its Commission and Court only function part-time – and it only has a few contentious cases in which SOEs played a role, recent reports by the Inter-American Commission of Human Rights (IACHR) have considerably improved the level of detail with which the system has developed human rights standards regarding business regulation and SOEs. In the following section, I will critically analyse these standards, asking whether the obligations stemming from the American Convention on Human Rights take account of Guiding Principle 4 and Pillar II; how their exact scope is framed, and to what extent we could claim that the Inter-American System has developed its own take on SOE due diligence.

The Approach

The Inter-American Court has pronounced itself on a few occasions on human rights violations that stemmed from SOE actions or omissions. Thus, the Court has not discussed the scope of SOE obligations explicitly, but found in the *Sarayaku* case regarding indigenous land rights the obligation to carry out free, prior and informed consultation, and the responsibility of a formerly state-owned – now privatized – oil company, that the state was responsible due to its SOE's actions although no analysis was made of the relationship between SOE and the state. All violations were committed by virtue of governmental functions of the SOE,[26] although the Court did not mention that point. In that sense, the Court presumed attribution and applied the same standards as it would have to any other state organ that carries out functions of economic regulation and oversight. That means that *mutatis mutandi*, it would also have obligations to protect or fulfil depending on its mandate in national law.

Similar to *Sarayaku*, in the case of *Dismissed Workers of Petroperú and Others* the Court analysed dismissals from ministries and SOEs by the same token. It found a violation of the right to access to justice in relation to all dismissals, and a violation of the right to work due to the failure to provide such access to justice. The analysis and reasoning of the Court were no different than regarding any state organ for which attribution is never questioned, and it did not discuss functions of the SOEs or the control the executive exercised over the company at all.[27]

Finally, in *Muelle Flores v Peru*, the Court addressed state obligations linked to the privatization of SOEs and the continued obligations to give effect to judicial decisions against those enterprises. In that sense, the Court found a violation of articles 8 and 25 ACHR on due process and access to justice, as well as a violation of articles 26 ACHR regarding social security, and article 21 ACHR on the right to property, as the state had not complied – despite various court decisions ordering so – with its residual obligations to pay Mr Muelle Flores a pension after the privatization of the former SOE. Crucially, the Court analysed the sales contract, which indicated explicitly that the SOE for sale did not have any pending obligations regarding the pensions of its employees.[28] For the first time, in this judgment, the Court revised the structure of the SOE and the documents of the privatization process to define state obligations, instead of automatically attributing a SOE's actions or omissions to the state. Certainly, the specific context of privatization – absent in previous case-law such

[26] For example, *Sarayaku v Ecuador*, IACtHR Series C 245 (2012), para 76. Ecuadorian law entrusts FPIC to Petroecuador, for all licences on oil projects.

[27] *Trabajadores Cesados de Petroperú et al v Peru*, IACtHR Series C 344 (2017), paras 81, 162, 172 and 193.

[28] *Muelle Flores v Peru*, note 10, paras 59 and 60.

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as *Dismissed Workers of Petroperú* – will have required that analysis. Overall, however, the Court's jurisprudence does not tell us which specific obligations a SOE might have in human rights matters, and where potential limitations might arise.

Two reports by the IACHR provide more detail, and especially, contain references to the UN framework that allow linking of the due diligence framework and SOE obligations. The most recent report on Business and Human Rights, adopted in 2019, sets out a framework on state obligations regarding the regulation and oversight of business activity carried out in their territories and abroad, as well as on access to justice and reparation. At the same time, the IACHR includes the existence of *indirect bindingness* of due diligence standards for companies: according to the IACHR, states have the obligation to legally require companies to implement human rights due diligence.[29] While the IACHR thus does not claim bindingness under international law, it clearly sets out that Pillar II needs to be made binding under the respective domestic law. Barnes had suggested in 2018 in the same vein that human rights due diligence (for SOEs) might become an obligation under the respect, protect, fulfil framework.[30]

The report is relatively brief on SOEs. Nevertheless, it sets out that states, according to Guiding Principles 4 and 6, must 'adopt additional measures of protection',[31] and that in these contexts, actions and omissions are attributable to the state, just as when privatizing essential public services. Not adopting such measures might constitute human rights violations.

In the report, the IACHR distances itself from a settled criterion of the Draft Articles:[32] for the IACHR, mere property in an enterprise is sufficient for attributing state responsibility. The IACHR is, therefore, closer to the Guiding Principles, which consider property, by itself, a sufficient reason for a state to have to take 'additional measures' to implement company due diligence in a SOE. The IACHR also prescinds the governmental function criterion the Draft Articles establish by inverting the burden of proof regarding that element. The closeness of a SOE to the state is considered 'regardless of whether the latter is a subject of private law and in a strict sense does not have the capacity to act as the state, or does not exercise any public function, unless the contrary is shown'.[33] The Commission does not make clear how the 'contrary is shown', but by its wording introduces the possibility of a twist in the Commentary to the Draft Articles and the jurisprudence of the European Court of Human Rights (ECtHR) that consider the 'public function' an essential requisite for attributing an act or omission to the state. The systemic approach proposed in section IV will suggest how to solve the challenge that arises: that a state might elude accountability by removing impact-intensive business from its direct control.

Relation with the OECD Approach on SOE Governance

The Commission's report does not make explicit how it relates to the OECD governance approach on SOEs, which encourages states to *withdraw* from controlling management directly. Thus, when the Commission calls on states to 'heighten precautions in order to

[29] Inter-American Commission of Human Rights, *Business and Human Rights: Inter-American Standards*, OEA/Ser.L/V/II, CIDH/REDESCA/INF.1/19 (1 November 2019), para 50.

[30] Barnes, note 1, 58.

[31] Ibid, para 307.

[32] Jonas Dereje, *Staatsnahe Unternehmen. Die Zurechnungsproblematik im Internationalen Investitionsrecht und weiteren Bereichen des Völkerrechts* (Baden-Baden: Nomos, 2016); Jaemin Lee, 'State Responsibility and Government Affiliated Entities in International Economic Law' (2015) 49 *Journal of World Trade* 117.

[33] Inter-American Commission of Human Rights, note 29, para 312.

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ensure [compliance with] its obligations to respect and guarantee human rights'[34] by exercising 'a major level of control or influence over the enterprise',[35] this could well be more demanding than what the OECD governance model for SOEs recommends when indicating that 'the government should allow SOEs full operational autonomy to achieve their defined objectives and refrain from intervening in SOE management'.[36] This being said, the choice between mechanisms of control or influence are irrelevant for the definition of the scope of human rights obligations. However, it might affect considerably how well and how effectively these obligations are implemented on the ground.

The OECD Guidelines for SOEs indicate that states should set up those information and accountability mechanisms that allow it to act as 'an informed and active owner',[37] especially by 'monitoring the implementation of broad mandates and objectives for SOEs, including financial targets, capital structure objectives and risk tolerance levels',[38] 'setting up reporting systems that allow the ownership entity to regularly monitor, audit and assess SOE performance, and oversee and monitor their compliance with applicable corporate governance standards'[39] and 'developing a disclosure policy for SOEs that identifies what information should be publicly disclosed, the appropriate channels for disclosure, and mechanisms for ensuring quality of information'.[40] The OECD discourages direct involvement in management decisions, while specifying that 'the ownership entity should also require that SOE boards establish adequate internal controls, ethics and compliance measures for detecting and preventing violations of the law'.[41] In that sense, the OECD recommends more than exercising 'influence' over SOEs. In relation to human rights, specifically, the Annotations to the Guidelines call on SOEs to:

> 'observe high standards of responsible business conduct, including with regards to the environment, employees, public health and safety, and human rights. Their actions should be guided by relevant international standards, including: the OECD Guidelines for Multinational Enterprises, which have been adopted by all OECD member countries and reflect all four principles contained in the ILO Declaration on Fundamental Principles and Rights at Work; and the UN Guiding Principles on Business and Human Rights.'[42]

The main responsibility for respect for human rights falls with the board and management: 'SOE boards and management should ensure that they are integrated into the corporate governance of SOEs, supported by incentives and subject to appropriate reporting and performance monitoring.'[43] With regard to the state's role as an owner, the language remains vague, but allows for mandatory reporting: 'The ownership entity can communicate its expectations in this regard and require SOEs to report on related performance.'[44]

[34] Ibid.
[35] Ibid.
[36] OECD, note 5, para II.B, 18.
[37] Ibid, para II.F, 18.
[38] Ibid, para II.F.3, 18.
[39] Ibid, para II.F.4, 19.
[40] Ibid, para II.F.5, 19.
[41] Ibid, 41.
[42] Ibid, 60.
[43] Ibid, 60.
[44] Ibid, 60.

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The OECD document is aware of the crucial role that transparency and disclosure play in relation to governance generally. Access to information is also a key ingredient to the human rights approach. This element appears to be the main point of intersection, as the OECD Guidelines for SOEs limit social, environmental and human rights mainly to considerations of disclosure. This enables the oversight organs to carry out their due diligence functions, including the assessment of human rights risk.[45]

However, it seems that the recommendations of the OECD Guidelines are insufficient to meet the Inter-American obligations: The ownership entity and board of SOEs are basically called to incentivize the application of corporate due diligence on human rights (adoption of policy, disclosure, participation), without focusing on obligations of result regarding the respect of human rights, that are, as we have seen, a key element of the approach. In that sense, a state that only implements the OECD governance approach would not live up to the IACHR's recommendations, as it would not adopt all the appropriate mechanisms to respect and protect human rights.[46]

Shortcomings and Need for Clarification in the Inter-American Approach

While the Commission's approach is more differentiated than previous jurisprudence of the Court, important issues remain vague or unresolved, probably as the Commission's report does not exclusively focus on SOEs. Nevertheless, the report introduces an important element to the assessment of human rights performance of a SOE when stating that it 'will depend, to a large extent, on the level of relationship between the State's behaviour and *the factors that threaten or allow human rights violations* related to corporate activities';[47] however, it does not provide detailed standards on oversight organs' human rights due diligence regarding set-up, operations and wind-down of SOEs, nor does it develop the concrete scope of the company's obligation to respect human rights. In addition, and this is the major criticism to its approach, the Commission gets caught in a confusion about obligations of due diligence versus obligations of result. I will address the latter point first, and then, in turn, the others.

The IACHR emphasized that with projects carried out by the authorities themselves, the state has a direct obligation to respect and guarantee human rights. In a somewhat odd way, the paragraph closes (in inobservance of Spanish grammar) that these obligations are 'with due diligence'.[48] The original paragraph of the Commission's 2015 Report is more accurate:

> 'the Commission wishes to emphasize that this principle [that the state knew or ought to have known] does not apply when the State itself is the one implementing the project. As it was mentioned previously, at times, extractive industries can benefit from State support. In these cases, States have direct obligations to respect and guarantee human rights *with due diligence.* When the State is [however] directly involved in promoting and advancing an extractive or development plan or project, it finds itself bound to *strict compliance* with all of the obligations provided for in the Inter-American

[45] Ibid, 59. Human rights impact assessment is not mentioned explicitly.

[46] Inter-American Commission of Human Rights, note 29, recommendation 18, 207.

[47] Ibid, para 312, emphasis added.

[48] Ibid, para 310: 'in the context of extractive industries and development projects, the Commission has already emphasized that when it is the State itself implementing such activities, the state has direct obligations to respect and guarantee the human rights involved, with due diligence', citing Inter-American Commission of Human Rights, 'Indigenous Peoples, Afro-Descendent Communities and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities, OEA/Ser.L/V/II. Doc.47/15 (31 December 2015), para 85.

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> instruments, such as the right to property, to life, to physical integrity, among others, as well as with the standards and obligations developed in the present report.'[49]

In that sense, the 2015 report shows a distinction that the 2019 report does not represent correctly. The IACHR considers that in cases of financial support by the state, the state obligation is to protect, and therefore, due diligence applies. To the contrary, if the state is directly involved in the project (not only 'financially'), its obligation is to *respect* human rights, and therefore 'strict compliance' is required.

This wording is more appropriate regarding the general framework of obligations of result and obligations of process (due diligence) in international law. Scholars have criticized the Guiding Principles for the same confusion,[50] and the clarity of the IACHR's 2015 report helps a great deal in that regard.

This reading is confirmed regarding extraterritorial obligations of states. The IACHR explains that those business entities acting under instructions of the state such as SOEs may violate the obligation to *respect* human rights, while other state organs only violate the obligation to *protect* ('guarantee' in Inter-American wording) human rights, in particular, with regard to *private* enterprises that are domiciled in its territory.[51] Thus, the IACHR requires from states that they apply 'strict compliance' to SOEs. To the extent a state's domestic law treats a SOE in the same way as private enterprises, the state may well fall short of its human rights obligations, as it would not have made use of all the 'appropriate'[52] regulatory and governance tools available to change or influence the SOEs decision-making over human rights.

In that sense, in the Commission's view, state duties are 'enhanced' in comparison with the UNGPs, both for the SOE itself, and for the state organs that exercise control and oversight, albeit in different ways. The most important difference to the Guiding Principles seems to be that for the IACHR, the states *must* make human rights due diligence obligatory for all enterprises, public and private alike. Both, in turn, present important differences with the OECD approach, even though the UNWG has considered the Guiding Principles as completely in line with the OECD governance approach. It seems that the problem lies exactly here.

The next section investigates the contributions the Inter-American System makes on the question about the exact scope of human rights obligations of states and their enterprises, and develops a systemic reading of obligations that might fill the voids or missing detail identified above.

IV. The Scope of Human Rights Obligations for SOEs in the Americas

This section develops elements of enhanced protection of human rights in the event of SOE activities that pose risks to the enjoyment of human rights. In that sense, I will address the Inter-American sources of obligations and then delineate a systemic approach for achieving SOE respect for human rights on the ground, addressing prevention; the question whether obligations are of result or of due diligence; obligations that arise when setting up a SOE;

[49] Ibid, para 85, emphasis added.

[50] Jonathan Bonnitcha and Robert McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights' (2017) 28 *European Journal of International Law* 899. Critically, John Ruggie, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights: a Reply to Jonathan Bonnitcha and Robert McCorquodale' (2017) 28 *European Journal of International Law* 924.

[51] Inter-American Commission of Human Rights, note 29, para 167.

[52] International Covenant on Economic, Social and Cultural Rights, UN Doc A/RES/21/2200 (adopted on 16 December 1966, entered into force on 3 January 1976), art 2.

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transparency and information; access to remedies, and issues regarding the use of revenues. A systemic approach of deriving duties related to SOEs from the general duties to respect and protect, viewing regulatory and governance approaches to SOE behaviour *together*, promises to avoid several of the shortcomings in the UN framework identified in earlier scholarship.[53]

Sources of Obligations

According to the Guiding Principles, SOEs have responsibilities with regard to all human rights recognized in the International Bill of Human Rights when these SOEs operate abroad, while the state-owner might not have ratified all treaties in question. In those cases, the SOE's responsibilities – as Backer warns – could be more encompassing than those accepted by the state via treaty ratification,[54] and reducing SOE responsibility to state responsibility might let SOE activity abroad too easily off the hook. The problem arises, for example, with regard to human rights violations that Chinese SOEs operating in the Americas have allegedly committed.[55] While the home state has not ratified the International Covenant on Civil and Political Rights, its companies operating abroad have to respect the rights enshrined in it, even if the host state did not oblige them to do so under domestic law. A similar issue would arise for US export guarantees towards Latin American countries: while the US has not ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), the companies supported by its guarantees, or publicly owned companies with activities abroad, will have to respect economic, social and cultural rights.

It seems that the puzzle can be solved by going back to the basic rules of state responsibility that arises under two conditions. First, there must be a breach of an obligation under international law, and second, this breach must be attributable to the state. This second element is fulfilled if a SOE carries out a public function or is closely controlled by state organs;[56] according to the IACHR, it could be even the case whenever there is a state's property stake in an enterprise.[57] The first element, in turn, is the existence of an obligation: if considered part of the state, a SOE can breach (only) the international obligations this state has – in that sense, obligations are circumscribed to what a state has signed up for: the treaties it has ratified, customary law that it is bound by, general principles of international law, binding resolutions of international organizations it is part of, or *jus cogens* norms.[58] The SOE itself should, in addition, respect all human rights referred to in the Guiding Principles.

If this differentiation is accepted, this would mean that *qua* enterprise, a SOE can infringe *all* norms mentioned in Pillar II – but then, *state* responsibility does not necessarily arise unless these norms *also* constitute customary human rights norms[59] or *jus cogens* norms.[60]

[53] Backer, note 1; Schönsteiner et al, note 7.

[54] Backer, note 1, 861, 863.

[55] Denunciations have focused on indigenous rights and environmental issues, see for example, COICA et al, *Vulneraciones a los derechos de los pueblos indígenas en la Cuenca amazónica por inversiones chinas*, Informe EPU 2018.

[56] For an overview regarding human rights law, Schönsteiner et al, note 7.

[57] IACHR does not exclude such a reading, and the IACtHR has never found to the contrary, but has not issued any explicit affirmation either.

[58] But see Backer, note 1, 863–864.

[59] As a starting point for the debate which international human rights norms would amount to international customary law, Hugh Thirlway, 'Human Rights in Customary Law: An Attempt to Define Some of the Issues' (2015) 28 *Leiden Journal of International Law* 495–506. See also, in relation to the problems that arise from the definition of customary international law, Brian D. Lepard, 'Why Customary International Law Matters in Protecting Human Rights', *Völkerrechtsblog*, 25 February 2019, doi: 10.17176/20190225-133150-0 (accessed 25 March 2021).

[60] Dire Tladi, Special Rapporteur to the International Law Commission, Fourth Report on peremptory norms of general international law (jus cogens), A/CN.4/727 (31 January 2019), draft conclusion 24.

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Qua state organ, the responsibility is effectively limited to norms that are binding on the state owner pursuant to the treaty ratification. This argument seems to avoid an unwanted effect in the law of state responsibility that Backer signals: that 'attribution may make the case for reducing the scope of the SOE corporate responsibility'[61] – it seems it does not, as there was no international obligation in the first place (although there might be attributability all the way through). In this context, it seems a priority task to identify all customary human rights and environmental norms of international law that will be applicable to SOEs independent of any treaty ratification. As the Court highlighted, such norms exist, particularly and just for example, in relation to transboundary environmental contamination.[62]

A Systemic Approach Integrating Regulatory and Governance Mechanisms to Achieve Respect for Human Rights

Looking at the whole issue of SOE human rights obligations from a victim or rights-holder perspective – as the Inter-American System has defined over decades – requires a systemic view of the respective business sector in which the SOE is operating, its economic structure, regulation and policies.[63] The Commission's report hints to such a systemic approach[64] that contributes to avoiding that a state's ownership and governance choices around its involvement in a business sector impede human rights accountability. It also helps to conceive of the state as 'just another' economic actor, as is the reality in most Latin American countries, and to design the corresponding accountability schemes for that economic activity.

Whichever governance model a state chooses for its SOEs, human rights violations need to be prevented and if that is impossible, mitigated, investigated and repaired. For example, if Mexican law allows its state-owned petrol company to run a hospital, the state will have to sign as fully responsible for violations of the right to health that might occur, pursuant to having assigned a public function to that entity.[65] In that sense, there would be no difference with a private entity that carries out public functions, as the Court held in *Ximenes Lópes*, a case concerning ill-treatment and death by negligence in a privately run mental hospital in Brasil.[66] The same would be true for the administration of drinking water concessions by the Chilean state-owned company ECONSSA.[67] However, it would be left to the state in both cases to what extent it chooses to adopt regulatory or governance mechanisms in order to implement this obligation.

[61] Backer, note 1, 864.

[62] *Environment and Human Rights*, OC-23/17, IACtHR Series A 23 (2017), see especially, UN General Assembly, *Prevention of Transboundary Harm from Hazardous Activities*, adopted through resolution A/RES/62/68 (6 December 2007).

[63] For such an exercise regarding the Chilean drinking water sector, in which both regulators and a state-owned enterprise can be defined as 'appropriate means' to bring about respect and guarantee for human rights, Macarena Contreras and Judith Schönsteiner, 'Derecho al Agua, Emergencias y Responsabilidades del Estado y de las Empresas Sanitarias', in Tomás Vial (ed), *Informe Anual sobre Derechos Humanos en Chile* (Santiago: Ediciones UDP, 2017), 99.

[64] Backer might have had such an approach in mind when suggesting a 'unitary approach to state duty', Backer, note 1, 860.

[65] For a concrete case, Comisión Nacional de los Derechos Humanos de México, *Inicia CNDH queja de oficio para investigar presuntas violaciones a derechos humanos en el caso de dos pacientes fallecidos y 42 afectados por el suministro de un medicamento contaminado en el Hospital Regional de Pemex en Villahermosa, Tabasco* (4 March 2020), Comunicado de Prensa DGC/067/2020.

[66] *Ximenes Lópes v Brazil*, IACtHR Series C 149 (2006).

[67] Contreras and Schönsteiner, note 63.

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Commercial activities such as mining, gas and oil, to name just the most typical ones in Latin America, would not be treated differently: the state also has to ensure respect of human rights – as according to the Inter-American view, its acts and omissions are fully attributable to the state. If the Latin American state-owned carbon majors such as Pemex, Petrobras or Petróleos de Venezuela S.A. violate human rights during their own activities, they make their owners incur international state responsibility – not just for not protecting human rights, but for not respecting them. Certainly, this approach is at odds with the 2001 Draft Articles' reading on attribution, but it seems to sit well with general criticism to that document.[68]

The Commission hinted at this view on attribution in its first business and human rights report that dealt with extractive industries and indigenous peoples' rights.[69] SOEs are located at a specifically crucial point and allow us to further explore the relationship between governance and regulation. It is only by systemically evaluating the different measures of direct corporate control and general regulation of corporations in a specific sector – rather than artificially dissecting the regulatory and governance function around SOEs – that a conclusion on compliance with business and human rights standards can be reached. Several points are pivotal and will be addressed in turn in the following sections.

Due Diligence or Obligations of Result?

Although a state organ *de facto* does not have full control over its officials, international law assumes such control when attributing their acts fully to the state, even if acting *ultra vires.*[70] This has also been the long-standing jurisprudence of the Inter-American Court.[71] This is different for private actors; the reason being that full control or knowledge of their acts is outside the scope of a liberal state. In that sense, if a violation occurs, the state must show that it took all the necessary and reasonable[72] measures to prevent the violation, and afterwards, to provide access to justice for victims.[73]

In this context, the question whether a due diligence-based presumption of knowledge exists regarding a SOE is the knot of the problem. Considering ownership rights and obligations in corporate law; the reality of Latin American SOEs over which states keep rather tight executive control; and even the 'active ownership' suggested by the OECD, there is no reason to presume that the state did not know, could not have known, or should not know what is going on in the companies it owns. This becomes especially clear when we look at companies that exercise public functions or are closely controlled – sometimes even in

[68] Badia, note 9; Dereje, note 32.

[69] Inter-American Commission of Human Rights, note 48.

[70] International Law Commission, Draft Articles on State Responsibility for Internationally Wrongful Acts, art 7 and commentary (A/56/10).

[71] For a different reading, subsuming concepts as diverse as proportionality, duty of care, and positive obligations of protection against the acts of private actors under the concept of due diligence, see Riccardo 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 (2008), chapter IV. Pisillo Mazzeschi only considers certain, exceptional, state obligations regarding risk or accidental variables as obligations of result. This reading does not conform itself, I argue, with the long-standing jurisprudence of the Court since Velásquez Rodríguez. I therefore prefer Shelton and Gould's classification, see note 97.

[72] *Osman v United Kingdom*, Application No. 23452/94, Judgment E.Ct.H.R. (28 October1998), para 116. Ebert and Sijniensky have – I submit correctly – criticized several conceptual confusions regarding the application of the Osman test to cases where the state itself contributed to the risk the victim was exposed to. See note 90.

[73] Cecilia Medina, *The American Convention on Human Rights. Crucial Rights and Their Theory and Practice* (Cambridge: Intersentia, 2016). The debate about overlap between duty to protect and positive obligations needs not be addressed here. See for an in-depth-discussion, Sandra Stahl, *Schutzpflichten im Völkerrecht. Ansatz einer Dogmatik, 232 Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* (Heidelberg: Springer, 2012).

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day-to-day or strategic decisions – by the state-owner. In those cases, full knowledge must be presumed to avoid an accountability gap.

This presumption of knowledge operates regarding the activities of the SOE itself and the company's obligation to respect human rights.[74] In exactly this same logic, according to the Commission, the due diligence standard does not apply 'if the State itself is implementing the project'.[75] The Commission is even more explicit:

> 'When the State is directly involved in promoting and advancing an extractive or development plan or project, it finds itself bound to strict compliance with all of the obligations provided for in the Inter-American instruments, such as the right to property, to life, to physical integrity, among others, as well as with the standards and obligations developed in the present report.'[76]

There seems to be agreement that the creation of an adequate institutional structure that allows taking preventive measures is, clearly, an obligation of result.[77]

If this is accepted, we can take the argument one step further. Conceptually, state due diligence and corporate due diligence are functionally similar, sufficiently enough so to justify the following reasoning: Pillar II spells out, for SOEs, *how* state obligations (independent of which treaty enshrines them, universal or regional) could boil down to concrete (governance) mechanisms in a business structure, with regard to obligations to respect human rights in its own activities as well as obligations to protect human rights in the supply chain.[78] This 'governance due diligence' is a means to achieve respect, which in itself is due as an obligation of result. It is only regarding third parties that a 'proper' due diligence logic comes into play, and no obligations of result arise.[79]

The similitude between company due diligence and state due diligence – the latter spelled out in *Advisory Opinion 23*,[80] or in *Hacienda Brasil Verde* where the Court identifies the duty to regulate, exercise oversight, act upon information that might hint to violations, *ex officio*, and provide access to justice, among other measures – is in that sense meaningful. It is true that the corporate responsibility to protect is not called such in the Guiding Principles but is treated as part of their duty to respect; however, conceptually, it makes sense to consider the responsibility a company has for ensuring the respect of human rights with its contractors or suppliers, a responsibility to protect. The control over those entities is reduced, both for private and public companies, just as state control over a liberal society, and therefore, due diligence as a means to avoid liability is the appropriate legal figure to get hold of that phenomenon.[81] In relation to the supply chain, therefore, SOE and state due diligence *do* resemble each other. The *difference* of duties arises from the different scope of leverage between the state and the enterprise, and the different structures of internal accountability (administrative law versus governance) that they respond to.

Summarizing the argument in practical terms, both state organs and the SOE must respect human rights and adopt due diligence measures of protection in relation to actors that they cannot fully control. In that context, the adoption of a human rights policy would

[74] See Guiding Principle 19.
[75] Inter-American Commission of Human Rights, note 48, para 85.
[76] Ibid.
[77] Ibid, para 86. Pisillo Mazzeschi, note 71, 334.
[78] Commentary to Guiding Principle 19.
[79] Bonnitcha and McCorquodale, note 50.
[80] IACtHR, note 62.
[81] Bonnitcha and McCorquodale, note 50.

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'correspond' to the political commitment to respect human rights (ratification of a treaty); evaluate human rights impact and risk, act upon the results (legislate), monitor and follow-up on the risks (oversee) and if necessary, remedy the violations (provide reparation and justice).[82] These correspond to a policy cycle that a state would have to install in order to comply with its treaty obligations.[83] Pillar II of the Guiding Principles spells out how the obligation to respect is to be implemented in a SOE, and also finds some correspondence in the OECD Guidelines for SOEs. It is therefore irrelevant whether a state decides to 'manage' a SOE through governance or through regulation. The treaty obligation remains.

Prevention

According to long-standing case-law interpreting the American Convention on Human Rights, prevention is key.[84] In addition, international law recognizes specific treaty obligations such as the obligation to prevent genocide,[85] violence against women,[86] torture,[87] to name just a few. There are also explicit customary law obligations to prevent transboundary harm through hazardous activities.[88] As Xenos puts it when analysing the European human rights system: 'from whichever angle the state's positive obligations are approached, it is inescapable to conclude that the quintessence of protection concerns the *prevention* of human rights violations.'[89]

Generally, prevention is required for all human rights violations, but especially, when there is a real and immediate risk of an irreparable violation.[90] In the environmental context, for example, this would mean that a SOE must prevent significant damage to the environment and to the health of people nearby. Regarding the right of indigenous peoples to their territory, prevention entails the duty of free, prior, and informed consultation or consent. In relation to labour issues, prevention is particularly key when avoiding accidents and any fatalities at work. In the ambit of the right to privacy, prevention requires protocols and mechanisms that ensure this right in telecommunications or banking services provided by SOEs.

In such situations, prevention is achieved by implementing the state's duty to regulate, exercise oversight, require and approve the company's environmental (social and human rights) impact assessments, plans of contingency, as well as the duty to establish the

[82] Compare Guiding Principles 17 and 19 and IACtHR, note 62.

[83] Inter-American Commission of Human Rights, note 48.

[84] IACtHR, note 62.

[85] Convention on the Prevention and Punishment of the Crime of Genocide, UN Treaty Series No. 1021, (adopted on 9 December 1948, entered into force on 12 January 1951).

[86] UN Convention on the Elimination of All Forms of Discrimination against Women, UN Treaty Series No. 20378 (adopted on 18 December 1979, entered into force on 3 September 1981); Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, OAS Treaty Series, 'Convention of Belem do Pará' (adopted on 6 September 1994, entered into force on 3 May 1995).

[87] Inter-American Convention to Prevent and Punish Torture, OAS Treaty Series No. 67 (adopted on 12 September 1985, entered into force on 28 February 1987); UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Treaty Series 24841 (adopted on 10 December 1984, entered into force on 26 June 1987).

[88] UN General Assembly, Prevention of transboundary harm from hazardous activities, adopted through resolution A/RES/62/68 (6 December 2007), Articles 2 and 3, taken up by IACtHR, note 62.

[89] Dimitris Xenos, *Positive Obligations under theEuropean Convention on Human Rights* (Abingdon: Routledge, 2012). Similarly, Stahl note 73, 154: 'Zudem kommt dem Präventivschutz im Bereich der Menschenrechte ein sehr hoher Stellenwert zu.'

[90] Franz Ebert and Romina Sijnienski, 'Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Courts: From the Osman Test to a Coherent Doctrine on Risk Prevention?', (2015) 15 *Human Rights Law Review* 343, 352.

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obligation to mitigate environmental damage, applicable to all enterprises alike.[91] The Court in its Advisory Opinion confirmed previous case-law on different subject matters such as modern forms of slavery,[92] forced labour[93] or gender-based violence.[94] The Court and Commission also take into account whether the affected persons are members of any vulnerable group.[95] The obligation to prevent encompasses potential future impact.[96]

Prevention is thus to be achieved through regulation, independent and efficient oversight mechanisms, and access to justice.[97] While regulation and oversight are tasks of 'traditional' state organs, the obligation to prevent also applies to SOEs, in particular, if they carry out public functions or are controlled closely by the state, but also if they are further removed from executive intervention, as the state should act as an 'informed and active owner', or, as the Commission puts it, should have known about human rights risks and violations in its companies' operations. 'Inside' the SOE, prevention is achieved through adequate governance and compliance mechanisms.

As SOEs are located at the juncture of regulatory and governance mechanisms, which all are controlled by the state, the latter must go beyond traditional regulation and use – additionally – governance mechanisms to ensure prevention. If it did not, it would violate the obligation to use 'all appropriate means' to respect and ensure respect for human rights (Article 2 ICESCR). Two sources are particularly relevant for determining the appropriate governance tools: first, Pillar II and Principles 29, 30 and 31 of the Guiding Principles, and second, several provisions of the Guidelines on SOE governance adopted by the OECD. SOEs should implement their obligation to respect by adopting a human rights policy (Guiding Principle 16), a due diligence process (Guiding Principle 17) that allows it to identify, in a participatory way, human rights risks and impacts (Guiding Principle 18), and integrate the findings in their operations by adopting preventive and mitigating measures (Guiding Principle 19), report on this process and its outcomes (Guiding Principles 20 and 21), and provide for 'operational-level grievance mechanisms for individuals and communities' (Guiding Principle 29), observing standards of equality of arms and procedural fairness (Guiding Principle 31). Although the OECD Guidelines only mention human rights once, in the context of reporting and transparency (annotation to section V.D.), there are several important entry points for the Guiding Principles: through internal monitoring and control mechanisms (V.C.), participation of stakeholders (V.B.), disclosure of human rights and environmental spending (III.D), adopting a disclosure policy (II.F.5), and a reporting system that allows the respective oversight organs – corporate or public – to evaluate and improve the SOE's human rights and environmental performance (II.F.4).

The private sector tier only comes in, in that specific situation, when the SOE relates to contractors or establishes supply chain relations with private companies, but not – I maintain – between the state and its enterprise.[98] In relation to contractors or the supply

[91] IACtHR, note 62, section B.1.c.

[92] *Hacienda Brasil Verde v Brazil*, IACtHR Series C 318 (2016).

[93] *Pueblo Bello v Colombia*, IACtHR Series C 140 (2006).

[94] *González et al (Cotton Field) v Mexico*, IACtHR Series C 205 (2009).

[95] Ebert and Sijniensky, note 90.

[96] IACtHR, note 62, para 165.

[97] Dinah Shelton and Ariel Gould, 'Positive and negative obligations', in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press, 2013), 562, 577.

[98] Similarly, for the second point, Larry Catá Backer, *'Un Somaro Piumato' – Rethinking the Scope and Nature of State Liability for Acts of their Commercial Instrumentalities: State Owned Enterprises and State-Owner Liability in the Post-Global* (2021), draft available at https://ssrn.com/abstract=3878303 (accessed 15 October 2021), discussing Mark Weidemaier, 'Piercing the (Sovereign) Veil: The Role of Limited Liability in State Owned Enterprises' (2021) 46:3 *Brigham Young University Law Review* 795. See also, *mutatis mutandi*, Badia, note 9.

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chain of a SOE, such obligations of prevention are of due diligence. For its own activities, a SOE would have to assume the risk and would be measured towards an obligation of result.

The difference between a public service and a SOE, therefore, is not the scope of the obligation to prevent that applies, but the *means* it employs to achieve this prevention: the public service would use administrative (public) law mechanisms, the SOE governance (private) law mechanisms or a mix of public and private law mechanisms, depending on, for example, the status of its employees, i.e., whether they are public officials or not. Differentiating according to the *mode* of accountability mechanisms allows us to capture the specific nature of SOEs while being faithful to the scope of the obligation to prevent human rights violations itself, which does not change whichever vehicle the state chooses for its activities.

Obligations at the Moment of Set-up

The state's full control (and responsibility) with regard to the conditions under which it sets up an SOE is crucial when defining the scope of the obligations to respect and protect. A state must adopt the appropriate institutional measures to respect human rights, regarding the channels it installs for keeping the state-owner informed on the SOE's human rights performance, the portion of revenues that is set aside for prevention measures and reparation, the mechanisms of access to remedies it creates, among others.

In this context, it is necessary to spell out with greater detail how the set-up of an SOE should be done so that a state complies with its international human rights obligations. Set-up must be done in such a way that the state maintains sufficient control over the company's human rights risks and impacts. Key factors in this context seem to be the definition of the information flow from the company to the state,[99] and the use of revenues for human rights risk prevention. Also, remedies must be set up in such a way that no impediments *de facto* or *de iure* make it difficult for human rights victims to access justice. Especially, there must be access to independent courts to prevent that the possible overlap of functions between administrative justice and ownership organs influence the outcome of cases. I will consider these aspects in turn.

Obligation to Request (additional) Information

The state's ownership function requires to reflect on the knowledge the state has or should have about human rights risks or violations in the operations of its enterprises. This knowledge must be sufficient to achieve the obligation to prevent, independent of whether the state opted for a more regulatory or more governance approach to human rights respect in its companies.

It should be undisputed that, when a state receives information about possible abuses against private persons, it must act and protect the persons at risk. However, this should not be considered sufficient for SOEs. The ECtHR correctly presumed the state to be more aware of human rights risks when the enterprise is state-owned.[100] This view was explicitly confirmed by the IACHR.[101] Also, the OECD Guidelines, despite tending to recommend that a SOE be pushed away from too close a relationship with its public owner, dedicate several recommendations to the responsibilities of the 'informed' owner.[102] A similar reasoning

[99] Rajavuori, note 9.

[100] *Heinisch v Germany*, Application no. 28274/08, Judgment, E.Ct.H.R. (21 July 2011). The reasoning was not confirmed in later jurisprudence of the European Court. That might have led to the perception that the ECtHR does not treat public and private enterprises differently, see Daelman, note 7, 421.

[101] IACHR, note 29, para 312.

[102] OECD, note 5, section on information.

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applies when the state is privatizing public services such as health, as highlighted by the Court 15 years ago.[103] In order to comply with the obligation to prevent human rights violations – generally and specifically – the state has to ensure to be fully informed about potential human rights risks in the SOE.

Spending on Prevention and Remedies

The state has to draw on taxes or similar contributions, in order to 'take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant [...]' (article 2 ICESCR). For revenues generated by SOEs, there is no exception to this obligation.

While a SOE does not have competences in relation to budgetary assignations,[104] there are some issues that seem to be relevant to human rights when designing the set-up of a SOE and the mechanism for injection of capital and recovery of revenues. The most important one is related to the capacity of spending on human rights prevention and mitigation measures, and of paying out compensation. Not leaving money in the company for paying out compensation would have exactly the same effect as – in a private enterprise – removing revenues from a subsidiary and putting a corporate veil between the victim's claim and the compensation money. Setting up a fund for these purposes, which remains in the SOE or is administered by the ownership entity with a view to compensating victims of human rights violations, would solve these problems. The same is true for money needed to take preventive mitigation measures.

A similar situation arises when privatizing SOEs. A state may not include clauses that limit its liability for environmental and human rights damage occurred while it was owner of the company. The admissibility decision in *La Oroya* points in the direction of such an understanding when the state of Peru accepted to pay for clean-ups related to all contamination generated prior to the privatization of a state-owned metallurgic complex.[105]

A specific problem is earmarking SOE revenues for activities that might actually put human rights at risk. A curious case is Chile's (now derogated) Reserved Copper Law, which legally earmarked each year's first 10 per cent of Codelco's revenues to the Ministry of Defense and the Armed Forces.[106] Codelco's revenues directly financed the armed forces when, during Pinochet's dictatorship, systematic human rights violations were committed. Even after the return to democracy, the law impeded that Congress freely decided upon budgetary assignation to, e.g., social rights guarantees, prison, police or justice reforms. This earmarking is in stark contrast to the absence of any earmarking in Codelco's budget regarding environmental or human rights prevention.

Access to Remedies

Generally, in order to be effective, access to justice has to allow for reparation and, ideally, restitution of the right that was violated. The rich jurisprudence of the IACtHR with explicit non-repetition guarantees is evidence thereof.[107] The specific risk in relation to SOEs is that

[103] *Ximenes Lópes,* note 66.

[104] There are only a few explicit standards on budgets in international human rights law. See especially, Committee on the Rights of the Child, General Comment 19, CRC/C/GC/19 (20 July 2016), paras 40–63.

[105] *La Oroya v Peru*, Admissibility Decision, IACHR, P-1473-06 (2009), para 68.

[106] Law 13.196 Ley Reservada del Cobre (Chile), and Law 21.174 of 2019 derogating Ley Reservada del Cobre (Chile).

[107] For a general overview, Carmelina Londoño, *Las Garantías de no-repetición en la jurisprudencia interamericana* (Madrid: Tirant Lo Blanch, 2014); Marcela Zúñiga, 'Garantías de no repetición y reformas legislativas: causas de la

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remedies in domestic law are not granted whenever necessary, due to the closeness of administrative justice organs to the ownership structure of the company, or due to a strong state capacity to litigate claims around compensation to be paid for state actions or omissions. The difficulties of access to remedies against the state have been documented thoroughly, including when producing evidence, accessing legal advice, and receiving threats to human rights defenders.[108]

In the context of SOEs, some additional questions arise. First, there is a question whether there is a possible residual obligation to repair owed by the state, beyond what would be the reparation due for failure to provide access to justice or a remedy. Such a situation could arise when the SOE is liquidated,[109] when revenues are directly incorporated into the state budget and when the SOE enjoys little margin to set aside compensation money. In that sense, this obligation, it would seem, depends on how the initial set-up of the enterprise was designed, and would require that reparation and restitution funds be set aside, ready to be used independently from additional budgetary approval in case the company is ordered or agrees to compensate victims. Such an obligation seems more than plausible especially if the state organs have not been doing enough to pursue reparations from their own enterprises.

The question of historic damages caused by SOE operations, on the contrary, has not yet been dealt with generally[110] and is left to future research. A specific question is whether the state should also be considered (internationally) responsible when evidence for the causal link between the SOE and historic damage is not sufficiently established, or when the claim is barred by statutes of limitations in domestic law. In those cases, the obligation would not be related to a state's economic activity but to the general obligation to protect potential victims from risk to their health that would constitute a (continuous) violation of their right to health.

Back to a Level Playing Field

The obligations developed in relation to SOEs are more demanding than what states, currently and *de facto*, do require from private business. But it would not be more than what they should require from any economic actor under the obligation to protect human rights. Overall, the differences between making public and private corporations accountable stem from the fact that the state plays a double role regarding SOEs as regulator *and* supreme governance organ and needs to be accountable for that double role.

If a state were concerned about an uneven playing field for its own versus private enterprises, when complying with human rights obligations, the solution seems to be that human rights due diligence by state organs regarding private actors be enhanced, too, instead of turning a blind eye to human rights risks in its own economic activities. A perspective that is first and foremost concerned about access to justice for victims of human rights violations would share that concern.

The Commission recommends that states require respect for human rights from public *and* private companies, in (domestic) law, obliging them to adopt (governance) mechanisms

falta de pronunciamiento y denegación de reparaciones en la jurisprudencia de la Corte Interamericana de Derechos Humanos a partir del caso Cinco Pensionistas vs. Perú' (2020) 46 *Revista Derecho del Estado* 25.

[108] IACHR, note 29.

[109] Decision of wind-down is for the state as an owner. Therefore, even in the OECD's independence model, accountability through 'effective exercise of ownership rights', OECD 2015, note 5, 38.

[110] For an analysis of the German situation, Wolf Richter, 'Ökologische Altlasten und Sanierungen im Treuhandnachfolgebereich', in Otto Depenheuer and Bruno Kahl (eds.), *Staatseigentum. Legitimation und Grenzen* (Heidelberg: Springer, 2014), 319.

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of due diligence.[111] This is a bold move in comparison with the cautious approach of other human rights organs that have not ventured into the consideration of making Pillar II obligatory; in passing, it might also provide an unintended solution to the uneven playing field: by up-levelling rather than down-levelling standards, the Commission took a stand for victims who need to see the accountability gap closed, for both state-owned and private business impact.

Finally, an issue arises that the Commission does not deal with. If SOEs more and more carry out activities abroad, extraterritorial obligations apply,[112] and the question of state immunity comes back into sight. Backer recently stated that 'key human rights and sustainab[ility] initiatives are undermining the integrity of the [accountability] model in ways that may open the door to the erosion of state immunity [...].'[113] As I argued elsewhere, it is actually the very fact of claiming immunity for their SOEs that suggests that their actions and omissions in human rights matters should be attributed to the State[114] – and it would, I wish to add, pointing to the interpretation by human rights regimes – not make a difference if such violations occurred abroad. Backer considers that the traditional model and its immunities is 'upended'[115] and summarizes:

> 'the sovereign act of delegating these responsibilities down and into the heart of the economic function of these enterprises (public or private), changes its character from sovereign to private, [imposing] a duty of the superior owner (in the case of the SOE its sovereign owner) [...] to ensure compliance.'[116]

Contrary to the International Court of Justice, the IACtHR has not dealt with state immunity in its jurisprudence. In its Advisory Opinion on extraterritorial obligations regarding human rights and the environment, it did not address the issue either. The IACHR remarked that absolute immunities of international financial institutions were impeding access to justice.[117] Although there is no authoritative pronouncement on the topic, it seems that the principle of estoppel would not allow for state immunities to be invoked to insulate SOE activities abroad from human rights claims.

Brought back to the question of human rights impact by economic actors, for a state, it would not make a difference anymore whether, for extraterritorial activities of SOEs, it was implementing Guiding Principle 2 regarding all companies, or Guiding Principle 4 regarding SOEs. Both should lead to the same results in terms of obligations and control, reflecting Backer's future-looking conclusion: 'there is no conceptual basis for treating the state corporate owner any differently from any other enterprise in markets.'[118] 'Leading by example' would then reflect a strategic discourse of consistency and a policy rationale of 'who moves first', not a difference in terms of legal obligations.

Still, international human rights law maintains a difference between the obligation to respect (regarding SOEs) and the obligation to protect (regarding public *and* private enterprises), while corporate and state due diligence are mimicking each other. This blurry

[111] IACHR, note 29, para 50.
[112] Committee on ESCR, note 25; IACtHR, note 62.
[113] Backer, note 98, 8.
[114] Schönsteiner, note 9.
[115] Backer, note 98, 17.
[116] Ibid, 18.
[117] IACHR, note 29, para 299.
[118] Backer, note 99, 33.

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similitude or 'blurring boundaries',[119] seem to arise because from a human rights perspective, *all* actors – SOEs, state-owners, and private corporations – are exercising *power*;[120] political or economic power, but power in the end. For the victims of a human rights violation, the result is very likely quite the same, independent of the entity that exercises the power.

V. Conclusions

This article proposed a sketch of the scope of human rights obligations of SOEs and their owners, and condensed them into a systemic approach. It did so for the Latin American context, building on the Commission's reading of the obligations of state-owned business, which built upon the Guiding Principles while addressing several of its conceptual problems, particularly the relationship between Pillars I and II, the scope of the obligation to respect, the role of due diligence, and the set-up and winding-down of SOEs. While the Commission's report did not tackle all relevant issues, they could be specified in the future discussing the questions and lines of argument suggested in this article.

Overall, the Commission's approach avoids the difficulties of the OECD ideal-type approach to SOE governance and takes on SOE human rights obligations from a victims' perspective, closing the accountability gap that arises when differentiating artificially between private law logics of SOE governance and public law logics of its owner. In this context, the differentiation between regulatory and governance control becomes – only – an issue of choice of 'the appropriate means', not a choice between different degrees (or absence of) of state responsibility, or a different scope of SOE respect for human rights. Regulatory and governance tools need to be combined in such a way that the overall – systemic – view of human rights accountability fulfils the obligations of respect, protection and access to remedies and justice, otherwise, a state would violate its obligations to 'adequate' its domestic law to the American Convention (Article 2 ACHR). In the same vein, state immunity for SOE human rights violations abroad, if at all invoked, are not admissible if they impede access to justice.

Enhancing the accountability for SOE activities with human rights impact according to ACHR obligations runs the risk of leaving SOEs competing on an unlevel playing field, having to comply with higher environmental, labour and human rights requirements than any private company. As that competitive disadvantage cannot be solved on the back of victims of human rights violations, a legal obligation to adopt human rights due diligence for *all* enterprises, public or private, seems to play out with the additional benefit of solving that problem.

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Conflicts of interest. The author declares none.

[119] Anne van Aaken, 'Blurring boundaries between sovereign acts and commercial activities', in Anne Peters (ed.), *Immunities in the Age of Global Constitutionalism* (Leiden: Brill, 2015), 131–81.

[120] John Ruggie, 'Multinationals as Global Institution: Power, Authority and Relative Autonomy' (2017) 12:3 *Regulation and Governance* 317–33.

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